

**THE HIGH COURT**

**[2018 No. 237 JR]**

**BETWEEN**

**MOHAMED AHSAN**

**APPLICANT**

**- AND -**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr Justice Max Barrett delivered on 31st March, 2020.**

**I. Introduction**

1. This is a European Union Treaty rights ("EUTR") related application that eventually came on for hearing after a number of adjournments. On the day before this application had been set down for hearing and marked 'peremptory', Mr Ahsan, a litigant in person, made a further application for an adjournment, which was refused by Humphreys J. At the outset of the hearing of the within application, Mr Ahsan sought to make what was in effect the same adjournment application. An affidavit was placed before the court which made some far-fetched claims about the previous day's application and sought unsuccessfully to create the illusion that the application placed before this Court was somehow novel when in truth it was not. Given the foregoing, as the application had already been decided by another High Court judge, the court respectfully refused the renewed adjournment application and proceeded with the hearing of the substantive application. Mr Ahsan then indicated that, not being a lawyer, he had nothing of substance to say. At the court's suggestion, counsel for the respondent then took the court carefully through the substance and detail of the within application, as documented. Thereafter, Mr Ahsan made a few brief observations (perhaps 2-3 minutes in length) and the court reserved its judgment, leading to the issuance of the within judgment today.

**II. Background**

2. Mr Ahsan, a European Union national, claims to have moved to Ireland in March 2015. EUTR applications were made in August 2015 for the issue of Irish entry visas to his wife and son, both third country nationals who are not applicants in the within proceedings. As part of those applications, Mr Ahsan stated that he was living and working in Ireland and wanted his wife and son to join/reside with him in Ireland.
3. As a matter of European Union law, once a European Union citizen has been resident in a host state for over three months he only retains a continued right of residence if the requirements of Art. 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ("Citizens' Rights Directive") [2004] OJ L 158/77 are established to have been satisfied. It is trite law that the entitlement of family members, seeking to join a family member exercising European Union Treaty rights in Ireland, is dependent on and derivative from the existence of the said European Union Treaty rights. Under Art. 35 of the Citizens' Rights

Directive, Member States are entitled to restrict rights arising thereunder in instances of abuse of rights and/or fraud.

4. Assuming Mr Ahsan arrived in Ireland in March 2015, then, as the visa applications for his wife and son were made five months later, his continued residence in Ireland pursuant to his EUTR, and hence any derivative right of his wife/son to join him, was dependent on proof of satisfaction of the conditions outlined in Art. 7 of the Citizens' Rights Directive.
5. The visa applications were refused in March 2017. The said refusals were unsuccessfully appealed. A notably comprehensive refusal letter issued in December 2017 which has been correctly summarised in the following terms in an affidavit sworn in the within proceedings by the relevant deciding officer:

*"[I]n rejecting the appeals, I noted, inter alia, that:*

- (a) the applicants had failed to provide a convincing explanation for the inconsistencies in the visa application to the Applicant's wife as concerns her proof of family relationship, in circumstances where she had previously stated that she was single and had described her relationship with the Applicant as 'other' than married on a previous unsuccessful UK visa application;*
- (b) taking into account, inter alia, the results of the Garda investigation, the applicants had failed to prove that they were joining an EU citizen who was lawfully exercising his free movement rights in the State;*
- (c) in particular, the applicants had failed to prove that the Applicant was genuinely resident or employed in the State;*
- (d) as concerns the Applicant's alleged residence, the Visa Appeal Refusals noted that, based on Garda investigations, he did not appear to be resident at the alleged property of residence....Rather, Mrs [DS] and her husband, Mr [AQ] appeared to be resident at that address...[Mr AQ having], upon Gardaí visiting the premises, falsely described himself as the Applicant's brother). In addition, electricity bills were paid by Mr [AQ]....In sum, concerning the Applicant's alleged residence, I concluded that the Applicant was not residing at [Stated Address]...and that the alleged tenancy agreement and utility bills being put in the Applicant's name was 'merely to give the appearance that he has a life in Ireland and resides here'.*
- (e) similarly, as concerns the Applicant's alleged bank accounts, I observed that these did not show transactions that any reasonable person would be expected to have on their account: no wages went into the account; no direct debits went out of the account; and this was indicative of a person who does not ordinarily reside in the country and who sought to give the appearance that he resided therein.*
- (f) as concerns the Applicant's alleged employer from June 2015, ASQ Commercial Cleaning Services, I noted that no evidence had been provided of the location of any services provided by this company and, when contacted by the Gardaí, Mrs*

[DS]...who claims to be the Applicant's employer, had refused to give any details of where the company conducts its business from and where [its] cleaning service[s] are provided. I noted that no relevant Revenue forms had been filed by the company. Further, there were clear inconsistencies in Mrs [DS's]...claims, including her varying claims of address, which cast serious doubts on the veracity thereof.

- (g) *it was noted that the evidence that Mrs [DS]...had purported to give in support of the Applicant's case also displayed significant inconsistencies and the Applicant and/or Mrs [DS]...had failed to prove that Mr and Mrs S [presumably Mr. AQ and Mrs. DS] is [sic] running a legitimate business.*
- (h) *as concerns the Applicant's flights to and from the UK, the Visa Appeal Refusals considered this evidence in detail in light of the Applicant's comments thereon and concluded that they show that the Applicant ordinarily resides in the UK."*

### **III. Reliefs Sought and Complaints Made**

6. In the within proceedings, Mr Ahsan seeks:

- "(i) an Order for Certiorari quashing the Respondent's decisions in the matter of the EUTR Visa applications of the Applicant's wife...and the Applicant's son...;*
- (ii) an Order awarding the Applicant damages for additional expenditure incurred arising from the Respondent's negligence;*
- (iii) an Order awarding the Applicant damages for suffering arising from the Respondent's breach of the Applicants Convention rights;*
- (iv) an Order for the costs of the within proceedings."*

7. The grounds for these reliefs are notably numerous, viz:

- "(i) The Respondent erred in law in applying an incorrect standard of proof for such applications and the appeal of same. The decision-maker found there to be 'serious concerns of abuse of rights'; any such findings of serious wrongdoing must be grounded upon cogent evidence which the Respondent in all the circumstances did not possess. The degree of probability required by the Respondent to ground a finding of potential abuse of rights was disproportionately low vis-à-vis the nature of the issue being investigated and the gravity of the consequences to the Applicant and his family members of such an adverse decision.*
- (ii) The Respondent further required the Applicant to disprove allegations of fraud and/or abuse of rights to an unrealistic standard of proof akin to beyond a reasonable doubt. The Respondent found the Applicant's account to be 'unconvincing', 'difficult to believe', grounded on 'insufficient evidence' and subject to 'huge doubt'.*
- (iii) Article 35 permits the State to adopt measures to refuse any right conferred by the Directive in the case of abuse of rights or fraud. However, any such measure must*

*be proportionate and subject to procedural safeguards. The Respondent's refusal of the within applications and appeals, on the basis of equivocal findings that 'serious concerns of abuse of rights' exist, constitutes a disproportionate measure.*

- (iv) The Respondent has denied the Applicant the procedural safeguard of an appeal as stipulated by Article 35. No clear allegation of fraud and/or abuse of rights was raised by the respondent in the first instance decision dated 7 March 2017. Concerns of abuse of rights were not expressly communicated until the appeal decision dated 20 December 2017.*
- (v) The Respondent acted in breach of Article 35 and/or the Applicant's right to constitutional justice by holding back the information obtained during the investigation carried out by An Garda Síochána at first instance and thereby rendered the appeal procedure a nullity by requiring the Applicant to deal with the issues for the first time on appeal.*
- (vi) The Respondent erred in law by failing to disclose further new information which operated to materially change the picture before the appeal decision-maker before proceeding to make final, unappealable findings adverse to the Applicant and his family members.*
- (vii) The Respondent failed to have any regard to the limitations of his investigation into the Applicant's exercise of free movement rights in this State. The Applicant entered the State on 16 March 2015; the Respondent contended that he had not commenced any significant examination of the visa applications even by October 2016. The visa officer at first instance held that the Applicant had not 'genuinely moved his centre of life to Ireland at any stage'. The Respondent failed to give due consideration to the evidence of the Applicant that over a period of some two and a half years he proportionately spent very little time out of the State and that during the period 16 March 2015 to 15 March 2016 he was continually present in the State with two exceptions.*
- (viii) The Respondent failed to disclose to the Applicant and to thereby put him on notice of a concern in respect of a second UK visa application made in September 2012 and the statements made in the course of the said application.*
- (ix) Without prejudice to the foregoing, the Respondent considered only the Applicant's wife's command of the English language and failed to have any or any proper regard to the other explanations afforded for the mistakes made in the UK visa applications.*
- (x) The Respondent engaged in an unlawful exercise of speculation as to the true intentions behind the UK visa applications.*

- (xi) *The Respondent failed to disclose to the Applicant and to thereby put him on notice of contradictory information obtained by the Gardaí from the property-owner of [Stated Address];*
- (xii) *The Respondent failed to disclose the fact and products of his search of the Residential Property Price Register.*
- (xiii) *The Respondent failed to disclose the fact and products of his search of the National Address Database.*
- (xiv) *The Respondent failed to disclose the fact and products of his search of the Commercial Leases Register.*
- (xv) *The Respondent failed to disclose the 'information made available to [his] office' presumably from the Revenue Commissioners pertaining to the tax records of ASQ Commercial Cleaning Services.*
- (xvi) *The Respondent speculated as to the 'behaviour of a person running a legitimate business'. It was irrational of the Respondent to suggest that there is one form of normative behaviour for each domain of human interaction. The decision-maker drew on the experience of the Gardaí."*

#### **IV. Discussion/Conclusion**

8. The court refers to its recent judgment in *Khan v. The Minister for Justice and Equality* [2019] IEHC 222 and does not propose to reiterate the various observations made therein concerning abuse of rights. Having regard to that judgment, the court would but make the following observations:

- (a) the Minister has the right to restrict the use of free movement rights under European Union law in circumstances of abuse of rights;
- (b) the impugned decision makes various findings as regards the facts and inconsistencies in, and the difficulties with, the appeals;
- (c) the Minister was entitled at law, and on the evidence before him, to make the findings and reach the conclusions that he made and reached;
- (d) notwithstanding that Mr Ahsan was given full and proper opportunity to address the Minister's concerns regarding the difficulties/inconsistencies presenting in the EUTR applications, Mr Ahsan has at no stage made any meaningful effort, including in the within proceedings, to explain the inconsistencies or dispute the facts identified by the Minister;
- (e) when it comes to abuses of rights, the same observations as were made by the court in *Khan*, at para. 5, apply, *mutatis mutandis*, with equal force in the within proceedings:

“5. Clearly, if...[the applicant] is engaged in an abuse of rights (as the Minister has found) then that is the end of the within application. Moreover, a judicial review application is a constrained exercise that does not involve a full appeal. In essence, the court has to find e.g., an error of fact/law, unreasonableness, or some breach of rights by the Minister in the Decision or how it was reached. The court sees no legal deficiency to present in the Decision or the process whereby it was reached: the Minister was entitled at law to reach the conclusion that he did on the evidence that was before him when the Decision was made”.

9. Freedom of movement of European Union nationals, among the greatest of the many great, and too often under-sung achievements of our wonderful European Union, has been constructed through law, can only be realised in accordance with law, and must be duly guarded by those tasked with policing/upholding the law. In this regard, the court would respectfully adopt the following observations made by counsel for the Minister in her written submissions:

*“The object of...Directive [2004/38/EC] is to facilitate the free movement of EU nationals between the Member States and in order that this object can be better fulfilled, the Directive also provides derived rights to their family members to accompany or join them. The Directive was not designed to facilitate entry by third country nationals into the European Union, although where that is the consequence of a family member moving to join or accompany an EU national who is moving between Member States it does have that effect. But that is a very different arrangement from one where the family seek to by-pass national immigration rules and enable a third-country national to enter the EU in circumstances [that the Minister lawfully found in the proper exercise of his decision-making power to be tainted by falsehood and fabrication].”*

10. It follows from all of the foregoing that no legal deficiency presents in the impugned visa appeal refusals or the related decision-making process such as would justify the court in granting any of the reliefs sought. All of the said reliefs are, therefore, respectfully refused.