THE COURT OF APPEAL – UNAPPROVED

Record Number: 2020/113CA
Neutral Citation Number [2023] IECA 74

Faherty J.
Ní Raifeartaigh J.
Binchy J.

BETWEEN/

RAYMOND HOLLAND

APPLICANT/
APPELLANT

- AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 31st day of March 2023

1. This is an appeal from a judgment of the High Court (Barrett J.) in two separate but closely related proceedings bearing High Court record numbers 2018/1023JR (the "2018 Proceedings") and 2019/312JR. In the 2018 Proceedings, the appellant sought an order of mandamus compelling the respondent to determine the appellant's application for a review of a decision of the respondent of 30th March 2017 (the "First Decision"), whereby the respondent declined to issue a residence card to the appellant's stepdaughter, and also a declaration that the failure to determine the review application within a reasonable period of time was in breach of the appellant's right to an effective remedy and/or good administration as provided by EU law.

2. Before the 2018 Proceedings came on for hearing, the respondent, on 29th March 2019, issued a determination of the appellant's request for a review of the First Decision, whereby the respondent confirmed the First Decision and affirmed the refusal to issue a residence card to the appellant's stepdaughter. The appellant then sought leave to issue judicial review proceedings whereby he sought, *inter alia*, an order of certiorari quashing the decision of the respondent dated 29th March 2019 (the "Impugned Decision"), and leave to do so was granted by Humphreys J. in the High Court on 24th June 2019. Both proceedings came on for hearing before Barrett J. on 4th December 2019, who delivered a single judgment addressing both proceedings on 9th December 2019. This judgment is concerned with the challenge to the Impugned Decision (High Court record no. 2019/312JR) and a separate judgment is being delivered concurrently in the 2018 Proceedings.

3. More specifically, these proceedings are mainly concerned with whether or not the respondent, in considering an application for a residence card received from a descendant over the age of 21 years who claims dependency on an EU citizen, is entitled to require evidence of that dependency in the country from which the applicant arrived into the State.

Background.

4. The appellant is a UK national who has resided in the State since 2005 with his wife, a Vietnamese national who is also an Irish citizen. The appellant's wife's daughter, i.e. the appellant's stepdaughter, whose name is Nguyen Thi Kim Tháo (hereafter Ms. Tháo), arrived in the State on 9th June 2016, having been issued with a tourist visa permitting her to stay in the State for 90 days. In the course of applying for that visa, Ms. Tháo gave an undertaking to leave the State before the expiration of the 90-day period.

5. Instead, however, less than three weeks later, on 29th June 2016, Ms. Tháo made an application for a residence card pursuant to Article 7 of the European Communities (Free movement of Persons) Regulations 2015 (the "Regulations), on the basis that she is a

dependent of the appellant and is therefore a "qualifying family member" of the appellant, as that term is defined in the Regulations. At the time of her entry to the State Ms. Tháo was 29 years of age.

6. In July 2016, the respondent sought further information in connection with the application. A response was provided by the appellant in November 2016. The application was refused by the respondent in the First Decision, on 30th March 2016, on the ground that Ms. Tháo had failed to provide the respondent with sufficient documentary evidence of her claimed dependency on the appellant. Ms. Tháo then submitted a request for review of the First Decision on 10th April, 2017. Following further requests for information by the respondent, and the provision of same by Ms. Tháo , the respondent issued the Impugned Decision on 29th March 2019, whereby the respondent declined the request for review of the First Decision. Throughout the process, Ms. Tháo was at all times assisted by her solicitors.

The Legislation

Directive 2004/38/EC – The Citizens Directive

7. The free movement rights and entitlements of Union citizens and their family members, and the duties of Member States in regard thereto are provided for in Directive 2004/38/EC of the European Parliament and of the Council of 29th April 2004 (the "Directive") commonly known as the Citizens Directive. So far as is material to these proceedings, the following provisions of the Directive are of relevance:

Preamble

"(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately

with workers, self-employed persons …. in order to simplify and strengthen the right of free movement and residence of all Union citizens….

(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 …the situation of those persons who are not included in the definition of family members…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.

General Provisions

Article 1

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

Article 2

Definitions

For the purposes of this Directive:

1) “Union citizen” means any person having the nationality of a Member State;

2) “Family member” means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

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

Article 3

Beneficiaries

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

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

(a) 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 dependents or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

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

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

Article 10

Issue of residence cards

1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called “Residence card of a family member of a Union citizen” no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

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

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

SI 548/2015 - The Regulations

8. The Directive was transposed into law in the State by the Regulations. It is common case that the Regulations are, for the purposes of these proceedings, in all material respects reflective of the Directive. Nonetheless it is desirable to set out the relevant provisions of the Regulations:

Definitions

"Family member" means a qualifying family member or a permitted family member;

"Permitted family member" means, in relation to a particular Union citizen, a person who is, under Regulation 3(6), a permitted family member of the Union citizen;

"Qualifying family member" means, in relation to a particular Union citizen, a person who is, under Regulation 3(5), a qualifying family member of the Union citizen.

Regulation 3

3. (1) This paragraph applies to—

(a) Union citizens entering or remaining in the State in accordance with these Regulations, and

(b) a family member of a Union citizen referred to in subparagraph (a) who—

(i) enters the State in the company of the Union citizen,

(ii) enters the State for the purpose of joining the Union citizen, or

(iii) becomes a family member while in the State and seeks to remain with the Union citizen in the State.

(2) – (4) ….

(5) For the purpose of these Regulations, a person is a qualifying family member of a particular Union citizen where—

(a) subparagraphs (a) and (b) of paragraph (1) apply, respectively, to the Union citizen and the person, and

(b) the person is—

(i) the Union citizens spouse or civil partner,

(ii) a direct descendant of the Union citizen, or of the Union citizens spouse or civil partner, and is—

(I) under the age of 21, or

(II) a dependent of the Union citizen, or of his or her spouse or civil partner, or

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

(6) For the purposes of these Regulations, a person is a permitted family member of a particular Union citizen where—

(a) subparagraphs (a) and (b) of paragraph (1) apply, respectively, to the Union citizen and the person, and

(b) 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, which decision has not been revoked pursuant to Regulation 27.

Residence card for family member who is not a national of a Member State

7. (1) A family member who is not a national of a Member State:

(a) may, within 3 months of the relevant date, apply to the Minister for a residence card, and

(b) shall, where an application under paragraph (a) has not been made within the period specified in that paragraph, before the expiry of 4 months after the relevant date, apply to the Minister for a residence card.

(2) In paragraph (1), the "relevant date" means:

(a) in the case of a qualifying family member, the date on which he or she –

(i) entered the State as a qualifying family member, or

(ii) having already been in the State, became a qualifying family member and

(b) in the case of a permitted family member-

(i) the date on which he or she first entered the State as a permitted family member, or

(ii) where he or she was present in the State on the date on which the Minister decided that he or she should be treated as a permitted family member, that date.

(3) An application under paragraph (1) shall contain the particulars specified in Schedule 2 and shall be accompanied by such additional information requirements provided for in that Schedule as are applicable.

Schedule 2

Applicant's particulars and relevant documentary evidence

1. Name of applicant

2. Address of applicant

3. Date and place of birth of applicant

4. Nationality of applicant

5. Passport of applicant

6. Where the applicant asserts that Regulation 5(1)(a) of these Regulations applies to him or her:

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

(b) proof that on the basis of serious health grounds strictly requires the personal care of the Union citizen

7. Where the applicant asserts that Regulation 5(1)(b) of these Regulations applies to him or her, documentary evidence that the applicant is the partner with whom a Union citizen has a durable relationship.

8. Photograph of the applicant.

9. It will be apparent from the above that the Regulations have usefully defined "qualifying family members" and "permitted family members" in order to distinguish between those family members referred to in Article 2(2) of the Directive and those referred to Article 3.2 of the Directive. While those definitions do not appear in the Directive, for convenience I will from this point onwards use those defined terms to refer to the relevant family members in the context of both the Directive and the Regulations.

Pleadings

10. By notice of motion dated 27th June 2019, the appellant seeks an order of certiorari quashing the Impugned Decision together with such declaration of the legal rights and/or legal position of the applicant and/or persons similarly situated as the court considers appropriate. The notice of motion is grounded upon an affidavit of the appellant which verifies the background to the Impugned Decision as summarised above.

Affidavit of the Appellant.

11. The appellant avers at para. 4 of his grounding affidavit that following upon Ms Tháo's entry into the State, he, the appellant, and his wife decided that it would be in her best interests to remain in the State and reside at the family home of the appellant and his wife. He describes how they submitted an EU 1 application to the respondent for the issue of a residence card to Ms. Tháo on the basis that she was residing with and dependent upon the appellant and his wife. He exhibits the application and the enclosures. The appellant included with the application, *inter alia*, Ms. Tháo's passport, the marriage certificate of the appellant and his wife, Ms. Tháo's birth certificate and certain other documentation personal to the appellant that was necessary for the purpose of the application. By way of evidence of Ms. Tháo's dependence on him, he exhibited receipts from Tesco for a mobile phone and mobile phone credit purchased by the appellant for Ms. Tháo, and a covering letter whereby

he stated that Ms. Tháo is dependent upon him in the State, and that he provides for all her essential needs, including rent, food and everyday necessities.

12. The appellant refers to a request dated 26th July 2016 from the respondent for further information, to which the appellant's solicitor replied on 10th November 2016. In this reply, the appellant's solicitor provided evidence of Ms. Tháo's residence at his home and credit union account statements which confirmed regular transfers from the appellant to his stepdaughter.

13. The appellant also exhibits the First Decision. This is addressed to Ms. Tháo and the following reasons are provided for refusing her a residence card:

> "*You did not submit the necessary documents which were requested on 26/07/2016. Evidence of dependence on the spouse of the EU citizen i.e. joint bank account, fund transfers. The only evidence submitted was a statement from Bishopstown Credit Union dated 03/11/2016.*
>
> *Therefore your application does not meet the requirements of Regulation 7(3) of the Regulations as you failed to submit the necessary supporting documentation as set out in Schedule 2 of the Regulations*."

14. The appellant then continues in his affidavit to refer to the request for a review of the First Decision which was submitted on behalf of the appellant by his solicitors by letter dated 10th April 2017. He refers to subsequent correspondence, including a letter from the respondent of 2nd May 2017 requesting further evidence of financial and material dependence of Ms. Tháo. He avers that further information was provided, including updated credit union statements in the name of Ms. Tháo, updated bank statements of the appellant showing transfers of money into his stepdaughter's credit union account, and some receipts, including a receipt of fees from Cork College of Commerce issued to Ms. Tháo, but which it was claimed were paid by the appellant on her behalf.

15. Subsequent to that correspondence, the solicitors for the appellant wrote to the respondent to inform her that he (the appellant) had been made redundant, but that he was seeking employment. That was in February 2018. In May 2018, his solicitors wrote to the respondent informing her of certain health difficulties of the appellant. Throughout this correspondence, the solicitors expressed concern about the immigration status of Ms. Tháo, and for her part, the respondent continued to extend the temporary permission of Ms. Tháo to reside in the State up until the issue of the Impugned Decision on 29th March 2019.

16. The appellant exhibits the Impugned Decision to his affidavit. The reasons given by the respondent in the Impugned Decision for upholding the First Decision were as follows:

1) The respondent was not satisfied that Ms. Tháo had proven that she was dependent on the appellant in the State (my emphasis). While statements from the credit union had been provided, the Impugned Decision states that no money was withdrawn from the credit union account during the relevant period, which, although broken down into two sub-periods, is effectively a single period between August 2016 and August 2017.

2) The respondent states that no evidence was provided to indicate that Ms. Tháo was dependent on the appellant prior to her entering into the State.

3) The respondent states that the transfer of money by the appellant to his stepdaughter does not in itself establish an ongoing pattern of dependence. The Impugned Decision states:

> "*You were required to establish that you relied for the essentials of life on the EU Citizen in question. You have failed to do so and, as such, the Minister is not satisfied that you have provided satisfactory evidence to establish that you have been dependent upon the EU Citizen*."

Statement of Grounds

17. In his statement of grounds, the appellant relies upon five grounds in support of the reliefs that he seeks:

1) That the respondent erred in law and/or in fact in making the Impugned Decision on the basis that the appellant had failed to submit evidence of Ms. Tháo's dependence upon him in circumstances where Ms. Tháo resides with him in the State, and the appellant provides for her accommodation, utility bills and day to day expenses.

2) The respondent erred in making the Impugned Decision on the basis that the appellant had not submitted evidence that Ms. Tháo was dependent on him prior to her entry into the State. There is no such requirement in respect of qualifying family members in accordance with Article 2.2(c) of the Directive and/or regulation 3(5) of the Regulations.

3) The respondent erred in failing to have regard to information furnished by the appellant to demonstrate that Ms. Tháo had made withdrawals from a credit union account into which the appellant had transferred funds for her use.

4) The respondent erred in law in the assessment of dependency having regard to the approach of the High Court in *Kuhn v. Minister for Justice* [2013] IEHC 424 and *Subhan v. Minister for Justice* [2018] IEHC 458 and the decision of the Court of Justice of the European Union in *Reyes v. Sweden* [2014] EUECJ C-423/12.

5) The respondent failed to examine, weigh and adjudicate properly upon the submissions of the appellant and the supporting documentation filed by him in connection with his application for a review of the refusal to grant Ms. Tháo a residence card.

18. At this point I should mention that while both the application for a residence card and the application for a review of the First Decision were made by Ms. Tháo, as applicant, as indeed they surely had to be, both these proceedings and the related proceedings seeking an orders of mandamus and declaratory relief have been brought in the name of the appellant. Hence, the reference in the pleadings to the filing of documents by the appellant with the respondent during the application process is not strictly accurate, although he was, no doubt, at all times assisting Ms. Tháo and her solicitors in submitting and advancing the applications. More fundamentally, no issue was taken in the pleadings as to the appellant's *locus standi* to challenge the Impugned Decision, although the respondent did refer to the issue in submissions in the 2018 Proceedings without expressly mentioning *locus standi*. In any case, I address the issue as needs be in the judgment in the 2018 Proceedings.

Statement of Opposition

19. In her statement of opposition, the respondent pleads that Ms. Tháo had, in her application for review, failed to establish to the satisfaction of the respondent that she (Ms. Tháo) was dependent on the appellant. It is pleaded that the Impugned Decision was reached based on an examination of all of the facts and taking into account all information and documentation provided by Ms. Tháo.

20. The respondent pleads that Ms. Tháo had failed to satisfy the respondent by cogent evidence which could be tested that the level of material support that she received from the appellant, its duration and its impact upon her financial circumstances combined together to meet the material definition of dependence. It is expressly pleaded that while Ms. Tháo had relied in particular on evidence of money transfers from the appellant into the credit union account of Ms. Tháo, there had been no withdrawals from that account during the relevant period.

21. The respondent denies that Ms. Tháo had demonstrated that the appellant provided for her accommodation, utility bills and day to day expenses.

22. The respondent pleads:

> "*As a matter of law the onus lay on Ms. Tháo to provide cogent evidence of her need for material support from the applicant sufficient to meet the definition of dependency. The need for material support must exist in the State of origin of the qualifying family member or the State whence he or she came at the time when he or she applies to join the Union citizen. The respondent correctly took into account that no evidence was submitted concerning dependency in this period*."

23. The respondent pleads that she took into account all information submitted, including the credit union statements, and again pleads that, as noted in the Impugned Decision, the statements show that no money was withdrawn by Ms. Tháo during the period covered by the statements submitted.

24. The respondent pleads that the Impugned Decision applied the correct test of dependency as developed in EU and Irish case law, and correctly concluded that Ms. Tháo had failed to establish by cogent evidence which could be tested that the level of material support that she received from the appellant, its duration and its impact upon her personal financial circumstances combined together to meet the material definition of dependence.

Affidavit of Mr. Carleton

25. The respondent's statement of opposition was supported by the affidavit of Mr. Mark Carleton, Higher Executive Officer of the EU Treaty Rights Review Unit of the Irish Naturalisation and Immigration Services of the respondent. Mr. Carleton gave the history of the entry into the State by Ms. Tháo, noting that she entered the State on a 90 day "C" visit visa. Mr. Carleton avers that applicants for short stay visit visas undertake to leave the

State upon the expiration of their visa, and such entry visas are granted on the basis of a proven obligation to return and are non-extendable or convertible to a residency type visa.

26. Mr. Carleton corroborates the evidence of the appellant as to the entry into the State by his stepdaughter and her subsequent application for a residence card, as a result of which Ms. Tháo was given temporary permission to reside in the State, which permission was renewed from time to time.

27. Mr. Carleton then proceeds to address the information submitted in support of the application. He avers that Ms. Tháo failed to discharge the burden of proving dependency. He avers that the Impugned Decision correctly concluded that Ms. Tháo had failed to satisfy the Minister by cogent evidence which could be tested that the level of material support she received from the Union citizen, its duration and its impact upon her personal financial circumstances combined together to meet the material definition of dependence. He avers that: "*In particular, the mere fact of money transfers does not show dependency in circumstances where Ms. Tháo had never in fact withdrawn money transferred in the period at issue*."

28. Mr Carleton further avers as follows: "*I further say and believe that as the decision correctly noted, Ms. Tháo had also failed to provide any evidence of dependency prior to her arrival in the State. I say and believe that this also constitutes a relevant aspect of analysis of dependency, including in the case of qualifying family members, and further submissions will be made by counsel in this regard*".

Judgment of the High Court.

29. The trial judge noted that the concept of "dependency" is an independent concept of European law, and the concept must be given uniform interpretation across all member states. In this regard, the trial judge found that it is clear from the decisions of the Court of

Justice of the European Union ("CJEU") in *Jia*, case C-1/05, and in *Reyes*, case C-423/12, that the need for material support must exist in the State of origin or the State from which the family member comes when he/she applies to join the Community national.

30. The trial judge noted that the appellant here at all times had had the benefit of legal advice and that he is therefore presumed to know that, when evidence of dependency is sought, it is evidence of the type referred to in the cases of *Jia* and *Reyes.*

31. The trial judge rejected any suggestion that the respondent had deliberately concealed from the appellant that the evidence required was evidence of dependency in Ms. Tháo's State of Origin. Since Ms. Tháo had provided no such evidence, the respondent was entitled to reject the application and accordingly the trial judge refused the reliefs sought.

Grounds of Appeal

32. The appellant relies upon six grounds of appeal:

1) The trial judge erred in concluding that the need for material support for the purposes of assessing dependence under the Directive must exist in the State of origin or the State from which the third country national came when she applied to join the union national.

2) As a corollary of the first ground of appeal, the trial judge erred in law in concluding that evidence of material support in the Member State in which the third country national is now residing, or intends to reside with the Community national is irrelevant for the purposes of assessing dependence under the Directive.

3) The trial judge erred in relying on the decisions of the CJEU in *Jia* and *Reyes* as authority for the proposition that dependence refers only to dependence in the State of origin or the State from which the third country national came when she

applied to join the European Union national for the purposes of the Directive or the Regulations.

4) The trial judge erred in law in failing to conclude as dispositive of the application the fact that Schedule 2 of the Regulations does not, in the case of qualified family members, require evidence of material support in the State of origin or the State from which the third county national came when she applied to join the European Union national.

5) The trial judge erred in concluding that the respondent had adequately sought evidence from the appellant of Ms. Tháo's dependence on him in her State of origin by requesting evidence of dependence *simpliciter,* without specifying the State in which that dependence had to be shown. The trial judge further erred in concluding that the applicant must be assumed to know what type of evidence of dependence is sought by the respondent solely by virtue of the fact that the appellant had the benefit of legal advice.

6) The trial judge erred in law and/or material fact in failing to hold that the respondent acted unfairly.

Respondent's Notice

33. The respondent replied to the grounds of appeal by reference to the same numbering in the grounds of appeal as follows:

1) The trial judge made no error of law in concluding that the need for material support for the purpose of assessing dependence under the Directive must exist in the State of origin or the State from which the third county national came when she applied to join the Union national. The trial judge was correct to interpret dependency, a concept of EU law, in accordance with the decisions of

the Court of Justice in *Jia* and *Reyes.* Moreover, the test for dependency is the same for permitted family members and qualifying family members, as was stated by Baker J. in this Court in *VK(Khan) v. Minister for Justice and Equality* [2019] IECA 232.

2) Accordingly, the trial judge made no error in concluding that, as no evidence of the dependency of Ms. Tháo in the country from which she came was provided, dependency within the meaning of Union law had not been proven.

3) The trial judge made no error of law in applying the test of dependency developed by the CJEU in *Jia* and *Reyes.*

4) The trial judge made no error in concluding that the wording of Schedule 2 of the Regulations was not determinative of the correct interpretation of "dependency". Even had the Minister wished to implement a broader test for dependency in National law (which it is clear from the Regulations he did not, as they mirror the text of the Directive), it is the interpretation of the CJEU of the concept of dependency which applies and binds the national courts, in circumstances where this term is an independent concept of Union law that must be given a uniform interpretation.

5) The trial judge made no error of law or material fact in concluding that the respondent had adequately sought further evidence from the appellant in circumstances where:

   (a) The respondent had repeatedly sought further evidence of "dependency" from the appellant's solicitors and

   (b) The appellant was at all times legally represented, and must be presumed to know that when further evidence of dependency is sought this means

evidence of dependency within the meaning of Union law as interpreted by the settled case law of the CJEU.

6) The trial judge made no error of law or material fact in failing to hold that the respondent acted unfairly.

Submissions

Submissions of the appellant

34. The appellant submits that there are two issues to be decided in this appeal:

(i) Whether, pursuant to the Directive, in order for a qualifying family member (as distinct from a permitted family member) to be dependent on a Union citizen the need for material support must exist in the State of origin or the State from which the third county national came when she applied to join the EU national, or whether it is sufficient to establish the need for material support in the State;

(ii) Whether the respondent erred in law in finding that the appellant had failed to submit sufficient evidence of his stepdaughter's dependence on him in the State.

Issue (i).

35. It is the appellant's case that, properly interpreted, neither the Directive nor the Regulations impose any requirement upon a qualifying family member to prove dependency on the Union citizen in the State from which the qualifying family member has come. In the submission of the appellant, it is necessary only for the qualifying family member to establish dependency at the time that the application for residency is made.

36. The appellant submits that this is apparent on a plain reading of both the Directive and the Regulations. Article 2(2)(c) of the Directive refers merely to *"Direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b)".* This does not require dependency to be proven in any particular place or country.

This is in contrast to permitted family members. In the case of Article 3(2) of the Directive, it is necessary for family members who do not fall under the definition in Article 2(2)(c) to be dependents *"in the country from which they have come".*

37. This distinction is continued in article 10 of the Directive, which, in the case of qualifying family members referred to in Article 2(2)(c) of the Directive requires only *"documentary evidence that the conditions laid down therein are met"* (article 10(2)(d)), and makes no reference to the country of origin or the country from which the qualifying family member had come. On the other hand, in the case of permitted family members, Article 10(2)(e) requires that in cases falling under Article 3(2)(a) of the Directive, a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependents or members of the household of the Union citizen is required.

38. Similarly, in the Regulations, in defining the meaning of a "qualifying family member", Regulation 3(5)(b)(ii)(II) refers (*inter alia*) to: *"a dependent of the Union citizen, or of his or her spouse or civil partner"* and does not make any reference to proving dependency in any place or country. On the other hand, Regulation 5(1) describes a permitted family member as being a person who (*inter alia*) *"in the country from which the person has come"* is a dependent of the Union citizen.

39. The requirement for a permitted family member to prove dependency in the country from which he or she has come recurs in Regulation 5(5)(a) which requires the Minister, in deciding whether an applicant should be treated as a permitted family member, to have regard to a number of factors, including *"in the case of financial dependency, the extent and duration of the financial support provided by the Union citizen to the applicant prior to the applicant's coming to the state".*

40. The appellant also places reliance upon Regulation 7 of the Regulations which deals with the requirement for residence cards for family members who are not nationals of a Member State. Regulation 7(3) provides that an application made, whether by qualifying family members or permitted family members, shall contain the particulars specified in Schedule 2 to the Regulations. The first five requirements of Schedule 2 are common to both qualifying family members and permitted family members, but the sixth requirement, which cross refers to Regulation 5(1)(a) of the Regulations, i.e. it relates to permitted family members only, requires the applicant to produce documentary evidence from the relevant authority in the country from which he or she has come certifying that he or she is a dependent of the Union citizen or a member of the household of the Union citizen. This is a direct reflection of Article 10 of the Directive.

41. It is the appellant's case that the absence of any requirement for an applicant as a qualifying family member, to submit information about dependence in the state of origin or the state from which the third country national is coming means that it is not, and cannot be required as part of the application process. Indeed, the application form EU1 which applies to qualifying family members makes no reference to any requirement of evidence of dependency in the country of origin, whereas the EU1A form which applies to permitted family members specifically refers to the requirement of evidence of dependence in the country from which the applicant has come.

42. For this reason, it is submitted that the trial judge further erred in so far as he concluded that the respondent had adequately sought evidence from the appellant of his stepdaughter's dependence on him in her state of origin by requesting further evidence of dependence *simpliciter,* without specifying the state in which that dependence needed to be shown. At no time during the two years and nine months of the application process did the respondent ever suggest to the appellant that only evidence of dependence in the country

from which his stepdaughter had come would satisfy the requirements of the Directive and/or the Regulations. It appears to me that this is, in essence, a fair procedures argument which, incidentally, forms no part of the statement of grounds.

43. While it is the appellant's case that the appeal should be determined by reference to the provisions of the Regulations alone, in case this is not accepted, the appellant addresses the authorities of *Jia* and *Reyes* upon which the trial judge heavily relied.

Jia

44. In *Jia,* the Grand Chamber of the Court of Justice was considering an earlier Directive, Directive 73/148/EEC, as well as Directive 68/360 and Regulation 1612/68. A Chinese couple wished to enter Sweden to join their son, who was married to a German woman working in Sweden. Article 1 of Directive 73/148 provided that: "*Member States shall abolish restrictions on the movement and residence of nationals of a Member State who are established or who wish to establish themselves in another Member State…. and (d) the relatives in the ascending and descending line of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality*."

45. On the facts of the case, there was no question of any dependency of the relatives concerned on the EU national while the relatives were resident in China. The dependency only arose in Sweden. Amongst the questions posed to the CJEU were:

> "*2a. Is Article 1.1(d) of Directive 73/148/EEC to be interpreted as meaning that "dependence" means that a relative of a citizen of the Union is economically dependent on the citizen of the Union to attain the lowest acceptable standard of living in his country of origin…. or where he is normally resident?*
>
> *2b. Is Article 6(b) of Directive 73/148/EEC to be interpreted as meaning that the Member States may require a relative of a citizen of the Union who claims to be*

dependent on the citizen of the Union… to produce documents…which prove that there is a factual situation of dependence?"

46. Addressing these questions at paras. 37 and 38 of its judgment, the Court of Justice stated:

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

38. That is the conclusion that must be drawn having regard to Article 4(3) of Council Directive 68/360/EEC …according to which proof of the status of dependent relatives in the ascending line of a worker or his spouse within the meaning of Article 10 of Regulation 1612/68 is to be provided by a document issued by the competent authority of the 'State of origin whence they came', testifying that the relative concerned is dependent on the worker or his spouse…."

47. So, the appellant submits, it is apparent that *Jia* was determined by reference to provisions in earlier legislation that are no longer of application, and in particular Article 4(3) of Directive 68/360/EEC which required the status of a dependent relative to be proved by a document issued by the competent authority of the State of origin. While that proof is still required of permitted family members, the Directive (it is submitted) abolishes, or in any case does not impose, any such requirement for those family members falling under Article 2(2)(c) of the Directive. It is submitted that the omission of the "country from which they came" requirement in Article 2(2) can be regarded as very deliberate by the EU

legislature, because the condition is expressly retained for other family members in Article 3 of Directive 2004/38. This view is reinforced by Article 10(2) of the Directive, which provides for different documentary requirements for applicants for residence cards depending on whether or not they are qualifying family members or permitted family members.

48. The appellant submits that it is abundantly clear from the above that the Directive imposes different conditions on qualifying family members and permitted family members, and that where proof of dependence is concerned, the requirement to prove the same in the country from which the applicant is arriving is of application only to permitted family members.

Reyes

49. In *Reyes*, which was decided seven years after *Jia*, and in the context of the Directive rather than Directive 68/360, the applicant had been brought up by her maternal grandmother in the Philippines. The applicant's mother had left the Philippines and moved to Germany to work in order to be able to support her family in the Philippines. The applicant's mother subsequently moved to Sweden where she lived with and subsequently married a Norwegian citizen who lived in Sweden. The applicant's stepfather had regularly sent money to support the applicant and other members of his wife's family living in the Philippines. Ms. Reyes moved to Sweden and applied for a residence permit as a family member of her mother and her mother's partner (at the time her mother and her mother's later-to-be husband had not yet married) on whom Ms. Reyes claimed she was dependent. The Immigration Board in Sweden rejected the application because, on the facts, they found that she had failed to prove that she was economically dependent on her family members in Sweden, having been supported throughout her childhood and adolescence by her grandmother. Of particular relevance in the case was the fact that Ms. Reyes had qualified as a nursing assistant, but she

claimed that she was unable to find work in the Philippines where unemployment is endemic, and this was central to the questions posed to the CJEU.

50. Two questions were referred:

(i) Can Article 2(2)(c) of the Directive be interpreted as meaning that a Member State, on certain conditions, can require a direct descendant who is 21 years old or older – in order to be regarded as dependent and thus come within the family member under Article 2(2)(c) of the Directive – to have tried to obtain employment or help with supporting himself from the authorities of his country of origin and/or otherwise to support himself, but that has not been possible?

(ii) In interpretating the term "dependent" in Article 2(2)(c) of the Directive does any significance attach to the fact that a family member – due to personal circumstances such as age education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State, which would mean that the conditions for him to be regarded as a relative who is dependent under the provisions are no longer met?

51. In addressing the first of these questions, the court, at paras. 21 and 22 stated:

"*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)."

52. The appellant contends that this last statement is erroneous because it fails to reflect that the decision in *Jia* was based upon a materially different legislative regime, and specifically article 4(3) of Council Directive 63/360/EEC.

53. The appellant submits that his interpretation of the Directive is supported by the decision of the Court of Appeal of England and Wales in the case of *Pedro v. Secretary of State for Work and Pensions* [2009] EWCA Civ 1358. In that case, the claimant was a 62 year old Portuguese national who arrived in the United Kingdom in 2004 to join her son, and lived with him at all times following upon her arrival. It appears to have been accepted that the claimant was, for the most part, financially dependent upon her son, and the question arose as to whether or not the test of dependency for the purpose of the Directive should be assessed in the country of origin of the claimant i.e. Portugal, or in the United Kingdom. The question arose in the context of a claim for a social welfare benefit. The court conducted an extensive analysis of the provisions of the Directive, and relevant case law, including *Jia* but not *Reyes,* because the latter post dates *Pedro.* At para. 67, the court held:

"67. *Article 2(2) does not specify when the dependency has to have arisen. Neither does it require that the relative must be dependent in the country of origin. Article 3(2)(a), on the other hand, requires actual dependency at a particular time and place. That difference, as I have said, is reflected by Article 8(5)(d) as compared with 8(5)(e)".*

[I pause here to explain that Article 8 of the Directive deals with the administrative procedures to be followed by Member States regarding registration with relevant authorities by those exercising free movement rights following entry into a Member

State. The requirements to be met to obtain a registration certificate under Article 8(5) are the same as those set out in article 10(2) for a residence card].

"These requirements are however identical to those set out in Article 10(2) of the Directive in connection with the issue of residence card to non-Union citizens. It cannot be an accident of drafting. It contemplates, as it seems to me, that where in an Article 2(2)(d) case reliance is placed upon dependency, it can be proved by a document from the host state without input from the state of origin. Taking Article 2(2)(d) together with Article 8(5)(d), suggests that dependency in the state of origin need not be proved for family members. It is sufficient if, as is alleged here, the dependency arises in the host state. Such an interpretation reflects the policy of the Directive to strengthen and simplify the realisation of realistic free movement rights of Union citizens compatibly with their family rights. On the one hand, close family members of Union citizens can move freely with Union citizens who might otherwise be inhibited from exercising their rights of free movement. On the other, Member States are merely obliged, as [counsel] put it, to give open-minded consideration to those extended family members who have demonstrable need. Such an interpretation, as well as being in accordance with the language of the Citizens' Directive, is consistent with the approach of the European Court of Justice in Metock.

68. Metock too provides an answer to [counsel's] argument that the wording of Articles 2(2) and 3(1) means that the benefits can only apply to a family member who is a dependent when he accompanies or joins the Union citizen. Mr. Metock moved to join his wife before they married.

69. In short, I have concluded that proof of dependence by Mrs. Pedro on her son in the United Kingdom will suffice under Article 2(2)(d)."

54. Before arriving at its conclusion, the court considered *Jia* and explained why it should be distinguished from the case before it. Simply put, the Court of Appeal of England and Wales considered that the conclusion in *Jia* was arrived at on the basis of the provisions of Article 4(3)(e) of Directive 68/360 which, as has been submitted by the appellant in this case, are materially different to the relevant provisions of the Directive.

55. The appellant in his submissions also addresses a subsequent decision of the Court of Appeal of England and Wales in the case of *Siew Lian Lim v. Entry Clearance Officer Manilla* [2015] EWCA Civ 1383 in which the court appeared to cast doubt upon the decision in *Pedro.* However, the appellant submits, any comments made by the Court of Appeal in that case were *obiter,* and the law in England and Wales remains as determined in *Pedro.*

Issue (ii): Whether the respondent erred in law in finding that the appellant had failed to submit sufficient evidence of his stepdaughter's dependence upon him in the State

56. Firstly, the appellant submitted that the trial judge did not address this issue at all because he took the view that evidence of dependence in the State was irrelevant. That being the case, there is no finding in the court below on the issue, and the appellant acknowledges that it may not be possible for this Court to address the issue in the absence of any findings by the court below.

57. However, should this Court consider that it can address the issue, the appellant relies upon the decision of this Court (Baker J.) in *VK v. Minister for Justice* [2019] IECA 232, wherein Baker J. summarised the approach to determining a claim of dependency at paras. 81- 85. Based on that test, the appellant submits that he has provided proof that his stepdaughter resides in his home and that he provides her with material support in the form of accommodation and utilities, and the respondent erred in failing to have regard to this

evidence which meets the requirements for the test of dependency as laid down by Baker J. in *VK*.

Submissions of respondent

58. The respondent submits that the central question to be determined by these proceedings is whether, in refusing the application for review of Ms. Tháo's application for a residence card, the Minister was entitled to have regard to the fact that no evidence had been provided by Ms. Tháo of her dependency on the appellant in her country of origin.

59. The respondent submits that the relevant date for the purpose of assessing dependency is the date on which the applicant joins the EU citizen. This is apparent from Article 3.1 of the Directive which states that it applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who *accompany or join them*. It is implicit therefore that the assessment of dependency, for the purposes of Article 2(2)(c) of the Directive should be conducted as of the date that the family member accompanies or joins the EU citizen.

60. Ms. Tháo arrived in the State on a visit visa, and in the process undertook to return to her country of origin within a 90-day period. It is submitted that it cannot be the case that in such circumstances she can be in a better position for the purposes of claiming an entitlement to a residence card than she was before she arrived in the State.

61. Furthermore, it is submitted that if the appellant's arguments are accepted, this has the effect of eliminating or substantially eroding the substance of any distinction between descendants who are under the age of 21, and those over the age of 21, but who claim to be dependents.

62. The respondent contends that the trial judge was correct to conclude that both *Jia* and *Reyes* made it clear that dependency must exist in the State of origin or the State from which an applicant has come when applying to join a Community national. By way of a preliminary

point, the respondent contends that the case now made by the appellant on this appeal is a new point that was not argued in the High Court. The respondent argues that the appellant's legal submissions to the High Court argued only that the judgment in *Jia* is not applicable and failed to acknowledge that the Court of Justice in *Reyes* applied the same test.

63. The respondent submits that no distinction is to be made when considering the dependency of a qualifying family member on the one hand and the permitted family member on the other. It is submitted that the test for dependency is the same for both categories of family members and this was clearly confirmed by this Court in *VK(Khan) v. Minister for Justice and Equality* wherein Baker J. held, at para. 29:

> "*29. For the purposes of the examination of the applicable legal principles, the test of dependency is to be regarded as the same whether an applicant is a family member under Article 2(2) of the Citizens Directive or 'other family member' dependent on a Union citizen within the meaning of Article 3(2)(a), as suggested by Advocate General Bot in his opinion in Secretary of State for the Home Department v. Rahman (Case C-83/11), ECLI:EU:C:2012:519. I see no reason not to adopt for the purpose of the present appeals the interpretation of Advocate General Bot in relation to the implementation of the Citizens Directive into Irish law, and I therefore see no difference between the test for dependency to be adopted for qualifying an applicant as 'qualified family member' or as 'permitted family member' under the provisions of the 2006 Regulations*."

64. The respondent submits that *Reyes* also involved a qualifying family member and it is clear that the Court of Justice addressed the issues in that case in the context of a family member to whom Article 2(2) applied. In doing so, the court followed *Jia* which confirms that, in the case of qualifying family members, dependency must be shown to exist in the country of origin of the family member. The respondent submits that the attempt of the

appellant to distinguish *Jia* on the basis that it was a judgment concerned with a different Directive must be rejected because *Reyes* affirms that precisely the same position obtains under Directive 2004/38.

65. The respondent places considerable emphasis on a statement made by the Court of Justice, at para. 38 of *Rahman* that Member States may, in assessing whether the requirements of dependence have been met, lay down:

> *"particular requirements as to the nature and duration of dependency, in order in particular to satisfy themselves that the situation of dependence is genuine and stable and has not been brought about with the sole objective of obtaining entry into and residence in the host Member State."*

66. It is submitted that this aspect of the test of dependency has been confirmed by the decision of Baker J. in *VK* and also by the decision of Keane J. in the High Court in *Awan v. Minister for Justice & Equality* [2019] IEHC 487 at para. 74 wherein Keane J held;

> *"74. The ECJ confirmed (at para. 21) in its decision in Case C-423/12 Reyes v Sweden ECLI:EU:C:2014:16, amongst others, that dependent status is the result of a factual situation and (at para. 22) 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. That dependency must be genuine and not contrived. As the ECJ had previously stated in Case C-83/11 Secretary of State for the Home Department v Rahman ECLI:EU:C:2012:519 (at para. 38), a host Member State is entitled to be satisfied that the situation of dependence is genuine and stable and has not been brought about with the sole objective of obtaining entry into and residence in its territory."*

While the decision of the High Court in *Awan* was appealed to this Court, and the appeal allowed, this summary of principles derived from decisions of the CJEU and EU legislation

was approved by the Court of Appeal (Faherty J.) at para.143 of her judgment delivered on 10th November 2021, under neutral citation [2021] IECA 298.

67. The respondent argues that it would be wholly at odds with that requirement if a Member State were not entitled to verify that dependency had existed in the country of origin. This is particularly relevant on the facts of this case, where no evidence of dependency in the country of origin has been provided, but rather in circumstances where Ms. Tháo arrived in the State on a short stay tourist visa having undertaken to the Irish authorities that she would be returning to her country of origin before the end of the 90-day period.

68. Furthermore, since dependency is a concept of EU law, it is necessary for this State to interpret dependency consistent with the decisions of the Court of Justice in *Jia* and *Reyes*, and so not only may the respondent look to evidence of dependency in the country of origin, but it must do so having regard to those decisions.

69. The respondent also submits that the appellant's argument that there is a deliberate distinction as between Article 3(5) of the Regulations which makes no reference to "country of origin or country from which he or she has come" in the case of qualifying family members, and Article 5(2)(c) of the Regulations which requires evidence of dependency from the country of origin in the case of permitted family members, is, in the respondent's submission**,** a kind of reasoning by deduction that is fallacious and is insufficient to support a conclusion that the respondent cannot look for evidence of dependency of an applicant prior to arrival in the State in the case of qualifying family members. In this regard, it is submitted that this Court rejected such reasoning in the case of *S.S. (Pakistan) v. Governor of Midlands Prison* [2018] IECA 384. It is submitted that in that case this Court held that the fact that specific provision was made for permitted family members but not for qualifying

family members (in the context arising in that case) did not change the fact that the legal position on the relevant legal issue was exactly the same for each.

70. The respondent also contends that the answer to the first question raised by the appellant in these proceedings was addressed definitively by this Court in *Abbas & Anor v. Minister for Justice & Equality* [2021] IECA 16, in which case the Court was required to consider the meaning of "the country of which they have come" as used in Articles 10(2)(e) of the Directive and Regulation 5(2)(c)(i) of the Regulations and concluded at para. 69 that:

> "*The language of these provisions envisages that the applicant concerned will be travelling or has travelled either from "a country of origin" or a third country to the host State where he or she is given the entitlement to make an application to enter and reside in the host State. It is also clear from the authorities referred to above that there is no restriction on what constitutes a "country from which the person has come" i.e. it need not be the country of origin of the applicant, and nor need it be the Member State of the European Union, although it may be a Member State*."

71. In circumstances where no evidence was advanced by the appellant or his stepdaughter as to her dependency on the appellant in the country of origin, it is submitted that the Minister was fully justified in concluding that dependency had not been established.

Discussion

Preliminary Issue

72. The first issue that falls for consideration is whether or not the specific argument advanced by the appellant with regard to the decisions of the Court of Justice in *Jia* and *Reyes* were advanced in the High Court. This is the argument that *Jia* was decided on the basis of Directive 68/360, whereas *Reyes* was concerned with the Directive, and it does not

appear that the CJEU considered this distinction in stating, as it did in *Reyes*, (in reliance upon *Jia*)**,** that the need for material support of a direct descendant who is 21 years or older must exist in the state of origin of that descendant or the state whence he came at the time when he applies to join the Union citizen.

73. Counsel for the appellant maintained that this was argued in the High Court, and counsel for the respondent argued that it was not, and**,** therefore**,** the appellant should not be permitted to raise that argument on appeal. The judgment of the High Court sheds no light on the issue. While this, of course, might support the argument of the respondent, it cannot be dispositive given the brevity of the judgment of the High Court.

74. The Court does not have available to it any transcript of the proceedings in the High Court, and the only point of reference that may be of any assistance is the written submissions of the parties to that Court. The appellant addressed the question as to whether or not Ms. Tháo was required to provide evidence of dependence prior to her entry into the State at paras. 38-49 of his written submissions. At para. 44 thereof he agrees that it is accepted that in *Jia* there is reference to *"the need for material support in the State of origin…."* but he proceeds to submit that this conclusion was arrived at in circumstances where the applicant in that case claimed to be a dependent relative in the ascending line on the basis of Article 1 of Directive 68/360. The appellant's submissions to the High Court continue to quote from a 2012 textbook by *Rogers Scannell and Walsh: Free Movement of Persons in the Enlarged European Union*, wherein this specific issue is addressed. The submissions of the appellant quote from the following passage at p.170 of that text:

> *"Justification for this position came from the reference in Article 4(3) of Directive 68/360 that proof of the status of the dependent relative is to be provided by a document issued by the competent authority "of the State of origin or the State whence they came", testifying that the relative concerned is dependent on the worker or their*

spouse. However, no such reference is made to such documents in Directive 2004/38 as regards direct descendants or ascendants. Indeed, Article 10(2)(d) is notably silent on what documentary evidence is required as compared with Article 10(2)(e) which stipulates that other dependent family members must provide documents from their country of origin or country from which they are arriving".

75. At para. 49 of his submissions, the appellant submits that:

"Whereas permitted family members are required under the Citizens' Directive to demonstrate dependence in the country of origin, no such requirement exists in either the Directive or the Regulations in respect of qualifying family members such as the applicant's stepdaughter."

76. While therefore it is clear from the above that submissions were made to the High Court that *Jia* was decided on the basis of a different legislative regime, there is nothing in the written submissions of the appellant to suggest that the argument was advanced in the High Court that the Court of Justice erred in its decision in *Reyes* in failing to recognise that *Jia* had been decided in the context of an earlier Directive. However, in the submissions of the respondent to the High Court, the decision of *Reyes* is drawn to the attention of the High Court, and the respondent relies upon the conclusion of the Court of Justice at para. 22 that:

"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)".

77. What emerges from the above therefore is that the written submissions of the parties clearly identified that the appellant was arguing that *Jia* was decided on the basis of an earlier legislative regime, and the respondent countered by saying that *Reyes,* decided after the coming into force of the Directive, affirmed the principle established in *Jia.* It seems difficult to imagine that in these circumstances**,** the question as to whether or not the CJEU

in *Reyes* addressed the different legislative background pertaining in each case was not to one extent or another an issue that required some consideration in the High Court. While there is some uncertainty as to the extent to which the issue was or was not argued, and while the issue does not feature in the decision of the trial judge, on balance I am satisfied that it featured sufficiently in the arguments before the High Court in order for this Court to entertain the point on appeal, not least in circumstances where the substantive question for determination is whether or not dependency must be established in the country of origin for the purpose of Article 2(2)(c) of the Directive, and not whether or not *Reyes* was decided *per incuriam.* Accordingly, I turn now to address the substantive arguments made on this appeal.

78. Regulation 3(5)(b) of the Regulations defines "qualifying family member" for the purposes of the Regulations and reflects Article 2(2) of the Directive. Where a person can satisfy the respondent that he or she is a qualifying family member within the meaning of Regulation 3(5)(b) of the Regulations, then, subject to certain exceptions which have no application in the circumstances of these proceedings, that person is entitled, as of right, to a residency permit.

79. In this case, Ms. Tháo made application for a residency permit on the basis of Regulation 3(5)(b)(ii)(II) i.e. that she is a dependent of the appellant's spouse. If Ms. Tháo was under the age of 21 at the time the application was made, there would be no need to prove such dependency.

80. In providing information to the respondent regarding her dependency, Ms. Tháo has provided information to demonstrate her dependency upon the appellant in the State. She was not asked for any evidence of her claimed dependence on the appellant or his spouse (her mother) in her country of origin. The respondent refused the application for a residence card in the first instance, and again on review, on the basis that (i) the respondent was not

satisfied that the information provided by Ms. Tháo demonstrated her dependence upon him and (ii) in any case, the information provided related to a claimed dependency upon the appellant in the State, whereas, according to the respondent, the Regulations, and the Directive, require that such dependency must be present in the country from which Ms. Tháo has come i.e. Vietnam, and not the State.

81. As the preamble to the Directive makes clear, free movement of persons constitutes one of the fundamental freedoms of the internal market. There have been numerous decisions of the CJEU emphasising that the Directive, and indeed its precursor, Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, as well as other legislative provisions addressing free movement, establishment and provision of services, should not be interpreted restrictively. So, for example, in the case of *Metock,* case C-127/08, the CJEU held, at paras. 83-85:

> *"83. Moreover, as recital 5 in the preamble to Directive 2004/38 points out, 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 dignity, be also granted to their family members, irrespective of nationality.*
>
> *84. Having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (see, to that effect, Eind, paragraph 43).*
>
> *85. Article 3(1) of Directive 2004/38 provides that the Directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a*

national, and to their family members as defined in point 2 of Article 2 of the directive who accompany or join them."

82. Notwithstanding the importance of the issue, the question as to in what country dependency must be established in order that a person may successfully claim to be a "family member" within the meaning of Article 2(2)(c) of the Directive does not appear to have been directly considered by the CJEU since the enactment of the Directive. While the respondent relies upon *Reyes*, and while there is, at para. 22 of *Reyes*, a clear statement that: *"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)"* , this was not one of the questions that fell for determination in *Reyes*, and the statement is, arguably ,*obiter*. That statement aside, the issue was not otherwise the subject of discussion either in the judgment of the CJEU in *Reyes*, or in the opinion of Advocate General Mengozzi in the case.

83. Furthermore, as the appellant contends, it is clear that in so stating in *Reyes*, the CJEU was relying upon *Jia*, in which case that conclusion had been reached by reason of an express provision in an earlier directive i.e. Council Directive 68/360/EEC, which was repealed by the Directive. The specific provision in the earlier Directive that led the Court to its conclusion in *Jia* has not found its way into the Directive so far as qualifying family members are concerned, although it does appear in the context of permitted family members.

84. None of this is open to any doubt, and the respondent really had no answer to the point. However, this does not mean that the statement that the need for material support must exist in the State of origin of the descendant or the state whence he came at the time when he applies to join the Union citizen is incorrect. All it means is that the question has not been referred for consideration by the CJEU since the enactment of the Directive, and therefore

that *Reyes* may not be as strong authority for the proposition (that it is in the country of origin that dependency must be established) as it first appears.

85. That then begs the question as to whether or not this Court should now make a reference to the CJEU. For the reasons that follow, I do not think that this is necessary. Firstly, I think it might be more helpful to frame the question temporally rather than geographically. By this I mean the answer to the question might more readily be revealed by asking *"At what point in time should the claim of dependency be assessed?"* rather than by asking in what country it should be assessed. I am of this opinion because Article 3(1) of the Directive states that:

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

In my opinion, this makes it clear that a person claiming to be a family member as defined in Article 2(2) must be a family member as so defined at the point in time at which that person accompanies or joins the Union citizen in the host country. The word "join" suggests that the person is arriving in the member state after the Union citizen; while the word "accompany" suggests that the person is arriving with the Union citizen i.e. at the same time. In such cases, the only logical place where their status of dependence (or otherwise) can be assessed is the country from which they have come.

86. This interpretation is not disturbed by the fact that, unusually, there may be occasions when the family member who claims dependence will have arrived in the host state before the Union citizen. I addressed this issue in the case of *Abbas & Anor. v. Minister for Justice & Equality* [2021] IECA 16, albeit in the context of permitted family members. While in that case the focus was on the meaning of the phrase "in the country from which the person has come", the issue was complicated by the fact that the applicant had arrived in the State

before his brother on whom he claimed dependence. I concluded that in such circumstances it was necessary for the person claiming to be a family member to establish dependency both in the country from which he or she had come, and in the host **S**tate.

87. Moreover, such an interpretation (that a descendant claiming to be a qualified family member must prove dependence in the country from which she/he has come) is, in my view, consistent with the purposes of the Directive which include the strengthening of the right of free movement by the removal of obstacles to the exercise of that right. It would obviously be an obstacle if a person wishing to exercise her or his right of free movement had to leave behind close family members, and therefore such family members – who have been identified in Article 2(2) of the Directive are entitled, as of right, to accompany or join the Union citizen. In the case of descendants, they are automatically deemed to be family members up to the age of 21, but over the age of 21 they are only deemed to be such when they are dependent upon the Union citizen. It is not difficult to see why a Union citizen might be reluctant to exercise his or her right of free movement to another state if he/she had to leave such dependants behind, or if those dependants were not free to join the Union citizen at a later stage. Such a restriction would be, in many cases, a discouragement to the exercise of the right to move and reside freely within the Union.

88. However, the corollary of the entitlement of descendants who are under the age of 21 years to accompany or join the Union citizen is that descendants over 21 years of age who are not dependants of the Union citizen have no such entitlement. On this basis alone, it seems to me that it follows, both as a matter of logic and upon a combined reading of Article 2(2)(c), Article 3(1) and Article 10(2)(d) of the Directive, that the assessment of dependency must be undertaken at the time that the descendant accompanies or joins the Union citizen, and not after he/she arrives in the host state.

89. Furthermore, there is some force in the argument made on behalf of the respondent that the distinction between descendants who are under the age of 21 years and those over the age of 21 years would be substantially eroded, at least in cases involving non-EU nationals, if they were free to enter the host State and thereafter advance a claim of dependency based upon their circumstances in the host Member State, rather than in the country from which they have come. If a person over the age of 21 years who is not a dependant of the Union citizen in his/her country of origin at the time that she/he joins the Union citizen in the host State, but becomes such a dependant after and simply by reason of having accompanied or joined the Union citizen, then there is no meaningful distinction left between descendants under the age of 21 years and those over that age. This is, *a fortiori* so in the case of descendants who are not nationals of a Member State, because, unlike such persons, they would have no automatic right of entry (as distinct from right of residence) into the host State unless they were qualified family members. Therefore if the appellant is correct, descendants over the age of 21 years would be entitled to be treated just the same as those under the age of 21 years for the purpose of entry into the host State, where they may then advance an application for residency grounded upon dependency on the Union citizen in the host **S**tate. Such an interpretation would surely erode a key distinction between descendants under the age of 21 years and those over that age.

90. Moreover, it is difficult to understand on what basis it can be claimed that the requirement to conduct an assessment of dependency in the country of origin at the time that the descendant (who claims to be a dependent) accompanies or joins the Union citizen could be in any way an obstacle to the exercise of the right of free movement. The Union citizen, contemplating a move, knows that his descendants who are dependants may either accompany him or join him later. But they cannot do so if they are not his dependants. I have difficulty, therefore, in understanding the circumstances in which the assessment of

dependency could ever fall to be conducted in the host State save perhaps in those limited number of cases where the dependent has actually arrived in the host State before the Union citizen, as in *Abbas,* which, as I have mentioned already, involved permitted family members and not family members. In any event, however, this is not such a case and that issue does not fall for consideration here.

91. It follows therefore that a person such as Ms. Tháo cannot circumvent the requirement to have her asserted dependency upon the appellant assessed at the time that she joined the Union citizen (the appellant) by arriving in the State (on a tourist visa) and then claiming dependency on the basis, principally, that she has taken up residence with the Union citizen and is, therefore, completely dependent upon him. Such an approach, if accepted, would drive a coach and four through the proper assessment of dependency for the purposes of the Directive and the Regulations. If that were accepted, dependency could be established in almost any case by the mere arrival of a descendant in the State and his/her taking up residence with the Union citizen It is particularly striking in this case that the appellant in his affidavit avers that following upon Ms. Tháo's entry into the State, he, the appellant, and his wife decided that it would be in Ms. Tháo's best interests to remain in the State and reside at the family home of the appellant and his wife. That may well be so, but that is a very different assessment to the one the Minister is required to undertake, which is whether or not she is dependent within the meaning of the Directive/Regulations.

92. In *Rahman,* which was a claim for dependency advanced by persons claiming to be permitted family members rather than qualifying family members, the CJEU held, at para. 38 that Member States, in assessing whether the requirements of dependents had been met may lay down in their legislation *"particular requirements as to the nature and duration of dependence, in order in particular to satisfy themselves that the situation of dependence is genuine and stable and has not been brought about with the sole objective of obtaining entry*

into and residence in the host Member State." While *Rahman* was concerned with Article 3(2) of the Directive, the entitlement of a host State to be satisfied as to the genuineness of the claimed dependence and that it was not brought about with the sole objective of obtaining entry into and residence in the host Member State can hardly be any different when assessing dependency in the context of qualifying family members.

93. I have considered whether the case of *Metock* should lead to a different conclusion. In *Metock* there were a number of applicants claiming to be qualifying family members of Union citizens. In the case of Mr. Metock, a national of Cameroon, he arrived in Ireland on 23rd June 2006 and applied for asylum. His application was refused on 28th February 2007. In October 2006, he married a Ms. Ikeng, whom he had met in Cameroon in 1994 and with whom he had been in a relationship ever since. Ms. Ikeng had acquired United Kingdom nationality, and had resided and worked in Ireland since late 2006. In November 2006, Mr. Metock applied for a residence card as the spouse of a Union citizen working and resident in Ireland. His application was refused on the basis that Mr. Metock did not satisfy a condition in the then applicable regulations that he should have had prior lawful residence in another Member State before entry into the State. The CJEU held:

> *"Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State."*

In coming to this conclusion, the CJEU held, at paras. 90-93, as follows:

> *"90. It must therefore be held that nationals of non-member countries who are family members of a Union citizen derive from Directive 2004/38 the right to join that Union*

citizen in the host Member State, whether he has become established there before or after founding a family.

91. Second, it must be determined whether, where the national of a non-member country has entered a Member State before becoming a family member of a Union citizen who resides in that Member State, he accompanies or joins that Union citizen within the meaning of Article 3(1) of Directive 2004/38.

92. It makes no difference whether nationals of non-member countries who are family members of a Union citizen have entered the host Member State before or after becoming family members of that Union citizen, since the refusal of the host Member State to grant them a right of residence is equally liable to discourage that Union citizen from continuing to reside in that Member State.

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

94. I think *Metock* is readily distinguishable from the instant proceedings. Mr. Metock was clearly a family member within the meaning of Article 2(2) of the Directive at the time he applied for a residence card, and the issue that fell to be determined in that case was whether or not Irish regulations that required him to have resided in another Member State before coming here were compatible with the Directive. The fact that Mr. Metock arrived in the State before he became a member of his wife's family within the meaning of Article 2(2)

of the Directive, could not and did not alter his status as a family member which he acquired when he married Ms. Ikeng. These proceedings, in contrast, are concerned with whether or not Ms. Tháo satisfies one of the criteria to be a family member within the meaning of Article 2(2), being that of dependence on a Union citizen, and at what point in time that issue falls to be determined.

95. *Metock* was relied upon by Goldring LJ in *Pedro.* In his conclusion, at para. 59, Goldring LJ stated:

> *"As Metock suggests, if a particular interpretation of the Directive would mean that a national of a Member State might realistically be discouraged from leaving that state and going to another Member State to work or if, when working or having worked, in another Member State, he might be encouraged to leave, that would not be consistent with the purpose of the Directive, or give effect to it. It seems to me that there is substance in [counsel's] submission that the Secretary of State's interpretation of Articles 2(1) and 3(1) could realistically result in a person deciding not to move to another Member State to work or, having moved, to be encouraged to return to his state of origin. A Union citizen who wishes to work in another Member State may be deterred from doing so if he knows that his elderly, but not then dependent mother, will not be regarded as his dependent for the purposes of Article 2(2) if she joins him and later becomes dependent upon him. If, in spite of that, he has left his state of origin, he may then be encouraged to leave his host State for his state of origin to enable his then dependent mother to be supported. As Eind and Metock make clear, no impediment should be placed in the way of a Union citizen which might realistically deter him from choosing to work in (for example) a city in another Member State, as opposed to one in his state of origin. If in the first case his dependent mother would*

not be supported and in the second she would, that would in my view amount to such an impediment."

96. With respect to Goldring L.J., I have some difficulty with this analysis. I would observe in the first instance that it is unclear from the facts in *Pedro* on what basis the mother joined her son in the UK, although it appears to have been accepted that once in the U.K., she was dependent on him. However, the basis upon which she joined him initially is of some importance and a number of different situations may be envisaged in this regard.

97. One scenario is where an elderly parent who is an EU citizen becomes dependent on the Union citizen *after* he has settled in another Member State. Here, she would be entitled to join him upon proof of dependency in her state of origin. Therefore, no lack of encouragement would arise at a prior point in time when her son is considering moving to another Member State if he is foreseeing this eventuality.

98. A second scenario, and perhaps the one envisaged by Goldring J in *Pedro*, is where the parent is an EU citizen who is not dependent on the EU citizen child at the time he moves to another Member State. The elderly parent (because she is not dependent) has no right to accompany him under Article 2(2): if she is living in the host State with her son before her dependency upon him develops, it can only be because she has independent rights under article 7, having satisfied the conditions therein. Goldring J was of the view that if the concept of dependency were interpreted to mean that she did not fall within Article 2(2), this would constitute a discouragement to a son who might contemplate, in advance of moving from one Member State to another, this scenario arising in the future. I am not persuaded by this reasoning. It seems unlikely to me that most people would be deterred from exercising free movement rights in circumstances where at the moment in time when the person is considering doing so, the family member is independent of the Union citizen who is considering exercising his/her rights, and is in a position to

accompany him/her. Moreover, it is not entirely clear that such a person would in fact be excluded from Article 2(2) as the CJEU does not appear to have ruled upon such a situation. Therefore I do not consider the hypothetical to be of any great assistance in interpreting whether, in the present case (where the EU citizen had already exercised his right to move to another Member State, and a non-EU national family member is claiming dependence), dependence should be assessed before or after her arrival in the State.

99. A third scenario is where the elderly parent is not herself an EU citizen. Her right to join her Union citizen son is only triggered in the event that he exercises his right of free movement. If he does not do so, the Directive is of no application, and whatever rights she might have to join her son would fall to be determined by reference to the (purely) domestic laws of the State where her son resides. Accordingly, far from being discouraged to move, a Union citizen who wishes his/her dependent family members who are not Union citizens to join him/her when they become dependent would be encouraged rather than discouraged to exercise his right to free movement to another Member State, in order to engage the Directive, regardless as to whether dependence is to be assessed in the country of origin or the host state.

100. For those reasons, having carefully considered the reasoning in *Pedro,* I am not persuaded by it.

101. As mentioned earlier, Pedro was decided before *Reyes*. While the respondent has relied upon *Siew Lian Lim,* which in turn relies upon *Reyes*, as casting doubt upon *Pedro*, I think that the appellant is correct in his submission that *Siew Lian Lim* is not authority for the proposition that *Pedro* was wrongly decided. *Siew Lian Lim*, somewhat unusually, was an uncontested appeal, and the Court appears to have placed reliance on *Reyes* without hearing any argument of the kind advanced in this case as to whether or not *Reyes* should be relied on for the proposition that dependence of those claiming to be qualifying family

members of a Union citizen must be assessed in the country of origin of those claiming that status. Moreover, *Siew Lian Lim* goes no further than to suggest that it is doubtful if the analysis in *Pedro* is compatible with *Reyes*. Accordingly, in coming to my conclusions, I have not relied on *Siew Lian Lim* as displacing *Pedro*. *Siew Lian Lim* is of no assistance, one way or another, to the arguments advanced on this appeal.

102. The appellant makes the very reasonable argument that the fact neither the Regulations nor the Directive expressly require an applicant who claims to be a dependant of a Union citizen to demonstrate dependency in the state in which she/he has come, in contrast to the fact that this is an express requirement in the case of permitted family members, suggests that the omission is deliberate. While at first glance this argument is persuasive, it does not withstand scrutiny when considered in the light of the task required of the respondent, i.e. to assess dependency at the time the descendant accompanies or joins the Union citizen. It would be an entirely artificial construct of "joins" to interpret it so literally as to confine it to the moment the descendant and the Union citizen meet in the State, without any regard at all to the reliance of the descendant on the Union citizen before his/her arrival in the State. As I have said above at para.88, this inevitably leads to the conclusion that dependence must be proven, in the first instance at least, in the country from which they family member has come.

103. Finally, in arriving at this conclusion I have also had regard to regulation 7(2)(a)(ii) of the Regulations, which, in defining the term "relevant date" clearly suggests that a person may become a qualifying family member after arrival in the State. While the appellant did not rely on this provision of the Regulations at the hearing of this appeal, nonetheless, I think it is appropriate to consider whether or not it should lead to a different conclusion than that indicated above.

104. It seems very likely that this provision owes its provenance to the decision of the CJEU in *Metock*, in order to make allowance for the decision of the Court in that case that a person may become a qualifying family member by marrying a Union citizen in the State, even though that person may have arrived here before the Union citizen and may not even have been lawfully in the State before the marriage. However, the provision is not restricted to such circumstances. It might therefore also apply, for example, where a Union citizen has accompanied his/her son or daughter here, in exercise of his/her own free movement rights under Article 7 of the Directive, as reflected in Regulation 6 of the Regulations. Where such a person originally had sufficient resources to be able to live in the State independently and without recourse to social welfare, but later exhausts those resources and becomes dependent, financially and/or otherwise on his/her son/daughter, he/she may become a qualifying family member of the Union citizen and be entitled to remain in the State, notwithstanding that he or she is no longer eligible to remain in the State under Article 7 of the Directive. I should make it clear that this was not an issue that was argued, and I am merely hypothesising in order to demonstrate that Regulation 7(2)(a)(ii) does not undermine the conclusion that I have reached, because it may apply to situations other than those that arise in these proceedings.

Conclusion

105. The assessment of whether a direct descendant of a Union citizen or of his or her spouse or civil partner is dependent on the Union citizen for the purposes of Regulation 5(b)(ii)(II) of the Regulations includes an assessment as to whether or not the descendant was dependent on the Union citizen at the time the descendant accompanies or joins the

Union citizen, and this necessarily involves a consideration of whether or not the descendant was dependant on the Union citizen in the country of origin of the descendant.

106. Since the appellant has failed in his claim that the respondent was not entitled to require proof that Ms. Tháo was dependent upon him in her country of origin, then it is unnecessary to consider the second limb of the appeal as to whether or not the respondent erred in law in finding that the appellant had failed to submit sufficient evidence of Ms. Tháo's dependence on him in the State, and the appeal must be dismissed.

107. However, this result is arrived at in the somewhat peculiar circumstance whereby, although this was given as a reason for refusing Ms. Tháo's application in the Impugned Decision, at no stage during the application process was such information requested by the respondent. That said, apart from the significant fact that this is not a ground on which leave to bring these proceedings was granted, neither the appellant nor Ms. Tháo have suggested in the course of these proceedings that evidence of dependence of Ms. Tháo upon the appellant while Ms. Tháo was resident in Vietnam could have been provided, if requested. More generally however, I think it is reasonable to observe that it would be an improvement in the efficiency of the application process, and fairer to applicants, to make it clear to them from the beginning - ideally on the application form - that evidence of dependency on the Union citizen is required at the time an applicant accompanies or joins the Union citizen, and that in most cases this will require evidence of dependency in the country of origin of the applicant.

108. Since the respondent has been entirely successful in this appeal, my provisional view is that she is entitled to an order for payment of her costs. If the appellant wishes to contend otherwise, he will have liberty to apply to the Court of Appeal office within 14 days of the date of this judgment for a short supplemental hearing on the issue of costs. If such hearing

is requested and results in the order proposed herein, the appellant may additionally be liable for the costs of such supplemental hearing.

109. Since this judgment is being delivered remotely, Faherty J. and Ní Raifeartaigh J. have authorised me to confirm their agreement with it.