

An Chúirt Uachtarach**The Supreme Court**

Clarke CJ
O'Donnell J
McKechnie J
Charleton J
O'Malley J

Supreme Court appeal number: S:AP:IE:2020:000059
[2020] IESC 000
Court of Appeal record number 2018/362
[2019] IECA 330
High Court record number 2016/707JR
[2018] IEHC 458

Between

**Sheharyar Rahim Subhan and Asif Ali
Appellants/Applicants**

- and -

**The Minister for Justice and Equality
Respondent**

Judgment of Mr Justice Peter Charleton delivered on Monday 21 December 2020

1. Two issues arise for decision on this appeal from the Court of Appeal: firstly, some guidance is sought as to the proper approach of a judge who is faced with an argument that the English or Irish version of European Union legislation may be informed by reading that text in another official language, such as French or Greek; secondly the meaning to be ascribed to defining or describing who is a “member of the household” of an EU citizen, whereby if he or she moves to another EU country, that other person or persons should be facilitated in accompanying him or her. The language issue may be resolved in concise form in this judgment. In contrast, the issue as to who is a member of the household of an EU citizen when exercising rights of free movement from one country to another, requires reference to the Court of Justice of the European Union.

Factual issue

2. At issue is the entitlement of Asif Ali, an able-bodied but unemployed man of 34 years who is a national of Pakistan, to move from Great Britain to Ireland with his first cousin Sheharyar Rahim Subhan, originally also solely a national of Pakistan. The latter became a naturalised British subject in February 2013. Asif Ali asserts that in his childhood, he and Mr Subhan lived in a family compound of two or more families in Pakistan. In due course Asif Ali asserts that he studied in university and gained qualifications in economics and related subjects. Meanwhile, Mr Subhan had moved to England. Some years later Asif Ali followed and they both lived in the same house. This was owned or rented by an older relative of them both. It is asserted that they later got a joint tenancy. On entering Britain, Asif Ali had a visa for higher study for four years and stayed with Mr Subhan, though the details of travel to university and accommodation are not clear.

3. In the months just before that visa expired, Mr Subhan had moved to Ireland. Just after the visa expired, Asif Ali moved to Ireland and sought residency on the basis of accompanying an EU citizen as a member of his household. This was on the basis of dependency on Mr Subhan and on the assertion of him being a member of Mr Subhan's household established in another EU country from which he was moving. This appeal consequently centred on the meaning of what it is to be a member of an EU citizen's household as a matter of national and of European Union law and on the definition or description whereby, under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006), as amended, which in turn implements 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, OJ L158/77 30.4.2004, a person is assessed as being a "permitted family member" of a Union citizen by the Minister for the purposes of considering whether or not the Minister will grant to him or her a residence card.

Detailed Background

4. Both Mr Subhan, born 1978, and Mr Ali, born 1986, were born and raised in Pakistan. Mr Subhan moved to Great Britain with his parents in 1997, age 19, and became a naturalized British subject on 8 February 2013. Mr Subhan moved to Ireland in January 2015. He was employed thereafter for a few months, and since October 2015 has been self-employed within the State. After he came to reside in Ireland he married a woman who is a Pakistani citizen and who resides in Pakistan but in respect of whom an application has been made to the Minister for family reunification. Mr Ali asserts that he is the first cousin of Mr Subhan and also says that both were brought up in the same family compound in Peshawar until Mr Subhan moved to Britain, when Mr Ali would have been 10 or 11 years old. Mr Ali has a third level degree in economics from a university in Pakistan. It is asserted that Mr Subhan funded, to some unspecified degree, his study in Pakistan. Both the Minister and the High Court on reviewing the Minister's decision, rejected any contention that Mr Ali was a dependant of Mr Subhan. Ostensibly to pursue further study, Mr Ali sought a visa for foreign study in Britain. In 2010 he travelled to the Britain on a four-year student visa, following a course in accountancy and business administration. While he was studying, it is claimed that he resided for over four years with Mr Subhan and with Mr Subhan's parents and other family members. This is asserted to be in a house which was owned by the brother of Mr Subhan, also a British subject. It is asserted that Mr Subhan paid a rental out of his income to that brother, who spent much of his time in Pakistan. Mr Subhan and Mr Ali entered into a joint tenancy agreement for one year with that brother on 11 February 2014, some four years after Mr Ali came to reside in the England, and less than one year before Mr Subhan came to reside in the Ireland. Then Mr Ali's visa expired within that year, on 28 December 2014.

5. On 5 March 2015, Mr Ali entered the State without a visa by travelling through Northern Ireland. Mr Ali went to reside with his cousin Mr Subhan in a residence in a provincial town. On 24 June 2015, Mr Ali applied for an EU residence card as a permitted family member of Mr Subhan. Mr Ali claimed that he was dependent upon Mr Subhan, a citizen of another EU country, Britain, exercising his free movement rights, and was, for the purposes of the Irish 2006 Regulations, both a family member and a member of the household of Mr Subhan, in the country from which he had come within the EU.

6. The respondent Minister disagreed: Mr Ali was not a member of Mr Subhan's household. She refused to grant a residence card. An initial decision was issued to Mr Ali on 21 December 2015. The initial decision of 21 December 2015 may be summarised as to the reasons for refusal as follows:

1. There was a failure to provide satisfactory evidence that Mr Ali was a family member of the Union citizen, a member of his household, or dependent upon him in the manner provided in the 2006 Regulations;
2. that the Union citizen obtained United Kingdom citizenship in February 2013 and that, therefore, the time Mr Ali and he resided together for material purposes is less than two years. This observation is presumably to take account of the caselaw and, in particular, the decision in *Moneke v. Secretary of State for the Home Department* [2011] UKUT 341, [2012] INLR 53, that what is to be assessed is the living arrangements of the Union citizen since that person became an Union citizen, wheresoever this occurred;
3. that the Union citizen's father, brother, and sister shared the same address, and that whilst documentation did show that Mr Ali and Mr Subhan shared a mutual address, this was not sufficient to demonstrate that Mr Ali was a member of the household of the Union citizen;
4. that the bank statements submitted did not explain Mr Ali's financial dependence between 2010, the date on which the last direct transfer of funds was made, and November 2014; that there was a failure to provide satisfactory evidence that the Union citizen's business was actively trading in the State and, thus, that the Union citizen was exercising EU rights.

7. After that decision, further documentation as to money was furnished and this shows the payments outlined above and an assertion of Mr Ali living off the earnings of Mr Subhan as detailed above is made as of the time when Mr Ali was lawfully a student pursuant to a student visa in Britain. The review decision of 21 December 2016, which is the decision under challenge in these proceedings, states that the applicant (Mr Ali) had not established that he was dependent upon Mr Subhan in the United Kingdom and did not qualify as a member of the household of Mr. Subhan because while he had provided evidence that he resided at the same address as the EU citizen Mr Subhan, he had "not however, established that the EU citizen was in fact the head of that household in the United Kingdom". It is useful to quote the review decision, which was communicated to him by letter of 15 August 2016. This letter stated:

The Minister has examined the supporting documentation submitted in support of your application for residence in the State under EU Treaty Rights. I am to inform you the Minister is satisfied that you have not established that you are in fact dependent [on] the EU citizen Sheharyar Rahim Subhan. In respect of your residence in the United Kingdom you have provided evidence that you resided at the same address as the EU citizen Mr Subhan, however, you have not established that the EU citizen was in fact the head of that household in the United Kingdom.

8. That letter also states that Mr Ali had failed to submit satisfactory evidence that he was a family member of the EU citizen and set out the facts above. The Minister's decision declining a residence

card to Mr Ali was appealed to the High Court by both Mr Subhan and Mr Ali. The application for judicial review was grounded on affidavits of Mr Subhan and of Mr Ali sworn on 8 September 2016. The affidavit of Mr Subhan set out that he had lived in the Britain for fifteen years before he was naturalised there in February 2013, that he is married to a Pakistani citizen since February 2016, and that she continues to reside in Pakistan. He says that he moved to Ireland in January 2015 for employment in the IT sector, and the affidavit asserts that he has been, since October 2015, self-employed in a business importing and selling mobile phone accessories, a business he previously operated from his residence in an Irish midlands town. That business is now run, the affidavit asserts, from a storage centre in an industrial estate in Dublin city. Mr Subhan avers to the financial support that he afforded to his first cousin, Mr Ali, and claims that he was dependent upon him for all his living expenses and college fees whilst they lived under the same roof in London between July 2010 and January 2015. He says it was “expected of me by my family in Pakistan to look after my cousin”. He says he, his parents, his brother, and his sister lived with Mr Ali in a house which was owned by one of his brothers. Mr Subhan claims that his move to Ireland was “specifically for employment purposes”, and that since Mr Ali came to reside with him in Ireland in March 2015, he is “fully and totally dependent” upon him. Claiming that Mr Ali was part of his “household” in London, it is sworn by Mr Subhan that it was he and he alone who had responsibility for looking after and financially supporting his cousin, that his brother, who owned the house, was in fact spending more time in Pakistan than in London, and that his parents are elderly, and his father retired from employment. He says he was the only person in the household working and the only person paying household utility bills.

8. In his affidavit of 8 September 2016, Mr Ali avers he is unemployed. He exhibits copies of receipts for seven money transfers from Mr Subhan to him in Pakistan between 3 February 2009, when Mr Ali was approximately 22 years old, and 13 May 2010, when Mr Ali was 24, amounting in the aggregate to £4,675 over that fifteen-month period. For the greater part of the four years Mr Ali spent in Britain studying accounting and business administration, he claims he did not have a bank account and that his cousin, Mr Subhan, covered his rent, paid for his studies, and gave him money for his general living expenses. It is in consequence of the absence of a bank account, it is claimed, that no transfers of money are evidenced for the period May 2010 to November 2014, a period of 52 months. In November 2014, Mr Ali opened a British building society account into which Mr Subhan made four transfers, totalling £700, between 6 November 2014 and 13 January 2015, and Mr Ali's account statements are exhibited for that period.

9. Central to their claim is that as Mr Subhan is an EU citizen, therefore entitled to move from Britain to Ireland, and that since Mr Ali is his cousin aged 34 who is not working, and in respect of whom there is no evidence of working within the EU, and who lived with him then as a member of what is asserted to be his household as an EU citizen, Mr Ali is entitled to come to Ireland with Mr Subhan. Mr Ali is not a qualifying family member, under the Irish transposition of the Directive, since this applies only to parents and children up to the age of 21, unless they are disabled, but the assertion is that Mr Subhan is a permitted family member due to being part of the asserted household of Mr Subhan.

The Directive and the transposition

10. The Directive recites as its purpose to lay down the law within which the exercise of the right of free movement within the territory of Member States by an EU citizen and their family members may be exercised. The Directive provides the framework within which permanent residence in the territory of a Member State for Union citizens and their family members is to be considered. This may be seen from Recital 1. This 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. Free movement of persons constitutes one of the four pillars of the internal market and, within the Directive, is described as constituting “one of the fundamental freedoms of the internal market”, an area “without internal frontiers”. Recital 5 of the Directive provides that the proper exercise of the right to move and reside freely within the territory of other Member States means the right should also be granted to their family members 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.

11. Recital 8 gives as one of the objectives of the directive as “facilitating the free movement of family members who are not nationals of a Member State.” Recital 10 notes the need to reconcile a number of competing interests, including the undesirability that persons exercise their right of residence becoming an “unreasonable burden on the social assistance system of the host Member State”. In this regard it is to be noted that whereas Mr Subhan is earning money in the State as a self-employed person, Mr Ali is not qualified to work, having no status enabling him to gain employment. That depends on the decision on this appeal. Recital 17, having noted that the enjoyment of permanent residence by Union citizens who have chosen to settle long term 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.

12. The Directive provides for a different approach to family members and extended family members. Family members who come within the definition in article 2(2) of the Directive are afforded the right of entry and residence in the Union citizen’s host Member State, provided certain conditions are met. A family member is clearly defined as 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, meaning dependent mother or father. Mr Ali is not a relation in the first degree and merely shares two grandparents with Mr Subhan. Hence, Mr Ali is in the category of permitted family members who do not come within the definition of family member in article 2 of the Directive, 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.

13. Hence it is Article 3(2) of the Directive which is the focus of the present appeal:

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

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

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

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

14. Neither Mr Ali nor Mr Subhan assert that, vis a vis each other, they are a family member within the definition of Article 2 of the Directive. It is common case that if Mr Ali has any rights to be considered under the Directive, they arise if he can properly be considered to be a family member who was dependent upon, or a member of the household of, the Union citizen, namely Mr Subhan.

15. The definition of a permitted family member under r. 2(1) of the 2006 Regulations is that a

“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

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- (a) is a dependant of the Union citizen,
 - (b) is a member of the household of the Union citizen,
 - (c) on the basis of serious health grounds strictly requires the personal care of the Union citizen, or
 - (d) is the partner with whom the Union citizen has a durable relationship, duly attested.

16. In Case C-83/11 *Secretary of State for the Home Department v Rahman*, it was emphasised that the Directive does not obligate the Member State to grant every application for entry or residence submitted by person who show they are family members who are dependents. The same may be said about members of the household, as a matter of logic. There is no assertion that the 2006 Regulations improperly transposes the Directive. The only change is that what is a family member becomes classified as a “qualifying member” while a “permitted family member” is so defined and classified. The only difference is of nomenclature and not of legal substance. Mr Ali is not the child of Mr Subhan, nor is he his dependant. Further, Mr Ali does not suffer from serious health issues as a person over 21 years of age. Mr Ali claimed that he is a permitted family member of his first cousin as he is dependent upon his first cousin, but that has been dismissed and leave to appeal was not granted on that issue. The sole remaining issue is whether Mr Ali migrated from Britain to Ireland with Mr Subhan and did so because Mr Ali is a member of the household of Mr Subhan, an EU citizen. Mr Subhan claims, in those circumstances, to be entitled to the benefit of Article 5 of the 2006 Regulations, and to be entitled therefore to enter the State and to apply for a residence card.

The issues

17. In the Determination of this Court granting leave, dated 20 July 2020, [2020] IESCDET 89, the issues were set out as:

1. the circumstances in which parties may cite and rely on alternative language versions of Directives, Regulations or other EU instruments; and
2. the true meaning to be given to the term “member of household” in the Directive, and in the Regulations applying that term.

The High Court

18. The judgment of the High Court dismissed the application for judicial review of the Minister’s decision. The law was correctly applied and any findings of fact were within the bounds of fundamental reason and common sense and were based on an analysis of the papers submitted by Mr Subhan and Mr Ali. In the High Court, Keane J dismissed the argument of Mr Ali that he was a dependent of Mr Subhan:

63. Mr Ali is a citizen of Pakistan, born in 1986. He lived in the same family compound as his cousin Mr Subhan, born in 1978, until the latter left for the United Kingdom with his parents and siblings in 1997, when Mr Ali was 11 years old. Very little appears to have been disclosed about Mr Ali's personal and family financial circumstances in Pakistan, save that he obtained the equivalent of a bachelor's degree in economics there. In 2010, when he was approximately 24 years old, Mr Ali travelled to the United Kingdom on a four-year student visa that was due to expire on 28 December 2014. While in the United Kingdom as a student, he resided in the same household as Mr Subhan's parents, siblings and Mr Subhan. That house is owned by Mr Subhan's brother. Mr Subhan became a United Kingdom citizen on 8 February 2013.

64. Mr Ali claims that he was dependent on Mr Subhan while in Pakistan. The evidence he has produced to corroborate that claim comprises copies of the receipts for seven money transfers that occurred between 3 February 2009, when Mr Ali was approximately 22 years old, and 13 May 2010, when Mr Ali was 24, amounting in the aggregate to £4,675 over that fifteen-month period. The applicants assert that, for the greater part of the four years Mr Ali spent in the United Kingdom, as an economics graduate studying accounting and business administration, he did not have a bank account and was entirely dependent on his cousin Mr Subhan, who covered his rent, paid for his studies and gave him money for his general living expenses, although no evidence has been produced to corroborate these disbursements by Mr Subhan. In November 2014, Mr Ali opened a building society account in the United Kingdom into which Mr Subhan made four transfers, totalling £700, between 6 November 2014 and 13 January 2015, as evidenced by copies of Mr Ali's account statements. On 17 February 2015, Mr Subhan sent a money transfer in the sum of €237 to Mr Ali, for which a copy receipt has been produced.

65. That was the relevant evidence by reference to which Mr Ali sought to establish that he was a dependent family member of Mr Subhan in the United Kingdom, as the country from which he had come. In the decision under challenge, the Minister concluded that Mr Ali had failed to do so.

66. In *Moneke*, already cited, the Upper Tribunal stated (at paras. 42 and 43): '42. We of course accept...that dependency does not have to be "necessary" in the sense of the [United Kingdom]Immigration Rules, that is to say an able bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs from his own economic activity; see [SM (India)v Entry Clearance Officer (Mumbai)]2009] EWCA Civ 1426]. Nevertheless, where, as in these cases, able bodied people of mature years claim to have been always dependent upon remittances from a sponsor, that may invite particular[ly]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.'

67. The approach recommended in *Moneke* appears to me to be the correct one. In this case, Mr Ali was on notice from the express terms of the first instance decision letter of 21 December 2015 that the Minister was not satisfied that he had established his dependency upon Mr Subhan while in the UK. The onus was on Mr Ali to satisfy the Minister by cogent evidence that was in part documented and could be tested that the level of material support he received from Mr Subhan, its duration, and its impact upon his personal financial circumstances combined together to meet the material definition of dependency. The Minister concluded that Mr Ali had failed to do so. I confine myself to observing that I can find nothing in that decision to suggest that the Minister failed to have regard to any of the evidence submitted by Mr Ali, nor can I find anything in the decision to suggest that the reasons given for it fail the test of reasonableness under the well-established *Keegan and O’Keefe* principles, confirmed by the Supreme Court in *Meadows v Minister for Justice* [2010] 2 IR 701.

The Court of Appeal

19. The Court of Appeal considered that it was necessary, on the appeal from the High Court, to further consider and exemplify what would be regarded in EU law as a person entitled to migrate from one EU country to another through accompanying the EU citizen as a member of that person’s household. Who is or is not a member of someone’s household was a question of relationship, intention and degree, more a descriptive matter than one for precise definition. This emerges from the judgment of Baker J:

67. Of itself, however, it seems to me, for the reasons that will appear, that the principle is not met by the perhaps formulistic identification of a “head of household”, but rather by ascertaining whether the cohabitation or co-living arrangements are more than merely convenient, and whether the non-Union citizen family member is part of a cohesive, long term, coherent and single unit which might generally be called a “household”. With that in mind, it seems to me that the living arrangements are not to be viewed with a bird’s eye view of a single moment in time but must rather have some regard to the durability of the co-habitation, and also of what future intentions can be objectively presumed regarding the continued existence of the household.

68. It may be more useful to consider the notion of household by reference to what it is not. Persons living under the same roof are not necessarily members of the same household and they may well be what we colloquially call housemates. An element of sharing that is necessary in a household may well be met in that the persons living together may agree on a distribution of household tasks and a proportionate contribution towards household expenses. But because, for the purpose of the Citizens Directive, one must focus on the living arrangements of the Union citizen, the members of the household of the Union citizen must, on the facts, be persons who are in some way central to his or her family life, that those family members are an integral part of the core family life of the Union citizen, and are envisaged to continue to be such for the foreseeable or reasonably foreseeable future. The defining characteristic is that the members of the group intend co-living arrangement to continue indefinitely, that the link has become the norm and is envisaged as ongoing and is part of the fabric of the personal life of each of them.

69. It is not a test of with whom the Union citizen would choose to live, but rather, with whom he or she expects to be permitted or facilitated to live in order that his or her family unit would continue in being, and the loss of whom in the family unit is a material factor that might impede the Union citizen choosing to or being able to exercise free movement

rights. That second element, it seems to me, properly reflects the core principle intended to be protected by the Citizens Directive.

70. It may be dangerous to give an example, and I do so by way of illustration only. A family member who had resided in the same house as a Union citizen for many years before free movement rights were exercised might well have become a member of the family with whom there has developed a degree of emotional closeness such that the person is integral to the family life of the Union citizen. That person could be a member of a household because the living arrangements display connecting factors that might, in an individual case, be termed a “household”. If the rights of free movement of a Union citizen within the group are likely to be impaired by the fact of that living arrangement, whether for reasons of the moral duty owed to the other members of the group or otherwise, then the rights under the Citizens Directive fall for consideration.

71. The averment by Mr Subhan that it was “expected of me by my family in Pakistan to look after my cousin” suggests factors at the other end of the spectrum, where Mr Subhan asserts an obligation to provide for his first cousin to enable him to study and gain his own independent living arrangements, or to help him to “get on his feet”. It does not support an argument that Mr Ali’s continued presence under the roof of his first cousin was core to the exercise of free movement rights, and that this perceived imperative to offer help means that Mr Subhan was impaired in the exercise of his free movement rights as a Union citizen.

72. It is true that recital 6 of the Citizens Directive includes the facilitation of family unity as a purpose of the Directive, but that is because a proper approach to free movement requires support to the person seeking to exercise free movement rights so that his or her family is preserved. The objective is not to keep families together, but rather to permit a Union citizen to have his or her family enter and reside the host Member State for the purpose of the ongoing family life of the Union citizen. The difference might appear subtle when seen in the abstract, but in a concrete case the degree of interconnectedness and the identification of what I might call a “core family” is often less difficult.

73. The colloquial use of the term “head of a household” might seem, in modern parlance, to be somewhat unfortunate, blunt, or even politically incorrect, and Keane J. was right, in my view, to recognise that the head of a household might not always be one person and does not, of course, have to be the male member or even the member of the household who, by reason of personality or otherwise, sets the rules of daily co-existence. The correct approach, it seems to me, is to look at the core family connections of the Union citizen and how those core connections may properly be understood and supported to enable free movement and establishment of the Union citizen in the host Member State. There must, in those circumstances, be at least an intention or an apprehension that the permitted family members would continue to reside under the same roof in the host Member State not merely for reasons of convenience, but for reasons of emotional and social connection, affection, or companionship

The Arguments

20. There is no issue as to dependency by Mr Ali on Mr Subhan that survives on this appeal. That has been disposed of by the High Court. In any event, the language of the Directive suggests a dependency arising from long term and unlikely to be remedied health issues as opposed to cousins making the case that one is giving the other a hand out while the other is studying or finding a

career path. Were the issue of dependency to be defined or applied as widely as Mr Subhan and Mr Ali suggest, then any assistance given by a brother or sister over 21 to another brother or sister or cousin to help with study or pocket money or living expenses while in college would render such persons dependant on those helping them. The Directive has to be given a rational construction in accordance with its plain language. Mr Subhan and Mr Ali argue that a level of financial assistance coupled with living under the same roof constitutes Mr Ali a member of the household of Mr Subhan, the EU citizen moving to Ireland. Great emphasis is placed on their early life in proximity together, which ended when Mr Ali was 10 or 11 years old, and the continuing assertion of family ties whereby Mr Subhan helped Mr Ali when he came to Britain from Pakistan in consequence of wanting to do further study well into his fourth decade. It is a combination of factors that is asserted to move sharing living arrangements into some more permanent state of being a member of not just a household, which many people are, whether sharing accommodation for a particular purpose such as study or work or out of economic necessity or from convenience, whereby Mr Subhan would be inhibited from moving from Britain to Ireland without the company of Mr Ali.

22. While Mr Ali and Mr Subhan are not in an emotional relationship with each other, in the sense of an enduring relationship, it is argued on their behalf that there is no appropriate analogy to what may be referred to as a partnership, where two men are a couple. Nor, it is argued, is there any true analogy to be drawn whereby under the directive, a person is a family member by virtue of being a parent to a child up to that child's 21st birthday unless dependency continues beyond. It is not the purpose of the Directive, the argument goes, to draw a line but rather to broadly describe a flexible situation. Thus, while Mr Ali is 34 years old, that does not matter, it is claimed, nor that he may be expected to marry and move on or find gainful employment in early middle age.

23. For the State, it is asserted that there is an appropriate analogy to be drawn as between family member and permitted family member. It would be senseless, the argument runs, that a family member be so well defined, a parent a spouse or a child who ceases to be a child at age 21 unless dependent, or that relationships must be duly attested, if it be the case that cousins in middle age can claim because of some help given by the EU citizen cousin to the other and shared accommodation, that the one helped is in the household of the other. Especially when the entire purpose of the arrangement is for study on a visa, a necessarily temporary arrangement, and study for a higher degree, a necessarily finite educational course.

24. House sharing is finite, a visa is finite, a university course comes to an end and so does help when someone is trying to improve himself/herself, the State argument proceeds. For all these reasons, on no permissible interpretation of the Directive, is Mr Ali a member of Mr Subhan's household. It was only when Mr Ali's visa for Britain ended that he came to Ireland and not because of some kind of interdependency that would qualify, the State claim, for him being a member of Mr Subhan's household.

The language issue

25. While the initial treaties setting up the predecessors to the European Union were in French, as matters developed other languages came to have equality with what is by tradition the language of diplomacy. This is a matter which has developed as the EU has matured. All versions of Directives and Regulations are in the language of all of the Member States. Article 41.3 of the Charter of Fundamental Rights of the European Union provides, under the title "Right to good administration" that: "Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language." Equivalence is fundamental to EU language versions of Directives and of Regulations whereby what is involved

ceases to be translation but is, instead, mandatory legal equivalence whereby all the language versions have the same legal value. This plurality of languages may be difficult to manage in terms of arriving at equivalent legal value as an expression of what is required, but even in the context of a mother tongue, as has been remarked of many languages that the poetical heights to which they may be brought is because of their inherent beauty. Languages evolved as instruments of the communication of deep emotion and it was only later that objectivity of language required spontaneous utterance to be brought to the service of exact legal expression. Hence, perfect expression in the language of a country is not always possible for the laws of that country and translation so as to assume exact equivalence as between 24 languages is a task requiring not only precision but native appreciation of resonance. Even so, concepts in one language may turn out differently in another and translating back what that language says into a literal version of the original may yield obvious divergence. The phrase that someone is a member of the household of an EU citizen: in German is “oder der mit ihm im Herkunftsland in häuslicher Gemeinschaft gelebt hat” which literally says or who lives with him in the same house in their country of origin; in Greek “ἡ ζει υπό τη στέγη του στη χώρα προέλευσης” which literally says or lives under his roof in the country of origin; in French, perhaps most eloquently “si, dans le pays de provenance, il est à charge ou fait partie du ménage du citoyen de l'Union bénéficiaire du droit de séjour à titre principal” declaring that the right emerges from dependency or being part of the household; in Italian “se è a carico o convive” which might literally only mean people living together; and in Spanish “o viva con el ciudadano de la Unión beneficiario del derecho de residencia con carácter principal”, literally saying lives with the Union citizen beneficiary with the principal right of residence.

26. What happened in this case is that in looking at the phrase “member of the household of the” EU citizen, argument on behalf of Mr Subhan and Mr Ali closely focussed on not the English version, which is legally valid, but on other languages such as German, French and Italian. In that regard, at case management it was suggested on their behalf that the entire Directive should be translated literally from all the languages in which it is expressed into English and that translators’ affidavits should in that regard be supplied. This was not a good idea and the case management judge vetoed the proposal firmly. The English language version is the law in Ireland. The German language version is the law in Austria and in Germany, the French in France, the Greek in the Hellenic Republic and so on. This is not a question of translation. It is not a situation where, as in the international situation prior to the Treaty of Versailles of 1919, for centuries the original language version was French and translations were informal where expressed in other languages. English is the version.

27. Reference was made to other cases where judges had drawn on their own competence in other languages to examine the text of, in particular, this directive and to comment on and compare versions. For instance, in Barrett J in *Shishu v. Minister for Justice and Equality* [2019] IEHC 566, set out a number of informal translations of the German, Greek, and Spanish text of Article 3(2)(1) of the Citizens Directive. At paragraph 7, he commented that the “proper meaning to be given to the notion of “household” within Art.3(2)(a) appears to be wider than recourse solely to the ordinary English meaning of same is appropriate.” Thus in Spanish, the phrase used is “viva con el”, which Barrett J translated informally into English as “lives with the Union citizen”. If considered on its own, and not in the context of the words surrounding it and with a teleological interpretation, this could be made to seem to connote no more than living under the same roof. In reality, however, this must work both ways and where a language literally says “living with him or her”, then reference can be had to the English language version whereby it is clear that more than merely sharing a house or flat is legally required but in being a member of a household, that is the household of the EU citizen.

28. While not commenting on that decision, it may be that two issues are being conflated in the submissions on behalf of Mr Subhan and Mr Ali. Article 267 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

29. As such, a national court of first instance has the discretion to refer or not to refer questions regarding the interpretation of European law to the CJEU. It cannot be compelled to do so by either the CJEU or the parties in question. But, if the national court is a court of final appeal it must make a preliminary reference unless the CJEU has already ruled on the point and the existing CJEU case-law is clearly applicable, or unless the law is “*acte clair*” meaning the interpretation is obvious; *Srl CILFIT v Ministry of Health* (1982) Case 283/81. Pursuant to the third paragraph of Article 267, where a question falling within the Article is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal must bring the matter before the Court. However, that obligation only arises where a ruling of the Court of Justice is truly necessary for the Court to reach its decision. Out of this emerges the idea that all languages may be consulted. At paragraphs 16 – 17 of the judgment, the Court of Justice stated that:

... the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.

30. The Court also emphasised, at paragraph 19 of the judgment that Community law uses language that is peculiar to it and that “legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States”. At paragraph 20, the Court stated

that “every provision of Community Law must be placed in its context and interpreted in light of the provisions of Community Law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.” In light of all of the above considerations the Court of Justice thus found that:

... the third paragraph of Article 177 of the EEC treaty [now Article 267 of the TEFU] is to be interpreted as meaning that a court or national tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court of Justice or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

31. In making these comments, the CJEU then spelled out the conditions required to be satisfied before a court of final appeal may find an issue to be *acte clair*. Essentially this means that that law is clear beyond a doubt based on reason. Critically, the national court: “must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice”. In reaching its conclusion, the national court must bear in mind “the characteristic features of Community law and the particular difficulties to which its interpretation gives rise”. These include:

- a. The need to compare the different language versions of Community legislation, each of which is equally authentic;
- b. The use of terminology which is peculiar to Community law, or which has a different meaning in Community law from its meaning in the law of the various Member States; and
- c. The need to place every provision of Community law in its context and to interpret in the light of the provisions of Community law as a whole, regard being had to the objectives of community law and to its data revolution at the date on which the provisions in question are to be applied.

Proper approach to language versions

32. It is only at the stage of considering a reference that it should be necessary to consider any possible lack of clarity in other EU language versions. The version of any Directive or Regulation is operative in English or in Irish. These are the official languages. That version has equivalence and equal validity to any other language version. It is to import complication where it is not necessary to view this matter the other way around as if to say that a national court can do better in interpretation through a mental exercise placing it in another country and using another language which is not the court’s *máthairtheanga*, mother tongue, and in respect of which a court cannot know the resonances of that language or how a phrase carries a meaning beyond the literal.

33. This is neither necessary or desirable. EU legislation is not ordinarily to be read other than in the official languages of the State; opinion of Advocate General Jacobs, *Wiener v Hauptzollamt Emmerich*(1997) C-338/95. That is the version that is valid and the version that is designed for the

greatest level of precision of which language permits in EU legislation. Where there is doubt about the language of EU legislation as to what it means, a teleological interpretation should be adopted in the light of the recitals, the surrounding and referential text and the ultimate purpose of the legislation; see Craig and de Búrca, *EU Law* (6th ed OUP 2015) 64 as to the proper approach to interpreting EU legal instruments and see *JC Savage Supermarket v Becton* [2011] IEHC 488, 3.8-3.11. Only if a lack of clarity thereby emerges and in the context of considering a reference should any issue as to other languages emerge. Consulting such languages is for the purpose of clarity and not to bring a lack of clarity to what is expressed in the official languages. It evokes the law of diminishing returns to leave the document in the language we have the best hope of interpreting and look to other language versions; but where there it can be said that some of the other language versions throws a light on the it may be possible to refer the court to another language version with which the court may be familiar and, if the point is of any substance, it should be apparent from that; an analysis of a legal kind that does not require proof, or translation. If however it is suggested there is a nuance which only emerges from translation and when a party intends to refer to a translation of another language version that party should give notice to the other party. This, however, is not to become a court contest of computer translation resources.

34. Further, this should not normally be an issue. The language or languages of the Member State is the language for use as the invariable tool of interpretation. In rare instances, where some asserted ambiguity is contended for, the ordinary response must be to use the interpretative tools for discerning the intention of the legislation; the context of the stated rule, the purpose as revealed in the recitals and the teleological analysis as to where the text is directed. This, properly so called, is interpretation as recognised in a court of law. Not stumbling searches in the undergrowth of multiple languages for some tangle with which to ensnare that which is clear by ordinary interpretive tools with a supposed pan-linguistic conflict. If other languages are called in aid on a claim of ambiguity, and an asserted nuance is pointed out, this has to be done in an orderly manner. There has to be a procedure for this polyglot excursion, otherwise a chaotic invocation of Babel will stymie the order proper to interpreting what EU law has declared to be the official version for this country. Where, however, ordinary interpretive tools do not achieve sharp focus, and by reason of a lack of clarity, it is proposed by a litigant to refer to another language version, the normal course is to reference that in written submissions, where there are written submissions, delivered two weeks before the hearing by the party making this unusual assertion. These matters are not to be sprung on litigants, State or private, without notice. Where a case does not call for advance written submissions but such a point is regarded as essential by either side, where there are no written submissions, then a letter should be written to the opposing side at least two weeks prior to the hearing, thus giving time to consider the position. If there is a dispute as to meaning, then this changes from being a matter of submission to one of evidence. Where the opposing side indicated disagreement as to a point derived from a translation point, it will thus be necessary, in such wholly exceptional circumstances to allow for the exchange of affidavit evidence. Here the State never suggested that the translations offered were incorrect, and the Court was entitled to have regard to what was offered. Where unnecessary time and expense is devoted to a translation issue which goes against the asserting party, a court, in the exercise of discretion under Order 99 of the Rules of the Superior Courts, should start from the proposition that this will be a matter for the adverse award of costs on that aspect of the case, irrespective of the outcome.

Reference

34. While the State has expressed no view as to a reference, regarding it as a matter for the Court, a reference has been asked for by the appellants and has been drafted with this judgment. This request is set out in an email to the Supreme Court and suggests that the following needs to be asked:

1. In order to qualify as a member of the household of a Union citizen for the purposes of Article 3(2)(a) of Directive 2004/38/EC, must it be shown that the Union citizen was the head of the relevant household?
2. When determining whether or not a person is a member of the household of a Union citizen, are that person's future intentions regarding their living arrangements relevant? In particular, is it necessary to show that the said person intends to reside with the Union citizen in the future in the host Member State, not merely for reasons of convenience, but for reasons of emotional and social connection, affection or companionship?
3. If the answers to Question 1 and 2 are no, is it sufficient to show that the family member lived in the same household as the Union citizen for an appreciable period in the country from which they have come?
4. Where a party relies on other language versions of a Directive as a guide to the meaning of a provision contained in that Directive, can the national court of a member state disregard those other language versions on the basis that
 - a) the said party has not provided expert evidence in relation to potential differing translations of the language relied upon and/or
 - b) the said party has not pointed to caselaw from the courts where the other languages relied upon are used?
5. Where a party relies upon uncontested translations of other language versions of a Directive as a guide to the meaning of a provision contained in that Directive, can the appellate court of a member state refuse to have regard to the said other language versions on the basis that the translations are "informal" in the absence of any rules of court governing the proper manner in which other language versions of a Directive may be put before its national courts?

35. The formulation of questions is, however, a matter for the Court as is the decision as to whether a reference is needed. This is not a case where this Court, as a court of final appeal, can decide the meaning of who is a member of the household of an EU citizen such that in he or she moving from one country to another, consideration ought to be given to particular factors in defining or describing the concept. Further, since the Directive applies across the EU it is desirable that a uniform definition, or certainly a uniform set of applicable criteria, be set by the CJEU so that in this important area touching on the four freedoms of the EU a common definition or set of criteria may be applied by all the courts of the EU to apply.

Result

36. Proper use of various language versions of EU legislation is as set out in this judgment. Apart from that, there must be a reference because the meaning of who is a member of the household of an EU citizen is not *acte claire*. The text of the reference, necessarily short to comply with the relevant guidelines of the CJEU, is thus appended to and forms part of this judgment.