



# THE SUPREME COURT

S:AP:IE:2019:000154

**Clarke C.J.**  
**O'Donnell J.**  
**Dunne J.**  
**Charleton J.**  
**Baker J.**

**Between/**

**Muhammad Uzair Pervaiz**

**Applicant/Respondent**

**- And -**

**The Minister for Justice And Equality, Ireland  
And The Attorney General**

**Respondents/Appellants**

**JUDGMENT of Ms Justice Baker delivered on the 2<sup>nd</sup> day of June, 2020**

1. This judgment concerns the interpretation and application of the Directive 2004/38/EC On the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, O.J. L/158, 30.4.2004 (“the Citizens Directive”), transposed into Irish law by the European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548/2015) (“the 2015 Regulations”).
2. The appeal is primarily concerned with how the Minister is to approach an application by a third country national to be treated as a permitted family member by reason of being in a durable relationship with a Union citizen. The two other matters that arise for consideration are the manner by which the proceedings are constituted, and the argument by Mr Pervaiz that the 2015 Regulations do not properly transpose the Citizens Directive.

3. This appeal is from the order of Barrett J. made on 21 June 2019 for the reasons given in his written judgment of 6 June 2019, *Pervaiz v. Minister for Justice and Equality* [2019] IEHC 403, granting *certiorari* of a decision of the Minister for Justice and Equality (“the Minister”) refusing the application of the respondent (“Mr Pervaiz”) to be treated as a permitted family member of a Union citizen pursuant to the Citizens Directive and the 2015 Regulations.

### **Background facts**

4. The facts may briefly be stated. Mr Pervaiz claims to be in a committed relationship with Ms L., a citizen of Spain who has been resident and working in the State for a number of years, thereby exercising her rights of free movement as a citizen of the Union.

5. Mr Pervaiz made an application to be permitted to reside in the State, received by the Minister on 20 October 2017. The documentation furnished with the initial application and thereafter in response to a request for further supporting evidence will be dealt with in the course of this judgment.

6. The application was refused by letter dated 19 December 2017 on the stated ground that Mr Pervaiz had failed to demonstrate that he and Ms L. were in a durable relationship.

7. An internal review was requested, and further information sought and furnished. The review resulted in the original decision being upheld.

8. *Certiorari* by way of judicial review and certain declaratory orders more fully set out below were sought of the decision on the internal review. This is an appeal to this Court directly from the decision of Barrett J. in that judicial review.

9. The primary challenge is that the 2015 Regulations do not correctly transpose the Citizens Directive by reason of the absence of specific and detailed criteria and by reason of the fact that the material parts of the Regulation repeat the words of the Directive itself. It is also argued that the Minister fettered his discretion. There is no claim that the Minister acted

unreasonably, or failed to explain the decision. This judgment is therefore primarily concerned with these general matters of high principle.

### **The judgment of the High Court**

10. Barrett J. rejected the argument advanced on behalf of the State parties that the proceedings were improperly constituted on account of the fact that the Union citizen was not a party, it having been argued that Mr Pervaiz was not competent without the joinder of the Union citizen to assert rights under the 2015 Regulations, as these rights were promulgated in order to advance and give concrete support to the free movement rights of Union citizens.

11. Barrett J. also considered that the Citizens Directive had not been adequately transposed into domestic law by reason of the fact that the general nature of the language used in the Regulations coupled with the fact that no legislative, or other non-legislative, guidance had been provided for the purposes of the interpretation of the concept of “durable relationship duly attested” found in the Directive and the 2015 Regulations mean that domestic provisions are unclear.

12. Barrett J. considered that the making of provision for an internal review of the decision at first instance did not provide an effective appeal mechanism and that Irish law therefore infringed article 47 of the Charter of Fundamental Rights of the European Union.

13. For these reasons Barrett J. granted an order of *certiorari* but did not make any formal declaration to reflect his decision on the issue of the proper transposition of the Citizens Directive and the availability of an effective remedy in national law.

### **The scheme and purpose of the Citizens Directive**

14. The Citizens Directive provides the framework within which application for residence in the territory of a Member State for Union citizens and their family members is to be considered. Recital 1 provides that the right to move and reside freely within the territory of the Member States is a “primary and individual right” of every citizen of the Union, subject to

the limitations and conditions laid down in the Treaties. The broad principle of free movement is described as constituting “one of the fundamental freedoms of the internal market”, an area “without internal frontiers”. Recital 5 provides that the proper exercise of the right to move and reside freely within the territory of other Member States means that the right should also be granted to family members of Union citizens irrespective of nationality:

“The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.”

**15.** Recital 17, having noted that the possibility of taking up the option of permanent residence in a host Member State “would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion”, provides that a right of permanent residence should be laid down for all Union citizens and their family members subject to the conditions in the Directive.

**16.** The scheme of the Citizens Directive provides for different approaches to two categories of family members. Family members who come within the definition in article 2(2) are afforded the right of entry and residence in the Union citizen’s host Member State, provided certain conditions are met. A family member in that category is a spouse, a civil partner, a direct descendant under the age of twenty-one, or dependent, and those of the spouse or partner, and any dependent direct relatives in the ascending line of the Union citizen and of the spouse or partner.

**17.** The present case concerns the category of family members in article 3 who are more remote from the Union citizen and whose application for entry and residence in the host Member State is to be “facilitated”, but who cannot be said to have a right of entry or to remain.

**18.** Article 3 of the Citizens Directive is the focus of the present appeal, and it is convenient to quote the material part in full:

“1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

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

(a) [...];

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

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

**19.** The meaning and effect of the requirement that the host Member State “facilitate” entry and residence for this category of family members is of importance in the present appeal.

**20.** The Irish implementing Regulations use the term “permitted family member” for this category of more remote family members to whom article 3(2) of the Citizens Directive applies, and the term “qualified family member” for those family members who have a right to enter and remain.

**21.** The Citizens Directive was considered in three judgments of the Court of Appeal delivered on 19 December 2019 after the present appeal was lodged: *A. R. v. Minister for Justice and Equality* [2019] IECA 328 (which dealt with, *inter alia*, transposition); *Safdar v. Minister for Justice and Equality* [2019] IECA 329 (which dealt with, *inter alia*, *locus standi* of permitted family members and transposition); *Subhan v. Minister for Justice and Equality* [2019] IECA 330 (which dealt with, *inter alia*, the definition of one category of permitted family members).

22. It is not proposed to rehearse here all of the analysis contained in those judgments save and insofar as that is necessary for the present appeal.

### **The 2015 Regulations**

23. The Citizens Directive was transposed into Irish law by the 2015 Regulations, which entered into force in February 2016 and replaced the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656/2006), as amended.

24. Regulation 5(1)(b) of the 2015 Regulations includes within the definition of permitted family member a person who is a partner of a Union citizen and with whom the Union citizen has a durable relationship duly attested, and the exact words of article 3(2) of the Citizens Directive are used:

“This paragraph applies to a person who—

[...]

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

25. Mr Pervaiz claims to be a person to whom this provision applies.

### **The standing argument**

26. The State parties argue that the proceedings are improperly constituted or, to put it another way, that Mr Pervaiz did not have standing to challenge the decision in his own right and that Ms L., the Union citizen, was a necessary party to the challenge, either alone or as a co-applicant. Barrett J. rejected that argument.

27. Since Barrett J. delivered his judgment, this point came for consideration in the Court of Appeal in *Safdar v. Minister for Justice and Equality*, where the standing objection was rejected. In my judgment, with which the other two members of the Court agreed, I said that while the rights of the third country national were derivative in nature, in that they were rights that supported and depended upon the rights of free movement of the Union citizen, the third

country national had an entitlement in his own name to challenge the decision. The third country national who seeks entry and residence as a permitted family member does not have the right afforded to the qualified member and has only a right to have an application considered and “facilitated”. I quote from para. 38 of my judgment as follows:

“[...]. The question is not whether the permitted family member has a vested right to enter and remain in the State, but whether both the permitted family member and qualified family member have a right, albeit how that right is exercised may be different. The qualifying family member has a right to enter and remain which automatically vests, the permitted family member has no more than a right to have his or her application considered, and whilst the result of the application is not pre-ordained or automatic, the right is still a vested right. For that reason, it does not seem to me that there is any difference in substance between the right of a qualifying family member and that of a permitted family member for the purpose of ascertaining whether such person or persons has standing to challenge a decision of the Minister under the scheme of the 2006 Regulations.”

**28.** It is useful to restate the argument. The Citizens Directive provides additional support to, and encouragement of, the rights of free movement of Union citizens in the Member States. Those free movement rights are enhanced and protected if family members or other persons with whom the Union citizen has a durable relationship, or who are dependent on the Union citizen, are also afforded rights of entry and residence in the host Member State. Stated in the negative, a Union citizen may be less inclined to take full advantage of the right to freely move, live, and work in the other Member States were he or she to be constrained by existing family ties, existing moral or other obligations, or by the fact that he or she is in a durable relationship with a person who has no right to travel to the host Member State, the loss of which would have personal, emotional, and social consequences for the Union citizen.

**29.** The means by which the free movement rights of the Union citizen were strengthened and protected was to grant to his or her family member, the partner with whom he or she is in a durable relationship, or a person dependent upon him or her, a right, irrespective of his or her nationality, to apply to join the Union citizen in the host Member State.

**30.** The rights of the third country national who is a family member of the Union citizen or, the relevant category in the present case, the third country national in a durable relationship with the Union citizen, exist to support the free movement rights in the Treaties and are given concrete and positive enhancement by the Citizens Directive. The rights for which provision is made are rights of entry and residence of the third country national who meets the criteria set out in the Citizens Directive and the implementing domestic provisions.

**31.** The legislation might have been configured in a different way: it might, for example, have given the Union citizen the right to make an application on behalf of his or her spouse, family member, or other person within the category of “permitted family member”, as defined in the 2015 Regulations. But that was not the scheme adopted by the 2015 Regulations, nor it is the scheme the Citizens Directive envisages.

**32.** It is true, as is argued by the Minister, that Mr Pervaiz has, in his own right and independently of Ms L., no right of free movement within the Union, and, *ipso facto*, no right to enter or remain in the State other than by reason of the provisions of the 2015 Regulations. Nonetheless, although his rights are derivative in that sense, I do not accept that the rights sought to be engaged by Mr Pervaiz are the rights of Ms L. It is true that she is interested in the result of the application, and that the 2015 Regulations exist to facilitate and assist the exercise by her of her rights as a Union citizen. The rationale for the creation of the rights in the Citizens Directive and in the 2015 Regulations does not, it seems to me, define by whom the rights may be asserted.



**33.** Mr Pervaiz seeks liberty to enter and remain in the State under the 2015 Regulations and is entitled to do so if he can establish that he is in a durable relationship with Ms L. The rights he asserts in the proceedings are these rights, and his challenge is to the approach of the Minister to his application to be afforded the right of entry and residence in accordance with the Regulations.

**34.** There is no authority of the Irish courts, of the Court of Justice, or from other jurisdictions directly on point. But in the course of my judgment in *Safdar v. Minister for Justice and Equality*, I noted the decision of the Court of Justice in *Secretary of State for the Home Department v. Banger (Case C-89/17)* EU:C:2018:570. The facts are as follows: Between 2008 and 2010 Ms Banger, a national of South Africa, and her United Kingdom national partner, Mr Rado, resided together in South Africa. In May 2010, Mr Rado accepted employment in the Netherlands, and they lived together there until 2013. In 2013, Ms Banger and Mr Rado decided to move together to the United Kingdom. Ms Banger's application for a residence was refused on the ground that she was the unmarried partner of Mr Rado and that the United Kingdom 2006 Regulations provided that only the spouse or civil partner of a United Kingdom national could be considered a family member of that national.

**35.** The precise point was not raised concerning the standing of Ms Banger to bring the challenge in the Upper Tribunal (Immigration and Asylum Chamber) without the joinder of her partner. A reference to the Court of Justice was made and that Court, at para. 31, repeated the principle that the Citizens Directive:

“[...] imposes an obligation on those Member States to confer a certain advantage on applications submitted by the third-country nationals envisaged in that article, compared with applications for entry and residence of other nationals of third countries (see, to that effect, judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 21).”

**36.** Regarding the correct approach to the question of remedy, the Court said, at para. 50:  
“As regards the content of those procedural safeguards, according to the Court’s case-law, a person envisaged in Article 3(2) of that directive is entitled to a review by a court of whether the national legislation and its application have remained within the limits of the discretion set by that directive (judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 25).”

**37.** Thus, the Court of Justice envisaged the challenge by a person claiming to be a permitted family member of the decision to refuse and of the national transposing instrument. The judgment went on to say, at para. 51:

“As regards its review of the discretion enjoyed by the competent national authorities, the national court must ascertain in particular whether the contested decision is based on a sufficiently solid factual basis. That review must also relate to compliance with procedural safeguards, which is of fundamental importance enabling the court to ascertain whether the factual and legal elements on which the exercise of the power of assessment depends were present (see, by analogy, judgment of 4 April 2017, *Fahimian*, C 544/15, EU:C:2017:255, paragraphs 45 and 46). Those safeguards include, in accordance with Article 3(2) of Directive 2004/38, the obligation for those authorities to undertake an extensive examination of the applicant’s personal circumstances and to justify any denial of entry or residence.”

**38.** The review is envisaged as an examination of the personal circumstances of the permitted family member and a justification to him or her of the reasons for the refusal of entry or residence.

**39.** The Court concluded as follows, at para. 52:

“In the light of the foregoing considerations, the answer to the fourth question is that Article 3(2) of Directive 2004/38 must be interpreted as meaning that *the third-country*

*nationals* envisaged in that provision *must have available to them* a redress procedure in order to challenge a decision to refuse a residence authorisation taken against them, following which the national court must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence." (Emphasis added)

**40.** I consider, in the light of these statements of principle, that the requirement of effectiveness means that a remedy must be available to the person asserting breach of his or her rights to bring an application for entry and residence, and any other conclusion would be contrary to the object of the Citizens Directive. A narrow approach to the question of standing to challenge a decision does not meet that test.

**41.** Further, the scheme of the 2015 Regulations provides for application not by the Union citizen but by his or her family member. Regulation 2(c)(iii) provides that an application may be made to the Minister by "a person to whom paragraph (1) applies", *i.e.*, in this case, a partner with whom a Union citizen has a durable relationship, duly attested, for a decision that he or she be treated as a permitted family member for the purposes of the Regulations and that applicant is to produce to the Minister "documentary evidence of the existence of a durable relationship with a Union citizen."

**42.** While it is not dispositive, I also note that the form by which an application is commenced, the EU1A application form, identifies the applicant as the third country national, and whilst it does require the signature of the Union citizen to signify his or her support for the application, the application is not made jointly by the couple.

**43.** As an aside, I wish to note that Ms L. did provide two affidavits in support of the application of Mr Pervaiz. There is no question, therefore, of the kind of difficulty that might arise were the Court to be concerned as to the degree of engagement by the Union citizen, or even his or her knowledge of the proceedings or the application. As noted in *Safdar v. Minister for Justice and Equality*, at para. 53, there may be policy reasons why the active presence of the Union citizen might be desirable where there is perceived to be a possible risk of aggressive or domineering relatives.

**44.** There may, in some cases, also be reasons why evidence from the Union citizen partner is necessary or desirable to establish the facts on which judicial review is sought.

**45.** These are practical considerations but do not establish a reason in principle why the Union citizen is an objectively necessary party to a judicial review of the decision of the Minister in a given case.

**46.** I wish to comment on two matters relied on in this appeal. It is argued that the reliance on the decision of the Court of Justice in *Ogieriakhi v. Minister for Justice and Equality* (Case C 244/13) EU: C:2014:2068, at para. 48 of my judgment in *Safdar v. Minister for Justice and Equality*, is misplaced as that case concerned a spousal relationship which had terminated and where the third country national was asserting a standalone right under article 16 of the Citizens Directive. It is argued that as the position of a spouse, or a former spouse, is quite different from that of a permitted family member under domestic law (whose rights are those for which article 3.2 of the Citizens Directive relates), *Ogieriakhi v. Minister for Justice and Equality* does not provide useful support.

**47.** Another argument made by the Minister in regard to the judgment in *Safdar v. Minister for Justice and Equality* is that the reliance on the judgment of the Court of Justice in *Chenchooliah v. Minister for Justice and Equality* (Case C-94/18) EU:C: 2019:693 does not take account of the fact that the spouse of that Union citizen, a third country national, is a

“qualifying family member” within the meaning of the Regulations. It is argued that, therefore, the third country national spouse had an interest in her own right to enter the State. It is argued that that judgment of the Court of Justice is not of assistance with regard to the standing point, having regard to the wholly different regimes operative in regard to the two classes of family members for which the 2015 Regulations provide.

**48.** In *Safdar v. Minister for Justice and Equality*, the judgments of the Court of Justice in *Ogieriakhi v. Minister for Justice and Equality* and *Chenchooliah v. Minister for Justice and Equality* were relied on by way of analogy, or as support for the reasoning on which the decision was based. The distinction between the right of the spouse who has automatic rights, and that of a permitted family member whose rights are qualified, are different in the 2015 Regulations, but the standing argument must be the same. Each of them has a right which is capable of being asserted, and a corresponding right to challenge an unlawful exercise of the administrative decision to refuse, albeit the right of the permitted family member is not automatic, and he or she has merely a right to be considered to be permitted entry and residence.

**49.** I am not persuaded that the reliance on those cases by way of analogy and to assist in the reasoning was wrong, or that the distinction now sought to be made by the Minister is of assistance, and the two judgments of the Court of Justice offer some support for the view that I take on the standing point.

**50.** In summary, the question of standing is not answered by reference to the nature or source of the right, but whether there exists a right in the first place, and, in my view, that is answered by repeating what I have said above: that the application is that of the third country national for judicial review by which he seeks to assert and protect an interest vested in him to apply for entry and residence as a partner of a Union citizen. Mr Pervaiz, in my view, has a right to apply under the 2015 Regulations to enter and remain in the State and to himself seek judicial review of the decision of the Minister. He has a sufficient interest in the outcome of

his application to be permitted to remain in the State to frame a challenge to the decision refusing him.

51. In the circumstances, I am satisfied that Mr Pervaiz did have standing to pursue the application for judicial review in his own right, and the proceedings are not improperly constituted on account of the fact that Ms L. was not a party. Mr Pervaiz has a right to be considered as eligible for entry and residence, and is entitled therefore to assert that right and to challenge the decision refusing him.

**Do the 2015 Regulations correctly transpose the Citizens Directive?**

52. I turn now to consider the substantive issues in the appeal and will first consider the argument accepted by the trial judge that the 2015 Regulations had failed to properly transpose the Citizens Directive.

53. Regulation 5(1) of the 2015 Regulations provides for permission to enter and reside in the State for permitted family members and the relevant sub-category is that provided in r. 5(1)(b), *i.e.* a partner with whom a Union citizen has a durable relationship, duly attested.

54. The argument accepted by the trial judge is that the failure of the 2015 Regulations to define the concept of “durable relationship duly attested” and the absence of legislative or other guidance as to the test to be applied, or the proofs needed to satisfy that test, mean that Irish law does not offer an effective and EU law-compliant means by which an applicant can avail of the rights for which the Citizens Directive provides. He accepted that the absence of the definition of “partner” or of “relationship”, or of the admittedly somewhat cumbersome phrase “duly attested” makes the Regulation effectively unworkable from the point of view of an applicant who cannot know, from an intelligent reading, what precisely he or she is required to show, or enable the decision-maker to assess the nature and quality of a relationship.

**55.** The point was rejected by the Court of Appeal *Safdar v. Minister for Justice and Equality* and *A. R. v. Minister for Justice and Equality*, and the State parties rely on these judgments.

**56.** It is also argued by counsel for Mr Pervaiz in support of the proposition that there is a failure of transposition, that article 3 of the Citizens Directive mandates the host Member State to “facilitate”, in accordance with national legislation, entry and residence for the class of permitted family member of which he claims to be a member.

**57.** The argument simply stated is that the 2015 Regulations do not *facilitate* the application by Mr Pervaiz to enter and reside in the State with his partner because the Regulations are opaque and devoid of concrete tests or any means by which an applicant could ascertain with any degree of certainty the identifying characteristics of such person. The word “facilitate” is argued to import a particular obligation on the host Member State, notwithstanding that the Member State has discretion as to how the provisions of the Citizens Directive are to be implemented. It is argued that the Directive requires that any implementing legislation or other domestic provision must be such as to facilitate the making of an application for entry and residence. I will deal further with the use of the word “facilitate” later in this judgment.

**58.** Whether the Irish legislation adequately transposed the Directive (in the sense that it does not breach the principle of effectiveness) involves two limbs. The first relates to the legitimacy of the provisions of the 2015 Regulations in the manner in which they define “permitted family member”, and whether those provisions do “facilitate” applications for entry and residence by third country nationals who claim to come within the definition of family members of a Union citizen under article 3(2) of the Directive. The second limb relates to the availability of an effective remedy under national procedural rules.

59. It is useful to approach the issue by first considering the argument that the 2015 Regulations lack clarity, and therefore, do not adequately transpose the Citizens Directive, before further dealing with the meaning of the word “facilitate” in the Directive.

**The language used in the transposing instrument**

60. The 2015 Regulations use precisely the language of the Citizens Directive, and cannot, therefore, be seen as being more restrictive than the Directive insofar as it uses precisely the same language. That does not mean that it is a sufficient transposition. In *A. R. v. Minister for Justice and Equality* [2018] IEHC 785, at para. 21, Humphreys J. put the matter clearly, albeit *obiter*: it is “normally a legitimate transposition of a directive to simply adopt the language of the directive concerned without seeking to define terms that are undefined in the directive itself”, and “the obligation to transpose does not require that every element of the directive must be given statutory language in full in every circumstance”. Those statements were noted with approval in the judgment of the Court of Appeal.

61. This was also the view of Keane J. in *Safdar v. Minister for Justice and Equality*, where he noted that a general transposing instrument might be more flexible and more able to meet changing circumstances. His decision was upheld in the judgment of the Court of Appeal.

62. The discretionary decision-making process, and a decision on the characterisation of an applicant and whether he or she meets the definition, will always engage the analysis by the decision maker of the facts and a testing of those facts against the legislative requirements. General language may more readily permit the exercise of this discretionary decision-making process in that it does not limit the approach to the facts by specifying detailed qualifying requirements.

63. The definitions or the terms used in the Citizens Directive are not self-executing, nor are they to be regarded as a list of persons who qualify, and whilst the persons to whom article 2 of the Directive applies may be relatively easy to discern, so that a spouse, child, or cousin



may readily come within the definition of “family member” because of actual legal or blood relationships, the identifying features of those persons who come within the category of permitted family member in article 3(2) of the Directive are difficult to set out in exhaustive terms, and a list may not be useful. The category is sufficiently broadly defined to admit a range of persons who could qualify, and permit the true exercise of discretion in the light of the individual facts.

**64.** At para. 24 of its judgment in *Secretary of State for the Home Department v. Rahman* (Case C-83/11), EU:C:2012:174, the Court of Justice made reference to the requirement that the host Member State must ensure that its legislation contains criteria consistent with the normal meaning of the language in the relevant part of the Citizens Directive, but I am unable to read that observation as containing a direction that the means by which the Directive is to be implemented into national law requires that legislation must contain definitions or specific additional provisions relating to the criteria for application.

**65.** The language of legislation is, by its nature, almost always general, and that is because, as a general rule, the Oireachtas would intend that the legislation not require amendment on a frequent basis and be sufficiently flexible and broad to permit application in cases which can be anticipated at the time of its enactment and those the concrete facts of which were not necessarily anticipated as being likely at the time of its enactment. Legislation must be sufficiently general not to leave a lacuna in application, and general language can often be resilient and capable of meeting a number of factual circumstances, and of providing flexibility in application.

**66.** The use of general language in the 2015 Regulations does not, for these reasons, offend the requirement of proper transposition merely on account of the fact that it uses the precise language of the Directive without further and detailed refinement or details of the criteria to be

met. The question then becomes whether it is sufficiently clear to enable an applicant and a decision maker to discern its meaning.

67. For reasons I now turn to explain, my view is that the 2015 Regulations permit a plain reading and do not lack clarity or sufficient precision.

**Does the language used lack clarity?**

68. The first point to be observed is the context of the 2015 Regulations as a whole, which deals with family members and, in that context, it must be obvious that the word “partner” denotes a person with whom the Union citizen has a connection which is personal in nature, and which is akin to, or broadly akin to, marriage. It is not a person with whom the Union citizen has a close friendship.

69. The opinion of Advocate General Bot in *Secretary of State for the Home Department v. Rahman* identified a number of rules of interpretation from the case law, including that the provisions of the Citizens Directive must be given a teleological interpretation having regard to their objective to promote the primary and individual right of the Union citizen to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

70. He noted too the second objective of the Citizens Directive is to promote family unity, including the family unity in “a broader sense”. Further, the interpretation of national rules must respect the autonomous meaning of the Citizens Directive as a matter of EU law if uniform interpretation throughout the Member States is to be achieved. The Advocate General referred to: “the context in which the terms occur and the purposes of the rules of which they form part”, at para. 39.

71. This is consistent with the approach in *CILFIT v. Ministero della Sanità (Case C-283/81)*, EU:C:1982:335, and is well established.

**72.** The word “partner” is frequently used in modern parlance. It has, in fact, for most people, replaced the now somewhat archaic language of “girlfriend” or “boyfriend”, words more frequently used by young people, and certainly almost never by more mature adults. Sometimes indeed, the word is used in juxtaposition to the word “boyfriend” or “girlfriend” to identify a degree of permanence or constancy in the relationship.

**73.** The partner must be someone with whom the Union citizen has a durable relationship. “Durable” does not mean “permanent”, and a test that required permanence in that sense would be an impossible burdensome hurdle, and would not be in accordance with any modern understanding of intimate relationships. What is meant, it seems to me, is that the relationship be one which has continued for some time and to which the parties are committed, with an intent that the commitment continues, one, therefore, which carries the indicia of commitment such that, at the present time, each of the parties to the partnership would express a view and a hope that the relationship will continue for the foreseeable future.

**74.** Thus, a durable partnership will tend to be one of some duration, but that is not to say that the duration of the relationship is, in itself, a defining feature. The length of a relationship will be an important, and sometimes compelling, index of the degree of commitment between the couple, but it is perfectly possible for a committed long-term, what is often called a “serious” relationship, to exist between persons who have known one and other for a short time. Indeed, that profile, while it is not common, is found in persons who marry after a short relationship, and the duration of the relationship is not, therefore, always a useful indicator of its durability.

**75.** Duration, therefore, is an important factor, but not always an essential one. Durability is not measured only, or even always, by duration, but a durable relationship is often one which has endured, such that the duration may illustrate its durability.

**76.** Durability connotes a relationship which carries indicia of permanence and commitment such that the couple live a life where each of them is connected to the other by a number of identifiable threads, such as their social life and social network, their financial interconnectedness or interdependence, their living arrangements, and the extent to which they are recognised and acknowledged by their family circle and their friends as a couple.

**77.** While all of the elements of a durable partnership might not be easy to list, it is probably true to say that most persons would be aware when their friends, acquaintances, or family members are in a durable partnership. For that reason, it seems to me that the language of the 2015 Regulations can readily be understood in its plain terms as connoting a committed personal interconnectedness which is recognised and recognisable between the couple and by the members of their circle or broader acquaintances, whether social or business, and which is anticipated as being likely to continue for the foreseeable future.

**78.** That this is so is also evident from the purpose of the legislation to support and enhance the free movement of Union citizens in the Member States. The right of free movement is enhanced and supported if the Union citizen can take comfort from the fact that his or her intimate partner, with whom he or she has, and hopes to continue to have, a long-term committed relationship, can travel and reside in the host Member State. The anticipation of the absence of that person from the life of the Union citizen without this supporting right might amount, in practical terms, to a restriction on the right of free movement and a failure of the law to fully support it in a practical way. A Union citizen who wishes to travel to another Member State to work, and who is entitled to do so, might be disinclined or reluctant to travel without knowing that an intimate committed relationship can be permitted to continue and flourish in the host Member State.

**79.** The reason why a couple wish for the third country national to obtain a visa and permission to remain is because the absence of that person from the life of the Union citizen

who has chosen to exercise free movement rights is important personally to the Union citizen and his or her absence is felt personally and emotionally. Equally, if a couple resides elsewhere and both wish to enter the State, permitting entry and residence to the third country national facilitates the Union citizen taking up employment in the host Member State. It would be less likely that those free movement rights be exercised if a choice had to be made between working in the host Member State or continuing a close personal intimate life with a partner to whom one is committed.

**80.** It is sometimes difficult to identify the relevant factors in the abstract and an itemised list of the factors bears the risk that the decision maker might be seen to be constrained or trammelled in the correct approach to the evidence.

**81.** The trial judge considered that the 2015 Regulations failed to meet the requirements of accessibility and clarity which he said derived from fundamental principles of the rule of law. He regarded the absence of a definition of “durable relationship” in the 2015 Regulations made the national provisions “entirely unclear and imprecise” and that an individual would be unable to ascertain unequivocally the nature and indicia of the test or proofs to be met and take steps accordingly because “no one [...] quite knows what a ‘*durable relationship*’ is”, at para. 3 of his judgment, emphasis in original. At para. 10, he regarded the natural and ordinary meaning of the phrase “durable relationship” to offer “effectively no guidance as to what an applicant needs to show” and whilst he was not prepared to go so far as to say that the definition had to be contained in legislation, the absence of non-legislative guidance taken together with what he regarded as the ill-defined and unclear provisions of the 2015 Regulations themselves, led him to the view, at para. 36 of his judgment, that the transposition was ineffective.

**82.** I do not agree. There may well be situations where more definition or greater specificity is required to enable a person to understand the meaning of an enactment or whether it is applicable to a given set of circumstances. The language used in the 2015 Regulations is not,

in my view, a language of that type. The ordinary literal meaning of the word “partner” is capable of being readily understood without any technical knowledge, especially when one has regard to the context of its use in r. 5(2) of the 2015 Regulations, *i.e.* that a partner is intended to denote a person with whom one is in a family-type relationship, a relationship short of marriage but at some level akin to a marriage relationship.

**83.** For the same reason, what is meant by a “durable relationship” may also be said to be, broadly speaking, capable of being understood in a non-technical literal way, and durability does bring to bear questions of duration. A relationship is durable if it carries indicia of commitment which are capable of being objectively ascertained, albeit being derived from subjective intentions.

**84.** Some elements of the test require more comment: whether cohabitation is necessary; whether there must be a sexual element in the relationship; and other indicia of commitment.

I turn now to examine these.

#### **Is co-habitation necessary?**

**85.** An argument was made that the Regulations wrongly impose a requirement that the couple be cohabiting or intend to cohabit. Section 4 of the EU1A application form requires details of the relationship of the applicant with the Union citizen including, at 4.6, whether the couple were in a relationship before they started living together, and, at 4.7, whether the couple had ever lived together outside of Ireland, and whether they had lived together at an address other than that given in the earlier part of the application during the two years immediately preceding the application. Mr Pervaiz answered that he had been in a relationship with Ms L. before they commenced cohabiting, that they had lived together at other addresses in the State, and that he and Ms L. intended to continue to permanently reside together in the State.

**86.** It would seem to me that cohabitation is in most cases a useful yardstick by which the durability of a relationship is assessed and by which it is possible to test whether persons are

genuinely in a committed partnership. Cohabitation can, of course, take many forms, and for reasons of social mores, a couple may choose to cohabit but not to be presently in a sexual relationship. Equally, a couple may cohabit but one of them may, for reasons of work (assuming the third country national has permission to work in the State), find himself or herself living intermittently in another part of the country or even outside the State altogether.

**87.** There may be difficulty also in establishing that a couple have cohabited if, for example, the third country national resides outside the State and his or her application is for a visa to enter. In those circumstances, at the time of the application, the couple will not be living together. But, at the minimum, it seems to me that it would have to be established that they intend cohabiting, and this would be a fundamental element of their relationship and an index of their commitment. It is improbable that a third country national would seek a visa to enter and remain in the State in order to live apart from his or her partner.

**88.** There is a variety of likely circumstances, but these are not concepts unfamiliar in ordinary language, and in the present case, Mr Pervaiz and Ms L. do cohabit and were so cohabiting when the application was made.

**Is it necessary that the relationship have a sexual element?**

**89.** The existence of a present sexual or intimate relationship would not seem to be mandated, but normally the couple will either be in a sexual relationship or intend such relationship in the future. Persons who are and have been in a long and committed relationship may qualify if that relationship was sexual but, for one or other reason whether medical, practical or personal, that aspect of their relationship has become less important with the passage of time. The 2015 Regulations do not, it seems to me, intend to grant rights to persons with whom the Union citizen has a close friendship, even one that is durable in many respects. The broad purpose of the Citizens Directive envisions special rights of families and those in family type relationships, not of friendships.

90. The obvious difficulty of proving a sexual relationship and the difficulty of testing the intimate details of a relationship in a civil administrative process, as well as sensitivity to different social mores, could explain why that element is not specifically mentioned in the application form or the explanatory leaflet.

**Indicia of commitment**

91. I agree with the trial judge that there will be many cases of persons in a durable relationship with a Union citizen who do not have a joint bank account or who do not own or rent property jointly. The factors in the lives of the couple that connote durability may well be factors of such commercial type, but there may also be wholly or mainly personal factors, such as their social network, their living arrangements, how they care for children if they have children, how each of them has integrated into the broader social and family network of the other. It is almost inconceivable in the modern world that a couple would not have many examples which can be established by documentary proof, whether from social media, correspondence, utility bills, photographs, text or email messages, financial transactions, *etc.*, which might establish the closeness of their interconnectedness and the nexus within which the relationship operates.

92. Mr Pervaiz did, in fact, furnish a joint health insurance policy and screenshots of posts on social media from a short holiday in the west of Ireland, the type of documentation or evidence one would expect to produce to establish the existence of a relationship, its durability, and its nature. He also furnished a letter from the father of Ms L., who also works and lives in Ireland, and from the employer of Ms L., the letting agreement in joint names of the apartment where they now both live, and a letter from a member of An Garda Síochána where the Garda member gave a description of the personal assistance offered to Ms L. by Mr Pervaiz following an incident with a third party. These were found not to offer sufficient evidence of the relationship or its durability, but the type of documentation furnished does tend to show that



he and his legal advisers had no difficulty in discerning what types of proof was required to meet the test in the Regulations.

**The application form and leaflet**

93. Finally, it is not true to say that no guidance has been published to assist an applicant for permission to enter or remain. The application form and the explanatory leaflet contain detailed instructions and advice regarding the kinds of documents required and those that might assist in the assessment of the application. Thus, guidance is available and may be updated from time to time as circumstances require. I comment further on the application form and the leaflet later in this judgment.

94. There is, in my view, no lack of clarity in the 2015 Regulations and in the other resources so that an applicant may readily understand the proofs to be met.

**The requirement that the Member State “facilitate” entry and residence**

95. As noted above, article 3(2) of the Citizens Directive requires the Member States to “facilitate” entry and residence by the persons there identified, and counsel for Mr Pervaiz relies on the decision of the the Grand Chamber of the Court of Justice in *Secretary of State for the Home Department v. Rahman* to support his argument that detailed guidelines and definitions are required in implementing instruments.

96. The Court of Justice, on a preliminary reference from the Upper Tribunal of the United Kingdom, found that the relevant parts of the Citizens Directive are not directly applicable and this had the consequence that Member States must ensure “that their legislation contains criteria which enable those persons 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”, at para. 26.

97. The question for consideration arose from an application by persons claiming to be “extended” family members of a Union citizen, that phrase in the United Kingdom legislation,

the Immigration (European Economic Area) Regulations 2016, bearing the same meaning as the “permitted” family member in Irish legislation.

**98.** The Court of Justice stated that the requirement to “facilitate” entry and residence to extended/permitted family members is mandatory and confers on that category of persons “certain advantages” when their application comes to be considered. That reasoning led to the conclusion that Member States must “make it possible” for such persons to “obtain a decision on their application”, and that that application must involve an “extensive examination of their personal circumstances”, and that a refusal is to be justified by reasons.

**99.** It seems to me that this conclusion must be interpreted as meaning that the application by a third country national who claims to be entitled under article 3(2) of the Citizens Directive must start not on the basis that the application will be accepted, but that the making of an application be facilitated, and that the application be dealt with on its individual and specific merits in the light of the personal circumstances of the applicant and the relationship of the applicant to the Union citizen. To “facilitate” an application in those circumstances does not mean that the requirements be easily met. It means that the host Member State must positively provide a mechanism for an applicant to furnish relevant and sufficient evidence to meet the test for which the Citizens Directive provides.

**100.** The Court of Justice, at para. 24, repeated that the Member States are individually free to select the criteria or factors to be taken into account in assessing an application:

“None the less, the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term ‘facilitate’ and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness.”

**101.** Counsel for Mr Pervaiz argues that that paragraph supports the proposition that the Member State must enact legislation or instruments equivalent to legislation containing

detailed criteria to identify the factors to be taken into account in assessing an individual application.

**102.** I do not read that paragraph in that way, but rather as a statement of the extent of discretion afforded to the Member State as to the content of its legislation, or as to the precise criteria and factors which it regards as qualifying. The paragraph can be seen as a statement of the negative: the Member State may select the criteria or factors it will take into account, provided those are within the spirit of the Citizens Directive and do not deprive it of its effect and practical application in the individual case.

**103.** The answer given by the Court of Justice at para. 26 confirms this.

“[I]t is, however, incumbent upon the Member States to ensure that their legislation contains criteria which enable those persons 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.”

**104.** Again, in the curial part of its decision at para. 40, the Court stated the following:

“[O]n a proper construction of Article 3(2) of Directive 2004/38, the Member States may, in the exercise of their discretion, impose particular requirements relating to the nature and duration of dependence, provided that those requirements are consistent with the normal meaning of the words relating to the dependence referred to in Article 3(2)(a) of the directive and do not deprive that provision of its effectiveness.”

**105.** The decision in *Secretary of State for the Home Department v. Rahman*, therefore, is authority for the general proposition that Member States have discretion as to the factors relevant in considering an application, but limited by the principle that the Member State must not impose criteria which are overly burdensome or restrictive such as to deny an otherwise qualified person from entry or residence, and that while discretion exists as to its procedure the

process must enable the decision maker to engage an examination of the individual factors relevant to the applicant and his or her personal circumstances.

**106.** For this reason, I would reject the argument that Irish law fails to sufficiently “facilitate” the application for entry and residence by a person claiming to be a permitted family member.

**Procedure to be applied**

**107.** The procedure to be engaged by the Minister is set out in r. 5(3) of the 2015 Regulations, which I quote in full:

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

**108.** The regulation adopts the words of article 3(2) of the Citizens Directive and the Minister is to carry out an “extensive examination of the personal circumstances of the applicant” to ascertain whether he or she is capable of being treated as a partner of a Union citizen with whom he or she claims to be in a durable relationship, and engages a number of separate questions: whether the partnership is established on the facts and whether sufficient evidence exists of its durability.

**109.** The precise sequencing envisaged by the provision was the subject of some controversy in the appeal, as r. 5(3) of the 2015 Regulations is somewhat opaque in its terms. It suggests, on first reading, that the Minister engages a two-stage process, first a process to satisfy himself or herself that the applicant is a permitted family member and thereafter, to carry out “an extensive examination” of the personal circumstances of that person. A process that is two-stage in that sense may be relatively straightforward in the case of certain classes of permitted family members who are a “member of the family” of a Union citizen. It may, for

example, be relatively easy to ascertain on the basis of a blood relationship, or a legal relationship, such as marriage or civil partnership, that a person is a family member. It is less straightforward when what is to be ascertained is the nature of the relationship with the Union citizen.

**110.** Regulation 5(3) of the 2015 Regulations, therefore, in my view, envisages not so much two stages but a series of questions with which the Minister must engage. In the case of a person claiming to be a partner in a committed relationship with a Union citizen, the gateway provision is less easily satisfied than will be the case in an application by a person who has a blood or a formal relationship with a Union citizen, and the evidence submitted, and analysis carried out by the Minister will overlap to a large extent.

**111.** I do not therefore agree with the submissions made on behalf of the State parties that the Minister is engaged in a two-stage process and that the Minister “facilitates” the application after an assessment is done of the nature and durability of the relationship. Quite apart from the fact that that is an overly artificial interpretation of the Citizens Directive and the 2015 Regulations, it seems to me that the Directive requires that the Minister engage with the facts presented by an applicant who seeks to come within the subcategory of permitted family member by reason of being a partner of a Union citizen, and must assess this application in the context of the individual circumstances identified by that person. The requirement from EU law is that the Member State put in place a system for assessing these applications, and that whatever mode of assessment is established, and whatever criteria are in place in national law, must be such as to not overly restrict the right of the permitted family member to be considered, whether that is on account of the means by which the application be made or the criteria to be applied.

**112.** The Minister will assess the documentary evidence furnished by the applicant and examine all the individual and personal circumstances of the particular case without applying a blanket or general approach.

**113.** The phrase used in the Citizens Directive that the durable relationship be “duly attested” does not sit easily in domestic legal parlance. I read that expression as requiring that the applicant provide evidence, in whatever form is relevant and suitable in the light of his or her circumstances, and that the Minister is to engage with that evidence not by the application of a general policy, but by reference to the individual facts and indicia of the relationship put forward by the applicant and established by evidence.

**114.** That is not to say that the evidence must always be in documentary form, but can be a narrative explaining the context of the relationship, how it arose, how long it was endured, where the couple have lived, what elements of their life have been and are still interconnected, and any personal factors which they may wish to show to establish their commitment to one another. In that regard, it should be remembered that while many of the indicia of commitment are self-evident, some may be personal to the couple. They may, for example, celebrate the day they met, have particular places which have a special importance to them, and commitment is shown not only by formal public events such as an engagement to marry but by many other indicia, all of which are likely to be recognisable by members of the community in which the couple live and by society generally.

**115.** What is required, however, is something more than mere assertion. To say that the evidence must be “duly attested” requires that it be “evidenced”, and may, in a suitable case, be evidenced by oral evidence or narrative. Were an applicant required to notarise or establish definitely by documentary evidence that he and the Union citizen are in a committed relationship, the test would be impossibly high. What is required is evidence by which the relationship is proved or substantiated, and a proper reading of the Citizens Directive means

that the criteria, whatever they are and however they are stated, must not impose too high a standard and make it impossible for a person to meet that standard.

**116.** I would also reject the argument of counsel for the Minister derived by *Secretary of State for the Home Department v. Rahman* that the approach adopted by the Court of Justice implicitly recognised that the process was a two-stage process, by which the Member State would first assess whether the family connection existed and, thereafter, consider the relevant personal circumstances giving rise to a right to apply including questions of dependency or membership of the household. The family members to which the judgment of the Court of Justice referred were blood relatives where the categorisation of the applicants was more readily made, and therefore it could be said that they appeared to be at the second or other stage of a process, they having passed the first qualifying hurdle.

**117.** Further, I also do not agree with counsel for the Minister that the means by which the application is to be “facilitated” for the purposes of the Citizens Directive is wholly that contained in r. 5(8)(b) of the 2015 Regulations, which provides as follows:

“The Minister shall grant permitted family members every facility to obtain an Irish visa and, on the basis of an accelerated process [...], if the Minister decides to issue an Irish visa, that visa shall be issued free of charge.”

**118.** That makes provision for what is to happen after the Minister has made an assessment that a person qualifies as a permitted family member within the meaning of the 2015 Regulations. The scheme by which a visa application is to be accelerated and is issued free of charge is supportive of the rights of the Union citizen and the right of a permitted family member, once the application to enter and remain in the State has been granted. That is not the means by which the Irish State implements the Citizens Directive, and were it to be such, it would be an insufficient transposition of the Directive.

**Did the Minister wrongly impose a requirement of cohabitation for two years?**

**119.** Mr Pervaiz argued in the High Court that the Minister had, by the contents of the leaflet, and in the statement of the reasons for refusing him liberty to remain, imposed a mandatory two-year requirement and had thereby fettered his discretion. The trial judge agreed, at para. 16 *et seq.* of his judgment, and held that absence of evidence of two years of cohabitation seemed to be of “real significance” in the consideration of the application by the Minister, or that, at least, the Minister had placed “some emphasis” on that fact, and he noted that the decision expressly made reference to the fact that “insufficient evidence of cohabitation for a period of two years” had been submitted by Mr Pervaiz.

**120.** That led the trial judge to conclude that the decision was flawed and that the Minister had taken improper considerations into account and applied the wrong test to the facts.

**121.** The evidence before the High Court included an affidavit of Sinead Murphy, sworn on 8 March 2019 on behalf of the Minister. Ms Murphy was a Higher Executive Officer assigned to the EU Treaty Rights Division of the then Irish Naturalisation and Immigration Service within the Department of Justice and was the decision maker on the review of the decision at first instance. She deals with the contents of the explanatory leaflet for the EU1A application form, which she says, “lays out the documentation that the First Respondent looks for as evidence of a *de facto* partnership with the EU citizen”. At para. 19, she goes on to confirm that evidence of cohabitation for the last two years is not a requirement applied in a “strict fashion” but is “flexible” and can be “moved downwards depending on the rest of the evidence furnished by an applicant”.

**122.** The trial judge was not persuaded by that averment and was unable to reconcile that evidence with the fact that the Minister’s decision expressly made reference to the absence of evidence of a two-year cohabitation period.



**123.** On appeal, counsel for the Minister argues that there has been no fettering of discretion by reason of the contents of the explanatory leaflet, and that no strict rules or requirements exist that a person show evidence of cohabitation for two years. It is argued that durability does permit an analysis of the length of a relationship, an argument dealt with earlier in this judgment.

**124.** Counsel for Mr Pervaiz does not argue that a two-year cohabitation requirement is, in itself, impermissible but argues, correctly in my view, that a two-year strict requirement may not be imposed without legislative provisions and that the *de facto* imposition of a two-year cohabitation requirement would unlawfully restrict the operation of the Citizens Directive in Irish law were it to be applied strictly.

**125.** No issue arises in this case as to whether a two-year strict legislative requirement would be lawful in a transposing instrument and, therefore, I do not propose considering the question from that point of view. That said, I am of the view that the imposition of such a requirement, were it to be strictly imposed or to be treated as a gateway requirement, could not lawfully be done by means of guidelines, and the guidelines contained in the explanatory leaflet had no statutory basis.

**126.** However, the explanatory leaflet for the EU1A application form, at Part 2, sets out a list of what is called, in the heading, “required supporting documents”. The list of evidence “required” of a relationship with a Union citizen includes evidence of cohabitation for the last two years (the first bullet point) and “evidence of a durable relationship” without reference to time (the second bullet point).

**127.** The short list is headed up as a list of documents that “should be provided”.

**128.** The EU1A application form contains 22 pages and asks questions such as whether the applicant is married, single, divorced *etc.*, whether he or she has children, and details of where the couple reside, the number of bedrooms, common rooms in their accommodation, details of

financial circumstances of the applicant and of the Union citizen, emotional or physical support received from the Union citizen, details of family in the home country.

**129.** Page 18 of the form expressly sets out a list of documents that might usefully be included, the relevant ones being evidence of living together, such as utility bills, mortgage/tenancy agreements *etc.*, birth certificates of children, evidence of the legal ending of a previous marriage or civil partnership.

**130.** The application form itself does not specify that a two-year cohabitation is a mandatory requirement and the request for information for the previous two years is not itself indicative of any policy or principle that mandates two years of cohabitation but seeks details of addresses within that period.

**131.** However, the explanatory leaflet does not seem to me to be sufficiently clear to alert a potential applicant to the fact that a two-year cohabitation requirement is not mandatory, but that a couple who can show two years of cohabitation will more readily satisfy the proofs. The use of the language “required” and the list of “required supporting documentation” to evidence a relationship after a heading which contains the mandatory language “should be provided”, taken together might seem to impose a two-year cohabitation requirement. The approach evidenced in the affidavit of Ms Murphy cannot be discerned from the explanatory leaflet or from the application form itself.

**132.** However, I do not accept that Mr Pervaiz was misled by the two-year cohabitation requirement and the initiating letter from his solicitors dated 18 October 2017 expressly said that no minimum period cohabitation exists at law, asked that the Minister consider all the documentation and evidence submitted on behalf of Mr Pervaiz, and requested that there be “no insistence on a two-year cohabitation period”.

**133.** Thus, it seems to me that Mr Pervaiz had legal assistance sufficient to enable him to make the argument from the outset that the two-year cohabitation requirement should not be

applied in a strict way. Accordingly, it does not seem to me that he can mount an argument that the two-year cohabitation requirement was treated as mandatory or is invalid in itself, merely on account of lack of clarity regarding the manner by which it is applied in an individual case by the Minister.

**134.** The decision on review dated 14 May 2018 does expressly say that Mr Pervaiz did not demonstrate that he cohabited with the Union citizen for two years and that “furthermore he had failed to submit evidence of a durable relationship”. I accept that the letter could have been clearer and could for example have explained that the two-year requirement was not being imposed strictly. However, the decision maker cannot be understood to have applied a two-year threshold requirement in an absolute sense, because she went on to assess the sufficiency of the other evidence provided by Mr Pervaiz described at para. 92 above, *viz.* a health insurance policy in joint names for a one-year period from 1 December 2017, more than twelve months after the couple say they commenced cohabiting, and a small number of photographs, together with a letting agreement in joint names made on 31 May 2017, and the supportive correspondence.

**135.** I am satisfied that the decision maker did not, on the facts, fetter her discretion and did not confine the analysis to the question of whether the couple could show two-years cohabitation. She weighed all of the evidence and considered it to be insufficient.

**136.** In that context, it should also be noted that Mr Pervaiz had probably come to the State in 2012 and a deportation order made on 6 May 2016 was not disclosed on his application form. Implicit in the decision is a degree of scepticism deriving from that fact, and that may explain why the decision maker would have referred in some detail to misleading and plainly wrong information in the application form which omitted all details of the deportation order and the earlier immigration history of Mr Pervaiz.

**137.** Thus, in the present case, I am not persuaded that the trial judge was correct that the decision shows an application of an overly rigid and unlawful test of two-year cohabitation.

### **Effective Remedy**

**138.** The trial judge also considered that Irish law failed to properly transpose the Citizens Directive by reason of not providing an effective remedy. Regulation 25 of the 2015 Regulations provides a right of a review of a decision at first instance. That review is submitted to the Minister within fifteen days of the decision, and is carried out by an officer of the Minister, not being the person who made the decision and of a more senior grade. The review is a full review, not merely of procedural correctness, but also of the merits and the reviewer may confirm the decision on the same or different grounds, set aside the decision, or substitute his or her determination for the decision.

**139.** Further, provision is made for an application for the suspension of a removal order while the review is being undertaken.

**140.** Finally, as the remedy adopted by Mr Pervaiz shows in the present case, judicial review of the decision is available.

**141.** Judicial review is a robust remedy and there are a number of recent illustrations in the case law of its use in regard to immigration matters generally, including the decisions of this Court in *AAA v. Minister for Justice and Equality* [2017] IESC 80, at p. 37, and in *Okujaye v. Minister for Justice and Equality* [2018] IESC 56, at para. 19.

**142.** Whether judicial review, as it operates in Ireland, can be said to be an effective remedy was considered in some detail by this Court in *AAA v. Minister for Justice and Equality*, and again by the Supreme Court in *V. J. v. Minister for Justice and Equality* [2019] IESC 75, at para. 79, where O'Donnell J., with whom the other members of the Supreme Court agreed, reiterated the point from *AAA v. Minister for Justice and Equality* that judicial review, as it

applied in Ireland especially in the field of international protection, “is both a flexible and powerful remedy” because:

“[d]ecisions may be reviewed for legality, procedural error, irrationality, proportionality, and compliance with and protection of rights under the Constitution and the ECHR, rights under European Union law, and the rights protected by the Charter.”

**143.** O’Donnell J. went on to say that the fact that a decision is not reviewed on its merits and that the court hearing an application for judicial review does not substitute its own findings of fact for those of the deciding body is:

“intrinsic to any concept of judicial review, and has the corresponding feature that in some cases review may be more extensive, since a decision may be quashed for an error which was capable of being corrected on a merits appeal.”

**144.** O’Donnell J. also noted that there is no basis on which that question might be further opened again soon after the judgment in *AAA v. Minister for Justice and Equality*, and, there being no new argument advanced in the present case, I do not propose considering the contention on behalf of the respondent that Irish law does not have a sufficiently robust remedy by which a decision may be reviewed. The Irish legislation provides for a full review on the merits, in effect, a full appeal, where the reviewing body may substitute its own decision on the merits and thereafter the full and, to borrow the language of O’Donnell J., “flexible and powerful remedy” of judicial review where legality, irrationality, procedural error, and other flaws may be assessed and where a decision may be quashed entirely by reason of that exercise.

**145.** I am not satisfied that the trial judge was correct when he took the view that Irish law provides no effective remedy. The point was not properly before him as leave to apply for judicial review had not been sought on this point, but irrespective of that procedural difficulty, it seems to me that the trial judge was wrong where, at para. 25 of his judgment, he considered

that the 2015 Regulations were ineffective to properly transpose the Citizens Directive on account of the fact that an effective remedy did not exist.

### **General Observations**

**146.** At the end of his judgment, the trial judge noted that the couple had, by the time of his judgment, been cohabiting for nearly three years, now somewhat over four years.

**147.** The relationship appears to have none of the indicia of a relationship of convenience. Ms L. has supported Mr Pervaiz throughout, and indeed swore a supporting affidavit for the purposes of the Supreme Court appeal as recently as December 2019 following a directions hearing, and another affidavit on 15 November 2019. She has, in all, sworn three affidavits. Mr Pervaiz has the support of her family. Ms L. attended the hearing of the appeal with Mr Pervaiz.

**148.** It is not the function of this Court to make any assessment as to the durability and nature of the relationship claimed to exist between Mr Pervaiz and Ms L., but I do wish to take the opportunity to say that there has been no evidence or suspicion regarding the nature of that relationship. The appeal should fail to the extent explained not on account of any decision that this Court does or can make on the facts, but rather on the legal grounds on which the application for judicial review is advanced.

**149.** The couple may seek to regularise their position now by the making of a fresh application. Nothing that I have said is intended to, or can, impact upon the decision-making process or the approach to the evidence and submissions on such further application.

### **Conclusion**

**150.** In my view, the appeal should be allowed and the order of the High Court quashing the decision of the Minister must be set aside. The Minister's appeal concerning the question of the standing of Mr Pervaiz to maintain these proceedings without joining Ms L. as a co-

applicant should be dismissed, and the trial judge was right in the view he took regarding the manner of the constitution of the proceedings.

**151.** However, the trial judge was, in my view, incorrect in his conclusion that the Citizens Directive has not been properly incorporated into Irish law, that the test applied by the Minister was vague and uncertain, and that the decision maker had fettered her discretion. He was also incorrect that the Irish transposing instrument fails to respect the principles of effectiveness.