



**UNAPPROVED  
THE COURT OF APPEAL**

Neutral Citation Number [2021] IECA 298

Appeal Number: 2019/403

**Faherty J.  
Collins J.  
Binchy J.**

**BETWEEN/**

**MUJEEBUR REHMAN AWAN, NAZAKET MUJEEB AWAN, MUHAMMAD  
USMAN MUJEEB AWAN, MUHAMMAD BILAL MUJEEB AWAN, AND SAIF UR  
REHMAN**

**APPLICANTS/APPELLANTS**

**- AND -**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**Judgment of Ms. Justice Faherty delivered on the 10<sup>th</sup> day of November 2021**

1. This is the applicants' appeal of the judgment and Order of the High Court (Keane J.) dated, respectively, 4 July 2019 and 16 July 2019 refusing them relief by way of *certiorari* of five separate decisions of the Minister for Justice and Equality ("the Minister") to uphold on review in each case a first instance decision to refuse the applicants a residence card as a qualified family member or, where appropriate, a permitted family member of Rabiya Awan (otherwise Rabiya Khatoon) a British and, hence, at the

relevant time, an EU citizen exercising free movement rights in the State. For ease of reference, the decisions will be referred to as “the review decisions”.

**The applicable legal provisions**

2. In order to better understand the issues that arise in the appeal it is appropriate at this juncture to set out the relevant EU and domestic legislative provisions.

3. Directive 2004/38/EC on the Rights of Citizens of the Union and their Family Members to Move and Freely Reside within the territory of the Member States, O.J. L/158, 30.4.2004 (“the Citizens Directive”) is the governing EU legislation. Recitals (5) and (6) provide:

“(5). 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.

(6). 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.”

4. Art. 2(2) defines “Family member” to include spouse, partner, “direct descendants who are under the age of 21 or are dependants” and “dependent direct relatives in ascending line”. Art. 3(1) of the Citizens Directive confirms that these are the persons who are the designated beneficiaries of the rights.

5. Art. 3(2) goes on to state, in material part:

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

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

...

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

6. Thus, the Citizens Directive provides for a different approach to family members and extended family members. Family members who come within the definition in Article 2(2) of the Directive are afforded the right of entry and residence in the Union citizen’s host Member State, provided certain conditions are met. Permitted family members are those who do not come within the definition of family member in Article 2 of the Directive, and whose application for entry and residence in the host Member State is to be facilitated, but who cannot be said to have a right of entry or to remain.

7. The Citizens Directive was implemented in domestic law by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656/2006) as amended (“the 2006 Regulations”), now replaced by European Union (Free Movement of Persons) Regulations 2015 (“the 2015 Regulations”) which came into effect on 1 February 2016. However, for the purposes of the within proceedings, the Citizens Directive was transposed by the 2006 Regulations.

8. Under the heading ‘Interpretation’, Reg. 2 of the 2006 Regulations provides, in material part, that:

“‘family member’ includes a qualifying family member and permitted family member;

...

‘permitted family member’, in relation to a Union citizen, means any family member, irrespective of his or her nationality, who is not a qualifying family member of the Union citizen, and who, in his or her country of origin, habitual residence or previous residence-

(a) is a dependant of the Union citizen,

(b) is a member of the household of the Union citizen,

....

‘qualifying family member’, in relation to a Union citizen, means-

...

(e) a dependent direct relative of the spouse of the Union citizen in the ascending line”.

9. Thus, a person who qualifies as “a family member” under Art. 2(2) of the Citizens Directive falls within the definition of “qualifying family member” under the 2006 Regulations, and any person who qualifies within the category of “other family members”

under Art. 3(2) of that Directive, falls within the definition of “permitted family member” under the 2006 Regulations.

**10.** Reg. 5 states, in material part:

“(1) A person who wishes to enter the State on the basis that he or she is a permitted family member of a Union citizen may be required to produce to the Minister-

(a) (i) where the person is a Union citizen, a valid passport or national identity card, or

(ii) where the person is not a national of a Member State, a valid passport,

(b) documentary evidence from the relevant authority in the country of origin or country from which he or she is arriving certifying that he or she is a dependent, or a member of the household, of the Union citizen, ....

(2) Upon receipt of the evidence referred to in paragraph (1), the Minister shall cause to be carried out an extensive examination of the personal circumstances of the person concerned in order to establish whether he or she is a permitted family member...”

Reg. 7 states:

“(1) (a) A family member of a Union citizen who is not a national of a Member State and who has been resident in the State for not less than 3 months shall apply to the Minister for a residence card.

(b) An application made under subparagraph (a) shall contain the particulars set out in Schedule 2 and be accompanied by such documentary evidence as may be necessary to support the application.

(c) The Minister shall immediately cause to be issued a notice acknowledging receipt of an application made under subparagraph (a).

(2) Where the Minister is satisfied that it is appropriate to do so, he or she shall, within 6 months of the date of receiving an application made under paragraph 1(a), cause to be issued a residence card containing the particulars set out in Schedule 3 in respect of the family member concerned.

(3) Subject to Regulation 20, a person the subject of an application made under paragraph (1)(a) may remain in the State pending a decision on the application.”

### **Background**

**11.** Ms. Rabiya Awan (hereinafter “the EU citizen”) was born in 1992. On 23 September 2013 she married Muhammad Ummar Majeed Awan, a national of Pakistan, born in 1993. On their marriage certificate, each were described as a “student”.

**12.** In December 2014, the EU citizen, her husband and the applicants entered the State. They were accompanied by the first applicant’s brother-in-law Rashid Mehmood, also a British citizen.

**13.** In February 2015, the EU citizen took up employment with a named childcare employer in Dublin. Her husband duly obtained a residence card and is in employment in the State. They have since had two children each of whom is an Irish citizen.

**14.** The first applicant is the father of the EU citizen’s husband and is thus her father-in-law. He is a national of Pakistan. In 2004, he entered the UK to study law. He is now a solicitor, qualified to practice law in Pakistan, the UK and Ireland. He was admitted to the Roll of Solicitors in Ireland in September 2015 and was issued with a practising certificate on 14 December 2015. The second applicant, also a national of Pakistan, is the first applicant’s wife and hence the mother-in-law of the EU citizen. She arrived in the UK in December 2005 with the fourth applicant the youngest son of the first and second

applicants. The third applicant, also a national of Pakistan, is also a son of the first and second applicants and, like the fourth applicant, is a brother-in-law to the EU citizen. He entered the UK from Pakistan in January 2006. The fifth applicant, a national of Pakistan, is a brother of the first applicant and, thus, the EU citizen's uncle-in-law. He arrived in the UK in September 2014 before travelling with the other applicants to this State in December 2014.

**15.** On 25 March 2015, each of the applicants submitted a separate "Form EU1" application together with a range of documentation to the Irish Naturalisation and Immigration Service ("INIS") in the Minister's Department for the purpose of obtaining a residence card.

**16.** The applications were made under cover of an undated letter signed by the EU citizen and her husband. In the letter, the EU citizen advised, in material part:

"The applicants are the direct family members of my husband moreover we have also been members of the same household since my marriage i.e. 23rd September 2013.

The applicants have been financially as well as otherwise fully dependent upon me and my husband."

**17.** The documentation furnished to INIS included the EU citizen's marriage certificate, her contract of employment, her salary slips, her and her husband's bank statements, her and her husband's tenancy agreement, their bank statements, their joint insurance policy "confirming previous household membership as well as financial dependency [of the fifth applicant]", their utility bills "confirming applicants' residence and household membership", "Applicants' bank statements confirming previous and current financial dependency" and all relevant passports.

**18.** The applications were duly acknowledged by INIS in separate letters on 29 April 2015. In each case, INIS sought the provision of various documentation to evidence the

applicants' claims. The applicants responded on 22 May 2015, furnishing additional documentation.

**19.** Between 10 and 20 November 2015, INIS wrote to each of the applicants informing them that the Minister had decided to refuse their applications for a residence card. After noting that the applications had been made pursuant to the European Communities (Free Movement of Persons) Regulations 2006 and 2008 ("the 2006 Regulations") and Directive 2004/38/EC ("the Citizens Directive"), each applicant was advised as follows:

"You have failed to submit satisfactory evidence that you are a family member of an EU citizen in accordance with Reg. 2(1) of the Regulations.

It was submitted that you were supported and maintained by the EU citizen through the provision of accommodation and financial assistance prior to entering the State and while residing in the State. However, you have not submitted satisfactory evidence to show that you are a dependant of the EU citizen under the Regulations and Directive."

No decision was given in respect of any applicant in relation to their claimed membership of the EU citizen's household.

**20.** Following the refusals, each of the applicants sought a review of their respective decision as provided for in Reg. 21 of the 2006 Regulations. The review applications were made under cover of a letter dated 7 December 2015 from the first applicant.

**21.** Between 18 July 2016 and 16 December 2016, Abbott Solicitors, which was the title of the firm through which the first applicant was practicing as a solicitor in Ireland, wrote to inform INIS separately on behalf of each of the applicants that they had authority and instructions to represent the applicants for the purpose of the review of the refusal to grant each a residence card. On 29 December 2016, Abbott solicitors resubmitted all of the evidence that had been provided in support of the first applicant's application. In their



cover letter, they stated that the first applicant qualified for the residence card as a parent of the spouse of the EU citizen. It was also advised that “the [first applicant] **has been** and still **continues to be**:

- “1. The member of the same household of the EU citizen, in the other EU State i.e. UK and in the State since 12/2014.
2. financially wholly and solely dependent parent of the spouse of [the] EU Citizen, in the UK and in the State since 12/2014.”

It was stated that Abbott Solicitors had been instructed to submit “that the applicant is wholly and solely [a] dependent parent upon his son, who is the spouse of EU citizen”. The letter went on to state that the first applicant was a qualifying family member of the EU citizen rather than a permitted family member. INIS were advised that he “has been actively participating in the State’s and personal and economic wellbeing since he had the temporary position to reside and work in the State. The applicant is participating into the economic wellbeing by engaging himself into self-employment as a:

- (i) Solicitor by having partnership in the local law firm;
- (ii) Part time motor trader, he buys and sells used cars instead of relying on the social assistance.”

**22.** On 30 December 2016, Abbott Solicitors wrote to INIS separately on behalf of the other four applicants, asserting that each was a qualifying family member and that each was “financially wholly and solely” dependent on the spouse of the EU citizen. In the High Court (and before this Court), it was not disputed that the third, fourth and fifth applicants were not in fact qualifying family members. As the brothers-in-law and uncle-in-law, respectively, of the EU citizen, they were eligible to be considered only as permitted family members. The second applicant was, however, eligible for consideration as a qualified family member.

***The review decisions***

**23.** The review decisions issued in March 2017. On 20 March 2017, INIS wrote to the first and second applicants stating in relevant part in each case:

“I am directed by the Minister for Justice and Equality to refer to your request for a review of the decision to refuse your application for a residence card... The decision to refuse your application...has been reviewed in accordance with the provisions of the European (Free Movement of Persons) Regulations 2006 and 2008 in line with the transitional provisions in Reg. 31 of the European Communities (Free Movement of Persons) Regulations 2015...

I am to inform you that the review of your application has not been successful, as you do not fulfil the relevant conditions set out in the Regulations and the Directive. The decision to refuse your application dated 27/03/2015 is affirmed for the following reasons:

On the basis of the documents supplied, the Minister has determined that you do not fulfil the criteria in respect of a qualifying family member as set out in Reg. 3(5) of the Regulations. The Minister is not satisfied that you have submitted satisfactory evidence in respect of your stated dependence on the EU citizen and residence as a member of the EU citizen’s household prior to travelling to this State.”

**24.** On dates between 17 and 21 March 2017, INIS wrote to the third, fourth and fifth applicants, stating, in material part, in each case:

“I am directed by the Minister for Justice and Equality to refer to your request for a review of the decision to refuse your application for a residence card... The decision to refuse your application made on 20/11/2015 has been reviewed in

accordance with the provisions of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 in line with the transitional provisions in Reg.31 of the European Communities (Free Movement of Persons) Regulations 2015...

I am to inform you that the review of your application has not been successful, as you do not fulfil the relevant conditions set out in the Regulations and the Directive. The decision to refuse your application dated 27/03/2015 is affirmed for the following reasons:

On the basis of the documents supplied, the Minister has determined that you do not fulfil the criteria in respect of a permitted family member as set out in Reg. 3(6) of the Regulations. The Minister is not satisfied that you have submitted satisfactory evidence in respect of your stated sole dependence on the EU citizen and residence as a member of the EU citizen's household prior to travelling to this State..."

### **Judicial review**

25. By Order of 19 June 2017, the High Court (O'Regan J.) granted the applicants leave to seek judicial review, principally *certiorari*, on the grounds specified in their statement of grounds.

26. Paragraph 5 of the statement of grounds sets out the bases upon which relief is sought:

*"In respect of the first and second Applicants:*

A. The Respondent's review decisions of the 20<sup>th</sup> March 2017 in respect of the first and second Applicants are based on a fundamental error of fact and of law, and the Respondent has taken irrelevant matters into consideration, in that the Respondent has applied the test in respect of permitted family members (i.e.

whether dependent on and/or a member of the household of the EU citizen ‘in the country from which the person has come’ – Regulation 5(1)(a) of the European Communities (Free Movement of Persons) Regulations 2015... instead of the test in respect of qualifying family members (i.e. whether dependent on the EU citizen in the State at the time of the application – Regulation 3(5)(b) of the 2015 Regulations). As ‘a dependent direct relative in the ascending line of the EU citizen, or of his or her spouse or civil partner’, the first and second Applicants clearly should have had their applications treated as being in the qualifying member category rather than in the permitted family member category. In examining dependency only in respect of the period prior to the first and second Applicant’s travel to the State, the Respondent has taken irrelevant matters into consideration, and has failed to examine the central question of dependency in the State at the time the residence card applications were made.

*In respect of all the applicants:*

B. In the review decisions of the 17<sup>th</sup> 20<sup>th</sup> and 21<sup>st</sup> March 2017 made in respect of the Applicants, the Respondent has erred in law and acted in breach of fair procedures and national and constitutional justice in failing to give adequate reasons such as would enable the Applicants to understand the basis on which the applications were rejected, such as would enable the Applicants to know what evidential gaps would need to be filled in any re-application and such as would enable the Applicants and this Honourable Court to establish whether the Respondent acted reasonably in finding that the evidence submitted was not satisfactory to show dependence and, where appropriate, membership of the EU citizen’s household. The reasoning given in each of the said review decisions is

confined to the following single sentence: *'The Minister is not satisfied that you have submitted satisfactory evidence in respect of your stated [sole] dependence on the EU citizen and residence as a member of the EU citizen's household prior to travelling to this State'* (the word 'sole' is included in the review decisions only in respect of the third, fourth and fifth Applicants-the sentence is otherwise identical in each of the decisions). In the circumstances, each of the said review decisions are invalid as they are unclear and fail to provide adequate reasons.

*In respect of the third, fourth and fifth Applicants:*

- C. In the review decisions made in respect of the third, fourth and fifth Applicants, the Respondent appears to have required that they show "sole" dependence on the EU citizen in order to be seen as a permitted family member. In finding that receipt of some funds from a source other than the EU citizen precludes a finding of dependency for the purposes of the 2015 Regulations, the Respondent made a fundamental error of law, which invalidates the review decisions made in respect of the third, fourth and fifth Applicants, as the correct test is whether an applicant's essential needs could be met without the financial support of the sponsor EU citizen."

**27.** In his grounding affidavit of 13 June 2017, the first applicant averred, *inter alia*, that following upon the marriage of the EU citizen to his son, and prior to their move to Ireland, the applicants, the EU citizen and her spouse lived together at a named address in the UK, that they were supported mainly in respect of their living expenses, including household bills, travel and clothes, by the EU citizen from her earnings of £35,000 per annum as an administrative assistant with a local firm. It was said that the mortgage payments on the UK house were made by the first applicant's brother-in-law Rashid

Mehmood, who was in full time employment. At para. 12, he averred that Abbott Solicitors who had acted for the applicants in respect of their applications to the Minister for a review of the original refusal decisions and who were instructed in the judicial review was his firm, that he had been admitted to the Roll of Solicitors in Ireland in September 2015, that his practising certificate issued on 14 December 2015 and that he was a partner in the firm and worked with a colleague who was also a practising solicitor.

**28.** The Minister delivered a Statement of Opposition dated 16 February 2018 supported by an affidavit sworn on the same date by Ms. Sinead Murphy, Higher Executive Officer of the Residence division of INIS. Ms. Murphy exhibited, in respect of each applicant, both the “examination of file report and recommendation” (“the Recommendation Submission”) made by an officer of the Minister, and Ms. Murphy’s own written decision as review officer (“the Review Officer Decision”). The review decisions were, in each case, based upon the Review Officer Decision.

***The documentation exhibited by Ms. Murphy***

**29.** The Recommendation Submission in respect of the first applicant, states, *inter alia*, as follows:

“This review application has been assessed in accordance with the provisions of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 in line with the transitional provisions in Reg. 31 of the European Communities (Free Movement of Persons) Regulations 2015...”

**30.** Under “Residence” it is noted that after her marriage the EU citizen moved to reside with her spouse at a named address in the UK (the residence of the first applicant). The officer further noted that “in respect of the applicant’s prior residence in the UK it is indicated there was more than one household resident at [the named address] ... i.e. the applicant and his spouse and children. Utility bills are addressed to the applicant though

bills appear to be paid from the EU citizen/spouse joint account. It is noted the applicant is a solicitor. In light of that information it is reasonable to consider the applicant was not a dependent of the EU citizen.” The Recommendation Submission also records that “supporting documentation shows residence at [a named address in Dublin]. Monthly rent payment of €1400.00 being paid from EU citizen and spouse joint account....”.

**31.** Under “Dependence”, the officer states:

“...Supporting documentation shows household expenses, rent etc. are paid from the EU Citizen/Spouse joint bank account. It appears funds are provided for the applicant and thereby his spouse and other family members. The evidence as presented indicates a degree of dependence on the EU citizen and her spouse while resident in this State pending the decision outcome in respect of their application for residence in the State under EU Treaty Rights”.

**32.** The officer, however, found “insufficient evidence” that the first applicant was dependent on the EU citizen and/or her spouse and was “not satisfied that the applicant has established he is a Qualifying Family Member of the EU Citizen in accordance with the relevant criteria and intention of Regulation 2(1) of the Regulations.”

**33.** Ms. Murphy’s “Review Officer Decision” in respect of the first applicant was expressed in the following terms:

“In relation to the dependence of the applicant on the EU citizen, there is evidence of funds debited from the joint account held by the EU citizen and her spouse. Most of these are labelled ‘maintenance’, however the recipient of the payments is not named. In addition, supporting documentation shows that household expenses, rent etc. are paid from the EU citizen and spouse’s joint bank account. This evidence does show a degree of dependency on the EU citizen and her spouse. However, the evidence is insufficient to show that the degree of dependence of the applicant and

other family members was such that without such support living, at subsistence level would be impossible for the applicant.

For these reasons, it appears that the applicant does not fit the definition of family member under Reg. 2(1) of the Regulations. While the applicant is a direct relative of the spouse of the EU citizen, it is not evident that they meet the criteria of dependence required to be considered a qualified family member under the Regulations.”

**34.** The Recommendation Submission and Review Officer Decision in respect of the second applicant were expressed in almost identical terms to that of the first applicant.

**35.** In the Recommendation Submission in respect of the third applicant, it was concluded that there was “insufficient evidence of the applicant’s sole dependence on his brother”. It was also considered that since he resided at the UK address with his parents, his family unit was with his parents (i.e. the first and second applicants). The officer was not satisfied that the third applicant had established that he was a permitted family member of the EU citizen “in accordance with the relevant criteria and intention of Reg. 2(1) of the Regulations”. The recommendation was that the initial refusal decision be confirmed. In her “Review Officer Decision”, Ms. Murphy noted the submission that the third applicant resided as a dependent brother of the EU citizen’s spouse and as a member of the household of the EU citizen since 2014. She found that there was

“insufficient evidence that the applicant is solely dependent on his brother. There is no evidence to show that while residing at the UK address that the applicant (sic) residing as part of the household of the EU citizen. The evidence suggests that while residing at that address, the applicant formed part of a household with his parents. It is not submitted that the applicant is dependent on the personal care of the EU citizen on serious medical grounds.



On the basis of the supporting documentation, I am not satisfied that the applicant has established he is a permitted family member of the EU citizen in accordance with the relevant criteria of Reg. 2(1) of the Regulations. Nor does the applicant fulfil the criteria listed in Reg. 3(5) of the Regulations in order to be a qualifying family member.”

**36.** In respect of the fourth applicant, the Recommendation Submission found that as a minor he was to be regarded as a dependent of his parents (the first and second applicants) and that his application “is associated with and dependent on his parents’ application”. As refusal was being recommended in respect of his parents, the fourth applicant should likewise be refused a residence card. In her Review Officer Decision, Ms. Murphy, likewise, found that the evidence suggested that the fourth applicant formed part of a household with his parents in the UK. As a minor, he was considered a dependent of his parents. She found no evidence that he was dependent on the EU citizen on serious medical grounds. Based on the documentation submitted she was “not satisfied that the applicant has established that he is a ‘permitted family member’ in accordance with Regulation 2(1) of the Regulations. The applicant does not fulfil the criteria required to be considered as a ‘qualifying family member’ of the EU citizen in accordance with Regulation 3(5) of the Regulations.

**37.** The Recommendation Submission in respect of the fifth applicant, after noting that he was in receipt of payments referred to as “maintenance” and that he was employed in the State, opined that apart from proof of residence at the address in the UK “there is little evidence that the applicant was a dependent of his nephew while resident in the United Kingdom”. Further, there was no evidence that he required the personal care of the EU citizen on health grounds. Accordingly, the officer was not satisfied that the fifth applicant was a permitted family member of the EU citizen in accordance with the relevant criteria

and intention of Reg. 2(1) of the Regulations. In her Review Officer Decision, Ms. Murphy found insufficient evidence to show that the fifth applicant was dependent on the EU citizen and their spouse during the time of their shared UK address.” She found that “it has already been established that there was more than one household at the listed UK address, and there is insufficient evidence to show that the applicant formed part of a household with the EU citizen and her spouse.”

**38.** The documentation exhibited by Ms. Murphy formed part of the material which was before the trial judge in the judicial review.

**Procedural history in the High Court**

**39.** The hearing of the judicial review application came on before Keane J. over a period of four days in June/July 2018. On 21 June 2018, an issue arose whether the applicants’ claim of dependency on the EU citizen in the UK was, as put by the trial judge at para. 26 of his judgment, “genuine or contrived”. The issue arose from bank statements which the applicants had submitted in respect of a joint account held by the EU citizen and her husband in the UK covering certain parts of the period between February and June 2014 and evidencing, as the only significant and consistent inward payments to the account, transfers from an entity described as Abbott Solicitors, as well as payslips from that firm on which the stated address was Luton in the UK, which appeared to show that the EU citizen was an employee of Abbott Solicitors. All of this was in the context where there was evidence that the first applicant was in practice as a solicitor in Ireland since December 2015 under the style and title of Abbott Solicitors.

**40.** In any event, following an enquiry from the trial judge to the applicants’ then counsel as to whether there was a connection between Abbott Solicitors, Dublin and Abbott Solicitors, Luton (from whence the transfers had come), the Minister sought leave to

adduce further evidence on this issue. The trial judge granted leave to each side to adduce evidence.

**41.** On 5 July 2018, prior to the resumption of the hearing, the applicants' solicitors came off record, following which the applicants were self represented.

**42.** On 12 July 2018, Mr. Owen Nicholson, a solicitor in the CSSO, swore an affidavit which exhibited copies of print outs from pages of a number of websites including those of Abbott Solicitors, Dublin, Abbott Solicitors with an address in Luton, Bedfordshire, England, the Facebook page of Abbott Solicitors and the Facebook and LinkedIn pages relating to the first applicant. The Facebook page in relation to the first applicant referred to employment as a solicitor with Abbott Solicitors "January 2012 – January 16, 2015 – Luton". On the same page, under the heading "About Mujeeb", the following appeared:

"I am the founder of:

1. Abbott Law Associates (Abbottabad, Pakistan).
2. Abbott Solicitors, Luton UK (I sold it to its existing partners since Jan 2015).
3. Abbott Solicitors Ireland."

**43.** The first applicant's LinkedIn page described him as the founder of Abbott Law Associates, Abbott Solicitors Luton (UK) and Abbott Solicitors Ireland.

**44.** As averred by Mr. Nicholson, by 11 July 2018, much of the Facebook information pertaining to the first applicant had been removed.

**45.** The first applicant affirmed a further affidavit on 12 July 2018. Therein he averred that he was not a proprietor, partner or owner of the UK based Law Firm known as Abbott Solicitors, Luton, UK nor did he pay wages or a salary to the EU citizen for her employment with that firm in 2013 or 2014. He averred that the five partners in that firm were originally from Pakistan and were family friends of his, three of them hailing from his home city of Abbottabad, Pakistan. He averred that the applicants were clients of that

firm in certain immigration and civil matters. He stated that one of his sons had placed incorrect information on his (the first applicant's) Facebook and LinkedIn pages. He stated that it was his partner in Abbott Solicitors Dublin and not he who had sold an interest in Abbott Solicitors, Luton. The first applicant exhibited a print out from the website of the UK Solicitors Regulation Authority which recorded that he paid for and obtained a practising certificate for the years 2011-2012 to 2017-2018 inclusive which, the trial judge opined, "strongly suggests that [the first applicant]: (a) was in practice as a solicitor in the UK prior to his arrival in Ireland; and (b) was, at the very least, closely connected with the practice of Abbott Solicitors in Luton when the Union citizen received payments from that practice in 2014." Other than commenting as he did, the trial judge did not make any specific factual findings arising from the contents of Mr. Nicholson's and the first applicant's respective affidavits.

### **The trial judge's consideration of the grounds for judicial review**

#### ***Ground 5A***

46. The trial judge first addressed ground 5A of the Statement of Grounds (which concerned only the first and second applicant). The ground as advanced had two limbs, the first being that the Minister wrongly applied the test for permitted family membership rather than qualifying family membership to the first and second applicants and, secondly, that in applying that test, the Minister wrongly considered whether the first and second applicants were dependent on the EU citizen in the UK as the State whence they came rather than whether they were dependent on the EU citizen in Ireland, which the applicants claimed was the correct test.

47. The trial judge addressed the arguments advanced in the following terms:

"52. In asserting that the Minister wrongly applied the permitted family membership test, the applicants point to the recital in each of the relevant review

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

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

54. I cannot accept those arguments for several reasons. First, the relevant decisions are not drafted as legislation would be and should not be analysed in that way.

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

55. Third, I am satisfied that, as a matter of both law and fact, the Minister did address the correct legal test *i.e.* whether the relevant applicants were qualifying family members as dependent direct relatives of the Union citizen's spouse in the State whence they came. That is so for several reasons. The review decision in each case recites that the relevant applicant does not fulfil the criteria in respect of a qualifying family member. Under the transitional provision of Reg. 31(28) of the 2015 Regulations, the Minister was required to consider each application under the 2006 Regulations and not the 2015 Regulations. It is evident from the 'examination of file' report and recommendation, and the review officer's decision, upon which the review decision in each case was based, that each review was conducted under the 2006 Regulations, notwithstanding the erroneous reference by implication on the face of each of the review decisions to the 2015 Regulations. Even if I am mistaken in relation to all of the foregoing, Reg. 3(5) of the 2015 Regulations must be given an interpretation that conforms with the requirements of the Citizens"

Rights Directive, by operation of the European Union law principle of consistent interpretation, otherwise known as the principle of indirect effect...”

For the reasons set out at paras. 52-55 of his judgment, and noting that in Case C-1/05 of *Jia v. Migrationsverket* ECLI: EU: C: 2007:1, the CJEU has stated that the need for material support “*must exist in the State of origin*” of the relatives in the ascending line or “*the State whence they came at the time when they apply to join the Community national*”, the trial judge duly rejected ground 5A.

### **Ground 5C**

48. The trial judge next considered ground 5C, namely the claim that the Minister erred in law and in her application of the permitted family members test to the third, fourth and fifth applicants by virtue of having recited in the respective decisions that she was not satisfied that those applicants had submitted satisfactory evidence of their respective “stated sole dependency” on the EU citizen prior to travelling to the State. The applicants position in the High Court was that the correct test was as enunciated by Mac Eochaidh J. in *Kuhn v Minister for Justice* [2013] IEHC 424 whereby the provision by the Union citizen of any support or assistance, however small, required by the family member concerned to maintain the essentials of life, is sufficient to establish the dependence of the latter upon the former. The trial judge addressed the applicants’ argument as follows:

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

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

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

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

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

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



**Ground 5B**

**49.** Latterly, the trial judge addressed ground 5B-the alleged failure to give reasons. He commenced his appraisal by noting that the existence and scope of the requirement to give reasons for an administrative decision affecting the rights and obligations of persons was a well-settled aspect of the administrative law of the State, in this regard citing *Meadows v. Minister for Justice Equality and Law Reform* [2010] 2 IR 701 (as authority for the obligation on a decision-maker to disclose the essential rationale of foot of which a decision is taken) *Rawson v. Minister for Defence* [2012] IESC 26 and *EMI Records (Ireland) Ltd. & Ors. v. Data Protection Commissioner* [2013] 2 IR 669 (the right to be provided with sufficient reasons to enable a party on judicial review to assess whether the decision sought to be questioned is lawful). He noted the jurisprudence of the CJEU in Case C-222/86 *UNECTEF v. Heylens* [1987] ECR 4097 and the Opinion of Advocate General Fennelly in Case C-70/95 *Sodemare & Ors. v. Regione Lombardia* [1997] ECR 1-03395 in relation to the obligation on national authorities under EU law to give reasons.

**50.** He went on to note that there may be circumstances where the provision of express reasons is not necessary, in this regard quoting the *dictum* of Fennelly J in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 IR 297 that “... *there may be situations where the reasons for the decision are obvious and judicial review is not precluded*”.

**51.** The trial judge stated that in applying the relevant legal principles to the review decisions, it was necessary to do so in the context of a number of pertinent propositions of law and fact. The first of those propositions was that each of the applications for a residence card “turned on the question of whether the applicants could establish the necessary ‘dependence’ for the purposes of Art. 2(2)(d) or of Art. 3(2)(a), as the case may be, of the Citizens’ Rights Directive.” He noted that Reg. 5(1)(c) of the 2006 Regulations required each of the applicants to produce to the Minister documentary evidence from the

relevant authority in the country from which he or she had come that he or she was a dependant of the Union citizen. While the applicants were entirely at large on the evidence they chose to present and the means whereby they chose to adduce it, “[n]onetheless, whatever evidence each applicant did submit was always going to be subject to qualitative assessment”.

**52.** He noted that in Case C-423/12 *Reyes v. Sweden*, the CJEU had confirmed that dependent status is the result of a factual situation and that in order to determine the existence of such status, the host Member State must assess whether having regard to the person’s financial and social conditions, he or she is not in a position to support himself and that the claimed dependency must be “genuine and not contrived” and not brought about with the sole objective of obtaining entry into and residence in the territory of a Member State.

**53.** Quoting from the decision of the United Kingdom Upper Tribunal in *Moneke v. Secretary of State for the Home Department* [2011] UKUT 34 the trial judge went on to state that “the onus was on the applicants to satisfy the Minister by cogent evidence that was in part documented and could be tested that the level of material support each received from the Union citizen, its duration, and its impact upon his personal financial circumstances combined together to meet the material definition of dependency in the UK (as the country from which each had come). The Minister concluded that each of the applicants had failed to do so.” (at para. 76)

**54.** He found that the claims lay “at the furthest end of the spectrum of those factual circumstances that may be asserted to constitute ‘dependence’”. He rejected the contention that the applicants had submitted “very comprehensive evidence” and/or “voluminous evidence” to the Minister of their dependence upon the Union citizen in the United Kingdom and found “there was a signal failure by each of the applicants to provide

anything equivalent to a statement of means (i.e. evidence of the financial and social conditions, or ability to support himself or herself, of each of them). Instead, each simply relied on evidence of accommodation and payments ostensibly provided to them by the Union citizen, that might demonstrate genuine dependence but might just as easily be a contrivance to falsely suggest it.”

**55.** The trial judge next stated:

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

**56.** Having found that the applicants had been provided with the Recommendation Submissions and the Review Officer Decisions *via* Ms. Murphy’s affidavit, that they could have requested that material earlier, that they had not applied to amend the statement of grounds further to the provision to them of the reasons contained in the documentation exhibited by Ms. Murphy, and there being no prohibition in public law on the subsequent provision of reasons for a decision already given (citing *Krupecki & Anor v. Minister for Justice and Equality No. 2* [2018] IEHC 538), the trial judge duly went on to state:

“...considering both the very particular factual context in which the review decisions were given and the more extensive reasons that were already then extant and which have since been provided to the applicants, and which the applicants were given an appropriate opportunity to consider for the purposes of any challenge

they might wish to mount I am satisfied there was not, and certainly is not now, any breach of the obligation to provide reasons capable of vitiating the review decisions. (at para. 85)

**The issues arising in the appeal**

57. In their notice of appeal and appeal submissions, the applicants identify six issues which they say arise for consideration. I address these issues below (albeit in a different order than that advanced by the applicants), including whether some of the issues properly arise on appeal. It is to be noted at this juncture that it is only the first, second, third and fifth applicants who are pursuing the substantive appeal. The fourth applicant is now in receipt of a residence card based on his marriage to a UK citizen. Accordingly, he no longer seeks *certiorari* of his review decision albeit he is pursuing the appeal in relation to costs.

***(i) Did the trial judge err in concluding that the review decisions were made in accordance with the 2006 Regulations?***

58. In accordance with Reg. 31(28) of the 2015 Regulations, the review applications in the instant cases, having been submitted on 7 December 2015 (i.e. prior to 1 February 2016) were required to be decided in accordance with the 2006 Regulations. The applicants' position in this Court, however, is that the review decisions are purported to be based (erroneously) on the 2015 Regulations. In this regard, they point to the review decisions in respect of the first and second applicants where reference is made to Reg. 3(5) of the 2015 Regulations, and to the reference to Reg. 3(6) of the same Regulations in the review decisions pertaining to the third to fifth applicants.

59. Reg. 3(5) of the 2015 Regulations provides, in material part:

“For the purposes of these Regulations, a person is a qualifying family member of a particular union citizen where-

...

(b) the person is-

...

(iii) a dependent direct relative in the ascending line of the Union citizen, or of his or her spouse or civil partner”.

Reg. 3(6) in relevant part provides that “...a person is a permitted family member of a particular Union citizen” where they have, *inter alia*, entered the State with the Union citizen and “... the Minister has, in accordance with Regulation 5, decided that the person should be treated as a permitted family member of the Union citizen for the purposes of these Regulations...”

**60.** Additionally, the applicants point to the Minister’s invocation of Reg. 3(5) in the Review Officer Decisions relating to the third and fourth and fifth applicants in finding that these applicants were not qualified family members. Counsel also points to paras. 8 and 9 of the statement of opposition as proof of what they describe as the Minister’s concession that the review decisions were made in accordance with the 2015 Regulations.

**61.** In the face of all of this, the applicants contend that the trial judge erred in law in concluding that “each review was conducted under the 2006 Regulations” when, as indeed observed by the trial judge, each of the review decisions on their face cite the 2015 Regulations. The applicants say that there was no evidential basis for the trial judge’s conclusion that the review decisions were conducted in accordance with the 2006 Regulations and that it was not for the trial judge in judicial review proceedings to attempt to remedy errors made by the Minister. It is submitted that as the decisions were made under the 2015 Regulations as opposed to the 2006 Regulations, a significant error of law arises which warrants relief by way of *certiorari*.

**62.** In her response to the applicants' submissions, counsel for the Minister asserts that the applicants are attempting to advance a challenge to the review decisions that was not pleaded or argued in the High Court.

**63.** The applicants counter the Minister's objection by stating that the reference to the 2015 Regulations in the review decisions and the underlying documentation is sufficient to quash the decisions and that in failing to so conclude, the trial judge erred. They argue that once the trial judge himself made a finding that the 2006 Regulations had been applied by the Minister, that entitles them to raise on appeal the argument that the trial judge was wrong to so find.

**64.** Albeit acknowledging that the statement of grounds does not plead that the Minister erroneously applied the 2015 Regulations instead of the 2006 Regulations, counsel for the applicants nevertheless asserts that what is pleaded in ground 5A is sufficient to sustain the ground of appeal now being advanced.

**65.** In light of that argument, it is apposite firstly to look at what ground 5A states. What is pleaded is that by virtue of the recital in the review decisions that the Minister was not satisfied of the first and second applicants' stated dependency on the EU citizen and or her spouse and of their residence as part of the EU citizen's household prior to travel to the State, the Minister applied to the first and second applicants the test in respect of permitted family members as set out in Reg. 5(1)(a) of the 2015 Regulations instead of the test for qualified family members as provided for in Reg. 3(5)(b) of the 2015 Regulations. Thus, in ground 5A, the first and second applicants specifically invoke the provisions of Reg. 3(5) of the 2015 Regulations in seeking to impugn the review decisions on the basis that the Minister did not assess their dependence on the spouse of the EU citizen by reference to their circumstances in this jurisdiction. As noted by the trial judge, by referencing the present tense as used in Reg. 3(5) of the 2015 Regulations, to wit, 'the person *is* ... a

dependent direct relative in the ascending line of the Union citizen', the applicants were making the case that their dependency fell to be considered only by reference to their circumstances post their arrival in the State.

**66.** Ground 5A also includes a plea that the Minister took irrelevant matters into account in examining the first and second applicants' dependency on the EU citizen in the period *prior* to their travel to the State and that she failed to examine the central question of the first and second applicants' dependency on the EU citizen in the State at the time the applications were made for residence cards.

**67.** As counsel for the applicants acknowledged, the central tenet of ground 5A is not that the Minister applied the wrong Regulations but rather that she purported to assess the first and second applicants under the rubric of permitted family members (Reg. 5(1)(a) of the 2015 Regulations) instead of assessing them pursuant to Reg. 3(5)(b), and thus applied to them the wrong test for dependency under the 2015 Regulations.

**68.** It is not disputed in this appeal that the trial judge properly rejected the argument that the first and second applicants were entitled to rely on Reg. 3(5)(b) of the 2015 Regulations in support of the proposition that as qualified family members the issue of their dependency fell to be considered by reference to their position in the State at the time of their applications for residence cards and not the position in the UK prior to their arrival in the State. As correctly found by the trial judge, that is not the law. Whether pursuant to the 2006 Regulations or the 2015 Regulations, dependency is required to be tested by reference to an applicant's living conditions in their State of origin or the place from whence they travel to this State. As said by the CJEU in Case C-1/05 *Jia* (cited by the trial judge at para. 55 of his judgment), when assessing the dependency of relatives in the ascending line of an EU citizen, "*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*". (emphasis added)

**69.** I return now to the applicants' contention that ground 5A encapsulates their complaint that the Minister considered their applications pursuant to the 2015 Regulations when they fell to be considered under the 2006 Regulations. Having regard to the import of ground 5A of the statement of grounds, and the arguments as advanced in the court below, I cannot accept the argument now made by the applicants' counsel that ground 5A is a sufficient hook on which to hang the appeal ground now sought to be advanced, namely that the trial judge erred in concluding that each review was conducted under the 2006 Regulations. Having invoked the 2015 Regulation in a very specific context in ground 5A, it is not now open to the applicants to raise ground 5A in order to further their argument that the trial judge erred in finding that the review decisions were conducted in accordance with the 2006 Regulations. However, I am of the view that there is nonetheless an alternative permissible basis upon which they may advance their argument.

**70.** Albeit that a challenge to the relevant review decisions on the basis that the Minister erroneously applied the 2015 Regulations instead of the 2006 Regulations was not advanced in the court below, as referred to above, in rejecting the first and second applicants' erroneous reliance on and interpretation of the 2015 Regulations, the trial judge expressly found that the review decisions were conducted pursuant to the 2006 Regulations, as required by Reg. 31(28) of the 2015 Regulations (a finding also made in respect of the third to fifth applicants).

**71.** In my judgment, the fact that the trial judge made a specific finding that the review decisions were conducted under the 2006 Regulations constitutes a sufficient basis for the applicants to raise the matter on appeal and argue that the trial judge erred in so finding.



**72.** Undoubtedly, the trial judge's finding that the review decisions were conducted under the 2006 Regulations was arrived at in the face of specific references having been made to certain provisions 2015 Regulations in both the review decisions and the documentation underlying those decisions as exhibited by Ms. Murphy. The question which arises is whether the trial judge was correct to find that notwithstanding the various reference in the review decisions to the 2015 Regulations, the reviews were nevertheless conducted pursuant to the 2006 Regulations.

**73.** At this juncture, I should say that I do not accept the applicants' submission that what is contained in paras. 8 and 9 of the statement of opposition is evidence that the Minister has conceded that the review decisions were conducted in accordance with the 2015 Regulations. It is expressly pleaded at para. 6 of the statement of opposition that the applicants applied for a residence card based upon a relationship with the EU citizen and/or her spouse within the meaning of the 2006 Regulations, as was in fact the case, as their applications show. At para. 7, it is pleaded that the reviews of the original refusals were carried out in accordance with the transitional provisions of the 2015 Regulations (as was required to be the case) and indeed as said to have been done on the face of each of the review decisions.

**74.** Overall, I am satisfied that on the basis of the documentation that was before him, it was open to the trial judge to conclude that the review decisions were conducted by the Minister under the 2006 Regulations. I so find notwithstanding the various references to the 2015 Regulations in the relevant documentation. As noted by the trial judge, each of the five review decisions makes specific reference to the fact that the original refusal decisions were reviewed in accordance with the 2006 Regulations "in line with the transitional provisions in Reg. 31 of [the 2015 Regulations]". Moreover, the Review Officer Decisions in respect of the first and second applicants specifically refer to "Reg.

2(1) of the Regulations”. While the exact Regulations are not specified as to year, it is clear from what follows in the Review Officer Decision (namely the reference to the first and second applicants being direct relatives of the spouse of the EU citizen) that the reference to “Reg. 2(1) of the Regulations” is to the 2006 Regulations. I also take the view that the references to Reg. 2 in the review decisions pertaining to the third to fifth applicants can be reasonably construed as a reference to the 2006 Regulations.

**75.** In light of this, in my view, neither the references to Reg. 3(5)/Reg. 3(6) of the 2015 Regulations in the review decisions, nor the fact that the Recommendation Submissions and Officer Review Decisions are prefaced by the statement that each “Request for a Review” was “to be considered under Regulation 25 of the [2015 Regulations]...” are, *of themselves*, sufficient to vitiate the Minister’s decisions.

**76.** I find no particular merit in the applicants’ reliance, in their written submissions, on *Wu v. Minister for Justice* [2002] IEHC 163 and *Ejerenwa v. Governor of Cloverhill Prison* [2011] IESC 41 as a basis to impugn the review decisions. Those cases concern orders, which is something quite different from the letters which issued to the applicants the purpose of which was to inform them of a decision on an application. The strict requirement for a deportation order (at issue in *Wu*) or detention order (at issue in *Ejerenwa*) to be correct on the face of the record has no particular application to the decision letters at issue in the within proceedings.

**77.** Furthermore, the applications of the first and second applicants were not refused arising from any point of difference between the 2006 and 2015 Regulations. Qualification as a family member under the 2006 or the 2015 Regulations derive from the Citizens Directive. The proofs required under both Regulations are identical as regards qualified family members, and the requirement on the first and second applicants to evidence claims of dependency arises equally under both sets of Regulations. The relevant test was the

same in material respects under both Regulations. While there are points of difference between the 2006 Regulations and the 2015 Regulations as far as permitted family members are concerned, the relevant points of difference between the two sets of Regulations did not feature in the Minister's considerations in respect of the third to fifth applicants, as will be later explained.

**78.** In any event, as far as the issue of the applicants' asserted dependency on the EU citizen and/or her spouse is concerned, whether as qualified family members or permitted family members, as the case may be, the essential question in this appeal is whether it is evident from the review decisions that the applicable criteria for assessing their asserted dependency were applied to the applicants' circumstances. This is the subject of consideration at issues (ii) and (iii) below. As will be seen at issue (ii), there is also the question of whether the first and second applicants are entitled to pursue on appeal the complaint that the correct test for assessing dependency was not applied to them.

*(ii) Did the High Court judge err in concluding that the Minister had applied the correct legal test when assessing the dependency claims of the first and second applicants?*

**79.** In the review decisions in respect of the first and second applicants, their claimed dependency on the EU citizen was rejected on the basis that the Minister determined that they did not meet the criteria in respect of a qualifying family member. In each case, the Minister was not satisfied that they had submitted satisfactory evidence in respect of their stated dependence on the EU citizen. In the respective Recommendation Submissions and Review Officer Decisions as exhibited in Ms. Murphy's affidavit, it was accepted, however, that the documentation which the first and second applicants had submitted disclosed a degree of dependency on their son and his spouse the EU citizen. However, it

was not accepted that the degree of dependence was such that without the support “living, at subsistence level would be impossible” for the first and second applicants.

**80.** Counsel for the applicants submits that the trial judge erred in upholding the review decisions in respect of the first and second applicants’ circumstances where the Minister, in the underlying Review Officer Decisions, clearly applied the wrong legal test when assessing their dependency. He points to the fact that the “subsistence” test as relied on by the Minister to reject the first and second applicants’ claims is not the correct test.

**81.** The term “dependent” is not defined in the Citizens Directive, nor in the 2006 Regulations. The 2015 Regulations do contain certain indices on the matters to which regard has to be had in making an assessment of dependency in relation to “permitted family members”. As already set out, these were not the operative Regulations for present purposes.

**82.** In Case C-1/05, *Jia*, which concerned Directive 73/148/EEC, the predecessor to the Citizens Directive, the CJEU gave the following guidance on what may constitute dependency:

*“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...”*

*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.*

...

*43. ... 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."*

**83.** In *Reyes* (Case C-423/12), which concerned the Citizens Directive and related to an adult child seeking residence in Sweden the CJEU observed:

*"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...*

*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.”*

**84.** The issue of dependence was considered by this Court in *V.K. and Khan v. Minister for Justice and Equality* [2019] IECA 232. In the course of her analysis, Baker J. quoted *Secretary of State for the Home Department v. Rahman* (Case C-83/11), ECLI: EU: C:2012: 519, where Advocate General Bot opined that the test for dependency is to be regarded as the same whether as a “family member” under Art. 2(2) of the Citizens Directive or “other family member” under Art. 3(2)(a), an approach adopted by Baker J. in *V.K. and Khan*, and which I also gratefully adopt.

**85.** Following her careful analysis of the relevant jurisprudence of the CJEU, Baker J. addressed the issue of dependence in the following terms:

*“79. ...the approach of the CJEU has been to construe the concept of dependence broadly, not to make it excessively difficult for an applicant to satisfy the test, and to involve interrogation of the facts of rather than the reasons for the dependence.*

...

*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.*

...

*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, an applicant does not have to establish that without that 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.”*

**86.** Baker J. did not accept that *“it is necessarily the case that a test stated in the negative that requires an applicant to show that it was impossible to live without support from a Union citizen family member is the same as a more positively expressed test which*

*asks whether a person needs support to meet their essential needs. The test stated in the negative imposes a burden which is more onerous than that justified in the light of the authorities of the CJEU... ”*

**87.** It should be noted that in *V.K and Khan*, Baker J. upheld, *inter alia*, the decision of MacEochaidh J. in *Kuhn v. Minister for Justice and Equality* [2013] IEHC 424, the authority upon which the appellants relied on in the High Court as to how dependence should be assessed.

**88.** Counsel for the applicants submits that in circumstances where the documentation available to the High Court in the instant case made it clear that the Minister applied the wrong test when assessing the applications made by the first and second applicants, the trial judge erred in refusing to quash the resulting decisions on this basis, particularly having regard to the fact that, as the Review Officer Decisions demonstrate, the Minister had accepted that the documentation submitted revealed some degree of dependence by the first and second applicants on the EU citizen.

**89.** As highlighted by the Minister to this Court, the first and second applicants did not assert in the High Court that the Minister applied the wrong test of dependency in the sense considered in *V.K. and Khan*. As already referred to, the issue actually pleaded in ground 5A, and advanced in the High Court, was that the Minister erred in assessing the first and second applicants' claimed dependence on the EU citizen by reference to their time in the UK when the first and second applicants maintained that applicable test was one of dependence in this State. Counsel for the Minister contends that for the first time, for the purposes of this appeal, the applicants now seek to argue that the Minister applied, in the case of the first and second applicants, the wrong test insofar as the nature of the required dependency is concerned. The Minister's position is that it is not open to the first and second applicants on appeal to raise a matter not canvassed in the court below.



**90.** The first and second applicants reject the argument that they did not plead that the wrong test for dependency was applied by the Minister. They point to ground 5A of the statement of grounds in support of their argument in this regard. They also contend that merely because they had asserted in their applications to the Minister that they were “financially wholly and solely dependent” on the EU citizen, that was not sufficient for the Minister to argue that she is entitled to interpret the dependency provisions of the Citizens Directive and the 2006 Regulations in accordance with statements used by the applicants to describe their circumstances. The Minister’s obligation was to assess the claims in accordance with established case law. For all of those reasons, the applicants contend that the decisions in relation to the first and second applicants’ dependency on the EU citizen cannot stand.

**91.** It is further submitted that even if this Court were to find that it was not pleaded that the wrong test for dependency was applied to their circumstances and that the applicants had failed to amend their pleadings after having sight of the documentation exhibited by Ms. Murphy, it was nevertheless not open to the trial judge to find that the correct test for dependency had been applied by the Minister in circumstances where the documents before the trial judge clearly and unambiguously demonstrated that the wrong test had been applied when assessing the first and second applicants’ asserted dependency on the spouse of the EU citizen.

**92.** Firstly, insofar as the first and second applicants rely on ground 5A of the statement of grounds as encompassing a challenge to the review decisions on the basis that the Minister applied a “subsistence” based test for dependency in assessing their claims, I reject that submission. I have earlier expressed a view as to the parameters of ground 5A. I cannot accept that ground 5A as formulated is sufficient to challenge the Minister’s

decision on the basis that the wrong test for dependency (in the sense considered in *VK and Khan*) was used in the review decisions.

**93.** As already outlined, insofar as the issue of dependency was expressly canvassed before the trial judge *vis a vis* the first and second applicants, it related to the (erroneous) case being made on their behalf that their dependency on the EU citizen, arising as it did under the qualified family members rubric, ought therefore to have been considered by the Minister by reference to their circumstances in this State and not their circumstances when resident in the UK with the EU citizen and her spouse. That is the thrust of ground 5A of the statement of grounds and that is what is addressed by the trial judge at paras. 52-55 of his judgment.

**94.** The trial judge's reference to *Jia*, at para. 55 of his judgment, was to underscore his rejection of the case advanced on behalf of the first and second applicants, both in ground 5A and at the trial, that they were entitled, based on their having (erroneously) invoked the 2015 Regulations, to argue (again erroneously) that their dependency on the EU citizen required to be assessed in this State at the time the residence card applications were made, as opposed to the State from whence they came.

**95.** There was no argument in the court below that the Minister's decisions in respect of the first and second applicants should be impugned on the basis that she wrongly applied a "subsistence" test when assessing their dependency. My observation in this regard is brought into further relief by the fact that both in the statement of grounds (ground 5C) and argument in the court below, the applicants were clearly seeking to impugn the third to fifth applicants' review decisions on the basis that the Minister assessed their claimed dependency by reference to a test of "sole" dependency and relied on the decision of MacEochaidh J. in *Kuhn* in support of their argument as the test that ought to have been applied, as indeed the High Court judgment records.

**96.** All of that being said, it is, however, the case, as clearly evident from the Recommendation Submissions and the Review Officer Decisions, that the review decisions which upheld the decisions to refuse residence cards to the first and second applicants were premised on the erroneous basis that they were required to show that without support from the EU citizen “living, at subsistence level would be impossible for them”, which is not the test under EU law as clear from *Jia* and the decision of this Court in *V.K. and Khan*.

**97.** Notwithstanding the frailty in the applicants’ pleading and the lack of argument in the court below, as far as the first and second applicants are concerned, on the issue of whether the correct test was applied by the Minister when assessing the extent and nature of their dependency I am nevertheless satisfied that the first and second applicants are entitled to raise this issue in the appeal and contend that the trial judge erred in upholding their review decisions in the face of a wrong legal test clearly having been applied by the Minister when assessing their claimed dependence on the EU citizen and her spouse. I do not consider that in seeking to advance this ground of appeal, the applicants have trespassed beyond the parameters of the test laid down by O’Donnell J. in *Lough Swilly Shell fish Growers Co-op Society Limited v. Bradley* [2013] 1 I.R 227 by advancing an argument that is “*diametrically opposed to that which had been advanced in the High Court*”. My reasons for so finding are as follows.

**98.** Firstly, the *factual* basis for the argument is addressed in the statement of grounds. Ground 5B pleads that the reasoning for the refusal of residence cards, in the case of the first and second applicants, was confined to the following: “[t]he Minister is not satisfied that you have submitted satisfactory evidence in respect of your dependence on the EU citizen...”. Thus, the decision on dependency was put in issue.

**99.** Secondly, in this appeal, there is no dispute between the parties as to what constitutes the correct legal test for assessing dependency.

**100.** Thirdly, albeit the Minister's appeal notice asserts that she is prejudiced by the first and second applicants raising this appeal ground, I am not persuaded that the Minister has been placed at any disadvantage. Indeed, in her submissions, counsel for the Minister posits that the correct test was applied by the Minister to the first and second applicants' asserted dependence on the EU citizen's spouse.

**101.** Fourthly, any suggestion of prejudice to the Minister is abated by the fact that the correct test for establishing dependence was squarely put in issue in the High Court (and in this Court) by the third to fifth applicants.

**102.** Fifthly, regard must be had to what the trial judge addressed when considering ground 5B. The trial judge saw fit to conclude, notwithstanding that the reasons provided by the Minister in the review decisions were "entirely inadequate", that those decisions could be upheld because, *inter alia*, reasons to sustain the decisions could be derived from the documentation (i.e. the Recommendation Submissions and the Review Officer Decisions) underlying the review decisions.

**103.** Both the Recommendation Submissions and the Review Officer Decisions in respect of the first and second applicants clearly document that their claimed dependency was assessed by the Minister by reference to whether they could establish that without support from the EU citizen and her spouse, "living, at subsistence level would be impossible", which as I have said, is not the test under EU law.

**104.** In my view, in circumstances where the trial judge, having deemed the reasons given by the Minister "entirely inadequate", was nevertheless satisfied to uphold the review decisions on the basis of what was contained in other documents, it was incumbent upon him to stress-test the content of those documents so as to ensure that the reasons for the refusal said to be contained in those documents were arrived at in accordance with EU law. In the instant cases, the relevant legal principles were those set out in *Jia* and *Kuhn*, of

which the trial judge was aware as both *Jia* and *Kuhn* are referenced by him at para. 58 of his judgment.

**105.** However, the trial judge failed to assess the Review Officer Decisions pertaining to first and second applicants by reference to the test for dependence as set out in *Jia* and *Kuhn*. Had he done so, he could only have concluded that their claim for dependency had been assessed by reference to entirely erroneous criteria and that, in the words of Baker J. in *V.K. and Khan*, “*the language of the Minister departed in its emphasis tone and possible import from that in the case law*” such that he could not be confident that the Review Office Decisions were a lawful substitute for the inadequacies of the review decisions.

**106.** While it could be said, as argued by the Minister, that the applicants could have applied to amend their pleadings after they were provided with the materials exhibited in Ms. Murphy’s affidavit, I do not consider that their failure to do so should debar them from arguing in this Court that the Minister applied the wrong test for dependency. In my view, the factors to which I refer at paras. 98-105 hereof present a compelling basis for permitting the applicants’ argument to be advanced.

**107.** Accordingly, for all of the foregoing reasons, I am satisfied that issue (ii) is one upon which the appellants are entitled to rely on and which the Court considered should be addressed. For the reasons already set out, I would uphold the appeal on this ground.

***(iii) Did the trial judge err in concluding that the Minister had applied the correct legal test for dependence in respect of the decisions which issued to the third, fourth and fifth applicants?***

**108.** It is common case that in like manner to the first and second applicants, the third, fourth and fifth applicants asserted in their applications to the Minister that they were “financially wholly and solely dependent” on the EU citizen and her spouse both in the UK and Ireland. As noted by the trial judge at para. 78 of his judgment, a claimed dependency

on a spouse of an EU citizen was not open to the third, fourth and fifth applicants to rely upon. Dependency in the State (as distinct from the UK, being the country from whence they had come) was also irrelevant, as is clear from *Jia*.

**109.** As the relevant review decisions reflect, in the case of the each of the third, fourth and fifth applicants the Minister was not satisfied that these applicants had submitted satisfactory evidence of their “stated sole dependence on the EU citizen...”.

**110.** In ground 5C of the statement of grounds, the third to fifth applicants plead that the Minister erred in requiring them to establish “sole” dependency on the EU citizen in order to be considered a permitted family member. This was described as a “fundamental” error of law.

**111.** As can be seen from the High Court judgment (para. 58), this ground of challenge was squarely advanced in the High Court on behalf of the third to fifth applicants and reliance was placed by the applicants on the decision of MacEochaidh J. in *Kuhn* as to the test which ought to have been applied when assessing the nature of their dependence on the EU citizen.

**112.** At para. 59 of his judgment, the trial judge addressed the third to fifth applicants’ complaint concerning the requirement that they establish their “sole” dependency on the EU citizen by observing that it was the relevant applicant in each case who had asserted his sole dependency on the EU citizen. Accordingly, he did not accept that the fact that just because the Minister had addressed each application in like terms, she was applying the wrong test. Other than finding as he did, the trial judge did not comment further on the reliance being placed by the third to fifth applicants on *Kuhn*, or their assertion that the review decisions patently demonstrated that the wrong test had been applied by the Minister.

**113.** Before this Court, the applicants submit that the trial judge erred in law and in fact in concluding that the Minister had not erred in law in failing to set out the appropriate test for dependency when examining the claims made by the third, fourth and fifth applicants.

**114.** In the respondent's appeal notice the Minister asserts that the applicants were not granted leave to challenge the failure to set out the test for dependency. I reject that assertion. At ground 5C of the statement of grounds, it is expressly pleaded that the Minister appeared to err in law in applying a test of sole dependency in respect of the third to fifth applicants and that the correct legal test is whether and applicants' essential needs could be met without the financial support of the sponsor EU citizen.

**115.** Insofar as the Minister makes the case that the formulation of her respective findings was in response to the third to fifth applicants' assertion that they were "financially wholly and solely sole dependent" on the EU citizen, I find that the Minister was not absolved from the obligation to apply the law correctly simply because of the words used in descriptive submissions made by the applicants. As set out in *V.K. and Khan*, what was required to be considered by the Minister was whether there was a real need by the third to fifth applicants for financial support from the EU citizen in order to meet their material needs. This test was clearly not applied to the third, fourth and fifth applicants, as the review decisions demonstrate. Based on these decisions, the third, fourth and fifth applicants have every reason to be apprehensive that the wrong test was applied. I am satisfied that the trial judge erred, both in failing to adequately address ground 5C, and in failing to quash the review decisions on the basis that the wrong legal test for dependency was applied to these applicants. Accordingly, I would allow this ground of appeal.

***(iv) Did the trial judge err in concluding that the applications for a residence card made by the third to fifth applicants turned on whether they could satisfy the Minister that their situation of dependence on the EU Citizen was genuine?***

**116.** It would appear to be the case that the failure of the trial judge to adequately consider ground 5C of the statement of grounds stemmed from certain findings made by him at paras. 60 and 61 of his judgment. In addressing the complaint that the Minister applied the wrong legal test in assessing the claimed dependency of the third to fifth applicants on the EU citizen, the trial judge opined, at para. 60, that the respective applications for residence cards “turned on whether the applicants could satisfy the Minister that the situation of dependence on the Union citizen claimed by each was genuine and had not been brought about with the sole objective of obtaining entry into and residence in the State”. He further opined that “[n]one of the applications turned on whether the financial support that the applicants claimed to be in receipt of from the Union citizen was or was not necessary to enable each to maintain the essentials of life”. At para. 61, he went on to find that “[n]o such assessment would have been possible, since none of the applicants provided anything equivalent to a statement of personal means, relying instead on accommodation provided, and payments made, to each by the Union citizen as the basis for inviting the inference that each is, and was, dependent on her.”

**117.** The 2006 Regulations do not specify that an application made by a permitted family member may be refused on the basis that dependency on or membership of the household of the EU citizen was brought about with the sole objective of obtaining entry and residence in the State.

**118.** This is, however, specifically provided for in the 2015 Regulations. In effect, the 2015 Regulations adopt a bifurcated system for the grant of a residence card to a permitted family member. Thus, even if the criteria for dependency and/or membership of the EU citizen’s household are met by a permitted family member, Reg. 5(3) of the 2015 Regulations provide that even where the Minister is satisfied that a person is a permitted family member, the Minister shall carry out an extensive examination of the personal



circumstances of the applicant in order to decide whether the applicant should be treated as a permitted family member for the purposes of the Regulations. Reg. 5(5) provides that when deciding if an applicant should be treated as a permitted family member the Minister shall have regard to the factors set out at Reg. 5(5)(a)-(f). Reg. 5(5)(e) provides that in deciding whether an applicant should be treated as a permitted family member, the Minister must have regard to whether the applicant's relationship with the EU citizen "was brought about with the objective of obtaining permission to remain in the State or a Member State".

**119.** The applicants submit that notwithstanding that he had earlier concluded that the 2006 Regulations had been applied by the Minister, the trial judge himself improperly invoked Reg. 5(5)(e) of the 2015 Regulations to call into question the genuineness of the third to fifth applicants' applications for residence cards. Counsel submits that the trial judge erred in law and in fact in upholding the Minister's decisions in respect of the third, fourth and fifth applicants on the basis that the dependency assessments conducted by the Minister turned on whether they "could satisfy the Minister that the situation of dependence on the Union citizen claimed by each was genuine and had not been brought about with the sole objective of obtaining entry into and residence in the State".

**120.** It is submitted that the trial judge cannot, on the one hand, make a finding that the applications for the residence cards had been made under the 2006 Regulations and then, on the other hand, invoke the 2015 Regulations to arrive at a conclusion in respect of a matter which the 2006 Regulations did not provide for and which, more particularly, had not been raised by the Minister in the course of her assessment of the applications, or indeed raised in the statement of opposition.

**121.** In her appeal submissions, the Minister asserts that the applicants' complaint ignores the fact that the requirement for the dependence to be genuine is a long-standing

consideration under the jurisprudence of the CJEU. As said by the CJEU in Case C-423/12, *Reyes* “... *dependency must be genuine and not contrived*”.

**122.** In light of the CJEU’s jurisprudence, the Minister contends that the trial judge’s observations cannot be read as an invocation of Reg. 5(5)(e) of the 2015 Regulations. It is further contended that the trial judge did not determine that the claims of dependency on the part of the third, fourth and fifth applicants were contrived or had been brought about for the sole objective of obtaining residence in Ireland: rather what the trial judge did was cite EU law, correctly identifying what the Minister was required to consider. According to the Minister, the evidence adduced by the third to fifth applicants did not establish dependency, a finding the trial judge upheld, particularly in light of the absence of evidence of need on their part.

**123.** The first question which arises is whether it can be gleaned from para. 60 of the judgment that the trial judge was actually invoking Reg. 5(5)(e) of the 2015 Regulations in stating that the applications of the third to fifth applicants for residence cards turned on whether they could satisfy the Minister that their claimed dependence on the EU citizen was genuine and had not been brought about to gain entry into and residence in the State. In the absence of any reference by the trial judge to Reg. 5(5)(e), and in light of his earlier finding that the review applications fell to be considered under the 2006 Regulations, I am not persuaded that the trial judge, in commenting as he did, was specifically referring to Reg. 5(5)(e) of the 2015 Regulations. As noted by counsel for the Minister, there is CJEU jurisprudence that a host Member State is entitled to be satisfied that an application is genuine, which predates the 2015 Regulations.

**124.** In any event, the salient issue here is not whether the trial judge was specifically invoking Reg. 5(5)(e). The central thrust of the applicants’ submission is that the exercise engaged in by the trial judge i.e. his observations about the genuineness of the applications

was more akin to a finding made on appeal *de novo* from the Minister's decisions as opposed to a finding made in the course of his function on judicial review.

**125.** I agree with this submission. There was no established factual basis for the finding that in reviewing the applications, the Minister's concern was whether the third to fifth applicants' claims of dependency on the EU citizen had been brought about with the sole objective of obtaining entry into and residence in the State. Neither the review decisions nor the documents exhibited in Ms. Murphy's affidavit purport to assess whether the dependency and/or membership of the household of the EU citizen claimed by the third, fourth and fifth applicants was brought about with this objective in mind. In essence, this was not an enquiry on which the Minister engaged in any shape or form when assessing the applications for residence cards. In point of fact, the review decisions in issue reveal that the considerations related only to whether the third to fifth applicants' claims met the test for dependence on the EU citizen (an entirely flawed consideration for the reasons I have already set out) or that for membership of her household, not whether the claims were genuine.

**126.** In those circumstances, the trial judge's effective characterisation of the Minister's rejection of third to fifth applicants' dependency claims as having been premised on her not being satisfied her that their claims were genuine and had been brought about with the objective of gaining entry into and residence in the State has no basis in fact. The trial judge would appear to have assumed the role of substantive decision-maker for the purpose of assessing first-hand the third to fifth applicants' applications for a residence card, a role that was solely reserved to the Minister.

**127.** Insofar as the Minister's appeal notice pleads that the trial judge, in opining as he did, was entitled to and did consider "the context he saw arising from the evidence adduced and the applications made", I cannot agree with that submission. The function of the trial

judge was one of judicial review and not an appeal. His function was limited to assessing the legality of the *Minister's* decisions, not to provide alternative reasons for those decisions, which is, effectively, what the trial judge did in the instant case.

**128.** I accept the submission of counsel for the applicants that the finding made by the trial judge was highly prejudicial in circumstances where the decision-maker herself had not found that a situation of dependency was brought about for the sole purpose of coming to Ireland. Nor was such a contention pleaded by the Minister in the judicial review proceedings.

**129.** In my view, there are clear grounds to conclude that the trial judge's obligation in the judicial review to assess the lawfulness of the Minister's decision was obscured by his concentration on the genuineness or otherwise of the third to fifth applicants' asserted dependency on the EU citizen, a function that, as I have said, if it were to arise, was for the Minister and not the trial judge. Accordingly, this ground of appeal is upheld.

*(v) Did the trial judge err in concluding that while the reasons provided in the review decisions would ordinarily be entirely inadequate, the real reasons were capable of being inferred having regard to the purported "highly unusual circumstances" in which the applications were made, such that no illegality arose?*

**130.** Despite having concluded, at para. 79 of his judgment, that the Minister's reasons for refusing the applicants residence cards were "entirely inadequate", the trial judge did not quash the review decisions. Rather, he found that "those reasons were obvious or were capable of being inferred from the terms of those decisions and their context" and that "on the particular and, quite possibly, unique facts of this case" "those reasons were capable of being inferred by the applicants from the highly unusual circumstances in which their applications were made".

**131.** At para. 85 he opined that on the basis of “the very particular factual context in which the review decisions were given” and the “more extensive reasons” that were contained in the Recommendation Submissions and Review Officer Decisions which were exhibited in Ms. Murphy’s affidavit and which had been provided to the applicants. “there was not any breach of the obligation to provide reasons capable of vitiating the review decisions”.

**132.** I will firstly address to the trial judge’s finding that the review decisions could be upheld because of the more extensive reasons contained in the documentation exhibited by Ms. Murphy, a matter I have already addressed to some extent under issue (ii).

**133.** It will be recalled that the review decisions in respect of the first and second applicants record that the Minister “was not satisfied that [they] have submitted satisfactory evidence in respect of [their] stated dependence on the EU citizen...”, a reason considered by the trial judge to be “entirely inadequate”. As has been seen, in the respective Recommendation Submissions and the Review Officer Decisions it was accepted that the evidence showed a degree of dependence by the fact the first and second applicants on the EU citizen and her spouse but ultimately it was concluded that “the evidence [was] insufficient to show that the degree of dependence of the applicant and the other family members was such that without such support living, at subsistence level would be impossible for the applicant”.

**134.** It is indisputably the case that the “subsistence” test as clearly applied by the Minister was not the correct test. I have already concluded that the proper test was known to the judge and indeed quoted by him on more than one occasion. In circumstances where the Review Officer Decisions pertaining to the first and second applicants blatantly demonstrate that the Minister applied the wrong test for dependency, the reasons therein contained could not therefore be reasonably considered by the trial judge to make up for

the “entirely inadequate” reasoning he found in the review decisions. Accordingly, the trial judge was in error in concluding that the information contained in the Review Officer Decisions cured the deficit in the review decisions, and in finding that the obligation on the Minister to give reasons was met in respect of the first and second applicants.

**135.** It will be recalled that the review decisions that issued to the third to fifth applicants advised, *inter alia*, that “the Minister is not satisfied that [they] have submitted evidence in respect of [their] sole dependence on the EU citizen...”, again, as I have already found, a test not in accordance with EU law.

**136.** To my mind, there is nothing in these Review Officer Decisions from which it could reasonably be concluded that the third to fifth applicants’ claims of being dependent on the EU citizen were assessed by the Minister in accordance with the principles enunciated in *Jia* and *Kuhn*, and which might possibly excuse the fact that the actual review decisions which issued to these applicants between 17 and 21 March 2017 clearly contain the wrong test for establishing their dependence on the EU citizen. In circumstances where nothing in the documentation exhibited by Ms Murphy suggests that the factual matrices which the third to fifth applicants presented to the Minister was addressed by reference to the correct (or indeed any legal test) for dependence, there is no reasonable basis upon which the trial could conclude, as he did, that the material exhibited in Ms. Murphy’s affidavit assisted the third to fifth applicants in deducing why their claims of dependence on the EU citizen were unsuccessful, such that there was no breach by the Minister of her obligation to give reasons.

**137.** I turn now to the trial judge’s finding that the review decisions could be upheld because reasons could be derived from “the unique facts of the case”, that the reasons were “obvious or were capable of being inferred from the terms of those decisions and their

context” and were capable of being inferred from “the highly unusual circumstances in which [the] applications were made”.

**138.** The trial judge’s findings in this regard appear to follow on from his analysis of the evidence which the applicants had put before the Minister and the other evidence as was before the High Court (but not the Minister), and his application of certain legal principles to the review decisions.

**139.** In summary, the legal principles to which the trial judge referred were as follows:

- (i) Applications for residence cards “turned on the question of whether the applicants could establish ‘dependence’ for the purposes of Art. 2(2)(d) or of Art. 3(2)(a), as the case may be, of the Citizen’s Directive”;
- (ii) Dependent status is the result of a “factual situation”;
- (iii) In order to determine the existence of such status, the host Member State must assess, whether having regard to the person’s financial and social conditions, he or she is not in a position to support himself;
- (iv) The claimed dependency must be “genuine and not contrived” and not brought about with the sole objective of gaining entry into and residence in the territory of a Member State.

**140.** At para. 77 of his judgment, the trial judge found the applicants’ case “at the furthest end of the spectrum of the factual circumstances that may be asserted to constitute ‘dependence’”. He noted that the first applicant was at all material times a homeowner in the UK and a qualified solicitor there, with a current practicing certificate at all material times, yet claiming to be dependent on the EU citizen, his daughter in law, who had been a student prior to her marriage and who was in receipt of a modest income as an administrative assistant in a solicitor’s practice to which, putting it neutrally, the first applicant was closely connected. The trial judge noted that, likewise, the second applicant

(a qualified homeopathic doctor) and the third to fifth applicants were claiming to have become dependent on the 21 year old EU citizen in the year between her marriage in September 2013 and the arrival of the extended family grouping in Ireland in December 2014 “without explaining, much less evidencing, how that dependency had come about”. At para. 78, the trial judge rejected the applicants’ claim of having submitted very comprehensive and voluminous evidence of their dependence to the Minister, stating that beyond having asserted as much they had not attempted to describe or summarise that evidence. He found that “there was a signal failure by each of the applicants to provide anything equivalent to a statement of means”. Instead he found that the applicants had “simply relied on evidence of accommodation and payments ostensibly provided to them by the Union citizen, that might demonstrate genuine dependence but might just as easily be a contrivance to falsely suggest it.”

**141.** These were not observations made or conclusions reached by the Minister.

**142.** The trial judge considered that there was:

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

**143.** While I have no difficulty with the principles (as summarised above) against which the trial judge purported to assess the review decisions-they are derived from EU legislation and case law- the frailty in the trial judge’s approach stems from the fact that



the analysis of the applicants' respective factual matrices in the context of the applicable principles of EU law fell in the first instance to be conducted by the Minister, not the trial judge. Neither the review decisions nor the documentation underlying those decisions reveal that the conclusions reached by the trial judge were arrived at by the Minister, who is the person charged under the relevant legislation with the necessary fact-finding function envisaged by the Citizens Directive and the 2006 Regulations. In the absence of any evidence that the Minister had reached the type of conclusions set out at paras. 77-78 of the High Court judgment, the trial judge was not at large to engage with the applicants' asserted factual matrices and make findings not arrived at by the Minister in an attempt to explain the rationale for the Minister's refusal of residence cards. The trial judge had no function in seeking to uphold the Minister's review decisions on a basis that was not contemplated or considered by the Minister. His function was to decide on the actual decision rendered by the Minister in each case. It was not open to the trial judge to deduce reasons for refusal that were not only wholly different to those proffered by the Minister, but which were also not capable of being gleaned from any considerations undertaken by the Minister either in the review decisions or the documentation exhibited by Ms. Murphy.

**144.** More fundamentally, albeit the trial judge at para. 76 of his judgment, on more than one occasion, opines that "those reasons" (for the refusal of residence cards) were "obvious or were capable of being inferred from the terms of [the] decisions and their context", nowhere does he explain what in fact "those reasons" were.

**145.** Furthermore, nowhere in the judgment is it explained what the "context" was from which the reasons for the refusal of residence cards could be inferred. Nor is it anywhere explained by the trial judge what the "highly unusual circumstances" were from which the reasons for refusal could be inferred. Neither the contents of the review decisions nor the

underlying documentation suggests to the reader that the Minister had formed the view that the applications were “highly unusual” such that they should be refused.

**146.** It seems to me that the trial judge’s assessment of the lawfulness of the review decisions was coloured by a view that he appears to have taken as to the genuineness of the applicants’ asserted dependence on the EU citizen and the observations he made in respect of the documentation exhibited by Mr. Nicholson in his affidavit. However, as I have said, neither of those matters were the subject of the Minister’s review decisions or the other materials underlying those decisions. It would appear that the trial judge’s own views led him to make undue allowances for the legal frailties evident in the review decisions and the underlying materials.

**147.** For the reasons set out above, I am satisfied that the trial judge’s finding that there was no breach of the Minister’s obligation to provide reasons cannot be upheld.

*(vi) Did the trial judge err in failing to quash the decisions in circumstances where the Minister gave no reasons for concluding that the applicants had not established that they were members of the EU citizen’s household?*

**148.** In accordance with Article 3(2) of the Citizens Directive and Regulation 2(1) of the 2006 Regulations, had the third to fifth applicants established that they were members of the EU citizen’s household in the UK then they would have qualified as her “permitted family members”. In the review decisions, the Minister determined that none of these applicants established that they were members of the EU citizen’s household prior to their arrival in the State. At Ground 5B of the statement of grounds, the applicants plead, *inter alia*, that the Minister failed to give adequate reasons as could enable them to establish whether she acted reasonably in finding that the evidence submitted was not sufficient to establish membership of the EU citizen’s household.

**149.** In this appeal, the applicants say that they were entitled to be notified of the reasons for the Minister's decision to refuse to accept that they were members of the EU citizen's household. They assert that the trial judge failed to address their challenge in this regard, which they say amounts to an error of law on his part.

**150.** In her oral submissions, counsel for the Minister agreed that the High Court judge did not address the applicants' complaint. It is submitted, however, in circumstances where the first applicant was a homeowner in the UK who permitted the EU citizen to live with him following her marriage to his son, that the Minister correctly found that the third and fourth applicants as sons of the first and second applicants came under their parents' household, and in finding that there was no evidence that these applicants, or the fifth applicant, had transferred from the first applicant's household to the EU citizen's household following her marriage. Counsel also points to the paucity of evidence in respect of the membership of either household (especially that of the EU citizen) of the fifth applicant. It is further contended that it was never demonstrated on the part of any of these applicants that their absence from the EU citizen's household in any way impeded her in the exercise of her EU rights in the State.

**151.** I do not propose to comment on the parties' submissions on the merits of this ground of appeal. This is because I am not satisfied that the applicants are entitled to pursue this ground. In my view, the most striking aspect of the applicants' complaint that the trial judge failed to address the Minister's refusal to find that the third to fifth applicants constituted members of the EU citizen's household is that there is no evidence or suggestion that the applicants actively pursued this complaint against the Minister in the court below. As is clear from the High Court judgment, the entire thrust of the submissions advanced on behalf of the third to fifth applicants was directed to establishing that the Minister erred in failing to find that they were dependent on the EU citizen. In

circumstances where the case is not being made to this Court that extensive submissions were made to the trial judge on the household membership issue which the trial judge failed to address, a complaint that the trial judge failed to address his mind to the relatively generic reference to “membership of the EU citizen’s household” in ground 5B is not a sufficient basis upon which to seek to impugn the High court judgment. Accordingly, I reject this ground of appeal.

***Alleged procedural unfairness on the part of the trial judge***

**152.** In their appeal submissions, the applicants take issue with the trial judge having relied on the documents exhibited by Ms. Murphy in concluding that there was no breach by the Minister of her obligation to provide reasons. They submit that these documents were only provided to them some eight months after the judicial review commenced.

**153.** I am satisfied, however, that there was no procedural frailty in the trial judge’s reliance on this material in circumstances where, following the provision of the material, the applicants were afforded the opportunity to amend their pleadings if they so wished. While, therefore, I have impugned the conclusions which the trial judge arrived at following his consideration of the material, he cannot be said to have caused the applicants unfairness by having actually considered that material.

**Summary**

**154.** The applicants have succeeded in the appeal to the extent set out in this judgment. It follows from the findings I have made that the Order of the High Court refusing the first, second, third and fifth applicants relief by way of *certiorari* must be set aside and their applications for residence cards remitted to the Minister for reconsideration. The Order refusing the applicants their costs is also hereby vacated.

**155.** As the applicants have succeeded in this appeal, it follows that they should be entitled to their costs. If, however, either party wishes to seek some different costs order to

that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, but any party seeking such a hearing will run the risk that if they are unsuccessful they may incur further costs. If no indication is received within the twenty-one-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

**156.** As this judgment is being delivered electronically, Collins J. and Binchy J. have indicated their agreement therewith and the orders I have proposed.