High Court of Ireland Decisions

Judgment

Title:	Khan & Ors -v- The Minister for Justice Equality and Law Reform
Neutral Citation:	[2017] IEHC 800
High Court Record Number:	2015 676 JR
Date of Delivery:	27/10/2017
Court:	High Court
Judgment by:	Faherty J.
Status:	Approved

[2017] IEHC 800

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 676 J.R.]

BETWEEN

MOHAMMAD KHAN, MAHNAZ KHAN,

MOHAMMAD SHUMAR KHAN AND

MALKA KHATOON

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 27th day of October, 2017

1. This is a telescoped hearing in which the applicants seek judicial review of two

decisions of the respondent dated 6th October, 2015, respectively, refusing the applications of a third and fourth named applicants to enter the State. The background to the within application is as follows.

2. The first applicant is a national of the UK and an EU citizen having been approved for naturalisation in the UK 2014. He is married to the second applicant who is also a national of the UK and a Union citizen.

3. The first and second applicants now reside in Ireland and own the residence at which they reside.

4. Since the first applicants arrival in the State he has worked as a taxi driver. He is also a part-time student. Since her arrival in the State the second applicant has worked as an accountant and has been employed as a senior accountant since 2009 in a permanent position.

5. The first and second applicant's have four children who are all UK nationals and who reside in the family home with them.

6. The third and fourth applicants are nationals of Pakistan and are the parents of the first applicant. The third and fourth applicants are married and were born on 15th October, 1945 and 15th December, 1956, respectively. The third and fourth applicants are said to reside in rental accommodation in Pakistan.

7. In early 2013, an application was made for visas for the third and fourth named applicants to enter the State. On 12th February, 2013, the Visa Section of the respondent's department wrote to the first and second named applicants requesting certain information in order to process the visa applications. In particular, the respondents sought the following: recent six months bank statements for the third and fourth applicants; evidence of any other family members residing in Pakistan or in any other country; evidence of the third and fourth named applicants' birth; details of their current residence; evidence of their income including any pension they might be receiving; and evidence of the first and second applicants' link to the third and fourth applicants. Details of the third and fourth applicants' health status were also sought.

8. The visa applications were refused by the respondent by letter of 14th May, 2013. The reason given for the refusal was that the evidence provided in respect of finances was deemed insufficient or incomplete and because of inconsistencies/contradictions in the information supplied.

9. On 1st July, 2014, the second applicant submitted a fresh visa application which stated that the third and fourth applicants were dependant on her and on the first applicant. Included with the application were details pertaining to the first and second named applicants' passports, birth certificates, marriage certificate together with evidence of their employment and recent bank statements in respect of both of them. Details of the first and second applicants medical insurance was also included as was documents evidencing transfers of money to the third and fourth named applicants in Pakistan.

10. These applications were refused on 1st October, 2014. The respondent found, inter alia, that it had not been demonstrated that the third and fourth applicants were totally dependent on the first and second applicants. Reference was made to the third applicant being in receipt of a monthly pension in Pakistan. It was also pointed out that no complete bank statement or other evidence had been provided by either the third or fourth applicants by way of proof that they were totally dependent, or to the extent to which they were dependent on the first and second named applicants. It was also

pointed out that no evidence of household finances, bills or day to day expenditure was provided for any of the addresses given by the third and fourth applicants.

11. In 2015, a third application for short stay visas was submitted in respect of the third and fourth applicants with assistance from IK Immigration Consultants based in Dublin.

12. The applicants included with their applications documentary evidence of financial support from the first and second applicants, evidence of their relationship to the first and second applicants, a rental deed in respect of their residence in Pakistan, documentary evidence of the financial position of the first and second applicants and a bank account statement in respect of the fourth named applicant.

13. Included in the bundle of documentation was a medical report from Dr. Atif Abbas stating that the third named applicant had a history of heart disease and which set out details of his medical prescriptions.

14. The application also included an affidavit from a Mr. Qureshi who averred that he was a friend of the first applicant and that he had in the past transferred money to the third applicant on the instructions of the first applicant.

15. The visa applications were refused by letters dated 2nd July, 2015, respectively to the third and fourth applicants.

16. The letter addressed to the third applicant stated that he had not provided documentary evidence that he was a dependent of the first and second applicants. Money transfers were noted by the respondent but it was stated that "money transfers in isolation are not proof of dependency". It was also noted that the third applicant had not provided bank statements or other evidence as to the extent on which he was dependent on the first and second applicants. It was re-stated that the third applicant was in receipt of a monthly pension in Pakistan and therefore not dependent on the first and second applicants. The Visa Officer was of the opinion that the third applicant had more than one source of income. It was also stated that no explanation had been provided as to the relationship between the third applicant and Mr. Qureshi and that no official explanation had been given for the change of address on a bank statement provided by the fourth applicant. It was also noted that a permanent address given on the first applicant's birth certificate was the same as that given on the third applicant's pension book which, it was stated, suggested that he had retained ownership of this property. It was again pointed out that no evidence of household finances, bills or day to day expenditure was provided for any address given in respect of the third and fourth applicants. It was further noted that the medical report which had been submitted was from the third applicant's son-in-law and that an independent medical report would be required.

17. The letter addressed to the fourth named applicant was in similar terms.

18. Subsequent to these refusals the third and fourth applicants exercised their right of appeal and by letter dated 27th August, 2015, IK Immigration Consultants submitted an appeal on their behalf.

19. It was submitted that the third and fourth applicants fell into the category of "qualified family members" within the meaning of EU Directive 2004/38/EC ("the 2004 Directive"). The case was made that the third and fourth applicants lived alone in rented accommodation and a certified copy of a rent agreement in respect of this accommodation was attached for the respondent's reference. The respondent was advised that the monthly rent was PKR 30,000. Certified copies of utility bills for the said accommodation in the name of the lessor's agent were enclosed. It was explained

that the applicants were not permitted to add their names on the utility bills. Enclosed also were affidavits from the third and fourth applicants wherein details of their expenditure was explained. The fact of the third applicant's pension book bearing the same address as that which appeared on the first applicant's birth certificate was explained on the basis that that was the village from which the third applicant originated. It was further submitted that in light of his affidavit it was clear that the third applicant's pension was not enough to meet day-to-day expenses and that the details of the applicants' expenditure, together with the third applicant's medical condition, showed that the third and fourth applicants could not survive without financial assistance from the first and second applicants. In light of the issue taken with Dr. Abbass' medical report, a medical report from Dr. Gondal was enclosed with the appeal.

20. Accompanying the appeal were letters from the first and second applicants, together with an affidavit sworn by the third applicant setting out that he was a retired government employee on a monthly pension of PKR 55,328 and that it was impossible for him to sustain himself and the fourth applicant on his pension and that therefore the first and second applicants provided financial support on a regular basis to meet the expenses of the third and fourth applicants. He set out details of the third and fourth applicants' average monthly expenditure of PKR 120,000 which was said to be the total sum expended by the third and fourth applicants on, rent, utility bills, maintaining a car, medical expenses, cooking and laundry expenses, sanitary expenses, food and grocery and miscellaneous expenses.

21. On 6th October, 2015, the respondent advised IK Immigration Consultants that the appeals had not been successful.

22. The refusal letter in respect of the third applicant stated, inter alia, that he had failed to prove that he qualified as a beneficiary of the 2004 Directive on the basis that insufficient documentary evidence had been submitted to show that he was a dependent of the first and second named applicants. The letter stated that "[t]he degree of dependency must be such as to render independent living, at a subsistence level by the family member in his/her home country impossible if [the financial and social support from the first and second applicants] were not maintained." While the bank transfers of monies from the first and second applicants were noted, with respect to the submission that monies had also been transferred to the third and fourth applicants via friends of the first and second applicants who travel to Pakistan, the respondent stated that "hand deliveries of cash cannot be verified and therefore, they cannot be accepted."

23. With regard to the money transfers it was stated that "money transfers in isolation are not proof of dependency. No bank statement or other evidence has been submitted by the applicant by way of proof that the applicant is totally dependent, or to the extent to which he is dependent [on the first and second named applicants]".

24. It was also stated that as the applicant was in receipt of a monthly pension he was not considered to be dependent on the first and second applicants.

25. The respondent did not accept the averments in Mr. Qureshi's affidavit that he had transferred money to the third applicant because a copy of his passport bio data had not been submitted to the appeal, with the result that his signature could not be verified. The respondent also found the explanations tendered by the fourth applicant's bank for the fact of a change of address on her bank statement to be insufficient to explain her change of address. It was also noted that copies of rental agreements in respect of the prior addresses for the third and fourth applicants had not been submitted with the appeal. Equally, the explanation which had been submitted to explain why the third applicant's birth address had appeared on his pension book was found to be insufficient. The respondent also found the statement of monthly outgoings, which had been

provided at appeal stage, insufficient, as "documentary evidence of all household finances, medical expenditure or day to day expenditure was not provided."

26. While the copies of electricity and gas bills which had been provided were acknowledged, it was noted that water and telephone bills were not provided. Accordingly, the respondent found that insufficient documentary evidence had been submitted to support the monthly expenses referred to in the third applicant's affidavit.

27. The respondent also noted that while car fuel and maintenance expenses were listed as part of the monthly expenses, a letter from the third applicant's medical practitioner, Dr. Gondal, which had been submitted with the appeal has stated that it was unsafe for the third applicant to drive.

28. Furthermore, the respondent did not consider the rental agreement which been submitted with the appeal to be sufficient to show the monthly rent being paid by the third and fourth applicants. It was also queried as to why the rent agreement which was dated 16th August, 2015, referred to the lessor having received a sum of PKR 100,000 as a security deposit in circumstances where the third applicant was living at the same address since 2014.

29. With respect to a letter from Dr. Gondal, the respondent noted that the letter was handwritten and undated and that the prescriptions for the third applicant referred to in that letter differed from the prescriptions which had been earlier submitted. It was further noted that Dr. Gondal was a colleague of Dr. Abbas.

30. The refusal letter concluded by stating that INIS had undertaken an extensive examination of the third applicant's personal circumstances and had found that he had failed to prove that he qualified as a beneficiary of the Directive.

31. The refusal letter in respect of the fourth named applicant was in largely similar terms.

32. The within proceedings issued on 3rd December, 2015.

The applicants' submissions

33. On behalf of the applicants it is submitted that the incorrect test was applied in determining the third and fourth applicants' dependency on the first and second applicants. In particular, the applicants take issue with the respondent's dismissal of money transfers to the third and fourth applicants by dint of the respondent stating that "money transfers in isolation are not proof of dependency" in circumstances where in excess of €19,000 was transferred to the third and fourth applicants via bank transfer, in addition to other sums of money sent via friends of the first applicant. Counsel contends that the respondent did not recognise the extent of the monies transferred, in particular that sent via bank transfer. Yet, the jurisprudence of the European Court of Justice ("ECJ") recognises such transfers as part of the proof that will establish dependency for the purposes of the 2004 Directive, if other factors are also present.

34. It is submitted that the respondent did not give any or any appropriate weight to the monies transferred by the first and second applicants. Counsel submits that €19,054 was a substantial amount of money which required due assessment by the respondent, which was not forthcoming. Furthermore, in the decision, the respondent stated that there was no proof that the third and fourth applicants were "totally dependent" on the first and second applicants. This test is not in conformity with the test set out in the ECJ jurisprudence. In this regard, counsel referred to Case C-316/85 *Lebon* [1987] ECR

2811, Case C-1/05 *Ji*a [2007] ECR1-1 and Case C-423/12 *Reye*s [2014] ECR 1-0000.

35. It is further submitted that for the respondent to say that the third applicant was not a dependent family member by dint of the fact that he was in receipt of a monthly pension flies in the face of the jurisprudence of the ECJ.

36. It is also the applicants' contention that it was only at the appeal stage that the respondent raised a number of queries which could have been raised earlier with the applicants. By way of example, the respondent queried the absence of bio data detail in respect of Mr. Qureshi's passport when this could have been asked for at an earlier stage. Equally, the respondent waited until the refusal decision to raise queries regarding the letter of explanation which came from the fourth applicant's bank, when it was open to the respondent to raise this matter with the applicants prior to the refusal decision thereby affording them an opportunity to deal with the observations set out therein.

37. In addition, the respondent formed the view that the evidence provided by the third and fourth applicants as to their monthly outgoings was insufficient evidence of all household finances and day-to-day expenditure, thereby suggesting that every element of such expenditure required to be vouched. Yet, there was no forewarning of this by the respondent.

38. Furthermore, the respondent stated that insufficient information was provided by the third applicant as to why the address given on his birth certificate appears on his pension book. However, an explanation was provided by IK Immigration Consultants in the appeal submissions, but no account was taken of this explanation by the respondent.

39. It is also the applicants' contention that the issue taken by the respondent with the third and fourth applicants claiming car and fuel expenses, in circumstances where the third named applicant's medical practitioner had stated that it was unsafe for him to drive, was irrational because no account was taken by the respondent that the fourth applicant would be capable of driving a car.

40. The respondent also raised issues regarding the third and fourth applicants' rental agreement. Yet, any such query as the respondent might have had in this regard could have been raised in correspondence if considered important in the context of establishing their dependency.

41. It is further contended that the respondent's reliance on the fact that the medical report of Dr. Gondal was handwritten and undated is irrelevant, as is the fact that different medical prescriptions are alluded in Dr. Gondal's medical report to those referred to in the earlier medical report. Again, the respondent waited until the decision to query such matters when they could have been raised at an earlier stage.

42. It is submitted that in seeking to establish dependency, the respondent failed to abide by the principles which emerge in the jurisprudence of the ECJ, as follows:

- As a matter of European Law, dependent status is the result of a factual situation categorised by the fact that material support for that family member is provided by the Union citizen;

- The host Member State must assess whether, having regard to his financial and social conditions, the direct relative of a Union citizen is not

in a position to support himself;

• There is no need to determine the reasons for that dependency or therefore for the recourse to that support;

• The fact that a Union citizen regularly, for a significant period, pays a sum of money to the family member, necessary in order for him to support himself in the state of origin, is such as to show that the family member is in a real situation of dependence vis-à-vis that Union citizen.

43. Counsel submits that at no point in either appeal refusal decision does the respondent apply the correct test under European law, namely whether material support for the third and fourth applicants is being provided by the first and second applicants to meet the former's essential needs. In determining whether the third and fourth applicants were dependents, the respondent failed to assess whether the first and second applicants provided material support for them and/or whether regular payments for a significant period were made by the first and second applicants. In the premises, it is submitted that the respondent acted in breach of the 2004 Directive and in breach of the then applicable European Communities (Free Movement of Persons) (No. 2) Regulations 2006 S.I. 656/2006, which transposed the Directive into Irish law.

The respondent's submissions

44. It is not in dispute between the parties that the first and second applicants are EU citizens and that the third and fourth applicants are candidates for family reunification as qualifying family members, provided that they are proven to be dependent on the first and/or second applicant.

45. It is disputed that the respondent applied the incorrect test for dependency in assessing the visa applications.

46. Counsel for the respondent submits that in an objective sense, it may or may not be the case that the third and fourth applicants are dependent on the first and second applicants, but insofar as the decision under review is concerned, the fact is that the respondent has not been given sufficient information in order for dependency to be established.

47. It is submitted that there are a number of deficits in the applicants' appeal to the respondent. These arise not because the respondent did not make inquiries or put the applicants on notice as to such deficits, as counsel for the applicants suggests, but rather because the applicants did not provide sufficient evidence to the respondent. Contrary to the applicants' submissions, it is not the case that the respondent has to advise the applicants on their proofs. It is for the applicants to make their case to the decision maker.

48. It is not correct that the visa applications were rejected without adequate reasons: it was stated in the respective decisions that insufficient documentary evidence had been submitted to establish dependency. The insufficiencies were exhaustively surveyed in the body of the decision.

49. Counsel submits that the respondent correctly determined that details concerning the residence within Pakistan of the third and fourth applicants had not been established. While a tenancy agreement was provided to prove their address, it dates from 2015 and refers to a security deposit paid at that time notwithstanding that the tenancy was supposed to begin on 15th January, 2015, and that the third and fourth applicants have claimed to have lived there prior to that time. Furthermore, as noted in the decision, the situation is also confused by a statement from the fourth applicant's

bank that she was living at one of two other addresses possibly prior to January 2014. Additionally, the third applicant's pension book gave another address, as noted by the respondent.

50. Again, as noted by the respondent, no vouching documentation such as would show the actual rent being paid was submitted by the third and fourth named applicants.

51. While the third named applicant furnished an affidavit setting out average monthly expenditure for, *inter alia*, rent, utility bills, food and groceries and other expenditure, vouching information was not included, as would have been expected. The averments in the third applicant's affidavit, although evidence, are not of themselves sufficient, in the absence of vouching documentation.

52. Moreover, the third and fourth applicants have not supplied bank statements such as would evidence their income and expenditure, save a bank statement in the name of the fourth applicant which refers only to the monies transferred by the first and second applicants. Accordingly, the respondent was entitled to query the context in which such transfers were made, where the third and fourth applicants' own expenditure and income was not vouched.

53. It is submitted that a continuing theme of all the visa applications submitted in this case is the deficiency in the information contained therein, which was not addressed by the applicants on any occasion despite their having been alerted to the deficiencies by the respondent. It is those deficiencies which has prevented the respondent in making a decision in the applicants' favour.

54. It is submitted that on more than one occasion, by reason of the matters highlighted by the respondent in earlier refusals, the applicants were given sufficient opportunity to prove their dependency, which was not availed of. Yet, the applicants' counsel deigns to suggest that it was incumbent on the respondent, prior to making the appeal decision, to raise such queries as she might have with the applicants. This is not the law.

55. The respondent does not dispute the fact of money transfers to the third and fourth named applicants. What is in issue is whether same proves dependency. It is the respondent's contention, as set out in the refusal decisions, that money transfers per se are not proof of dependency. This must be the case, otherwise family members who are in a position to meet their own essential needs in their foreign state of origin could be designated "dependent" merely by receipt of remittances from a Union citizen. The essential question is whether the family member said to be dependent needs such material support as is made by the Union citizen in order to meet his or her essential needs. It is submitted that this threshold has not been reached in the applicants' case, largely owing to the evidential gaps and inconsistencies in the documentation which was provided.

56. Contrary to the applicants' submissions, the respondent did not dismiss the first and second applicants' money transfers – the respondent accepted the level of the transfers but was not satisfied from the other documentation supplied that the third and fourth named applicants were in fact dependent.

57. While it is agreed that the respondent does not, as per the ECJ jurisprudence, inquire why someone is dependent, the respondent is still entitled to examine whether in fact they are dependent. As set out in Case C-1/05 Jia, the test is whether the third and fourth applicants need material support of the first and second applicants to meet their "essential needs".

58. There is no merit in the applicants' contention that the respondent applied an

incorrect test. Any such criticism on the part of the applicants is simply elevating form over substance. The precise form of words for assessing dependency that the respondent adopted in the refusal decisions was that the degree of dependency must be such as to render independent living, at a subsistence level by the family member in his home country, impossible if the financial and social support of the EU citizen was not maintained.

59. In this case, there was no procedural unfairness given the control the applicants themselves had over the process, in that it was open to them to submit the respondent whatever proofs they had.

60. Equally, there is no basis for finding that the respondent misdirected herself in law as to the applicable test or otherwise erred in law, in circumstances where the proofs expected by the respondent were not provided by the applicants. In all of those circumstances, the decisions were not irrational or unfair.

Considerations

61. The proceedings raise the following legal issues:

> 1. Did the respondent apply the correct test of dependency under European Union law and, in particular, under Article 2(2) of Council Directive 2004/38/EC? and
>
> 2. Was the respondent correct to conclude that no evidence of dependency or the extent of dependency had been submitted?

62. Article 2 of the 2004 Directive defines family member in the following terms:

> "Article 2
>
> Definitions
>
> For the purposes of this Directive:
>
> 1)"Union citizen" means any person having the nationality of a Member State;
>
> 2) "Family member" means:
>
> (a) the spouse;
>
> (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
>
> (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
>
> (d) the dependent direct relatives in the ascending line and those

of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

…

Article 5

Right of entry

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in

Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions."

63. As the third and fourth applicants are relatives in the ascending line, in principle, they fall within the definition of family members entitled to enter and reside in the State under the 2004 Directive.

64. In Case C-316/85 *Lebon*, the ECJ considered the concept of dependency under Regulation 1612/68 (an earlier incarnation of the 2004 Directive). In that case the ECJ

stated:

> *"21. It must be pointed out, secondly, that the status of dependent member of a worker's family does not presuppose the existence of a right to maintenance either. If that were the case, the composition of the family would depend on national legislation, which varies from one state to another, and that would lead to the application of community law in a manner that is not uniform.*
>
> *22. Article 10(1) and (2) of regulation no 1612/68 must be interpreted as meaning that the status of dependent member of a worker's family is the result of a factual situation. The person having that status is a member of the family who is supported by the worker and there is no need to determine the reasons for recourse to the worker's support or to raise the question whether the person concerned is able to support himself by taking up paid employment.*
>
> *23. That interpretation is dictated by the principle according to which the provisions establishing the free movement of workers, which constitute one of the foundations of the community, must be construed broadly (see, most recently, the judgment of 3 June 1986 in Case 133/75 Kempf [1986]ECR 1741 at p.1746). Moreover, it corresponds to the wording of the provision in question, whose German language version ("unterhalt gewaehren") and Greek language version ("efoson synthreitai") are particularly clear in that respect.*
>
> *24. The answer to the third question must therefore be that the status of dependent member of a worker's family, to which article 10(1) and (2) of Regulation no 1612/68 refers, is the result of a factual situation, namely the provision of support by the worker, without there being any need to determine the reasons for recourse to the worker's support."*

65. In Case C-1/05 *Jia*, the ECJ, in the context of considering Directive 73/148/EEC (which was ultimately replaced by the 2004 Directive) referred to its jurisprudence in *Lebon* and went on to state:

> *"34 Article 1(1)(d) of Directive 73/148 applies only to 'dependent' relatives in the ascending line of the spouse of a national of a Member State established in another Member State in order to pursue activities as a self-employed person.*
>
> *35 According to the case-law of the Court, the status of 'dependent' family member is the result of a factual situation characterised by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement or by his spouse (see, in relation to Article 10 of Regulation No 1612/68 and Article 1 of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), Lebon, paragraph 22, and Case C 200/02 Zhu and Chen [2004] ECR I 9925, paragraph 43, respectively).*
>
> *36 The Court has also held that the status of dependent family member does not presuppose the existence of a right to maintenance, otherwise that status would depend on national legislation, which varies from one State to another (Lebon, paragraph 21). According to the Court, there is no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment. That interpretation is dictated in particular by*

the principle according to which the provisions establishing the free movement of workers, which constitute one of the foundations of the Community, must be construed broadly (Lebon, paragraphs 22 and 23).

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

38 That is the conclusion that must be drawn having regard to Article 4(3) of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition, 1968(II), p. 485), according to which proof of the status of dependent relative in the ascending line of a worker or his spouse within the meaning of Article 10 of Regulation No 1612/68 is to be provided by a document issued by the competent authority of the 'State of origin or the State whence they came', testifying that the relative concerned is dependent on the worker or his spouse. Despite the lack of precision as to the means of acceptable proof by which the individual concerned can establish that he falls within one of the classes of persons referred to in Articles 1 and 4 of Directive 73/148, there is nothing to justify the status of dependent relative in the ascending line being assessed differently according to whether the relative is a member of the family of a worker or of a self-employed worker.

39 In accordance with Article 6(b) of Directive 73/148, the host Member State may require proof that the applicant comes within one of the classes of person referred to in particular in Article 1 of that directive.

40 When exercising their powers in this area Member States must ensure both the basic freedoms guaranteed by the EC Treaty and the effectiveness of directives containing measures to abolish obstacles to the free movement of persons between those States, so that the exercise by citizens of the European Union and members of their family of the right to reside in the territory of any Member State may be facilitated (see, by analogy, Case C 424/98 Commission v Italy [2000] ECR I 4001, paragraph 35).

41 With regard to Article 6 of Directive 73/148, the Court has held that, given the lack of precision as to the means of acceptable proof by which the person concerned can establish that he or she comes within one of the classes of persons referred to in Articles 1 and 4 of that directive, it must be concluded that evidence may be adduced by any appropriate means (see, inter alia, Case C 363/89 Roux [1991] ECR I 1273, paragraph 16, and Case C 215/03 Oulane [2005] ECR I 1215, paragraph 53).

42 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 a 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.

43 In those circumstances, the answer to Question 2(a) and (b) must be that Article 1(1)(d) of Directive 73/148 is to be interpreted to the effect that 'dependent on them' means that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national or his or her spouse 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. Article 6(b) of that directive must be interpreted as meaning that proof of the need for material support may be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence."

66. In essence, the ECJ held that dependency for the purposes of Directive 73/148/EEC was established if the family member *"needs the material support of [the] Community national or his or her spouse in order to meet their essential needs in the State of origin".*

67. In Case C-423/12 *Reyes*, the ECJ expanded on the concept of dependency. In Reyes, the applicant was an adult child who sought a right of residence as a family member on the basis that, although an adult, she was nevertheless dependent upon her mother. The Swedish Administrative Court found that the mere fact that Ms. Reyes' mother and stepfather had taken it upon themselves to support her did not establish that there was a relationship of dependence which could confer on Ms. Reyes a right of residence in Sweden.

68. In dealing with the question which the Swedish Court referred to it, the ECJ observed as follows:

"20. In that regard, it must be noted that, in order for a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the existence of a situation of real dependence must be established (see, to that effect, Jia, paragraph 42).

21. That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, Jia, paragraph 35).

22. In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant, who is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, Jia, paragraph 37).

23. However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support. That

interpretation is dictated in particular by the principle according to which the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly (see, to that effect, Jia, paragraph 36 and the case-law cited).

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).

28. Accordingly, the answer to the first question is therefore that Article 2(2)(c) of Directive 2004/38 must be interpreted as meaning that a Member State cannot require a direct descendant who is 21 years old or older, in circumstances such as those in the main proceedings, in order to be regarded as dependent and thus come within the definition of a family member under Article 2(2)(c) of that provision, to have tried unsuccessfully to obtain employment or to obtain subsistence support from the authorities of his country of origin and/or otherwise to support himself."

69. The *Lebon* and *Jia* decisions were considered by Mac Eochaidh J. in *Kuhn v. Minister for Justice, Equality and Law Reform* [2013] IEHC 424. The learned Mac Eochaidh J. observed as follows:

"18. In the German language version of Jia, the verb deployed for "to meet their essential needs" is "urn seine Grundbedürfnisse … zu decken". The verb "zu decken" translates as "to cover". Thus, the German language version of the test suggests that the financial assistance is needed to cover or to meet all of the costs of essential needs. The French language version of Jia suggests a slightly different meaning and its text is "de necessiter le soutien materiel. ..afin de subvenir a ses besoins essentiels …" The sense of the words "de subvenir a" is more suggestive of supporting or making a subvention or a contribution to the essential

needs. If I interpreted the test as meaning that dependence requires that assistance be given for all of a person's essential needs, this would greatly restrict the category of persons entitled to claim to be dependants. Only persons who could prove that they were reliant for all of their food and shelter and any other essentials would ever qualify and this, in my view, could not have been the intended effect of the test announced in Jia . Such a restrictive test could only be designed by the European legislator and it has not given any indication of such an extreme restriction on the concept of dependence.

19. In my view, the Jia decision marks a shift from dependence which was found to exist merely where support is given, to dependence being based upon the need for assistance with the provision of the essentials of life. Neither the European Court of Justice nor the European legislator nor the Irish legislator has ever identified exactly how much support is required to be given to the recipient in order for that person to be said to be dependant on the European based donor. My view is that where outside help is needed for the essentials of life (for example, enough food and shelter to sustain life) then regardless of how small that assistance is, if it is needed to attain the minimum level to obtain the essentials, then that is enough to establish that the recipient is dependent. (The essentials of life will vary from case to case: expensive drugs maybe an essential for someone who is ill, for example.)

20. In these proceedings, the parties agree that the correct test for dependence is to be found in Jia. Thus, in accordance with paras. 37 and 43 of Jia, my task is to see if the various officials processing the many applications and appeals assessed whether the Egyptian based family require the material support of the Irish based family "in order to meet their essential needs" in Egypt. At the heart of these proceedings is the allegation that the test in Jia was misapplied by the respondents.

…

32. Notwithstanding that the applicants in the clearest terms stated that they were dependent on the Irish family for their basic living conditions, this claim is not analysed. In my view, the appeal decision maker was, at a minimum, required to identify the definition, such as it is, of the concept of dependence as identified in the Jia case. Further, the official was required to apply that test to the assertions and facts advanced on behalf of the applicants. Any lawful analysis of a claim of dependence arising under the Citizens Directive must ask a fundamental question: is financial assistance given by a Union citizen and/or his spouse to a qualifying person to meet their essential needs? Nothing short of that analysis will suffice.

33. The case made by the applicant is that the test in Jia was misapplied. My view is that there is no evidence that the test was applied in this decision just quoted. The analysis of the concept of dependence made at first instance by Mr. Hargadon is expressly adopted by the decision maker on appeal such that any error which was contained in Mr. Hargadon's analysis infected the appeal."

70. It is submitted by the applicants that the test in *Jia*, as analysed in *Kuhn*, is not applied by the respondent in the instant case. Rather, the test applied was whether proof of the degree of dependency was such as to render independent living at a subsistence level not viable if the third and fourth applicants were not maintained by the

first and second applicants. The applicants contend that that at no point in either of the decisions does the respondent apply the correct test under European law, namely whether the material support being provided by the first and second applicants is for the third and fourth applicants to be able to meet their essential needs.

The applicants' complaint is that the test applied by the respondent was far more onerous than that set out in *Jia*. They submit that their complaint is borne out by reference to the respondent's Policy Document on Non-EEA Family Reunification ("the Policy Document").

71. The test for dependency for the purpose of non-EEA family reunification is set out in the policy Document as follows:

> "14.1 For the purposes of this Policy Document, "Dependency" means that the family member is (i) supported financially by the sponsor on a continuous basis and (ii) that there is evidence of social dependency in the two parties. The degree of dependency must be such as to render independent living at a subsistence level by the family member in his/her home country impossible if that financial and social support were not maintained …
>
> 14.2 Adult persons who claim dependency are not persons of independent means, and vice versa. This is an important distinction from the points of view of both lodging and examining applications. Persons who claim dependency are saying they rely for their subsistence from a family member who is resident in Ireland. Officials examining such applications must be satisfied – by the applicant – that the family member is actually dependent on the sponsor."

72. I am satisfied that this is in effect the test applied to the applicants in this case. Proof of this is evident from the statement in the decision that "the degree of dependency must be such as to render independent living, at a subsistence level by the family member in his/her home country impossible if that financial and social support were not maintained."

73. In *Jia*, there is no reference to it being a requirement of dependency that it was impossible to live at a "subsistence" level if financial support from the EU citizen or his or her spouse was not maintained. The *Jia* test does not require that the family members have to be totally dependent on the EU citizen.

74. Furthermore, I am satisfied that it is not the law that a family member cannot qualify as a dependent simply because he or she is in receipt of a pension – yet that seems to be the thrust of the respondent's decision in respect of the third named applicant. Accordingly, in this regard, the respondent fell into legal error.

75. To my mind, the prism through which the decision-maker considered the question of the third and fourth applicants' dependency is sufficiently removed from the more nuanced test, as set out in *Jia*, to persuade the Court that the wrong test was applied. The test used by the decision-maker is too closely aligned with the Policy Document test.

76. Counsel for the respondent submits that there was no prejudice to the applicants in the form of words used in the decision. Nor, it is said, have the applicants said how they were prejudiced by the wording used by the respondent. Insofar as the applicants take issue with reference in the decision to "total dependency", the respondent is not saying that the third and fourth applicants have to be totally dependent in order to qualify as dependent family members. It is contended that the respondent is merely

acknowledging that there are shades of dependency – that does not affect the question as to whether a person is, in fact, dependent. The respondent argues that much of the applicants' complaint in the present proceedings relate to alleged infelicities in the wording of the decision which, counsel for the respondent submits, the Court should ignore. Accordingly, counsel submits that the criticism levelled by the applicants as to the wording used in the decisions is an insufficient basis to vitiate decisions which are sound in substance. It is also submitted that the form of words used by the respondent accords with the test as formulated by Mac Eochaidh J. in *Kuhn*, albeit counsel acknowledges that it would have been preferable if the form of words used in *Jia* had been replicated in the refusal decisions. I am not convinced that the decision-maker's test in fact accords with either Kuhn or Jia, for the reasons I have already stated.

77. Counsel for the respondent also contends that it is not the case, unlike the situation in Kuhn, that no test was applied. This is certainly the case, but in my view it remains the position that the wrong test was identified by which to ascertain the third and forth applicants' dependency on the first and second applicants. Counsel for the respondent also makes the point that in *Kuhn*, the decision was impugned because the respondent had deemed vouching documentation, which had been submitted, insufficient. It is submitted that the insufficiency in *Kuhn*, however, was marginal compared with the dearth of information in the applicants' case.

78. Essentially, the respondent's position is that irrespective of any frailty in the test applied to establish dependency, there were sufficient deficiencies in the information supplied by the applicants to justify the refusal of the visas. However, I am not persuaded that the deficiencies in the applicants' proofs, as identified in the decisions, are sufficient reason to sustain the refusal decisions made in this case. My reasons are as follows: first, as a matter of law, the third and fourth applicants' claimed dependency was required to be examined according to the letter and spirit of the 2004 Directive, as that has been interpreted by the ECJ. Secondly, it seems to me that, irrespective of what information might be furnished by the applicants, the door would appear to be closed to the third named applicant in any event, given that it is categorically stated in his refusal decision that as the third applicant "is in receipt of a monthly pension of PKR 55, 328 (approx €454.00) [he] is not considered to be dependent on [the first and second applicants]". Thirdly, the third and fourth applicants' personal circumstances were subjected to "an extensive examination", as explained in their respective decisions. Again, this raises the spectre that the third and fourth applicants' personal circumstances were viewed through the wrong prism. In the 2004 Directive, for the purpose of free movement, "an extensive examination" is reserved to the host Member State in respect of the personal circumstances of permitted family members, a category the third and fourth applicants did not fall into, being qualified family members for the purpose of the 2004 Directive, subject to establishing dependency.

79. In this regard, I note the opinion of Advocate General Mengozzi, in *Reyes*:

> *"Although, as such, the concept of dependent member of the family of a Union citizen is an independent concept of Union law which must, on that basis, be given a uniform interpretation, it is in terms of the proof required of applicants that the distinction intended by the Union legislature between dependent members of the nuclear family and other dependent family members will be able to take on its full meaning." (at para. 55)*
>
> *"The applicant may thus provide the authorities of the host Member State with both subjective evidence connected with his own economic and social situation and any other relevant evidence that may illustrate, in a manner helpful to those authorities, the objective background to the application.*

> *At all events, the authorities of the host Member State have a duty to ensure that the effectiveness of the rights indirectly conferred on the members of the nuclear family by Directive 2004/38 is maintained and that access to the territory of the Union is not made excessively difficult by, in particular, placing too heavy a burden of proof on applicants." (at para. 58)*

80. It is the applicants' contention that it is clear from the overall thrust of the decisions that the respondent was intent on raising myriad small queries. Accordingly, they submit that the question arises as to whether the respondent was making it excessively difficult for the applicants such that their EU rights will be deprived of their effectiveness. By virtue of the reference to "an extensive examination" having been conducted into the third and fourth applicants' personal circumstances, the applicants' apprehension of being subjected to myriad small queries is not unreasonable. In coming to this conclusion, I note the applicants' submission that the respondent's finding that the third and fourth applicants' expenses for car maintenance was inconsistent with the medical evidence that he was unable to drive, did not appear to countenance that perhaps the fourth applicant could be the person in the family who drives the car.

81. I note that the respondent states in the decisions that the applicants can make a fresh application for a visa. The applicants' apprehension is that any such application will not succeed if the test applied by the respondent in the present decisions is maintained in any future decision. I am satisfied that this is a reasonable apprehension on the part of the applicants.

82. That being said, as set out in Jia, the respondent is entitled to "*proof of the need for material support*". Thus, I find no basis to impugn the respondent's expectation as set out in the respective decisions that documentary evidence of the claim of dependency would be provided by the applicants.

83. Much of the criticism levelled at the respondent in the course of this application centred around the failure of the respondent to give advance warning to the applicants of perceived deficiencies or contradictions in the documents submitted with visa applications prior to the respondent reaching a decision on the respective appeals. Counsel for the applicant maintained that had the applicants been forewarned they would have been able to address the perceived deficiencies or contradictions.

84. Counsel for the respondent submits that it was incumbent on the applicants to put their best foot forward and to present such relevant facts and evidence as might be necessary to support their applications, including facts and evidence which would tend to prove dependency. Accordingly, the respondent cannot be criticised, in these proceedings, for the condition of the applicants' own proofs, because the respondent was not willing accede to their application while in receipt of insufficient proof of dependency.

85. I agree with the respondent's submissions in this regard. As stated in *A.M.Y. v. Minister for Justice* [2008] IEHC 306, "*there is no onus on the Minister to make inquiries seeking to bolster an applicant's claim; it is for the applicant to present the relevant facts*". However, the fact that the Court has upheld the respondent's position in this regard is not sufficient to sustain the decision, given the frailties which the Court has identified earlier in this judgment.

86. In the course of the hearing, counsel for the applicants also made the case that the money transfers made by the first and second named applicants to Pakistan should have been weighed in the balance by the respondent as in and of themselves indicative of dependency, and that the respondent should then have gone on to see if other factors

were present which combined with the money transfers indicated dependency for the purposes of the 2004 Directive. Counsel for the respondent disputes the applicants' contention that there are two separate stages to the test which the respondent should have applied, namely an acknowledgment of the transfer of monies which then should have been followed by an analysis of the circumstances said to give rise to the dependency. Counsel contends that the test is not a two pronged test. Rather, it is whether the sum of money transferred is necessary for essential needs – "necessary" being a predicate of "a sum of money". I am more inclined to agree with the respondent in this regard. In *Reyes*, the ECJ refers to "*dependent status*" as a "*factual situation characterized by the fact that material support for [a] family member is provided by the Union citizen*". However, "*in order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, [the family member] is not in a position to support himself*." (Emphasis added) Accordingly, this particular complaint, which, as I understand it, is that the respondent should have found that the amount of money actually transferred should have tipped the balance in the applicants' favour even if there were deficiencies in other aspects of the applicants' proofs, is not made out.

Summary

87. In this case, I have found that the respondent applied the wrong test to establish the third and fourth applicants' dependency. I am satisfied that the wording used in the decisions was not a mere infelicity in language in the decisions, but rather that the decision-maker in fact applied the wrong test for the purpose of ascertaining whether dependency was established. Accordingly, the application of the incorrect test has infected the substantive finding that the third and fourth applicants have failed to qualify as beneficiaries of the 2004 Directive. This is sufficient to vitiate the decisions. Accordingly, I grant leave to seek judicial review, and, this being a telescoped application, I will grant *certiorari* of the two decisions dated 6th October, 2015, respectively.