

**THE HIGH COURT**

[2022] IEHC 243

[Record No. 2017/412JR]

**BETWEEN**

**ARFAN NISAR**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Barr delivered electronically on the 27th day of April, 2022.**

**Introduction.**

1. The applicant is a Pakistani citizen. He is 33 years of age, having been born on 1st January, 1989. The applicant travelled to this State in October 2014, having previously resided in the UK with his brother-in-law, who is a UK citizen.
2. The applicant applied for a residence card under Directive 2004/38/EC on 20th October, 2015, on the basis that he was a permitted family member of an EU citizen. That EU citizen was his brother-in-law Mr. Ali, with whom he had lived in the UK and with whom he continued to live in this country.
3. On 25th April, 2017, the respondent in a review decision of an earlier refusal which had issued on 25th November, 2016, refused the applicant's application for a residence card on the basis that he had failed to submit satisfactory documentary evidence of his dependence on Mr. Ali, or evidence of membership of Mr. Ali's household, prior to residing in the State.
4. The principal relief sought by the applicant is an order of *certiorari* setting aside the decision of the respondent to refuse the applicant a residence card. The applicant submitted that the respondent had conflated the applicable tests of dependency and membership of an EU citizen's household into a unitary test, when, under the provisions of the Directive and the implementing regulations in Irish law, these were separate tests. In the alternative, it was submitted that the respondent in considering his application, had not correctly applied the tests as identified in relevant authorities when considering his application, on the basis that he had submitted extensive evidence that he was a member of Mr. Ali's household both before and after his arrival in the State.

**Background.**

5. The factual background to the application, as set out in the applicant's affidavit and in the documentation submitted by him and in the correspondence submitted on his behalf by his solicitor, can be summarised in the following way: In 2009, Mr. Ali married the applicant's sister. At that time, a decision was made by the whole family, including Mr. Ali, that it would be in the applicant's best interest to pursue a course of third-level education in the United Kingdom. It appears that Mr. Ali was already resident in the UK at that time.
6. In 2011, having obtained a student visa to enter the UK, the applicant travelled to that country and resided with Mr. Ali in his house in Manchester. They were the only people

living in the house, as Mr. Ali's wife remained in Pakistan. The applicant did not pay any rent. The household jobs were shared between Mr. Ali and the applicant. As Mr. Ali was a chef, he tended to do more cooking, but the applicant did other tasks, such as cleaning and maintenance of the house. From the documentation submitted, it appeared that Mr. Ali had a mortgage on the property.

7. In the three years which followed his arrival in the UK, the applicant pursued a number of courses at various colleges. Documentary evidence was furnished in relation to the courses. In particular, it appears that Mr. Ali discharged at least some of the tuition fees, in the sum of STG £670.
8. In 2014, Mr. Ali decided to come to Ireland, as he was not able to get a visa for his wife and their two children to join them in the UK. The applicant did not remain to continue his studies in the UK, but travelled to Ireland with Mr. Ali.
9. In the period 2014 to date, the applicant continues to live with Mr. Ali in Ireland. In 2015, the applicant's sister joined them and since then they have had two further children. The applicant resides with the family and helps with shopping and looking after the children. He brings them to school and to medical appointments. He helps translate various matters for his sister. The applicant does not pay rent, as he is not entitled to work in the State, but he is paid a small amount of money by his brother-in-law for his services in looking after their children.
10. Accordingly, in terms of the applicant's relationship with the EU citizen, he has resided with Mr. Ali and his family, and has been at least partially dependent on him, for upwards of eleven years.

**Relevant statutory provisions.**

11. Council Directive 2004/38/EC of the European Parliament and of the Council of 29th 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, was transposed into Irish law by the European Communities (Free Movement of Persons) Regulations 2015 (SI 548/2015).
12. The most relevant regulation for this case is Regulation 5, which deals with the grant of permission for a permitted family member to enter the State. It defines who comes within the definition of "permitted family member" and sets out some of the evidence that must be submitted by an applicant to establish his/her right to enter the State as a permitted family member of an EU citizen's family. The relevant provisions of Regulation 5 are as follows: -

*"5. (1) This paragraph applies to a person who—*

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

*(i) is a dependant of the Union citizen,*

*(ii) is a member of the household of the Union citizen, or  
(iii) on the basis of serious health grounds strictly requires the personal care of the Union citizen,*

*or*

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

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

*(a)*

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

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

*(b) evidence that he or she is a member of the family of the Union citizen,*

*And*

*(c) one of the following:*

*(i) documentary evidence from the relevant authority in the country of origin or country from which he or she has come, that he or she is a dependant, or a member of the household, of the Union citizen;*

*(ii) proof of the existence of serious health grounds which strictly require the personal care of the applicant by the Union citizen;*

*(iii) documentary evidence of the existence of a durable relationship with the Union citizen.*

*(...)*

*(4) For the purposes of his or her decision under paragraph (3), the Minister may require the applicant to produce such additional evidence as the Minister may reasonably require.*

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

*(...)*

*(b) where the applicant is a member of the household of the Union citizen concerned, the duration of the period during which he or she has been living within the household of the Union citizen;*

*(...)*

*(e) whether the relationship described in subparagraph (a), (b), (c) or (d), as the case may be, was brought about with the objective of obtaining permission to remain in the State or a Member State;*

*(f) the capacity of the Union citizen concerned to continue to support the applicant in the State in the event that the applicant is to be treated as a permitted family member under these Regulations.”*

13. It should be noted that it was accepted by the parties that there is a typographical error in the version of the Regulations as printed, in that the word “or” is missing between the provisions of Reg. 5(1)(a)(i) and (ii). It was accepted that the eligibility criteria set down therein, were separate and distinct from one another.

**Discussion.**

14. It was agreed between the parties that the most relevant decisions were the judgment of the Supreme Court handed down on 21st December, 2020 in *Subhan and Ali v. Minister for Justice and Equality* [2020] IESC 78, in which the Supreme Court had decided to refer certain questions to the Court of Justice of the European Union pursuant to Art. 267 of the Treaty on the Functioning of the European Union, in relation to the meaning of the term “membership of a household” for the purposes of the Directive. Judgment is still awaited from the CJEU on that reference.
15. The second case which is of particular significance to this case, is the judgment of the Court of Appeal in *Shishu & Miah v. Minister for Justice and Equality* [2021] IECA 1, which judgment was delivered by Haughton J. on 8th January, 2021. It considered the law in this area in considerable detail and in particular, had regard to the dicta of Charleton J. in the *Subhan* reference judgment, which had been delivered one month earlier.
16. The court accepts the principles that have been referred to by the Supreme Court in the *Subhan* case, as endorsed and expanded upon by the Court of Appeal in the *Shishu & Miah* case. It is neither appropriate nor necessary for this Court to restate in extensive detail the discussion and analysis that was carried out by the Supreme Court and the Court of Appeal in those cases. It will suffice for this Court to summarise the general principles that emerge from its reading of those judgments.
17. The test which is to be applied when determining who is a member of the household of an EU citizen was considered by Charleton J. at paras. 25-28 of his judgment in the *Subhan* case. Those criteria were adopted and applied by Haughton J. in the Court of Appeal judgment in the *Shishu & Miah* case. In essence, when a court is considering whether a person is part of the household of an EU citizen, it is clear that cohabitation between the applicant and the EU citizen in the other EU state, prior to arrival in Ireland, is a *sine qua*

*non* of being a member of the household. However, as pointed out by both the Supreme Court and the Court of Appeal, cohabitation of itself, does not indicate that a person is a member of the EU citizen's household. For example, an applicant may be merely a housemate or flatmate of the EU citizen in the other EU country. That would not be sufficient. Accordingly, while cohabitation is an essential requirement; it, of itself, is not determinative.

18. In looking at cohabitation, the judgments make it clear that one has to look at the nature of that cohabitation. In this regard, the purpose of the cohabitation between the applicant and the EU citizen is relevant. In both judgments it was pointed out that the purpose of the cohabitation is relevant to the question of whether the applicant can be seen as forming part of the EU citizen's household. For example, if the applicant had merely moved in with the EU citizen, because it was convenient for him to stay with the EU citizen while he was pursuing a course of studies, or undertaking some other purpose of limited duration, that would tend to negative the assertion that while so cohabitating, he or she was a member of the EU citizen's household. In the *Shishu* case, Haughton J. pointed out that in the *Subhan* case, the applicant, a Mr. Ali, had arrived in the UK on a student visa and had studied accountancy and business administration. The relationship with Mr. Subhan and his family, was therefore open to the interpretation that it was for a defined purpose and not intended to be permanent.
19. Another aspect relevant to the issue of cohabitation is the length of time for which it had lasted, both prior to arrival in the State and subsequent thereto. As Haughton J. noted at para. 81 of his judgment, the reference in the *Subhan* case suggested that the length of time spent in the household of the EU citizen was important and "may indicate a transitory or a settled embeddedness in the household of the EU citizen"; in domestic law that was a specific consideration under Reg. 5(5). It was relevant in the *Shishu* case, that Mr. Miah had lived in the same household, or at least under the same roof, as his brother since 2013 in three separate locations.
20. Also of relevance is the relationship between the cohabittees. In particular, it is necessary to have regard to whether there is any blood relationship between the EU citizen and the applicant. It is also relevant to have regard to the age difference between them. In the *Shishu & Miah* case there was a fourteen-year difference between the applicant and the EU citizen; whereas in the *Subhan* case, there was an eight-year difference between the EU citizen and the applicant. In the present case, Mr. Ali is approximately nine years older than the applicant.
21. Dependency can be a ground for application in its own right. It is also relevant to the issue of membership of a household. The decision maker is required to examine to what extent, if any, the applicant was dependent upon the EU citizen when they were living outside the State and since their arrival in the State. In this regard, questions such as whether the applicant was paying any rent or was otherwise contributing to the household are relevant. It is also relevant whether the EU citizen was making any payments to or for the benefit of the applicant prior to the time when the application is considered.

22. Where the accommodation is shared by a number of people, the court can consider the relationship as between those sharing the accommodation, be they cousins, or friends, or work colleagues. The decision maker is also entitled to ask who is the dominant party, is it the EU citizen? Or is it the non-EU citizen? By dominant, what is meant is the authority to accept the non-EU citizen into the EU citizen's household. Could that EU citizen ask the non-EU citizen to leave?
23. The cases also make it clear that the issue has to be looked at from the perspective of the EU citizen, because it is his or her rights that are guaranteed under the Directive. The decision maker is permitted to ask whether it would have inhibited the EU citizen in making his decision to move to the State, if the applicant did not travel with him or her.
24. Two further principles emerge from the judgments. Firstly, it is clear from Art. 3(2) of the Directive, that there is an obligation on the decision maker to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence: see judgment of Haughton J. at para. 92 *et seq*, citing judgment of the CJEU in *Banger v. Secretary of State for the Home Department* (C-89/17).
25. Secondly, the decision in the *Shishu* case made it clear that the onus was on the applicant to prove their entitlement on the balance of probabilities, the usual civil standard of proof. The Minister may entertain doubts about elements of the evidence provided, but that does not warrant a refusal, unless the Minister, on assessment of the totality of relevant evidence and information provided or otherwise available to him, on the balance of probabilities is not satisfied that the applicant is a person to whom Reg. 5(1) applies.
26. Thus, while decisions in earlier cases are undoubtedly helpful, each application will turn on its own facts, because the decision maker has to look at the somewhat intangible aspect of cohabitation, being whether the cohabitation is merely the sharing of accommodation, or constitutes the applicant becoming a part of the household of the EU citizen.

**Conclusions.**

27. The conflation argument, to the effect that the Minister had erred in conflating the eligibility criteria of dependency and membership of a household into a unitary test, whereby the applicant had to establish that he was both dependent on the EU citizen and was a member of his household in order to qualify under the regulations; was not strenuously pursued at the hearing of the action.
28. The court is satisfied that while the applicant and his solicitor had concerns that the initial refusal decision, which had issued on 25th November, 2016, had been based on an erroneous conflation of the two criteria, the applicant's solicitor in the course of a comprehensive and well-argued submission by letter dated 24th February, 2017, had made it clear that there should be no conflation of the two criteria. The letter further made it clear that the applicant was not putting forward his application on the basis that he was dependent upon Mr. Ali, but merely had referred to the fact that there was some dependency on his part on Mr. Ali, as evidenced by the fact that Mr. Ali had paid some of

his tuition fees while in the UK, as supporting his primary contention that he was a member of Mr. Ali's household.

29. The court is satisfied that reading the review decision of 25th April, 2017 in its entirety, which issued after the extensive submission had been made by the applicant's solicitor; it is not possible to argue that the decision maker had conflated the two tests when considering the applicant's applicant. The court is satisfied that these two eligibility criteria were not conflated when the decision maker was considering the application herein.
30. However, while the court is satisfied that the Minister did not conflate the issue of dependency and membership of a household into a unitary test, and while the decision maker accepted that certain tuition fees had been paid by Mr. Ali on behalf of the applicant while in the UK, he did not seem to take into account that there was evidence of a significant element of dependency on the part of the applicant on Mr. Ali while in the UK. Not only did Mr. Ali pay for at least some of the applicant's tuition fees, there was also the fact that the applicant did not pay any rent to Mr. Ali while residing with him in Manchester. These matters supported the contention that the applicant was to some extent dependent on his brother-in-law and was a member of his household in the UK. That was further supported by the fact, as noted by the decision maker, that the EU citizen had been transferring funds to the applicant on a regular basis since his arrival in the State.
31. It is clear from the judgment in *Shishu* that the decision maker is entitled to take account of the living arrangements and other salient factors after the applicant arrived in the State: see para. 98 *et seq.*
32. It is not clear from the decision that the decision maker had sufficient regard to the evidence submitted that the applicant continued to be a part of the expanded household, after his sister and her children arrived in the State and after she had two further children. There was strong documentary evidence submitted in relation to his role as a carer of the children. There was a letter from the School Principal, acknowledging that the applicant would bring the children to school on a regular basis. There was also evidence that he would assist his sister with various business and other matters that required translation into English. There was also evidence that Mr. Ali pays the applicant for looking after the children. Thus there is evidence of a continuing dependency between them.
33. The court is also concerned that the decision maker did not appear to take account of the fact that it appears that the applicant left the UK while he continued to hold a valid permission to stay in that country and to study therein, which presumably would have included the right to engage in some paid employment. Instead, the applicant chose to come to this country with Mr. Ali, even though he would be in a much more precarious immigration position and would not be able to work legally. That conduct on his part, is supportive of the applicant's case that he did so because he was part of Mr. Ali's household.

34. The question of the difference in ages between Mr. Ali and the applicant is also relevant. The applicant was approximately 22 years of age when he joined Mr. Ali in the UK. Mr. Ali would have been approximately 31 years of age at that time. This would be supportive of the assertion that the younger man was becoming part of the household of his older brother-in-law.
35. It is also necessary to consider the familial hierarchy within an extended Pakistani family. The applicant has submitted that by marrying his sister, Mr. Ali became a senior member of the applicant's family, such that when he went to live with him and study in the UK, he came under his patronage and became a part of his household. The importance of this analysis was emphasised by Haughton J. at para. 74 of his judgment in *Shishu*, where he cited the judgment of Baker J. in the Court of Appeal in *Subhan* ([2019] IECA 330), where she had stated as follows at para. 54: -

*"54. ...[W]hat has to be identified is the household of the Union citizen, and thereafter whether the applicant for permission to enter and remain is a member of that household. The centrality of the Union citizen is what is in issue, not whether the Union citizen heads up the group or governs the living arrangements within the dwelling. Insofar as the phrase "head of household" is used in the authorities from England and Wales, it seems to me that it was used more as a matter of convenience or as a colloquial expression. What is required is that the core members of the household are to be identified for the purpose of identifying the factual link between the family unit thus defined or identified and the non-Union citizen who seeks to derive a right therefrom."*

36. At para. 75 of the judgment, Haughton J. again referred to the judgment of Baker J. in *Subhan*, where the judge had made it clear that the living arrangements were not to be viewed with a bird's-eye view of a single moment in time, but must rather have some regard to the durability of the cohabitation and also of what future intentions could be objectively presumed regarding the continued existence of the household. In this regard, the position of the applicant in this case must be seen as being particularly strong, as he has effectively lived with the EU citizen, Mr. Ali, for over eleven years. There is certainly credible evidence that he has become an integral part of the family unit which now includes Mr. Ali's wife and their four children. While the court has to acknowledge that the decision under review was made in April 2017, it does not appear that the full extent of the living arrangements within the State were given due consideration.
37. Having regard to the fact that the authorities make it clear that under the Directive and under the regulations, there must be extensive examination of the individual circumstances of the applicant and his relationship with the EU citizen, the court is not satisfied that that was done in this case, having regard to the matters set out above. Accordingly, the court will set aside the decision of 25th April, 2017 refusing the applicant a residence card and will remit it back to the Minister for fresh consideration.



38. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any further matters that may arise.