



## THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2021] IECA 16

Record No. 2019/449

Donnelly J.  
Noonan J.  
Binchy J.

BETWEEN/

FARRUKH ABBAS AND FAHAD ABBAS

APPLICANTS/RESPONDENTS

- AND -

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT/APPELLANT

**JUDGMENT of Mr. Justice Binchy delivered on the 26<sup>th</sup> day of January 2021**

1. This is a judgment on an appeal from a decision of Barrett J. in the High Court of 26<sup>th</sup> September 2019, whereby he granted an order of *certiorari* of a decision of the appellant made on 13<sup>th</sup> November 2018, by which he refused the second named respondent's application for a residence card, which application was made on the basis that the second named respondent, is, as a matter of law, a "permitted family member" of the first named respondent, as that term is defined in Article 2 of the European Communities (Free Movement of Persons) Regulations 2015 (SI 548 of 2015) (the "Regulations"). The trial

judge further ordered that the application be remitted to the appellant for further consideration.

2. The Regulations, which came into operation on 1<sup>st</sup> February 2016, were made for the purpose of giving further effect to Directive 2004/38/EC of the European Parliament and of the Council of 29<sup>th</sup> April 2004, on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (the “Directive”).

### **Background**

3. The respondents are brothers, born and raised in Pakistan. The first named respondent was born on 27<sup>th</sup> July 1981, and the second named respondent was born on 18<sup>th</sup> December 1987. The first named respondent resided in the United Kingdom from 10<sup>th</sup> April 2004 to November 2016. He became a naturalized citizen of the United Kingdom in September 2016.

4. The second named respondent, upon his brother’s invitation, joined the first named respondent in London on 29<sup>th</sup> July 2010, and the two brothers resided there until 21<sup>st</sup> November 2011, when the second named respondent returned to Pakistan. According to the respondents, during that time, the first named respondent paid all of his brother’s outgoings, because the second named respondent was a full time student and had no other source of income. During this time, the second named respondent avers that he did a diploma in Business Administration in Essex College and Scotts College, the fees for which were paid for by the first named respondent.

5. According to the respondents, when the second named respondent returned to Pakistan in November 2011, he continued to be financially dependent upon the first named respondent because he did not have employment in Pakistan. In their grounding affidavits, the respondents say that the first named respondent regularly sent money transfers both to the

second named respondent and other family members. The second named respondent says that this is the only income that he had during this period. He says that their father was already supporting other siblings (including another brother and three sisters) and he, the second named respondent, did not wish to be a burden on his father and he therefore asked the first named respondent to support him while he was looking for work in Pakistan. In his grounding affidavit, the first named respondent avers that “sometimes the money was sent to my father, on behalf of the second applicant and my other family members, but mostly it was sent directly to the second applicant.”

6. The second named respondent says that he was unable to obtain employment in Pakistan, and accordingly the first named respondent agreed to sponsor him in a move to this country, so that he could do further studies, get a degree and improve his employment prospects. Accordingly, the second named respondent moved to Ireland from Pakistan on a student visa on 28<sup>th</sup> January 2014. He undertook studies at various institutions, including a diploma in Management and Leadership in the Carlyle Institute; a diploma in Business Administration in Shelbourne College, Dublin; and a Bachelor’s Degree in Business Administration in Dorset College, Dublin. The respondents say that the first named respondent paid for the fees of all of these courses, as well as other living expenses of the second named respondent. The various course fees, which were vouched, came to a total of €10,400.

7. The first named respondent moved from the UK to Ireland in November 2016, approximately two years and 10 months after the arrival of the second named respondent. In his grounding affidavit of 10<sup>th</sup> January 2019, the first named respondent avers that he did so in order to set up a business. This business he describes as a wastage removals and cleaning service, which he carries on through a company called Fin Logic Services Limited, and which he avers that he formed on 15<sup>th</sup> February 2017. He avers that this company has been

successful, and also that he continues to work for thirty-two hours per week in Circle K and that since 12<sup>th</sup> December 2018, he has been working full time with Deliveroo. He avers he does not actively work for his own company because he is busy with the latter two jobs.

**8.** The first named respondent says that he paid all the fees of the courses undertaken by the second named respondent in the State referred to above. He avers that he gave the second named respondent spending money of approximately €500 per month and he also initially paid for the second named respondent's rent while he, the first named respondent was still living in the UK. However, since the first named respondent came to live here, he has paid the rent for both respondents.

**9.** For a period after his arrival here, the second named respondent had employment and in his grounding affidavit, also of 10<sup>th</sup> January 2019, he says that he earned (on average) between €700 and €750 per month, and sometimes earned as much as €900 per month when he was able to work more hours. He says however that this income did not allow him to meet all of his basic needs and he was reliant upon the first named respondent to assist him with the rent, college fees and travel expenses. He avers that he gave up his part time employment in February 2017 because he was unable to focus on his studies while working and this caused him to fail his first year exams. As a result, he had to repeat the first year of his course. He says that he has had no other income, other than that which he has received from the first named respondent, since February 2017.

**10.** On 4<sup>th</sup> May 2017, the respondents submitted an application, on behalf of the second named respondent, seeking a residence card (the "Application"). The Application was grounded upon the provisions of the Directive and the Regulations. The Application was refused by the appellant on 18<sup>th</sup> September 2017 (the "First Decision"), and the respondents requested a review of that decision. However, the appellant affirmed the First Decision upon review, by letter dated 13<sup>th</sup> November 2018 (the "Impugned Decision").

11. The respondents then made an application for leave to apply for, by way of an application for judicial review, an order of *certiorari* quashing the Impugned Decision. The order granting leave was made on 21<sup>st</sup> January 2019, and the proceedings came before Barrett J. on 30<sup>th</sup> July 2019.

**Decisions of the appellant of 18<sup>th</sup> September 2017 and 13<sup>th</sup> November 2018**

12. The Impugned Decision was the result of a statutory review of the First Decision. In the First Decision, the deciding officer stated that the second named respondent had failed to satisfy her that he was a dependant of the first named respondent (by which it appears she means as of the date of the First Decision), or that he was a dependant of him (the first named respondent) prior to the arrival of the second named respondent in the State.

13. The First Decision refers to print outs from a money exchange (“BFC” exchange) provided by the respondents in support of the Application, and stated that the print outs were not on headed paper and were not verifiable and there was no corresponding documentation to show that the second named respondent had received those transfers.

14. Furthermore, the appellant noted that while the second named respondent had been granted entry to the State as a student, he was permitted to work up to twenty hours per week during term time, and full time during breaks. Accordingly, the appellant considered that the second named respondent was not dependent on the first named respondent and was capable of sustaining himself independently, while residing in the State.

15. For these reasons, the deciding officer stated that she was not satisfied that the second named respondent was a “permitted family member” of the first named respondent, as defined in the Regulations, and refused the Application.

16. The respondents then sought a review of the First Decision and in doing so made submissions through their solicitors dated 3<sup>rd</sup> October 2017. They submitted that the deciding officer had failed to consider the submissions made on behalf of the second named

respondent and the documents provided by him in support of the Application. They identified nine money transfers made between 14<sup>th</sup> September 2012 and 15<sup>th</sup> January 2015 from the first named respondent to the second named respondent, while the latter was resident in Pakistan (This is not quite accurate because the last payment, which was for £200, was made on 15<sup>th</sup> January 2015, when the second named respondent was in this jurisdiction). They referred to a personal statement made by the first named respondent in response to the First Decision, and in which the first named respondent provides further information and clarification of the second named respondent's dependency upon him. The submissions go through, in some detail, the payments relied upon by the respondents in support of the Application, including payments for course fees in both London and Dublin. They submit that the entitlement of the second named respondent to work in this jurisdiction is not relevant, because he had to give up that work in order to focus on his studies.

**17.** The solicitors also made legal submissions, to the effect that the evidence provided of payment of course fees, travel expenses to and from Pakistan, rent and other payments made by the first named respondent to and/or on behalf of the second named respondent are such as to demonstrate that a situation of real dependence of the second named respondent on the first named respondent is established as a matter of fact.

**18.** On 5<sup>th</sup> September 2018, a different deciding officer notified the second named respondent of his intention to affirm the First Decision, giving the reasons underpinning his preliminary intentions. By this letter, the appellant afforded the second named respondent the opportunity to make further submissions before a final decision was made on the review application. The solicitors for the respondents made further detailed submissions in response to this correspondence, by letter dated 10<sup>th</sup> October 2018, and the Impugned Decision then issued on 13<sup>th</sup> November 2018, affirming the First Decision.

### **The Impugned Decision**

**19.** In the Impugned Decision, the deciding officer provided the following reasons for affirming the First Decision:

- (1) Firstly, it was stated that no evidence was provided to demonstrate that the second named respondent was dependent upon the money transfers made by the first named respondent in the period 2011-2014. Moreover, insofar as reliance was placed on these money transfers, the deciding officer was unable to verify the authenticity of the same. In any case, he was not satisfied that if those payments had not been made, the second named respondent would not have been able to support himself in Pakistan.
- (2) Similarly, while the deciding officer accepted that the first named respondent had helped to defray the costs of the second named respondent's education in the State, he was not satisfied that the second named respondent would not have been able to support himself if he had not received that assistance.
- (3) The deciding officer then went on to refer to some of the evidence furnished, noting that the respondents are "tenants on the lease of the property where they both reside", which he considered was an indicator that the respondents had a shared responsibility for that lease, which is not consistent with a dependent relationship.
- (4) The deciding officer also stated that in reaching his determination in the matter, he had considered all of the information and documentation made available by the respondents.

### **Statement of Grounds**

**20.** The respondents relied on four main grounds in support of their application for an order of *certiorari*. They claim:

- (1) That the appellant acted unreasonably and/or erred in fact and/or erred in law in finding that the second named respondent had failed to establish that he was dependent on the first named respondent while the former was living in Pakistan, and having regard to:
  - (i) The supporting documentation submitted by the respondents;
  - (ii) The requirement (on the part of the appellant) to facilitate such applications under Article 3(2) of the Directive;
  - (iii) The principle of effectiveness under EU law and,
  - (iv) The letter and spirit of the Directive.
- (2) The appellant erred in failing to take into account relevant material and/or in failing to make a finding in respect of whether the second named respondent was dependent on the first named respondent while the former was living in the UK.
- (3) The appellant acted unreasonably and/or erred in fact and/or in law in finding that the second named respondent had failed to establish that he was dependent on the first named respondent in Ireland, in light of the supporting documentation submitted, and also in light of the matters referred to at paras. 1(i) – (iv) above.
- (4) The appellant erred in law and acted in breach of constitutional fair procedures and/or acted in breach of statutory duty pursuant to s. 3 of the European Convention on Human Rights Act 2003, in failing to take into consideration, adequately or at all the applicant's right to respect for family life pursuant to Article 7 of the Charter of Fundamental Rights of the European Union and/or Article 8 of the European Convention on Human Rights, in exercising its emigration functions and making the Impugned Decision.

**Statement of Opposition**



21. In his statement of opposition, the appellant denies each and every ground relied upon by the respondents. The appellant pleads that all information and documentation submitted in relation to dependency, whether in the UK, Ireland or Pakistan was considered. It is pleaded that the appellant was not required, however, to make a specific finding in relation to dependency in the United Kingdom in the period between 2010 - 2011 in circumstances where the primary issue for determination was whether the second named respondent had demonstrated dependency on the first named respondent in the country from which he had come, which was Pakistan.

22. It is further pleaded that the respondents did not provide sufficient evidence of dependency in Ireland at the relevant time. Without prejudice to that contention, it is pleaded that in the absence of sufficient evidence of dependency in the country from which he had come i.e. Pakistan, any evidence of dependency in Ireland is not sufficient to entitle the second named respondent to residency under the terms of the Directive.

### **Judgment of the High Court**

23. In his judgment, the trial judge first addressed the question as to “the country from which the person has come” for the purposes of the Application. He did this having regard to reg. 5 of the Regulations which provides, *inter alia*:

- 1) This paragraph applies to a person who—
  - (a) irrespective of his or her nationality, is a member of the family (other than a qualifying family member) of a Union citizen to whom paragraph (2) applies and who in the country from which the person has come—
    - (i) is a dependant of the Union citizen,
    - (ii) is a member of the household of the Union citizen, or
    - (iii) on the basis of serious health grounds strictly requires the personal care of the Union citizen,

or

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

**24.** Reg. 5 of the Regulations reflects Article 3(2) of the Directive, and as is apparent, it is necessary for a person relying upon it to establish dependency on a Union citizen in the country from which the person has come. In considering the question as to “the country from which [the second named respondent] has come” the trial judge had regard to the decision of the European Court of Justice in the case of *Rahman* (Case C-83/11), and he referred to para. 31 of that judgment wherein the court stated:

“[T]here is nothing to indicate that the term ‘country from which they have come’ or ‘country from which they are arriving’ [‘pays de provenance’] used in those provisions must be understood as referring to the country in which the Union citizen resided before settling in the host Member State. On the contrary, it is clear, on reading those provisions together, that the country referred to is, in the case of a national of a third State who declares that he is a ‘dependant’ of a Union citizen, the State in which he was resident on the date when he applied to accompany or join the Union citizen.”

**25.** The trial judge then proceeded to determine this issue at para. 7 of his judgment, as follows:

“A visa application will typically be made from outside Ireland. An ensuing application for an EU Treaty rights residence card [made] within three months of entry on a short-stay visa will intrinsically be linked to the initial short-stay application. Here, however, Fahad had residence permission in his own right to reside (and he was residing) in Ireland at the time of making the EU Treaty rights application that is at the heart of these proceedings. Thus Fahad was clearly and demonstrably resident in Ireland in his own right on the date when he made his application under reg.5(1). It

follows from the decision of the European Court of Justice in *Rahman* that dependency in Ireland ought to have been the focus of the Minister when it came to making the Impugned Decision. But this was not the focus of the Minister – he (mistakenly) maintains that Pakistan is the country from where Fahad has come for the purposes of reg.5.”

**26.** Later on, at para. 24 of the judgment, Barrett J. draws the following conclusion from the foregoing:

“For the reasons identified in Part 2 above, the court considers that ‘the country’ from which Fahad ‘had come’, having regard to the binding case-law of the European Court of Justice, was Ireland.”

**27.** Barrett J. went on to consider the implications if he is incorrect in that conclusion. He expressed the opinion that if he is incorrect in that conclusion, it remains the case that the periods spent by the second named respondent in the United Kingdom and in Ireland would be relevant to consideration of his dependency upon the first named respondent while in Pakistan in the intervening period. He expressed the opinion that the fact that there had been a protracted supportive relationship between the two brothers outside of Pakistan, would make more credible the contention that while the second named respondent was unemployed in Pakistan, he was supported by his “consistently supportive brother to the point of dependency.”

**28.** The trial judge then went on to consider the evidence provided by the respondents in support of the Application. This documentation included a statement made by the first named respondent about which there is disagreement between the parties as to whether or not it constitutes evidence that must be accepted and taken into account by the appellant in the course of the decision making process. The statement in question is a summary on the part of the first named respondent of his financial support of the second named respondent

from 2010 to the date of the statement, 3<sup>rd</sup> April 2017. It seems that, to an extent at least, the controversy in the court below about the status of this document revolved around the fact that it is not a sworn document. However, the trial judge placed some reliance on the fact that it was included with the Application, which is a pre-prepared form concluding with a heading “Declarations”, under which there is a signed acknowledgment on the part of the applicant that it is an offence to provide any information which the applicant knows to be false or misleading. The trial judge concluded that the statement is “patently evidence”, while at the same time he noted that it is for the appellant to determine what weight ought properly to be attached to such evidence.

**29.** The trial judge then went on to consider the extent of the dependency of the second named respondent on the first named respondent, at the time of the Application. He noted that the appellant had referred, in his letter of 5<sup>th</sup> September 2018, to the second named respondent, to the fact that the first named respondent appeared to have transferred sums totalling approximately €22,000 to the second named respondent, and that the appellant had, in the Impugned Decision, characterised those transfers as “some small transfers of funds”. In the letter of 5<sup>th</sup> September 2018 to the second named respondent, the appellant referred to a total sum of €21,783.00 as having been paid by the first named respondent to the second named respondent between 20<sup>th</sup> January 2017 and 1<sup>st</sup> February 2018. At this time the deciding officer was querying how the first named respondent could afford to make such payments, as well as other payments for a flight, rent and college fees, in circumstances where the first named respondent appeared to have an income of just €7,500 (as disclosed on his form P60) for the year ending 31<sup>st</sup> December 2017. This enquiry was addressed in some considerable detail by the solicitors for the respondents in a replying letter dated 10<sup>th</sup> October 2018. In any case, as far as dependency in Ireland is concerned, the trial judge was satisfied that, as of the date of the Application, the respondents had provided sufficient

information to demonstrate the dependency of the second named respondent on the first named respondent, and accordingly in this respect he concluded that the Minister had acted unreasonably, and to some extent, irrationally, in not accepting or in disregarding this information.

**30.** As far as Pakistan is concerned, the trial judge noted that while the appellant had expressed doubts about the authenticity of documentation demonstrating the transfer of almost €13,500 over a five-year period by the first named respondent to his family in Pakistan, he considered that the appellant did not take sufficient account of explanations provided by the first named respondent in his statement as regards why there was no supporting paperwork available in Pakistan, in relation to these transfers for funds. He noted that the appellant did not offer any reasons as to why the explanation provided was not accepted. This, he considered to be a conclusion reached without offering a reason.

**31.** The trial judge noted the finding of the appellant that the second named respondent had failed to satisfy the appellant that, had he not been in receipt of the small cash transfers involved, he would have been unable to support himself in Pakistan. In relation to this conclusion, the trial judge firstly queried the reasonableness of it in circumstances where the second named respondent was unemployed in Pakistan, and so he was clearly dependent on others for his income. Secondly, the trial judge stated that he considered the second named respondent was being asked to prove the impossible i.e. how could he prove that if he was not in the position that he found himself to be in, he would not have been able to support himself?

**32.** Having reached the conclusions above, the trial judge granted the order of *certiorari* as sought.

**33.** In the interest of completeness, I should add that he found against the respondents as regard their arguments made under the Convention.

### **Grounds of Appeal**

34. In his notice of appeal, the appellant identifies eleven grounds of appeal from the decision of the trial judge. However, it is fair to say that, in essence, the appeal raises three central questions, and it was on this basis the appeal proceeded. These are:

- 1) Whether the trial judge was correct in determining that, for the purpose of reg. 5 (1) of the Regulations, and Article 3(2) of the Directive, Ireland is the place from which the second named respondent “has come”?
- 2) Whether or not the trial judge erred in his conclusion that the appellant, in making the Impugned Decision, erred in fact or in law, and acted unreasonably and, to a certain extent irrationally, in finding that the second named respondent was not dependent on the first named respondent?
- 3) Whether or not the trial judge erred in appearing to hold that the appellant was obliged to accept that unsworn statements submitted with the Application by the respondents constituted documentary evidence within Article 10(2) of the Directive and reg. 5 of the Regulations?

### **The Country from which they have come**

35. The first matter that falls for consideration is the country from which the second named respondent has come, for the purposes of reg. 5(1)(a) of the Regulations (Article 3(2)(a) of the Directive). The appellant submits that there is no authority at all for the proposition that the country in which residence is sought can also be the country in which dependence is claimed and relied upon for the purposes of an application for residency. However, at para. 6 of his judgment, the trial judge quoted from para. 31 of the decision of the ECJ in *Rahman*, as per the extract at para. 24 above. On the face of it, the second part of that paragraph does indeed suggest that the “country from which they have come” means the State in which the

applicant for the residency permit was resident on the date when he applied to accompany or join the Union citizen.

**36.** In *Rahman*, the court was required to consider, *inter alia*, whether or not Article 3(2) of the Directive requires that the family member who is seeking residency status in the host country, should, prior to making such an application, have resided in the same country as the Union national and his/her spouse before the Union national came to the host State. As can be seen from para. 31 in *Rahman*, the ECJ determined this question in the negative, and held that it is dependency in the country from which the applicant has come which must be established, and that that term means the country where the applicant was resident on the date of his application. The respondents argue that this supports their case and that the trial judge was, on this basis, correct to determine that Ireland was the country from which the second named respondent had come, for the purpose of the Application, because it was in this country that he was resident at the date of the Application.

**37.** The appellant submits that this paragraph in *Rahman* must be considered in the light of the very different factual situation pertaining in that case. The factual background in *Rahman* was indeed very different. There, Mr. Rahman, a Bangladeshi national, had married an Irish national who was working in the United Kingdom. After their marriage, Mr. Rahman's brother, half-brother and nephew all applied under the UK regulations implementing the Directive for EEA family permits in order to obtain the right to reside in the United Kingdom, as the dependants of Mr. and Mrs. Rahman. Initially, the applications were refused because the applicants were unable to demonstrate that they were dependent upon Mr. and Mrs. Rahman while they were in Bangladesh. However, they succeeded in overturning this decision on appeal, on 19<sup>th</sup> June 2007. They then joined Mr. and Mrs. Rahman in the United Kingdom, having been issued with EEA family permits.

**38.** In January 2008 they applied for residence cards to confirm their right to reside in the United Kingdom, but this was refused by the Secretary of State, as he was of the opinion that they were required to, and had not proved, that they had resided with Mrs. Rahman, the relevant Union citizen, in the same EEA Member State before she came to the United Kingdom. This was the issue being addressed by the ECJ in para. 31 of its judgment, and the appellant argues that that paragraph should be interpreted having regard to that factual background i.e. that what the ECJ determined in that case was that it was not necessary for the applicants to have resided with the Union citizen in another EEA Member State before she came to the United Kingdom. It is submitted that the need to prove dependency in the country from which the family member concerned comes is made apparent later on the judgment, at paras. 33 and 34:

“33. It is clear that such ties may exist without the family member of the Union citizen having resided in the same State as that citizen or having been a dependant of that citizen shortly before or at the time when the latter settled in the host State. On the other hand, the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent.

34. In the main proceedings, it is for the national to establish, on the basis of the guidance as to interpretation provided above, whether the respondents in the main proceedings were dependants of the Union citizen, in this instance Mrs. Rahman, in the country from which they have come, Bangladesh, at the time when they applied to join her in the United Kingdom. It is only if they can prove that dependence in the country from which they have come, in accordance with Article 10(2) of Directive 2004/38, that the host Member State will have to facilitate their entry and residence in



accordance with Article 3(2) of that directive, as interpreted in paras. 22 to 25 of the present judgment.”

39. These passages, it is submitted, make it clear that the focus, as regards dependency, is on the “country from which they have come” which, as can be seen from para. 34 of the judgment in *Rahman* was stated in that case to be Bangladesh. It is not fully apparent from the judgment where the applicants in that case had resided immediately prior to the application, but taking paras. 31 and 34 together, it is reasonable to surmise it was Bangladesh. For this reason, the appellant argues, care must be taken not to interpret *Rahman* any more expansively than the facts of the case require.

40. The appellant submits that the language of the Directive itself in Articles 3 and 10, and the Regulations in reg. 5 all make it clear that, for the purposes of Article 3(2)(a) of the Directive what is required of an applicant is that he establish that, prior to coming to the host State, he was dependent upon the Union citizen in the country from which he had come. The relevant parts of these provisions are as follows:

**The Directive - relevant provisions**

“3(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) 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.”

“10(2) For the residence card to be issued, Member States shall require presentation of the following documents:

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen.”

### **The Regulations - relevant provisions**

“5.(1) This paragraph applies to a person who

(a) irrespective of his or her nationality, is a member of the family (other than a qualifying family member) of a Union citizen to whom paragraph (2) applies and who in the country from which the person has come –

- (i) is a dependant of the Union citizen,
- (ii) is a member of the household of the Union citizen, or
- (iii) on the basis of serious health grounds strictly requires the personal care of the Union citizen.”

“(2) Where a Union citizen has entered or is residing in the State in accordance with these Regulations or is proposing to do so, a person to whom paragraph (1) applies may apply to the Minister for a decision that he or she be treated as a permitted family member for the purposes of these Regulations and shall, for the purposes of such an application produce to the Minister –

- (a) (i) where the applicant is a national of a Member State, a valid passport or national identity card, or

- (ii) where the applicant is not a national of a Member State, a valid passport.
- (b) evidence that he or she is a member of the family of the Union citizen,  
and
- (c) one of the following:
  - (i) documentary evidence from the relevant authority in the country of origin or country from which he or she has come, that he or she is a dependant or member of the household, of the Union citizen;
  - (ii) proof of the existence of serious health grounds which strictly require the personal care of the applicant by the Union citizen;
  - (iii) documentary evidence of the existence of a durable relationship with the Union citizen.”

“(5) The Minister, in deciding under paragraph (3) whether an applicant should be treated as a permitted family member for the purposes of these Regulations, shall have regard to the following:

- (a) where the applicant is a dependant of the Union citizen concerned, the extent and nature of the dependency and, in the case of financial dependency, the extent and duration of the financial support provided by the Union citizen to the applicant prior to the applicant’s coming to the State, having regard, amongst other relevant matters, to living costs in the country from which the applicant has come, whether the financial dependency can be satisfied by remittances to the applicant in the country from which the applicant has come and other financial resources available to him or her;”

**41.** The appellant also relies upon a Communication from the Commission to the European Parliament and the Council dated 2<sup>nd</sup> July 2009 providing guidance for better transposition

and application of the Directive (the “Commission Guidance Document”). At section 2.1.4., under the heading “Dependent family members”, the following is stated:

“In order to determine whether family members are dependent, it must be assessed in the individual case whether, having regard to their financial and social conditions, they need material support to meet their essential needs in the country of origin or the country from which they came at the time when they applied to join the EU citizen (*i.e. not in the host member state where the EU citizen resides*)....” [the emphasis in italics appears in the original text]

In reply to this, the respondents contend that this document is not binding on the Court and does not enjoy the status of a judgment of the ECJ. In effect, the respondents contend that the decision of the ECJ in *Rahman* determined this issue differently, and so the Court is bound to follow that decision and disregard this part of the Commission Guidance Document to the extent that it is in conflict with the decision in *Rahman*.

**42.** The appellant also relies upon the decision of the Court of Appeal of England and Wales in the case of *Aladeselu v. Secretary of State for the Home Department* [2013] EWCA Civ. 144, which it is submitted addresses the issue raised by these proceedings, in the light of the decision in *Rahman*. In that case, the applicants were citizens of Nigeria, who, prior to their applications for residence cards in the United Kingdom, had all lived in Nigeria. They entered the United Kingdom at different times, between November 2006 and August 2007. Their claim of dependency related to their first cousin, who had lived previously in the Netherlands and had acquired Dutch nationality long before any of the dates material to the proceedings. However, she did not move to the United Kingdom until April 2008, eight months after the latest date on which her three cousins had entered the United Kingdom. In that respect, the factual background is more closely aligned to the facts in these proceedings

than in *Rahman*. However, the court had to consider the implications of the decision in *Rahman*, which it did as follows, in paras. 47 and 48:

“47. It is necessary to recall the questions that the court was answering in *Rahman* and the factual framework within which those questions arose. The relatives were living in Bangladesh at the time of their applications to join the EU citizen in the United Kingdom. Their applications were refused because it had not been shown that they had resided with that citizen in the same Member State before she came to the United Kingdom or that they continued to be dependent on her or were members of her household in the United Kingdom. The third and fourth questions (the answers to which are the basis for Mr Collins's argument) asked whether ‘it was necessary to have resided in the same State as [the EU citizen] and to have been a dependant of that citizen shortly before or at the time when the latter settled in the host Member State’. The court held that the requirement of dependency in ‘the country from which they have come’ did not refer to the country in which the EU citizen resided before settling in the host Member State, but to the country from which the family member came. When the court said that the situation of dependence must exist in that country ‘at the time when he applies to join the Union citizen on whom he is dependent’, it was adopting a formulation appropriate to the particular circumstances of the case (where the applications were made by persons outside the host Member State) rather than laying down a principle of universal applicability. The court cannot have intended to exclude from the scope of article 3(2) persons who had arrived in the host Member State before the EU citizen and before making their applications: that would have been contrary to the approach in *Metock*.

48. Thus, whilst *Rahman* establishes the need for a situation of dependence in the country from which the applicant comes, and a situation of dependence at the date of

the application, it is not to be read as laying down a requirement that the dependency at the date of the application must be dependency in the country from which the applicant comes, such that a relative who has been dependent throughout cannot qualify if he arrives in the host Member State many months before the EU citizen and the making of the application.”

**43.** It is the appellant’s contention that this decision demonstrates that, even on a most liberal interpretation of the provisions of the Directive, an applicant cannot escape the requirement to demonstrate dependency “in the country from which they have come” to the host State. Accordingly, in circumstances such as those in *Aladeselu* or in this case, the applicant must demonstrate dependence in the country from which they have come and, if they arrive in the host State prior to the EU national, they must also demonstrate such dependency in the host State as of the date of the application. Or to put it another way, as the appellant does, the fact that the second named respondent in these proceedings had resided in the State on a student permission for three years and five months in advance of the Application does not give him a derogation from the requirement to establish dependency in the country from which he has come i.e. Pakistan.

**44.** It is a further ground of the appeal that the trial judge failed to have regard to or address the submissions of the appellant in relation to the impact of the decision in *Aladeselu*. While acknowledging that that decision, as a decision of the Court of Appeal of England and Wales is no more than persuasive authority, it nonetheless should have been addressed by the trial judge. At the hearing of this appeal the appellant relied upon two further English authorities, namely *Oboh and Others v. Secretary of State for the Home Department* [2013] EWCA Civ. 1525 and *Ahamed v. Secretary of State for the Home Department* UKUT (8<sup>th</sup> January 2020).

**45.** The judgment in *Oboh* relates to two different applications that raised the same question. The first application concerned the Oboh family, made up of a husband,

Alexander, his wife Linda and four children. The husband and wife were Nigerian citizens. They married in 1997 and in 1998 Linda moved to Italy for work purposes, having obtained a work permit. Alexander joined her in Italy in July 2002. Three of their children were born in Italy between 2003 and 2006.

**46.** The husband's brother was a German citizen, Marcus, who moved to the United Kingdom in February 2008. It was not in dispute that he was an EU citizen, exercising his treaty rights in the United Kingdom. Very soon afterwards, in the same month i.e. February 2008, Alexander and Linda Oboh and their three children who by that time had a right of permanent residence in Italy, came to the United Kingdom as visitors. Marcus Oboh had sent them the money to assist them with travel expenses. Their fourth child was born on 17<sup>th</sup> May 2008. On 10<sup>th</sup> February 2009 they applied for residence cards on the basis of their dependence on Marcus Oboh, in whose household they resided. While it was accepted that Alexander, Linda and their children formed part of Marcus' household, the Tribunal judge found that the family had not established that they were dependent on Marcus while they lived in Italy, and it was insufficient to show that they were financially dependent on him and living in his household in the United Kingdom.

**47.** The second case addressed in the *Oboh* judgment is that of a Mr. Haulader. He was born in February 1981, and was a citizen of Bangladesh. He was given permission to enter the United Kingdom as a student, and did so in October 2004. That permission was extended on a number of occasions, until it finally expired at the end of October 2010. Since 2007, he had been in paid employment. He lived in the same household as his brother, who married an EEA national in 2007. Just before his student permission expired, Mr. Haulader applied for a residence card on the basis that he had lived with his brother and sister in law since 2007 and had been dependent on them since then. The application for a residence card was refused because the Secretary of State held that there was no evidence that Mr. Haulader had

lived in the same household as the EEA national (his brother's wife) prior to his arrival in the United Kingdom or that he was financially dependent upon her. Mr. Haulader appealed that decision, unsuccessfully, on two further occasions, in accordance with United Kingdom procedures. It appears his case was then joined with that of the Oboh family, for the purposes of the proceedings before the Court of Appeal of England and Wales.

**48.** The Court of Appeal carried out a very comprehensive analysis of the Directive, the domestic regulations in the United Kingdom and relevant authorities which were raised in argument before it, including *Rahman*, *Aladeselu* and the case of *Metock v. Minister for Justice Equality and Law Reform* (Case C-127/08) of the European Court of Justice, a case that was referred to the ECJ by the High Court here.

**49.** At paras. 45-47, the Court of Appeal held:

“45. The words used in the English language text of the Directive to set the limits of category of other family members who qualify for the preferential treatment described are, in their plain and natural meaning, clear. Article 3(2)(a) expressly addresses the position of ‘any other family members... who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence...’ ... The words ‘in the country from which they have come’ must be given a meaning and, on their face, are important words in the definition of the qualifying category.

46. If the words of the Directive are given their plain and natural meaning, the scope of Article 3(2) of the Directive accords with that prescribed in the corresponding provision [in the United Kingdom Regulations]. On this basis, the appellants in the present appeal do not qualify for privileged treatment under Article 3(2) because they were not dependants or members of the household of the EU citizen, in the country from which they have come.



47. The recent decision of the CJEU in *Rahman*'s case lends powerful support to the Respondent's submission that the literal meaning of the provision is, indeed, that intended by the legislation. At two points in the judgment the Court states in terms, with regard to the situation of dependence, that it must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent (at [33] and [35]), thus indicating a requirement that the necessary relationship of dependency or membership of the household must have existed in another country as well as in the host Member State."

50. The court referred to arguments that it heard from both sides invoking the scheme of the Directive as supporting their respective submissions. In summary, the appellants/applicants in *Oboh* argued that Article 3(2) of the Directive should be interpreted widely, not least because the host State has a discretion to refuse to issue a residence card. The court also noted that the appellants' cases were driven by the submission that to insist on the plain meaning of Article 3(2) would constitute a disincentive to an EU national settling in another EU State. At para. 51, the Court of Appeal stated:

"51. The most fundamental difficulty in the path of the appellants' submission is that we are unable to identify any policy which would require such a reading. The judgment of the CJEU in *Rahman's* case makes clear that the general purpose of Article 3(2) is (see [30]) 'to 'maintain the unity of the family in a broader sense' by facilitating entry and residence for persons who are not included in the definition of family member .... but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances, such as economic dependence, being a member of the household or serious health grounds'. It is, moreover, clear that Article 3(2) is intended to protect both the right of free movement and the right of

residence enjoyed by EU citizens: see Case C-127/08 *Metock*, View of Advocate General Poiares Maduro, [AG13] and [AG17].”

**51.** The court then went on to consider and address the argument that a literal interpretation of Article 3(2) of the Directive would constitute a disincentive to an EU national settling in another EU State. At para. 54 the court stated:

“Although the emphasis in the Directive is on the elimination of obstacles to the Treaty rights of the Union citizen, rather than a policy of family reunification, the inclusion of dependants makes the rationale of the policy less clearly focused on the crisp policy of facilitating EU citizens maintaining their households wherever they are in the Union .... Furthermore, the qualifying category within Article 3(2) extends to dependants of an EU citizen who reside in a Member State other than that in which the EU citizen was resident prior to his arrival in the host State. We have difficulty in seeing why a failure to accord preferential treatment to dependants resident in a third Member State (or indeed in a non-Member State) should constitute a disincentive to the EU national to set up his residence in the host Member State. We would expect that he would be able to provide for his dependants in precisely the same way in which he did so before his move to the host Member State.”

**52.** In the course of these proceedings, counsel for the respondents argued that the interpretation of Article 3(2) of the Directive as contended for by the appellant could give rise to inconsistent and discriminatory outcomes. So, for example, it was argued that if the first named respondent had chosen to go to any other EU Member State than Ireland, then the second named respondent, in applying to join the first named respondent in that other Member State, would clearly be entitled to claim that Ireland is the country from which he had come, for the purpose of such an application. Similar arguments were advanced in *Oboh*, and the court addressed these arguments at para. 56 as follows:

“We acknowledge that, if what is required is historic dependency or membership of household as well as present dependency or membership of household, there will be situations, such as those posited by [counsel for the appellants in that case] in which the inability of the individuals concerned to qualify as ‘other family members’ within Article 3(2)(a) of the Directive may have some deterrent effect on the exercise by the EU citizen of his right of free movement and residence, in particular of residence, within the territory of the Member States. However, it is important not to lose sight of the nature of Article 3(2) which is intended to lay down a rule of general application. In our view it was not intended to make detailed provision for individual cases. Furthermore, it is significant that it confers on persons falling within the identified category certain advantages in the pursuit of rights of entry or residence. Its application does not result in the refusal of such rights to individuals who fall outside the preferred category. They are able to make their applications in the ordinary course. In the exceptional cases postulated by the appellants other legal principles will come into play, among them Article 8 of the European Convention on Human Rights. Accordingly, we consider that we would not be justified in permitting such exceptional cases to set the limits of general application of Article 3(2).”

**53.** The Court of Appeal then went on to say that it was greatly assisted by the clear statements by the ECJ in *Metock*, to the effect that the policy of the Directive is not one of family reunion. The court stated:

“Absent a requirement that the relevant relationship exists in another Member State, we have great difficulty in seeing how the policy of the Directive does not, in practice, become one of a family reunion rather than one of facilitating the EU citizen in maintaining his household wherever he is in the Union. This seems to us to be a critical consideration.”

**54.** Ultimately, the court held that the combination of the clear language of Article 3(2), the contrast of that language with Article (3)(1) when read with the definition of “family member” in Article 2, and the clear statement of the ECJ that the underlying policy of the Directive is not family reunion, the words “in the country from which they have come” should be interpreted literally. The court considered that those words are deliberately intended to limit the scope of application of the rights conferred. The court was invited to make a reference to the ECJ on the issue, but considered that it was unnecessary.

**55.** The appellant also relies on the decision of the Upper Tribunal of Immigration and Asylum in the case of *Ahamed v. Secretary of State for the Home Department* of 8<sup>th</sup> January 2020. In that case, the appellant, a citizen of Bangladesh, entered the UK as a student in 2009. In 2017, he married his wife, also a Bangladeshi national, but who had settled status in the UK. The appellant began living with his wife’s family. His wife’s father is a national of Portugal. The appellant applied for a residence card on the basis that he is an extended family member of his father in law, pursuant to the relevant provisions of the UK regulations implementing the Directive. He failed in his application because it was found that he had not been dependent on or a household member of his father in law prior to his arrival into the UK.

**56.** On appeal before the Upper Tribunal, it was argued on behalf of the appellant that there is no requirement for him to have been dependent on or to have cohabited with his father in law (the EEA national) prior to coming to the UK, so long as he is able to establish dependency at the date of the application. This argument was based on the decision of the ECJ in *Rahman*. Having reviewed the authorities, including *Aladeselu* and *Oboh*, the court dismissed the appeal concluding that since the appellant was not dependent upon or a household member of his father in law prior to arriving in the UK, he did not satisfy the requirements of Article 3 of the Directive or regulation 8 of the UK Regulations.

**57.** Before proceeding further, I should mention at this juncture that in these proceedings, counsel for the respondent argues that this Court ought to be cautious in its approach to decisions regarding the Directive in the neighbouring jurisdiction because of differences in that jurisdiction in the implementing regulations. The most relevant of these provisions (it appears to me) is regulation 8(2) of the Immigration (European Economic Area) Regulations 2016 which provides:

“(2) The condition in this paragraph is that the person is -

(a) a relative of an EEA national; and

(b) residing in a country other than the United Kingdom and is dependent upon

the EEA national or is a member of the EEA national’s household; and either -

(i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or

(ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national’s household.”

**58.** On comparing this regulation with reg. 5 of the Regulations (see para. 23 above), it is apparent that there are differences. Perhaps the most significant difference is that the regulations in the United Kingdom expressly require that an applicant be residing in a country other than the United Kingdom at the time of the application. However, as against that, regulation 8(2)(b)(ii) also clearly permits the person concerned to join the EEA national in the United Kingdom before the application. It is in my opinion unclear as to how the different wording in the implementing regulations in each country would impact on the issue now under consideration. While the Court was urged to be cautious, in a general way, about placing reliance on *Oboh*, having regard to differences between the implementing regulations in both countries, the precise differences and the impacts of those differences

were not argued before this Court, and I do not think it appropriate for this Court to engage in its own deliberations as to the effect of such differences in such circumstances. In general terms, it is apparent that the regulations in each country substantially track the provisions of the Directive in requiring the applicant either to be dependent upon a Union citizen or to be a member of that person's household, and link the entitlement to a residence permit to dependence on a Union citizen who is either already residing in the host State or is proposing to do so.

**59.** In their submissions, counsel for the respondents placed significant reliance upon para. 31 in *Rahman*. They submit that “the State in which he was resident on the date when he applied to accompany or join the Union citizen” in these proceedings was Ireland, and the second named respondent will be denied the opportunity to advance his application if Ireland is not deemed to be “the country from which the family member concerned comes”. This is because at para. 35 of *Rahman* it is stated that “the situation of dependence must exist in the country from which the family member concerned comes, at the very least at the time when he applies to join the Union citizen on whom he is dependent.” So therefore, if the country from which he comes is interpreted as meaning Pakistan, he will automatically be excluded from the entitlement to apply for a residence card, because at the time he applied to join the first named respondent, he was already in the State.

**60.** The situation of the second named respondent is contrasted to the more usual circumstances of such applications, where the applicant is required, at the behest of the Minister, to enter the country on foot of a short stay visa application in order to make the application for residence. In this case, the second named respondent was lawfully resident here for some years because of his student visa. Accordingly, evidence in relation to his dependency on his brother in Ireland during that period was not just a relevant consideration in determining the Application, but it should have been the principal focus of the appellant.

Furthermore, as I have pointed out above, the respondents further argue that the interpretation of the Directive as argued for by the appellant would, if accepted, be such as to treat arbitrarily and differently between the circumstances of the respondents as they are now, and as they would have been if, for example, the first named respondent moved to another EU Member State.

**61.** The respondents rely on the case of *Metock* (Case C-127/08) in which the High Court here referred questions concerning four nationals of third countries, each of whom, upon their arrival here had applied for asylum. In each case the application for asylum was refused. In two of the cases, the “non-national” subsequently married a Union citizen who had resided and worked here for some time previously. In the other two cases, the “non-national” married before the decision on the asylum application. Subsequent to the marriages, in all cases, the “non-nationals” applied, pursuant to the regulations for a residence card as the spouse of a Union citizen. In each case, the application was refused on the grounds that the applicants did not satisfy the condition of prior lawful residence in another Member State as required by the regulations then in force i.e. The European Communities (Free Movement of Persons) (No.2) Regulations 2006. The High Court referred two questions to the ECJ:

- (1) Whether the Directive precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive?
- (2) Whether the spouse of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State whose nationality he does not possess accompanies or joins that citizen within the meaning of Article

3(1) of Directive 2004/38, [and consequently] benefits from the provisions of that directive, irrespective of when and where the marriage took place and of the circumstances in which he entered the host Member State? (I have placed the words “and consequently” in square brackets, because although they appear in the report, they disrupt the question, as made clear by the answer to the question in which the words do not appear.)

**62.** The ECJ answered the first of these questions in the negative: The Directive precludes any requirement that the national of a non-member country who is the spouse of a Union citizen residing in a Member State, but not possessing its nationality, to have previously been lawfully resident in another Member State, before arriving in the host Member State, in order to benefit from the provisions of the Directive. As to the answer to the second question, the court held that it does not matter when or where the marriage between the citizen of the non-member country and the Union citizen took place, and nor does it matter how the national of the non-member country entered the host Member State.

**63.** The respondents rely on the following passage at para. 93 in the judgment of the ECJ in *Metock*:

“... in the light of the necessity of not interpreting the provisions of Directive of 2004/38/EC restrictively and not depriving them of their effectiveness, the words ‘family members [of Union citizens] who accompany... them’ in Article 3(1) of that directive must be interpreted as referring both to the family members of a Union citizen who entered the host Member State with him and those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether the nationals of non-member countries entered that Member State before or after the Union citizen or before or after becoming his family members.”



**64.** In their submissions, counsel for the respondents argue that the case of *Aladeselu* does not assist the appellant's case because the question of whether the focus of the Home Secretary should have been on dependency in the United Kingdom or on dependency in Bangladesh did not arise, because it was not in dispute that the applicants in that case had at all times been financially dependent on the EU citizen. Furthermore, in that case, a relevant feature was that all applicants had been present illegally in the UK, a factor which was likely to weigh heavily against them when the Home Secretary came to decide whether or not to "facilitate" their residence in the United Kingdom.

**65.** In response to the argument made on behalf of the appellant that Pakistan is "the country from which [the second named respondent] has come" counsel for the respondents pose the following question: How could a country in which an applicant has not resided for over three years be the country "in which he was resident" (per *Rahman*) at the time when he made application for a residence card? The respondents contend that since the second named respondent was living in the State throughout that period, the trial judge was correct in holding that Ireland was the country from which he had come for the purpose of Article 3(2) of the Directive, and reg. 5(1) of the Regulations. For that reason, in considering the issue of dependency, the issue to be determined is whether or not the second named respondent was dependent on his brother in this country, and it is that issue which should have been the focus of the appellant, when assessing whether or not the second named respondent was "a permitted family member". Since this was not the focus of the appellant, he applied the incorrect legal test and the trial judge was correct to quash the Impugned Decision.

**"The country from which they have come" - Discussion and Decision**

**66.** The purpose of the Directive is to facilitate the exercise of the rights of citizens of the European Union, and their family members, to move and reside freely within the territory of

Member States of the Union. This involves the removal of any obstacles to the exercise of those rights. If citizens of the Union who wish to exercise their right to travel and reside in another Member State of the Union were not free to bring their family members and those dependent upon them, then that would be such an obstacle. It is clear from the authorities referred to this Court that, in interpreting the Directive, and domestic instruments implementing it, courts of Member States should do so liberally so as to ensure that the rights of free movement and residence within the Union are freely exercisable. All of this is reflected in recital 5 of the Directive which provides:

“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. For the purposes of this Directive, the definition of ‘family member’ should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.”

**67.** Recital 5 of the Directive is then given effect by Articles 2(2) and 3(1) thereof. Article 2(2) defines those “family members” to whom the Directive applies automatically, and Article 3(1) states that “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.” Recital 6 of the Directive addresses family members other than those defined by Article 2(2), but upon whom rights of entry and residence in host Member States may be granted on the basis of dependency:

“In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in

the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.”

**68.** Recital 6 of the Directive is then given effect through Article 3(2) thereof, which is implemented in this jurisdiction by reg. 5(1)(a) of the Regulations (see relevant extracts at para. 40 above). It is of some interest that reg. 5(2)(c)(i) of the Regulations requires evidence of dependence to be provided by a relevant authority either in the country of origin of the applicant or in the country from which the applicant has come. This reflects Article 10(2)(e) of the Directive.

**69.** These provisions are of obvious relevance to proof of dependency, which I address later. However, they are also of interest to consideration of the meaning of “the country from which they have come”. Both Articles 10(2)(e) of the Directive and reg. 5(2)(c)(i) of the Regulations refer to and draw a distinction between “country of origin” on the one hand, and the “country from which they are arriving” or the “country from which he or she has come”, on the other. But in either case, in my view, the language of these provisions envisages that the applicant concerned will be travelling or has travelled either from a “country of origin” or a third country to the host State where he or she is given the entitlement to make an application to enter and reside in the host State. It is also clear from the authorities referred to above that there is no restriction on what constitutes a “country from which the person has come” i.e. it need not be the country of origin of the applicant, and nor need it be the Member State of the European Union, although it may be a Member State.

**70.** The trial judge’s interpretation of para. 31 of the decision of the ECJ in *Rahman* was key to his decision in these proceedings. In that paragraph of its decision, the ECJ, in

interpreting Article 3(2) of the Directive, firstly states that there is nothing to indicate that the term “country from which they have come” used in Article 3(2) of the Directive must be understood as referring to the country in which the *Union citizen* resided before settling in the host Member State. The issue raised by these proceedings however is concerned with where the *dependent person* resided at the time of the Application, and not the Union citizen. This is addressed in the second part of para. 31 of *Rahman*, where the ECJ determined that, in the case of a national of a third State who declares that he is a “dependant” of a Union citizen, the State in which he (i.e. the national of the third state, and not the Union citizen) was *resident* on the date on which he applied to accompany or join the Union citizen, is the country from which he has come. While it may appear that this is being stated as a general proposition, I agree with the submissions of the appellant that the statement is made against the background of and in the context of the facts of *Rahman*. In that case, the country from which the dependants had come (on any interpretation of that phrase) was the same country in which they were resident at the time they made their residency application. The court was considering a very different issue to that raised in these proceedings i.e. a proposition put forward in that case by the Secretary of State to the effect that the national of the third State should have resided with the Union citizen in the same EEA State (not the host State) before she came to the host State, which in that case was the United Kingdom. At the time, this was a requirement of the regulations implementing the Directive both in this country and in the United Kingdom. The ECJ rejected that argument in para. 31 and the following paragraphs of *Rahman*. It is in that context, and against that background, that the ECJ stated, as it did, at the end of para. 31 of its judgment that “the country from which they have come” means the State in which the person claiming dependency was resident at the time he/she applied to join or accompany the Union citizen.

**71.** As I mentioned earlier (at para. 38 above) the appellant submits that this interpretation of para. 31 of *Rahman* is supported by paras. 33 and 34 of the judgment in that case. In para. 33, it is stated, unambiguously, that “the situation of dependence must exist, in the country from which the family member comes, at the time when he applies to join the Union citizen on whom he is dependent”, and then at para. 34 it is made clear that Bangladesh was the country from which they had come.

**72.** While para. 31 of *Rahman* is open to the interpretation given to it by Barrett J. in the court below, when all of the background facts of *Rahman* are taken into account and when the purpose of and the plain language of Article 3(2) and Article 10(2)(e) of the Directive are considered, in my opinion it is highly unlikely that the ECJ considered that the phrase “the country from which they have come” could ever be interpreted as meaning the same country in which the application for residence is made i.e. the host State; the language of the relevant provisions in my opinion clearly envisages that the dependency referred to must, in the first instance at least, be one existing in a country other than the host State i.e. a country of origin, or another country from which the applicant is coming to the host State. I am fortified in this view by the extract from the Commission Guidance Document referred to above.

**73.** In my opinion the decisions of the Court of Appeal and the Upper Tribunal in the cases of *Aladeselu*, *Oboh*, and *Ahamed* all support this conclusion even though those decisions did not address expressly the second part of para. 31 of *Rahman*. However, what *Aladeselu* established, and correctly in my view, is that when a host State is dealing with an application for residence where the non-EU national has arrived in the host State many months before the EU national, then it is necessary to evaluate dependency firstly in the country from which the non-EU national has come (in accordance with para. 33 of *Rahman*) and secondly in the

country where the applicant is living at the time of the application (per para. 31 of *Rahman*), i.e. the host State, and dependency must be established in both jurisdictions.

**74.** In concluding that this also represents the law here, I have taken into account the argument made by counsel for the respondents that, if both respondents had moved to a third Member State, the second named respondent would only have to prove dependency on the first named respondent in the State, for the purpose of satisfying the requirements of the Directive to secure an entitlement to residency in that other Member State, and there would be no assessment of dependency in Pakistan. Viewed from that perspective, it is argued, the requirement to prove dependency in Pakistan as well as in Ireland, in so far as the Application is concerned, is anomalous and discriminatory and could be considered a restriction on the exercise by the first named respondent of his right to free movement and residence within the EU.

**75.** However, I think the answer to this argument lies in what was said by the Court of Appeal at para. 56 of *Oboh*, quoted at para. 52, above. The Directive is of general application, and is not intended to and indeed could not make detailed provision for individual cases. In *Aladeselu*, the Court of Appeal devised a mechanism to bring an applicant within the scope of the Directive, and not to exclude him from its benefits. Similarly, in this case, that mechanism does not exclude the application of the Directive to the respondents, or deny them the privileges conferred by it, but rather through a flexible interpretation and application of Article 3(2) of the Directive and reg. 5(1) of the Regulations, affords an applicant the opportunity to avail of the Directive by establishing dependency in the country from which he has come (as well as in the host State) even though he arrived in the host State many months before the EU citizen and was not, for that reason, any longer dependent on the EU citizen in the country from which he has come. The fact that the second named

respondent has not met the applicable test does not mean that the test, which applies to all persons in this situation, is discriminatory.

**76.** Finally, on this issue, I think it is also appropriate to observe that the second named respondent was at all times lawfully in the State on a student visa, and, on his own case, was here with the financial support of the first named respondent. The Impugned Decision does not affect this in any way. Presumably it remains open to the second named respondent to remain in the State, with the support of the first named respondent, for as long as he is a student and meets the criteria for a student visa. While acknowledging that permission to reside here under a student visa is likely to be a permission of a different character to a residence permit granted under the Regulations, nonetheless, it is difficult to see how the interpretation of the Directive above could be said to amount to any sort of restriction or obstacle to the first named respondent's rights to free movement and residence within the European Union.

### **Dependency**

**77.** Having decided as I have as regards the interpretation of "the country from which they have come", it follows that the appellant was correct to consider whether or not the second named respondent was, at all material times, dependent on the first named respondent, in Pakistan. The appellant was not satisfied in this regard. The appellant then proceeded, in the Impugned Decision to consider the question of dependency in the State, although strictly speaking this may not have been necessary since dependency in both countries must be established. In any case, the appellant was not satisfied that dependency of the second named respondent on the first named respondent had been demonstrated in the State either.

**78.** In support of the Application, the second named respondent provided evidence of money transfers made by the first named respondent directly to him (following his return to Pakistan) and also to his father and sister, during the same period (being a period of a little

over two years, from November 2011 to January 2014) totalling approximately stg£13,500. Of this, the amount transferred directly to the second named respondent came to approximately stg£3,764.79, but he also claims that he would have benefited from the transfer of funds to his father who, he says, used the monies received for the benefit of all of the family. The transfers made directly by the first named respondent to the second named respondent during this period were as follows:

14<sup>th</sup> September 2012, £1,972.39;

6<sup>th</sup> November 2012, £65.68;

8<sup>th</sup> July 2013, £236.81;

15<sup>th</sup> July 2013, £100.27;

28<sup>th</sup> August 2013, £156.30;

29<sup>th</sup> October 2013, £88.24;

26<sup>th</sup> November 2013, £1,000;

10<sup>th</sup> January 2014, £145.10.

**79.** Initially, the appellant raised doubts about the authenticity of these transfers because they were not documented on headed notepaper. In response, the respondents provided evidence of the transfers on headed notepaper, which includes an address and contact details for the transfer agency which is based in London. The appellant asked the respondents to produce documentary evidence that the funds concerned had been received in Pakistan, but the respondents explained that no such documentary proof was available; the monies were simply paid out by the transfer agency to the recipients concerned.

**80.** There was also included with the Application a two page statement of the first named respondent, in which he describes the dependency of the second named respondent on him, firstly in London between 2010 and 2011, then in Pakistan from November 2011 to January 2014, and then in Ireland from that time onwards. A further single page statement in support



of the Application was provided by the first named respondent on 26<sup>th</sup> September 2017, in connection with the appeal of the First Decision. The statements also provide information about the first named respondent, in particular relating to the exercise by him of his EU travel rights. The statements contain substantially the same information set out by the respondents in their affidavits grounding these proceedings, as summarised under the heading “Background” at the outset of this judgment.

**81.** As I have mentioned earlier, it was a matter of some controversy in the court below as to whether or not these statements constitute “evidence” in support of the Application. The trial judge took into account that the first statement made by the first named respondent was included as part of the Application, the standard form of which concludes with the stern warning that it is an offence to provide false information or make false statements for the purposes of the Application. He therefore considered it appropriate to accord the statement the status of evidence, in effect thereby accepting the contents of the statement in relation to matters of fact.

**82.** However, in my opinion, the legal character of the statements made by the first named respondent is not of any particular significance. If the statements had been sworn, then they would of course constitute evidence in a legal sense, but the contents of the statements, regardless as to their legal character (i.e. statement or affidavit) could never amount to anything more than mere assertion. For the purposes of such applications, the appellant clearly requires to be provided with supporting or vouching documentation in relation to the matters asserted therein. While the statements are necessary in order to provide the appellant with essential background information relating to the Application, and to give a context to assist in explaining supporting or vouching documentation provided by an applicant, it is really only the latter documentation that constitutes evidence i.e. it is evidence provided in support of the factual background relied upon by an applicant in his supporting statement(s).

Without such supporting or vouching documentation, the appellant would have great difficulty adjudicating favourably upon an application for residency.

**83.** In short, the appellant cannot be expected to accept either the contents of an unsworn statement made or an affidavit sworn by an applicant for residency at face value, in the absence of supporting documentation. The quality of that documentation is obviously central to the consideration of such applications. On the other hand, it is not open to the appellant to ignore such statements either. Their credibility should be assessed in the light of the supporting documentation provided. The entitlement of a host State to require production of evidence of dependency in support of applications for residency brought in reliance on Article 3(2) of the Directive is not in dispute, and is accepted by the respondents who in their written submissions stated:

“To conclude on this issue, the applicants accept that the weight to be placed on evidence is a matter for the Minister, subject to the requirement that it be considered in line with the letter and spirit of the Directive. They also accept, as confirmed by this court [(Baker J.) in *Safdar v. Minister for Justice and Equality* [2019] IECA 329], that the onus is on them to produce evidence of dependency and to satisfy the Minister that the claimed dependency exists. However, in their efforts to discharge that onus the applicants are also entitled to have *all* of the evidence submitted by them considered particularly when, as observed by Barrett J, there is no suggestion that any of the information provided by them is false or inflated in any way.”

**84.** So far as dependency in Pakistan is concerned, the Impugned Decision states as follows:

“You assert that you travelled to the UK in July 2010 and resided with your brother in that jurisdiction until November 2011. You returned to Pakistan thereafter and resided in your family home until you travelled to Ireland in 2014. You assert that

you are dependent on your brother in the State and that your brother has supported you for several years – in Pakistan, in the UK, and in Ireland. In this regard, you have submitted receipts for several money transfers made to Pakistan from the UK. These receipts, the authenticity of which cannot be verified, appear to show that your brother occasionally sent money to you in Pakistan. It is not apparent, however, that you were dependent on these money transfers. That is, no evidence has been provided to suggest that, had you not been in receipt of these small cash transfers, you would not have been able to support yourself in Pakistan. You have not provided any further information in respect of your financial situation before you arrived in Ireland, so it is not possible to ascertain whether you were in receipt of any other source of income in Pakistan.”

#### **Decision of High Court on Dependency in Pakistan**

**85.** In his affidavit grounding these proceedings, the second named respondent says, at para. 10 thereof:

“When I returned to Pakistan, I lived in our family home at Gulshan-E-Iqbal, Karachi. My brother continued to financially support me as I did not have employment while in Pakistan. He sent me and our other family members money transfers on a regular basis. That was the only income I had. My father was already supporting my other siblings, including another brother and three sisters, and I did not want to be a burden. Therefore I asked my (sic) the first named applicant to support me while I was looking for work in Pakistan. It (sic) the end it was not possible for me to get a job in Pakistan. The first named applicant therefore agreed to sponsor me to move to Ireland as a student, to get a degree and improve my employment prospects.”

**86.** In his judgment, Barrett J. observes that the Impugned Decision appears to accept that monies were indeed transferred by the first named respondent to the second named respondent in Pakistan, in that one of the reasons for refusal of the Application is that no

evidence had been provided to demonstrate that, had he not received that money, the second named respondent would have been unable to support himself in Pakistan. The trial judge considered that the conclusion of the appellant on this issue was unreasonable because, firstly, the second named respondent was unemployed in Pakistan, and so he was “clearly dependent on somebody for his income” and secondly, he considered that the second named respondent was being asked to prove the impossible i.e. how could the second named respondent “prove that if he was not in the position that he found himself to be in, he would still not have been able to support himself; how could he possibly demonstrate that?”

**87.** While the appellant complains that the trial judge did not refer to Irish authorities, addressing the test for dependency, and referred to him by the appellant, in the course of his judgment, the trial judge did refer to *Kuhn and Others v. Minister for Justice and Equality* [2013] IEHC 424 and he also referred to the decision of the ECJ in *Jia* (Case C-1/05). He quoted from para. 43 of *Jia* wherein the ECJ stated, as regards dependency, that it:

“Means that members of the family of a Community national... need the material support of that Community national... in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join the Community national.”

**88.** At paras. 16 and 17, Barrett J. continued:

“16. What is ‘material support’? Doubtless such support can take many forms but the most common form seems likely generally to be money; certainly that is the form of support that is at play in these proceedings. It is clear from *Kuhn and Ors v. MJE* [2013] IEHC 424, paras. 17-18, that material support can take the form of a financial contribution and does not require that the entirety of the cost of the essential needs be covered by the person providing such support.

17. What are ‘essential needs’? In *Kuhn*, para. 19, this was construed to be a reference to the ‘essentials of life’, it being acknowledged that what is essential will vary from case to case. It follows that if, e.g., my brother provides me with material support in order to cover my particular essential needs, though not (as *Kuhn* makes clear) meeting the full costs of all of them, I am dependent upon that brother. In truth, this is not an especially stringent test, if properly applied, i.e. the transfer of quite small sums of money could on the facts of a particular case offer a perfectly sound predicate on which to claim and establish a dependent relationship; and it must be remembered too that the test of dependency falls to be applied in the context where, as is clear from recital 6 of the Citizen’s Rights Directive, and as noted in *Rahman*, para. 32, the objective of Article 3(2) of that directive (from which reg.5 of the 2015 Regulations derives) ‘is to ‘maintain the unity of the family in a broader sense’ by facilitating entry and residence for persons who are not included in the definition of family member of a Union citizen contained in Article 2(2) of Directive 2004/38, but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances’. That too ought to steer decision-makers in the direction of a relatively generous test as to what constitutes dependency.”

**89.** Barrett J. also considered that the second named respondent was entitled to rely, to a certain extent at least, on the payments made by the first named respondent to their father, on the basis that their father continued to support the entire family, including the second named respondent, with the assistance of monies provided by the first named respondent.

**90.** In summary, so far as dependency in Pakistan is concerned, Barrett J. concluded that the monies transferred by the first named respondent to the second named respondent, while the latter was in Pakistan, between 2011 and 2014, coupled with money transfers by the first named respondent to their father, indicated a level of dependency (during that period) by the

second named respondent on the first named respondent which was sufficient for the purposes of the test adumbrated by the ECJ in *Jia*, and by the High Court in this jurisdiction in *Kuhn*, and that it was unreasonable, and possibly irrational of the appellant to hold otherwise. In arriving at this conclusion, Barrett J. did so on the basis that the transfer of quite small sums of money could, on the facts of a particular case, be sufficient to establish a dependent relationship, and that it is not necessary for the person concerned to establish that all of his or her needs are met by the EU citizen.

**91.** The principal difference between the conclusions drawn by Barrett J. and those drawn by the appellant in the Impugned Decision, is that Barrett J. considered that the fact that the second named respondent was unemployed in Pakistan (which he accepted was the case on the basis of the respondents' word alone) and was in receipt of money from his brother during this period, was sufficient to demonstrate a measure of dependency by the second named respondent on the first named respondent (and Barrett J. considers that the appellant was unreasonable not to draw the same conclusion), whereas the appellant, while apparently accepting, albeit with reservations, that the first named respondent transferred funds to the second named respondent, was not satisfied that the second named respondent had demonstrated, by cogent evidence, that "without those small cash transfers", the second named respondent would not have been able to support himself in Pakistan.

#### **Submissions of the parties on Dependency in Pakistan**

**92.** As I have said above, the respondents accept that the weight to be placed on the evidence advanced in support of the Application is a matter for the Minister, and that the onus is on the respondents to produce evidence of dependency and to satisfy the appellant that the claimed dependency exists. However, it is submitted on behalf of the respondents that the appellant must consider all of the evidence submitted by them, including the statements made by the first named respondent in support of the Application. It is submitted

that, contrary to what is stated in the Impugned Decision, the appellant had documentary evidence of money transfers showing a steady flow of money from the first named respondent to the second named respondent, following the return of the latter to Pakistan in November 2011 up until the point in time he came to Ireland in January 2014. The respondents also provided evidence of payment of education expenses on behalf of the second named respondent, in the United Kingdom (in the sum of stg£4,500) before he returned to Pakistan. In his statements, the first named respondent describes the dependence of the second named respondent on him since 2009, and says that he continued to support his brother financially when he returned to Pakistan in November 2011 because he did not have a job. He says that he used to send money regularly via a money transfer agency. His statement in this regard is supported by evidence of the transfer of money, and the Minister was provided with sufficient information to verify this through the transfer agency, and did not do so.

**93.** It is the respondents' case that having regard to all of the evidence referred to above, the Impugned Decision is both unreasonable and irrational. The respondents rely upon the decision of the ECJ in the case of *Reyes v. Migrationsverket* (Case C-423/12) wherein at paras. 24-27 the court stated as follows:

“24. The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.

25. In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself.

26. The requirement for such additional evidence, which is not easy to provide in practice, as the Advocate General noted in point 60 of his Opinion, is likely to make it excessively difficult for that descendant to obtain the right of residence in the host Member State, while the facts described in paragraph 24 of this judgment already show that a real dependence exists. Accordingly, that requirement is likely to deprive Articles 2(2)(c) and 7 of Directive 2004/38 of their proper effect.

27. Furthermore, it is not excluded that that requirement obliges that descendant to take more complicated steps, such as trying to obtain various certificates stating that he has not found any work or obtained any social allowance, than that of obtaining a document of the competent authority of the State of origin or the State from which the applicant came attesting to the existence of a situation of dependence. The Court has already held that such a document cannot constitute a condition for the issue of a residence permit (*Jia*, paragraph 42).”

**94.** It is the contention of the appellant that the trial judge erred as a matter of law, in failing to consider the authorities of the ECJ, the High Court, and the Commission Guidance Document, which (it is submitted) all confirm that permitted family members claiming dependency are required to present documentary evidence of such dependency when seeking a right of residence. It is submitted that the trial judge appeared to consider that the appellant had somehow unreasonably required such documentary evidence despite the provisions of Article 10 of the Directive and reg. 5 of the Regulations.

**95.** The appellant relies upon the decision of the ECJ in *Rahman*, where at para. 30, that court affirmed the effect of Article 10(2)(e) of the Directive as follows:

“Also, Article 10(2)(e) of Directive 2004/38, relating to the issue of residence cards, authorises the Member States to require family members referred to in Article 3(2) of the directive to present a ‘document issued by the relevant authority in the



country of origin or country from which they are arriving certifying that they are dependants ... of the Union citizen’.”

The appellant also refers to the following passage in the Commission Guidance Document:

“Dependent family members are required to present documentary evidence that they are dependent. Evidence may be adduced by any appropriate means, as confirmed by the Court. Where the family members concerned are able to provide evidence of their dependency by means other than a certifying document issued by the relevant authority of the country of origin or the country from which the family members are arriving, the host Member State may not refuse to recognise their rights.”

**96.** The appellant submits that, in the court below, the trial judge was referred to a number of authorities of the High Court which support the entitlement of the appellant to require an applicant for residency to provide cogent documentary evidence of dependency. These include: *Rehman v. Minister for Justice* [2018] IEHC 779, *Gull v. Minister for Justice* [2018] IEHC 778 and *Awan v. Minister for Justice* [2019] IEHC 487. The appellant submits that the trial judge failed to refer to any of these authorities in his judgment, and, it is submitted, his decision runs contrary to those decisions of the High Court which entitle the appellant to seek cogent documentary evidence. By way of example, the appellant refers to the following paragraphs from the judgment of Keane J. in the case of *Rehman*:

“54. ...In reality, Mr Rehman was entirely at large on the issue of both the evidence he chose to present in support of his claim and the means whereby he chose to adduce it; Case C-215/03 *Oulane* [2005] E.C.R. I-1215 (at para. 53), Case C-1/05 *Jia* [2007] 1 C.M.L.R. 41 (at para. 41). Nonetheless, whatever evidence he did submit was always going to be subject to qualitative assessment and, in particular, as the ECJ has made clear in *Jia* (at para. 42), ‘a mere undertaking from a Community

national or his spouse to support the family member concerned need not be regarded as establishing that family member's situation of real dependence.'

55. For that reason, I reject as fundamentally misconceived Mr Rehman's argument that the Minister was obliged to attribute evidential significance to a declaration and statement of Mr Rahman amounting to the provision of such an undertaking on the authority of certain English cases on the weight to be attributed to sworn and unsworn statements of family members in refugee status cases and naturalisation applications (see *R (on the application of SS) v. SSHD ('self-serving' statements)* [2017] UKUT 164 and *The Queen on the application of MK (a child by her litigation friend CAE) v. The Secretary of State for the Home Department* [2017] EWHC 1365 (Admin)).

56. 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 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.’

57. That appears to me to be a correct statement of the law. It follows the onus was on Mr Rehman to satisfy the Minister by cogent evidence that was in part documented and could be tested either that the level of material support he received from Mr Rahman, its duration, and its impact upon his personal financial circumstances combined together to meet the material definition of dependency in the UK (as the country from which he had come) or that he had lived for some time under the roof of a household that could be said to be that of Mr Rahman in the UK (as the country from which he had come) so as to establish membership of his household. The Minister concluded that Mr Rehman had failed to do so.”

The decision of Keane J in *Rehman* was upheld by Baker J. in this Court.

### **The Test of Dependency**

97. In a decision delivered in this Court in July 2019 in the case of *VK and Khan v. Minister for Justice* [2019] IECA 232, Baker J., having reviewed the relevant authorities of the ECJ, set out a summary of the test for dependency as drawn from the principles enunciated in those authorities. She did this at para. 81-84 of her judgment as follows:

“81. The test for dependence is one of EU law and an applicant must show, in the light of his financial and social conditions, a real and not temporary dependence on a Union citizen. The financial needs must be for basic or essential needs of a material nature without which a person could not support himself or herself. A person does not have to be wholly dependent on the Union citizen to meet essential needs, but

the needs actually met must be essential to life and the financial support must be more than merely 'welcome' to use the language of Edwards J. in *M. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 500.

82. The concept of dependence is to be interpreted broadly and in the light of the perceived benefit of family unity and the principles of freedom of movement.

83. For the purposes of making the assessment, the proofs required, although remaining in the discretion of Member States, must not impose an excessively burdensome obligation on an applicant or impose too heavy a burden of proof or an excessive demand for the production of documentary evidence. The requested Member State must justify the refusal, and therefore must give reasons which explain and justify the refusal.

84. When the case law identifies the requirement that the dependence be 'real', this means that the dependence must be something of substance, support that is more than just fleeting or trifling, and support that must be proven, concrete, and factually established. However, the applicant does not have to establish that without the real or material assistance he or she would be living in conditions equivalent to destitution. Dependence may be for something more than help to sustain life at a subsistence level and no more.

85. What is to be assessed is whether a family member has a real need for financial assistance and not whether that person could survive without it. Thus stated, it is a test of the facts and not an interrogation of the reasons for the support."

**98.** The trial judge delivered judgment in this case in September 2019, and so it is highly unlikely he received any submissions arising out of the decision of Baker J. in *VK and Khan*, and he may not even have been aware of the decision when delivering the judgment in this case. However, in her decision, Baker J. noted at para. 81 that the test for dependence is one

of EU law, and the principles identified by her above she drew together following a review of all relevant authorities of the ECJ, including *Jia*, *Rahman*, *Reyes* and *Banger*, all of which precede in time the decision of the trial judge in these proceedings. So the fact that the decision of Baker J. in *VK and Khan* was handed down after the hearing of these proceedings in the High Court is of no significance - the principles identified by Baker J. as making up the test for dependency were of equal application at the time of the Impugned Decision and the trial in the High Court, as they were the day Baker J. handed down judgment in *VK and Khan*.

**99.** It is for this reason perhaps, there appears to be comparatively little difference between the approach to dependency taken by Barrett J. and the test identified by Baker J. in *VK and Khan*. Barrett J. considered the concept of “essential needs” and noted that this did not require a person to prove that the entirety of the cost of his or her essential needs is covered by the EU citizen (para. 81 of the judgment of Baker J.). He considered that the test is a generous one (para. 82 of the judgment of Baker J.). He noted that it can be difficult for persons making applications of this kind to keep all relevant records, although they must nonetheless establish what requires to be established (para. 14 of the judgment of Barrett J. and para. 83 of the judgment of Baker J.). But it is the last question in the test identified by Baker J. that poses a difficulty in this case i.e. what is to be assessed is whether a family member has a real need for financial assistance and not whether that person could survive without it?

### **Conclusion**

**100.** The respondents provided evidence to the appellant of the transfer of money by the first named respondent to the second named respondent during the period from November 2011 to January 2014, when the latter was in Pakistan. In the Impugned Decision the appellant states that the authenticity of the information provided in this regard cannot be

verified, but gives no indication that he took steps to verify the same through the money transfer agency. However, it appears that the appellant did not consider that this was necessary, presumably because, even assuming such transfers of funds were made, the second named respondent had failed to satisfy the appellant, by cogent evidence, that, had he not received the “small” cash transfers from his brother, he would not have been able to support himself in Pakistan.

**101.** The outcome of these proceedings depends, not upon the opinion of this Court as to whether or not the second named respondent was dependent upon the first named respondent while the former was in Pakistan during the period from November 2011 to January 2014, but rather upon whether or not the decision of the appellant on the question of the claimed dependency in Pakistan during this period was so unreasonable as to offend the principles established in *O’Keeffe v. an Bord Pleanála* [1993] 1 IR 39 and *Keegan v. Stardust Compensation Tribunal* [1986] IR 642. It is well established that the courts should be very slow to interfere with the decisions of specialist tribunals. That places a high bar in the way of a person seeking to set aside decisions of the appellant in applications made pursuant to reg. 5 of the Regulations.

**102.** Furthermore, it is clear from *Rahman*, that, where Article 3(2) of the Directive is concerned, Member States enjoy a wide discretion. At para. 26 of its judgment in that case, the ECJ held:

“In the light of the foregoing, the answer to the first and the second question referred is that, on a proper construction of Article 3(2) of Directive 2004/38:

- the Member States are not required to grant every application for entry or residence submitted by family members of a Union citizen who do not fall under the definition in Article 2(2) of that directive, even if they show, in

accordance with Article 10(2) thereof, that they are dependants of that citizen;

- it 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;
- the Member States have a wide discretion when selecting those criteria, but the criteria must be consistent with the normal meaning of the term ‘facilitate’ and of the words relating to dependence used in Article 3(2) and must not deprive that provision of its effectiveness; and
- every applicant is entitled to a judicial review of whether the national legislation and its application satisfy those conditions.”

**103.** While all of this makes clear that Member States enjoy a wide margin of flexibility as regards the application of Article 3(2) of the Directive, it is equally clear from the passage above that neither domestic legislation nor the application of that legislation must be such as to deprive Article 3(2) of its effectiveness. It is also clear from the authorities that, in applications of this kind, the appellant is required to construe the Directive broadly (see example para. 23 of the decision of the ECJ in *Reyes*) and, if he or she fails to do so, then his/her decision may be vulnerable on judicial review.

**104.** It cannot be the case that the mere transfer of funds from one party to another establishes dependence for the purposes of the Directive and the Regulations. While the recipient will always, no doubt, be very pleased to receive financial assistance, as Baker J. observed in *VK and Khan*, funds advanced “must be essential to life and the financial support

must be more than merely 'welcome', although an applicant does not have to prove that without such assistance, he or she would be living in conditions equivalent to destitution."

**105.** Before addressing the payments made directly to the second named respondent, I should say that in my opinion, the payments made by the first named respondent to the father of the respondents, during the same period when the first named respondent was making payments directly to the second named respondent, should not be taken into account when considering the dependency of the second named respondent on the first named respondent during this period. It may well be the case that the respondents' father spent these funds for the benefit of all of the family, including the second named respondent, but there is no evidence that this was so. Furthermore, even if this were established, this would only serve to establish a degree of dependence by the second named respondent on his father, to whom the funds were presumably given for use entirely at his own discretion. No authority for reliance on what might be described as an indirect dependency of this kind was opened to the Court, and in my opinion a great deal more information would have to be provided about the family finances as a whole before such an argument could be entertained. In this respect, I consider that the trial judge was in error in taking those funds into account when considering the issue.

**106.** I turn next to consider the funds transferred directly by the first named respondent to the second named respondent in Pakistan in the period between November 2011 and January 2014. Given the amount and the intermittent nature of these payments and the fact that the evidence of these payments was the only objective evidence of dependency advanced by the respondents in relation to this period (save for the payments to the respondents' father, which I have excluded from consideration for the reasons given), and having regard also to the fact that there was no evidence at all available to the appellant regarding the second named respondent's living expenses or financial situation generally during this period, I find it



difficult to describe the decision of the appellant - that he was not satisfied that the payments of themselves were sufficient evidence of dependency - as being either unreasonable or irrational. I should add that it was a matter for the appellant as to decide as to how much weight should be placed on the unsupported statement of the first named respondent that the second named respondent was unemployed while in Pakistan between November 2011 and January 2014, and I do not think it was unreasonable or irrational of the appellant to consider that insufficient to close the information gap. At best, from the point of view of the respondents, the Impugned Decision is marginal, and is not such as justifies interference by the Court.

**107.** Moreover, as Keane J. observed in *Rehman*, an applicant is “at large” as regards the evidence he/she chooses to present with an application for residency. Where dependency is relied upon, it is essential that the fullest possible information is provided, which in my view, in the context of financial dependence, should include not just particulars of money given by the EU national to the dependent relative, but also, as stated by Keane J. in *Rehman*, the impact of the support provided on the personal financial circumstances of the person claiming dependency. I might add that Keane J. reached similar conclusions in other cases referred to the Court, including for example, the case of *Safdar* referred to above, which was upheld on appeal to this Court.

**108.** It follows from these conclusions that it was neither unreasonable nor irrational on the part of the appellant to conclude that he was not satisfied that the second named respondent was dependent on the first named respondent while the former resided in Pakistan, the country from which he came, from November 2011 to January 2014, when he arrived in the State. That being the case, it is unnecessary to consider the question of dependency in this country, it being secondary to the requirement to establish dependency in the country from which the second named respondent has come.

**109.** Finally, as regards proof of dependency, I would like to avail of the opportunity to say something about Article 10(2)(e) of the Directive, as implemented by reg. 5 of the Regulations. These provisions entitle the authorities in the host State, when addressing applications for residency advanced under Article 3(2) of the Directive (reg. 5 (1) of the Regulations) to require the applicant to produce a certificate of dependency from the competent authorities in the country from which the applicant has come. In their written submissions, the respondents argued that Member States cannot insist on production of such a document having regard to para. 42 of the decision of the ECJ in *Jia*, which states:

“Consequently, a document of the competent authority of the State of origin or the State from which the applicant came attesting to the existence of the situation of dependence, albeit appearing particularly appropriate for that purpose, cannot constitute a condition for the issue of a residence permit, while a mere undertaking from a Community national or his spouse to support the family member concerned need not be regarded as establishing the existence of that family member’s situation of real dependence.”

This paragraph was referred to by the ECJ in *Reyes* (see para. 93 above). However, *Jia* was actually a decision concerned with Directive 73/148, which had no provision equivalent to Article 10(2)(e) of the Directive. As far as *Reyes* is concerned, Article 10(2)(e) of the Directive was not engaged at all because that case was concerned with a person claiming to be a dependent child within the meaning of Article 2(2) of the Directive, and Article 10(2)(e) only applies to persons seeking to avail of Article 3(2) of the Directive. The application of Article 10(2)(e) of the Directive to applications made pursuant to Article 3(2) thereof is so clear from the text of the provision itself as not to require any authority, but if authority is needed, it has been provided by the ECJ at para. 30 of *Rahman*, cited at para. 95 above. The

appellant is clearly entitled to require production of such certificates under Article 3(2) of the Directive, and reg. 5(2)(c) of the Regulations.

**110.** It follows from all of the above that the appeal should be allowed and the order quashing the Impugned Decision should be vacated. Since this decision is being delivered electronically, Noonan and Donnelly JJ. have indicated their agreement with the decision.

**111.** As the appellant has been entirely successful in this appeal, my provisional view is that she is entitled to her costs both in this Court and the High Court. If the respondents wish to contend for an alternative form of order, they will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the Court, the respondents may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.