THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 497 JR]

BETWEEN

MUJEEBUR REHMAN AWAN,

NAZAKET MUJEEB AWAN,

MUHAMMAD USMAN MUJEEB AWAN,

MUHAMMAD BILAL MUJEEB AWAN,

AND SAIF UR REHMAN

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 4th July 2019

Introduction

1. This is the judicial review of five separate decisions by the Minister for Justice and Equality ('the Minister'), each made under Regulation 21(4) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 and 2008 ('the 2006 Regulations'), since revoked, on various dates between 17 and 21 March 2017, to uphold on review in each case a first instance decision of 10 November 2015 or, as the case may be, 20 November 2015, under Reg. 7(2) of the 2006 Regulations, to refuse each of the five applicants, who are nationals of Pakistan, a residence card as a qualifying family member or, where appropriate, a permitted family member of Rabiya Awan (née Khatoon), a British - and, hence, European Union – citizen, exercising free movement rights in the State. For convenience, I will refer to those five decisions collectively as 'the review decisions'.

2. While the review decisions were made after the revocation of the 2006 Regulations by the European Union (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations'), which came into operation on 1 February 2016, each of the applicants had sought that review on 7 December 2015, and, under the transitional provision of Reg. 31(28) of the 2015 Regulations, the review provisions of Reg. 21 of the 2006 Regulations continued to apply in those circumstances.

3. The 2006 Regulations and the 2015 Regulations that succeeded them were each 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'). The requirements of the Citizens' Rights Directive have not changed.

4. In substance, the reason the Minister gave for the review decision in each case is that the person concerned failed to establish that he or she is a 'qualifying family member' or, as the case may be, 'permitted family member' of Ms. Awan, within the meaning of those terms under Reg. 2(1) of the 2006 Regulations (transposing the definitions in Art. 2(2) and Art. 3(2) of the Citizens' Rights Directive of 'family member' and 'other family members' respectively), because each applicant failed to establish that, in the United Kingdom (as the country from which each had come), he or she was either: (a) a dependant of Ms. Awan, as a Union citizen; or (b) a member of the household of Ms. Awan, as a Union citizen.

Background

i. the applicants

5. Rabiya Khatoon, a British citizen, was born in 1992. On 23 September 2013, she married Muhammad Ummar Majeeb Awan, a national of Pakistan, born in 1993. On their marriage certificate they are each described as a 'student'. For clarity, I will refer to Ms. Awan (née Khatoon) as 'the Union citizen' and to Muhammad Ummar Majeeb Awan as 'the husband.' Together with each of the applicants and the Union citizen's brother Rashid Mehmood, also a British citizen, the couple entered the State in December 2014. In February 2015, the Union citizen took up employment in a creche in West Dublin. The Union citizen and her husband have had two children since they arrived in the State, the first born in 2015 and the second in 2017. Each is an Irish citizen, presumably by operation of s. 6A(2) of the Irish Nationality and Citizenship Acts 1956 and 2004. The husband has obtained a residence card and has obtained employment with a company in the information technology sector.

6. The first applicant Mujeebur Rehman Awan is a male national of Pakistan, born in 1969. He is the father of the husband and, hence, the father-in-law of the Union citizen. He entered the United Kingdom on a student visa in 2004 to study law and is now a solicitor, qualified to practice law in Pakistan, the UK and Ireland. His student visa to enter and reside in the UK expired in 2008, and his permission to remain in the UK expired in June 2009 when an appeal he had lodged with the immigration authorities there was dismissed. He was admitted to the Roll of Solicitors in Ireland in September 2015 and a practising certificate issued to him on 14 December 2015. By the time these proceedings commenced, he was in practice as a partner in a firm of solicitors in Dublin. For the purpose of clarity, I will refer to him in this judgment as 'the father-in-law.'

7. The second applicant Nazaket Mujeeb Awan is a female national of Pakistan, born in 1972, and is the wife of the first applicant and, hence, the mother-in-law of the Union citizen. She is a qualified homeopathic doctor. I will refer to her as 'the mother-in-law'.

8. She entered the UK in December 2005 with the youngest son of the marriage, Muhammad Bilal Mujeeb Awan, the fourth applicant. He is a national of Pakistan, born in 1999. When these proceedings commenced, he was still a minor (suing through his father, as his next friend) but has since attained his majority and is now pursuing them in his own right. I will direct the amendment of the title of

the proceedings, accordingly. He is the Union citizen's brother in law. For clarity, I will refer to him as 'the younger brother-in-law'.

9. The two other sons of that marriage, who are the Union citizen's husband and the third applicant Muhammad Usman Mujeeb Awan, joined the family in the UK from Pakistan in January 2006. I will refer to the third applicant, who is a national of Pakistan, born in 1994, as 'the older brother-in-law'.

10. The fifth applicant, Saif Ur Rehman, is a national of Pakistan, born in 1961. He is the brother of the Union citizen's father in law. He entered the UK in September 2014, before travelling to Ireland with the other applicants, the Union citizen and her husband in December 2014. For simplicity, although not without placing some strain on the English language, I will refer to him as 'the uncle-in-law.'

ii. the applications

11. Each of the applicants submitted a separate 'Form EU1' application for a residence card, signed on 25 March 2015, together with a range of supporting documentation, under cover of an undated letter signed by the Union citizen and her husband. In that cover letter, the Union citizen stated, in material part:

> 'The applicants are the direct family member[s] of my husband moreover we have also been member[s] of the same household since my marriage *i.e.* 23rd September 2013. The applicants have been financially as well as otherwise fully dependent upon me and my husband.'

12. The INIS acknowledged receipt of each of those various residence card applications in separate letters dated, 29 April 2015, requesting the provision of various kinds of documentation to evidence the applicants' claims. Each of the applicants wrote in reply on the 22 May 2015, furnishing additional documentation in response to that request.

iii. first instance refusal to issue a residence card to each applicant

13. On 20 November 2015, the INIS wrote to each of the applicants to inform them that the Minister had decided to refuse their applications 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 [Reg.] 2(1) of [the 2006 Regulations].
>
> It was submitted that you were supported and maintained by the EU citizen through the provision of accommodation and financial assistance prior to entering the State and while residing in the State. However, you have not submitted satisfactory evidence that you are a dependant of the EU citizen under the Regulations and Directive.'

iv. the review

14. Each of the applicants submitted an unsigned request for a review of that decision, dated 7 December 2015, although the only copy of the form prescribed for that purpose, the 'Form EU4', exhibited in these proceedings is that of the father-in-law and he did not sign it or date it. The signature section of that form required an applicant to acknowledge that he or she was aware that a person who asserts an entitlement to any rights on the basis of information which he or she knows to be false or misleading in a material particular would be guilty of a criminal offence. That offence was created by Reg. 25 of the 2006 Regulations. The INIS acknowledged receipt of each of those requests on 13 January 2016, before writing to each of the applicants again on 22 January 2016 to request the provision of certain additional documentation.

15. On 18 July 2016, Abbott Solicitors, which was the title of the firm through which the father-in-law was then practising as a solicitor in Ireland, wrote to inform the INIS separately on behalf of each of the applicants, including the father-in-law, that it had authority and instructions to represent them for the purpose of the review of the refusal to grant each a residence card. Over the following months, further correspondence ensued between that firm and the INIS.

16. On 29 December 2016, Abbott Solicitors re-submitted all of the evidence that had been provided in support of the father-in-law's application, under cover of a letter, which stated in material part that:

> 'It is our submission that [the father-in-law] qualifies for the residence card being a parent of the spouse of the EU citizen. The [father-in-law] *has been* and still *continues to be:-*
>
> > 1. The member of the same household of the EU citizen, in the other EU State *i.e.* UK and in the State since 12/2014.
> >
> > 2. Financially wholly and solely dependent parent of the spouse of the EU Citizen, in the UK and in the State since 12/2014.
>
> We have been instructed to submit that the applicant is wholly and solely dependent parent upon his son, who is the spouse of EU citizen.'
>
> (emphasis in original)

17. The letter went on to assert that the father-in-law was a qualifying family member, rather than a permitted family member, of the Union citizen as a 'wholly and solely financially dependent parent' before later stating:

> 'The [father-in- law] has been actively participating in the State's and personal and economic well being since he had the temporary permission to reside and work in the State. The applicant is participating in the economic well being by engaging himself into self-employment *i.e.* as a :-
>
> > i. Solicitor by having partnership in the local law firm;
> >
> > ii. Part time motor trader, he buys and sells used cars instead of relying on the social assistance.'

18. On the following day, Abbott Solicitors wrote to the INIS separately on behalf of the mother-in-law and the three other applicants, asserting in the course of lengthy submissions that each was a qualifying family member. Of course, as the applicants now acknowledge, only the father and mother-in-law were eligible to be considered as qualifying family members; the brothers-in-law and uncle-in-law were eligible to be considered as permitted family members. Significantly, the submissions made to the INIS on behalf of the brother-in-law applicants state that each 'has been and continues to be .... [the] financially wholly and solely dependent brother of the spouse of EU citizen, in the UK and in the State since 12/2014' and the submission made on behalf of the uncle-in-law applicant stated that he 'has been and still continues to be ... [the] financially wholly and solely dependent paternal uncle of the spouse of EU citizen, in the UK and in the State since 12/2014.' That is significant because, in these proceedings, those applicants submit that, by addressing their claims in the terms in which they were made, the INIS and, hence, the Minister applied the wrong test of dependency.

The review decisions

19. The INIS wrote to the father-in-law and mother-in law on 20 March 2017, stating in material part in each case:

> '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 [residence card] application [received by the INIS on 27 or 29 March 2015, as the case may be] is affirmed for the following reasons:
>
> On the basis of the documents supplied, the Minister has determined that you do not fulfil the criteria in respect of a qualifying family member as set out in Regulation 3(5) of the Regulations. The Minister is not satisfied that you have submitted satisfactory evidence in respect of your stated dependency on the EU citizen and residence as a member of the EU citizen's household prior to travelling to this State.'

20. Similarly, on various dates between 17 and 21 March 2017, the INIS wrote to the older and younger brother-in-law and the uncle-in-law, stating in material part in each case:

> '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 [residence card] application [received by the INIS on 27 March 2015] is affirmed for the following reasons:
>
> On the basis of the documents supplied, the Minister has determined that you do not fulfil the criteria in respect of a permitted family member as set out in Regulation 3(6) of the Regulations. The Minister is not satisfied that you have submitted satisfactory evidence in respect of your stated sole dependence on the EU citizen and residence as a member of the EU citizen's household prior to travelling to this State.'

Procedural history and grounds of challenge

21. The application is based on a statement of grounds dated 13 June 2017, supported by an affidavit of the father-in-law, affirmed on the same day. Several months later (indeed, long after leave was granted), each of the other applicants affirmed a short verifying affidavit on 14 February 2018 in respect of the contents of both the statement of grounds and the father-in-law's affidavit.

22. By Order made on 19 June 2017, O'Regan J granted the applicants leave to seek the reliefs identified, on the grounds specified, in their statement of grounds. Principal among those reliefs are orders of *certiorari* quashing the Minister's decision in the case of each applicant.

23. The applicants impugn the review decisions on the following three grounds. First, the Minister failed to comply with the obligation to provide reasons for each decision. Second, the Minister erred in law in wrongly applying the 'permitted family member' test to the Union citizen's parents-in-law, who are qualifying family members, and in wrongly considering the issue of the dependency of those applicants on the Union citizen in the United Kingdom, as the country from which each had come, rather than in the State. And third, the Minister erred in law in considering the 'sole' dependence on the Union citizen of the other applicants, as part of the 'permitted family member' test in respect of each.

24. The Minister delivered a statement of opposition dated 16 February 2018. It is supported by an affidavit, sworn on the same day, by Sinead Murphy, a higher executive officer in the Residence Division of the INIS, which forms part of the Minister's department. Ms. Murphy exhibits, in respect of each applicant, both the 'examination of file' report and recommendation, made by an officer of the Minister (on 1 or 2 February 2017, depending on the case), and her own written decision, as review officer (of 20 or 21 March 2017, likewise).

25. On 28 June 2018, the applicants' solicitors issued a motion seeking liberty to come off record, returnable on 5 July 2018. The applicants then served a notice of discharge, dated 5 July 2018, on their solicitors. Those solicitors were permitted to come off record that day. For the remainder of the hearing, the applicants represented themselves, as litigants in person.

Further evidence adduced at the hearing

26. An issue arose in the course of the hearing concerning whether the applicants' claim of dependency on – or, differently put, their claimed requirement for material support to meet their essential needs from – the Union citizen in the United Kingdom, as the country from which they had come, was genuine or contrived. In support of their application for residence cards, the applicants had submitted copies of bank statements for a joint account held by the Union citizen and her husband in England, covering certain parts of the period between February and June 2014, and evidencing, as the only significant and consistent inward payments, transfers from an entity described as Abbott Solicitors, as well as payslips to evidence that the Union citizen was its employee. As noted earlier in this judgment, since December 2015, the father-in-law has been in practice as a solicitor in Ireland, under the style or title Abbott Solicitors.

27. When that point was raised in court on 21 June 2018, the Minister sought leave to adduce further evidence to address it. I granted leave to each side to do so.

28. On behalf of the Minister, Owen Nicholson, a solicitor in the Office of the Chief State Solicitor ('CSSO'), swore an affidavit on 12 July 2018, which was filed the following day. To that affidavit, Mr Nicholson exhibited, among a range of different documents, copies of printouts of pages from the following websites: (i) Abbott Solicitors, Dublin (20 June 2018); (ii) the Facebook page of Abbott Solicitors, Dublin (20 June 2018); (iii) the Facebook page of the father-in-law (20 June 2018); (iv) the LinkedIn page of the father-in-law (20 June 2018); (v) Abbott Solicitors, with an address in Luton, Bedfordshire, England (20 June 2018).

29. On the print-out of the father-in-law's Facebook page, under the heading 'About Mujeeb Awan' and the sub-heading 'Work' appears, amongst other entries evidencing consistent employment:

> 'Abbott Solicitors
>
> Solicitor – January 2012 to January 16, 2015 – Luton'

30. Further down on that page, under the heading 'About Mujeeb', the following text appears:

> 'I am the founder of:-
>
> 1. Abbott Law Associates (Abbottabad, Pakistan).
>
> 2. Abbott Solicitors, Luton, UK (I sold it to its existing partners, since Jan 2015).
>
> 3. Abbott Solicitors, Ireland.'

31. Similarly, on the print-out of the father-in-law's LinkedIn page, he describes himself as the founder of Abbot Law Associates, Abbot Solicitors Luton (UK) and Abbott Solicitors Ireland.

32. There is much other information in both the material already described and in other material exhibited by Mr Nicholson, which – to use a neutral expression – strongly suggests that the father in law: (a) was in practice as a solicitor in the UK prior to his arrival in Ireland; and (b) was, at the very least, closely connected with the practice of Abbott Solicitors in Luton when the Union citizen received payments from that practice in 2014.

33. Mr Nicholson avers that, when he revisited some of the relevant websites on 11 July 2018, he discovered that the relevant details no longer appeared on the father-in-law's Facebook page and that the message 'confirming profile not found' was now all that was apparent on the father-in-law's LinkedIn page.

34. The father-in-law affirmed a further affidavit on 12 July 2018. In short summary, he avers in it as follows. He was not proprietor, partner or owner of the UK based law firm known as 'Abbott Solicitors, Luton, UK' and did not pay wages or a salary to the Union citizen for her employment with that firm in 2013 or 2014. The five partners in that firm are originally from Pakistan and are all family friends of the father-in-law; three of them hail from his home city of Abbottabad in Pakistan. Hence, the title under which the firm practices is a play on words. The applicants were clients of that firm in certain immigration and civil matters. One of his sons placed incorrect information on his Facebook and LinkedIn pages. It was his partner in Abbott Solicitors, Dublin, who sold an interest in Abbott Solicitors, Luton, and not he. That partner was (and, although it is not entirely clear, perhaps still is) a partner in the Luton firm.

35. Very significantly, the father-in-law exhibits a printout from a search page on the website of the Solicitors Regulation Authority, the regulatory body for solicitors in England and Wales, recording that he paid for, and obtained, a practising certificate for each of the years 2011-2012 to 2017-2018 inclusive.

Oaths and affirmations

36. In response to an inquiry from the court about the basis upon which he had elected to affirm, rather than swear, the truth of the contents of each of his affidavits, the father-in-law, a qualified solicitor, responded in substance that, while he considers himself to be an observant Muslim, he had understood that the election between taking an oath and making an affirmation was a matter of simple choice and he had randomly chosen to make an affirmation, seeing no difference between the two alternatives.

37. Of course, any such understanding is wrong. The Oaths Act 1888 does not confer on any witness or deponent the right to make a random choice, devoid of any significance, between swearing an oath or making an affirmation. Section 1 of that Act provides that a person who objects to being sworn, and who states, as the ground of such objection, either that he or she has no religious belief, or that the taking of the oath is contrary to his or her religious belief, shall be permitted to make a solemn affirmation instead. The father-in-law has stated no such objection.

38. In Thomson, '*By Allah, The manner and significance of swearing an oath for a Muslim'*, The Expert and Dispute Resolver (Journal of the Academy of Experts), Summer, 2011, the following view is expressed:

> 'Although holding a Qur'an or referring to the Qur'an when swearing an oath by Allah is not necessary, it is not forbidden by the Shari'a. It would be fair to say that for many Muslims, holding a copy of the Qur'an when swearing an oath by Allah is an outward demonstration to those who are present that they intend by this action to emphasise that their oath is a sincere and solemn oath.
>
> If a Muslim witness refuses to take an oath "on the Qur'an" no adverse inference should be drawn from this, provided that he or she willingly swears an oath "by Allah".
>
> If a Muslim avoids doing so, either by refusing to swear an oath by Allah or by electing to make some other form of oath such as an oath of affirmation, it can safely be inferred that he or she will not be telling the whole truth – or that he or she no longer considers [himself or herself] a Muslim.'

39. Allowing for the possibility of divergent views and giving the father-in-law the benefit of the doubt, I do not propose to draw any such inference in this case. Rather, I will assume, in ease of the father-in-law's position that, although a qualified solicitor, he simply failed to properly acquaint himself with the applicable law.

The law

40. Article 1 of the Citizens' Rights Directive lays down, amongst other things, the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members. Article 2 of the Citizens' Rights Directive defines both a 'Union citizen' and the 'family member' of a Union citizen for the purposes of the exercise of those rights. Under Art. 2(1) a 'Union citizen' means any person having the nationality of a Member State. Under Article 2(2), 'family member' is defined to include the dependent direct relative in the ascending line of the Union citizen or the Union citizen's spouse or partner so defined under Art. 2(2)(b). As Article 3(1) of the Citizens' Rights Directive confirms, these are the persons who are the designated beneficiaries of the rights the exercise of which it conditions.

41. Article 3(2) states, in material part:

> 'Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> > (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
>
> …
>
> 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.'

42. 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…;
>
> …'

43. As has frequently been noted, Recital 6 in the preamble to the Citizens' Rights 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.'

44. At the material time, the Citizens Rights Directive was transposed in Ireland by the 2006 Regulations.

45. Under the heading 'Interpretation', Regulation 2 provides in material part that:

> '"family member" includes a qualifying family member and permitted family member;
>
> …
>
> "permitted family member", in relation to a Union citizen, means any 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 dependant of the Union citizen,
> >
> > (b) is a member of the household of the Union citizen,
>
> ….
>
> "qualifying family member", in relation to a Union citizen, means-
>
> ...
>
> > (e) a dependent direct relative of the spouse of the Union citizen in the ascending line'.

46. Simply stated, a person who qualifies as 'a family member' under Art. 2(2) of the Citizens' Rights Directive falls within the definition of 'qualifying family member' under the 2006 Regulations, and any person who qualifies within the category of 'other family members' ('OFMs') under Art. 3(2) of that Directive, falls within the definition of 'permitted family member' under those Regulations.

47. 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.

...'

48. Under Regulation 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 Regulation 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).

49. 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.'

50. 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.'

Argument and analysis

i. the application of the qualifying family member test

51. The applicants first ground of challenge to the review decisions concerns only the cases of the father-in-law and mother-in-law. That ground has two limbs. The first is that the Minister wrongly applied the test for permitted family membership, rather than qualifying family membership to those applicants. The second is that, in applying that test, the Minister wrongly considered whether they were dependent on the Union citizen in the United Kingdom, as the State whence they came, rather than whether they were dependent on the Union citizen at that time in Ireland.

52. In asserting that the Minister wrongly applied the permitted family membership test, the applicants point to the recital in each of the relevant review decisions that the Minister was not satisfied that the father-in-law or mother-in-law had submitted 'satisfactory evidence in respect of your stated dependency on the EU citizen and residence as a member of the EU citizen's household prior to travelling to this State'. Membership of the household of the Union citizen forms no part of the test for qualifying family membership under Reg. 2(1) of the 2006 Regulations or Art. 2(2) of the Citizens Rights Directive, but does provide the basis, in appropriate circumstances, for seeking recognition as a permitted family member under Reg. 2(1) of those Regulations and Art. 3(2) of that Directive.

53. The second limb of this ground results from the recital in the preceding sentence of each of the relevant review decisions that the Minister had determined that the father-in-law and mother-in-law did not fulfil the criteria in respect of a qualifying family member 'as set out in Regulation 3(5) of the Regulations'. That is a clear and obvious error of a type unhappily very common in decisions made during the relevant period, whereby reference is made to the definition of 'qualifying family member' under Reg. 3(5) of the 2015 Regulations in a case still governed by Reg. 2(1) of the 2006 Regulations under the transitional provisions of the later instrument. That error opens the door to the ingenious argument that the applicants are entitled to rely on the 2015 Regulations, in which the definition of 'qualifying family member' under Reg. 3(5) includes the words 'the person *is* ... a dependent direct relative in the ascending line of the Union citizen.' Thus, the applicants submit, the Minister should properly have considered the issue of the dependency of the father-in-law and mother-in-law on the Union citizen by reference to the position in Ireland at the time of the application and not the position in the UK prior to their arrival in the State.

54. I cannot accept those arguments for several reasons. First, the relevant decisions are not drafted as legislation would be and should not be analysed in that way. Second, from the surrounding context, it is clear that the words used in the decision are intended to meet the specific claims made by the relevant applicants, not to reformulate (and, thus, wrongly state) the relevant test under the Regulations and the Directive. It was the relevant applicants who wrote to the Minister on 29 and 30 December 2016 stating that each had been, and continued to be, a member of the household of the Union citizen in the UK and in the State. While I accept that the Minister did not have to address those factual assertions because they were irrelevant to the test the Minister had to apply, I do not accept that by addressing them, the Minister was applying the wrong test.

55. Third, I am satisfied that, as a matter of both law and fact, the Minister did address the correct legal test *i.e.* whether the relevant applicants were qualifying family members as dependent direct relatives of the Union citizen's spouse in the State whence they came. That is so for several reasons. The review decision in each case recites that the relevant applicant does not fulfil the criteria in respect of a qualifying family member. Under the transitional provision of Reg. 31(28) of the 2015 Regulations, the Minister was required to consider each application under the 2006 Regulations and not the 2015 Regulations. It is evident from the 'examination of file' report and recommendation, and the review officer's decision, upon which the review decision in each case was based, that each review was conducted under the 2006 Regulations, notwithstanding the erroneous reference by implication on the face of each of the review decisions to the 2015 Regulations. Even if I am mistaken in relation to all of the foregoing, Reg. 3(5) of the 2015 Regulations must be given an interpretation that conforms with the requirements of the Citizens' Rights Directive, by operation of the European Union law principle of consistent interpretation, otherwise known as the principle of indirect effect. As the European Court of Justice ('ECJ') plainly stated in Case C-1/05 *Jia v Migrationsverket* ECLI:EU:C:2007:1 (at para. 37):

> 'In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national.'

56. Thus, I reject the first ground of challenge to the review decisions.

ii. the application of the permitted family member test

57. The applicants' next ground of challenge to the review decisions concerns only those in the cases of the brothers-in-law and the uncle-in-law. It is that the Minister erred in law in his application of the 'permitted family membership' test to each of those applicants because of the recital on the face of each of the relevant review decisions that the Minister was not satisfied that the applicant concerned had submitted satisfactory evidence of his 'stated sole dependence' on the EU citizen prior to travelling to the State.

58. The applicants argue that this recital discloses a failure to properly apply the correct legal test for dependence under EU law, as described by Mac Eochaidh J in Ku*hn v Minister for Justice* [2013] IEHC 234, (Unreported, High Court, 22nd August, 2013), whereby the provision by the Union citizen of any support or assistance, however small, required by the family member concerned to maintain the essentials of life, is sufficient to establish the dependence of the latter upon the former.

59. This is an argument of the same type as the preceding one. As the terms of the relevant review decisions make clear, it was the relevant applicant in each case who asserted that he was 'financially wholly and solely dependent [brother or paternal uncle, as the case may be] of the spouse of EU citizen.' I do not accept that in addressing each such application in the terms in which it was made, the Minister was applying the wrong test.

60. As is abundantly clear from the evidence before the court, each of the applications in suit turned on whether the applicants could satisfy the Minister that the situation of dependence on the Union citizen claimed by each was genuine and had not been brought about with the sole objective of obtaining entry into and residence in the State. None of the applications turned on whether the financial support that the applicants claimed to be in receipt of from the Union citizen was or was not necessary to enable each to maintain the essentials of life.

61. No such assessment would have been possible, since none of the applicants provided anything equivalent to a statement of personal means, relying instead on the evidence of accommodation provided, and payments made, to each by the Union citizen as the basis for inviting the inference that each is, and was, dependent upon her. But, of course, that does not follow. If you provide accommodation for, and make payments to, a person of independent means, you do not make that person your dependent. As Mac Eochaidh J observed in Kuhn, referring to the Opinion of the Advocate General in *Jia*:

> 'The Advocate General's Opinion thus marks a transition from dependence being established by the mere fact of support to dependence being established by reference to a proven need of financial support and proof of that need by documentary evidence.'

62. The ECJ confirmed that view of the law in the passage from its decision in Jia, quoted above.

63. Thus, I reject the second ground of challenge to the review decisions.

64. For that reason, I mention only in passing that there appears to me to be a separate reason why these three applications could not have succeeded. As both Art. 3(2) of the Citizens Rights Directive and Reg. 2(1) of the 2006 Regulations clearly provide, to qualify as an OFM or permitted family member it is necessary to establish the fact of dependence on the Union citizen – dependence on the Union citizen's spouse is not enough; see *Soares v Secretary of State for Home Department* [2013] EWCA Civ 575.

iii. failure to provide reasons

65. The existence and scope of the requirement to give reasons for an administrative decision affecting the rights and obligations of persons is by now a well-settled aspect of the administrative law of the State. In *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 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.'

66. In *Rawson v Minister for Defence* [2012] IESC 26, (Unreported, Supreme Court, 1st May, 2012), Clarke J observed (at para. 6.8):

> 'While the primary focus of a number of the judgments cited, and indeed aspects of the decision in [*Meadows*] itself, were on the need to give reasons as such, there is, perhaps, an even more general principle involved. As pointed out by Murray C.J. in [*Meadows*] a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness. How that general principle may impact on the facts of an individual case may be dependent on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this court is concerned on this appeal, the particular basis of challenge.'

67. As Clarke J summarised the position in *EMI Records (Ireland) Ltd & Ors. v Data Protection Commissioner* [2013] 2 IR 669 (at 739):

> '[67] It follows that a party is entitled to sufficient information to enable it to assess whether the decision is lawful and, if there be a right of appeal, to enable it to assess the chances of success and to adequately present its case on the appeal. The reasons given must be sufficient to meet those ends.'

68. 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. In the words of the ECJ in that case (at para. 15):

> 'Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons. But where, as in the this case, it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.'

69. As Advocate General Fennelly explained in Case C-70/95 *Sodemare and Others v Regione Lombardia* ECLI:EU:C:1997:55, [1997] ECR I-03395 (para. 17):

> '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.'

70. As against the foregoing principles, it must not be overlooked that, in *Mallak v Minister for Justice* [2012] IESC 59, [2012] 3 IR 297, Fennelly J acknowledged that there may be circumstances in which the provision of express reasons is not necessary, when he stated (at 322):

> '[68] ... The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and judicial review is not precluded.'

71. In applying those principles to the review decisions under challenge, it is necessary to do so in the context of a number of pertinent propositions of law and fact.

72. The first pertinent proposition of fact is that there can be no doubt that each of these applications turned on the question of whether the applicants could establish the necessary 'dependence' for the purpose of Art. 2(2)(d) or of Art. 3(2)(a), as the case may be, of the Citizens' Rights Directive.

73. Next, as a proposition of law, under Regulation 5(1)(c) of the 2006 Regulations, reflecting the requirements of Article 10(2) of the Citizens' Rights Directive, in claiming the relevant status on the basis upon which they did, each of the applicants was obliged to produce to the Minister documentary evidence from the relevant authority in the country from which he or she had come that he or she was a dependant of the Union citizen. In reality, the applicants were entirely at large on the issue of both the evidence each chose to present in support of his or her claim and the means whereby he or she 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). Nonetheless, whatever evidence each applicant did submit was always going to be subject to qualitative assessment.

74. The ECJ confirmed (at para. 21) in its decision in Case C-423/12 *Reyes v Sweden* ECLI:EU:C:2014:16, amongst others, that dependent status is the result of a factual situation and (at para. 22) that, in order to determine the existence of such status, the host Member State must assess whether, having regard to the person's financial and social conditions, he or she is not in a position to support himself. That dependency must be genuine and not contrived. As the ECJ had previously stated in Case C-83/11 *Secretary of State for the Home Department v Rahman* ECLI:EU:C:2012:519 (at para. 38), a host Member State is entitled to be satisfied that the situation of dependence is genuine and stable and has not been brought about with the sole objective of obtaining entry into and residence in its territory.

75. In *Moneke v Secretary of State for the Home Department* [2011] UKUT 34, the United Kingdom Upper Tribunal stated (at paras. 42 and 43):

> '42. We of course accept...that dependency does not have to be 'necessary" in the sense of the [United Kingdom] Immigration Rules, that is to say an able bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs from his own economic activity; see [*SM (India) v Entry Clearance Officer (Mumbai)* [2009] EWCA Civ 1426]. Nevertheless, where, as in these cases, able bodied people of mature years claim to have been always dependent upon remittances from a sponsor, that may invite particular close scrutiny as to why this should be the case. We note further that Article 10(2)(e) of the Citizens Directive contemplates documentary evidence. Whether dependency can ever be proved by oral testimony alone is not something we have to decide in this case, but Article 10(2)(e) does suggest that the responsibility is on the applicant to satisfy the Secretary of State by cogent evidence that is in part documented and can be tested as to whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency.
>
> 43. Where there is a dispute as to dependency (as there was in the present case) immigration judges should therefore carefully evaluate all the material to see whether the applicant has satisfied them of these matters.'

76. That appears to me to be a correct statement of the law. It follows the onus was on the applicants to satisfy the Minister by cogent evidence that was in part documented and could be tested that the level of material support each received from the Union citizen, its duration, and its impact upon his personal financial circumstances combined together to meet the material definition of dependency in the UK (as the country from which each had come). The Minister concluded that each of the applicants had failed to do so.

77. This was a case at the furthest end of the spectrum of those factual circumstances that may be asserted to constitute 'dependence'. The father-in-law was at all material times a homeowner in the United Kingdom and a qualified solicitor there, with a current practising certificate at all material times, claiming – as an able bodied person of mature years – to be a dependent of his daughter in law, a young woman who, on her marriage to his son just over a year previously had been described as a student and who was afterwards in receipt of a modest purported income as an administrative assistant in a solicitor's practice with which he was, to use a neutral expression, closely connected. The mother-in-law, a qualified homeopathic doctor, the two brothers-in-law and, for good measure, an uncle-in-law were also claiming to have become dependants of the Union citizen between her marriage, as a 21 year old student, in September 2013 and the arrival of that extended family grouping in Ireland in December 2014, without explaining, much less evidencing, how that dependence had come about.

78. In the written submissions filed on their behalf, the applicants contend variously that they had submitted 'very comprehensive evidence' and 'voluminous evidence' of their dependence upon the Union citizen in the United Kingdom. However, beyond those bare and sweeping assertions (which call to mind the punchline to the old joke about tailors selling rough or shop-worn cloth; 'never mind the quality, feel the width'), they do not attempt to describe or summarise that evidence, or to explain how it establishes the entitlement that each claims. And that is so in circumstances where, it seems to me, there was a signal failure by each of the applicants to provide anything equivalent to a statement of means (*i.e.* evidence of the financial and social conditions, or ability to support himself or herself, of each of them). Instead, each simply relied on evidence of accommodation and payments ostensibly provided to them by the Union citizen, that might demonstrate genuine dependence but might just as easily be a contrivance to falsely suggest it.

79. Turning to the review decisions under challenge, I have no difficulty in accepting that the reasons provided, had they been free standing, would have been entirely inadequate. But that is not the end of the matter. I must next consider whether, in the particular circumstances of this case, those reasons were obvious or were capable of being inferred from the terms of those decisions and their context. On the particular and, quite possibly, unique facts of this case, I believe those reasons were capable of being inferred by the applicants from the highly unusual circumstances in which their applications were made.

80. There is an air of unreality to the contention that a home-owning practising solicitor and four members of his family who had applied for residence cards as the dependants of his recently acquired Union citizen daughter-in-law of limited experience in the workforce and modest income, and who had been informed that the Minister did not consider satisfactory the evidence they had submitted of that dependence, were deprived of sufficient information: first, to enable them to assess whether that decision was lawful; second, to assess their chances of success on judicial review; and third, to adequately present their case for that purpose.

81. I must also have regard to the reasons that have now been provided in the 'examination of file' report and recommendation, and in the review officer's decision, each of which has now been exhibited on behalf of the Minister, albeit after these proceedings had issued.

82. I would make three observations in that regard.

83. The first is that, as the Minister points out, the applicants did not request the disclosure of those documents before issuing these proceedings. The second flows from the first. It is that in Case C-222/86 *UNECTEF*, already cited, the ECJ confirmed that the duty on the competent authority in protecting the fundamental right of Union citizens and their family members to free movement, to enable those persons to defend those rights, is to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.

84. The third is that I would gratefully adopt as my own the reasoning and analysis of Humphreys J in *Krupecki & Anor v Minister for Justice and Equality* [2018] IEHC 538, (Unreported, High Court, 20th July, 2018) (at para. 13-16) in concluding that there is no absolute prohibition in public law on the subsequent provision of reasons for a decision already given, and that the risk of retrospective reasoning, identified in *T.A.R. v Minister for Justice and Equality* [2014] IEHC 385, (Unreported, High Court (McDermott J), 30th July, 2014) as requiring circumspection before permitting late reasons to be provided and considered, does not amount to anything like an absolute prohibition in that regard. In this case, in light of the date of the documents concerned, and of their nature and purpose, I do not think it can be seriously argued that they have been manufactured or retrospectively created to bolster the Minister's position, nor was any such argument advanced. The applicants had an opportunity to consider those reasons and to apply to amend their statement of grounds in the context of any further argument that they might wish to raise in light of them, although they did not do so.

85. Thus, considering both the very particular factual context in which the review decisions were given and the more extensive reasons that were already then extant and which have since been provided to the applicants, and which the applicants were given an appropriate opportunity to consider for the purpose of any challenge they might wish to mount, I am satisfied that there was not, and

certainly is not now, any breach of the obligation to provide reasons capable of vitiating the review decisions.

86. Hence, I reject the third ground of challenge to the review decisions.

Conclusion
87. I refuse the application for judicial review.