**THE HIGH COURT**

[2022] IEHC 577

**RECORD NO. 2021/74/MCA**

**BETWEEN**

**CORNELIA MOCANU**

**APPELLANT**

**- and -**

**THE CHIEF APPEALS OFFICER**

**- and –**

**SOCIAL WELFARE APPEALS OFFICE**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Niamh Hyland delivered on 23 September 2022**

**Summary**

1. These proceedings seek to challenge a decision of the Appeals Officer of the second respondent to refuse an application for the State Pension (Non-Contributory) (the "pension") on the basis that the appellant did not have a right to reside in the State. The central dispute between the parties concerns whether, as a matter of EU law, the appellant, who came from Romania to join her daughter in Ireland, was required to be dependent on her daughter in Romania (the "home country") to obtain a right of residence, or whether dependency in Ireland ("the host country") is sufficient.
2. Having regard to the case law of the CJEU on this question, I am quite satisfied that the correct interpretation of dependency in EU law requires that the dependent relative must

have been dependent in the home country prior to joining the person exercising free movement rights. A person who becomes dependent only after they arrive in the host Member State is not considered to be dependent within the meaning of the Citizenship Directive, as interpreted by the CJEU.

3. As the appellant accepts that she was not dependent upon her daughter until after she came to Ireland, she must fail in her appeal against the decision of the respondent that she does not have a right to reside in the State and is not therefore entitled to a non-contributory pension.

**Facts and background**

4. The appellant is a Romanian national who has resided in the State since in or around 12 October 2011. The appellant resides with, and is dependent upon, her adult daughter who is a Romanian citizen living and working in this State.
5. The appellant, having reached retirement age, made an application for a non-contributory state pension which the respondent recorded as received on 15 January 2020. Subsequently, the appellant was asked, *inter alia*, to complete a Habitual Residence Condition form and a Social Welfare Inspector was appointed to investigate the application.
6. The Inspector provided a report to the department on 19 March 2020 and, in a Decision Letter dated 23 March 2020, the Deciding Officer refused the application on the basis of, *inter alia*, a finding that the appellant had failed to prove a right of residence in the State. An appeal was lodged on 30 March 2020. On 18 June 2020, in accordance with a request pursuant to Article 10 of the Social Welfare (Appeals) Regulations 1998, the appeals office was provided with a statement from the Deciding Officer setting out the extent to which the Deciding Officer accepted or rejected the facts and contentions of the appellant.

7. By way of letter dated 13 November 2020 the Appeals Officer wrote to the appellant setting out a summary of the evidence and the issues arising on appeal. The Appeals Officer invited her to correct or refute any part of the content of the summary provided or to submit any further evidence. On 24 November 2020 the appellant provided further documentation by way of email.

8. In a decision dated 8 January 2021, the Appeals Officer upheld the Deciding Officer's finding that the appellant had not established a right to reside in the State as a dependent. The decision summarised the evidence as follows:

> *"3. The Appellant was aged 65 at the time of the application, she is a Romanian national and her Spouse and Son live in Romania. Weekly pensions of €25.50 and €58 are payable to the Appellant and her Spouse respectively. The Appellant states that she worked in Romania to support herself. Ownership of an apartment in Constanta in Romania is advised. The Appellant's Spouse lives in this apartment.*
>
> *The Appellant states she has not left Ireland since her arrival. The Appellant has stated that she has lived with and been supported by, her daughter since 2011. No evidence of pre-dependence in Romania is advised. The Appellant states that she supported herself in Romania by working. The Appellant has responded negatively in relation to whether or not she had the necessary permissions to reside in Ireland since 2011. An Account with PTSB ending ***725 is advised. Employment and self-employment are denied. The Appellant had lived all her life in Romania prior to her arrival in Ireland in October 2011. The Appellant is stated to have supported herself in Romania by working. The Appellant's Spouse, son, and siblings, two sisters and one brother, reside in*

*Romania. There are no plans for family re-unification and the Appellant has indicated to live in Ireland "forever"* [sic].

9. The decision then goes on to analyse the question of a right to reside, noting:

*"…The [European Communities (Free movement of Persons) Regulations 2015] provide in Regulation 6(5) for an EU citizen to derive a right to reside in another Member State from another family member, provided they inter alia, are a direct family member in the ascending line, of an EU citizen exercising EU Treaty rights. In this case this would be the Appellant's daughter who is working in Ireland since at least 2011. However, in order to establish this right the Appellant must demonstrate pre-dependency in her country of origin and continued dependence in Ireland. Furthermore, such a right is conditional on continued employment by the employed EU Citizen. The evidence on file has not established such a pre-dependency existed between the Appellant and her daughter prior to the former's arrival in Ireland. On the contrary the Appellant has stated that she supported herself by working. Additionally, the Appellant was living with her Spouse in their privately owned apartment."*.

10. The Appeals Officer went on to conclude that the appellant had "*failed to establish a right to reside which would entitle her to receive a social assistance payment such as State Pensions Non-Contributory*". The appellant is appealing this decision in accordance with s.327 of the Social Welfare (Consolidation) Act 2005 (the "2005 Act").

**Proceedings**

11. An originating Notice of Motion of 7 April 2021 was issued grounded upon an affidavit of Ms. Sinnott of Sinnott Solicitors of 2 April 2021. A verifying affidavit by Ms. Mocanu was sworn on the same day. A further affidavit was sworn by Ms. Mocanu on

22 June 2021. The respondent filed points of opposition on 14 October 2021. An affidavit of Mr. Bourke, Appeals Officer in the Social Welfare Appeals Office, was sworn on the same date. An affidavit was sworn by Mr. Cojanu, the son-in-law of Ms. Mocanu, on 11 November 2021, in relation to the question of whether the appeal was within time.

**Issue raised in these proceedings**

12. There are two principal issues between the parties in this appeal. The first is the preliminary objection of the respondent that this appeal was brought out of time having regard to Order 84C, Rule 2(5)(a) of the Rules of the Superior Courts (the "RSC"). The appellant accepts that she was out of time but seeks an extension of time. The second is the substantive ground of appeal pursued by the appellant, i.e. that there is no requirement as a matter of EU law that the appellant should have to provide evidence of dependency prior to her entry into the State.

**Extension of time**

13. There is no dispute between the parties that Order 84C, Rule 2(5) of the RSC, sets out the time limits within which the appeal must have been brought. Rule 2(5) provides as follows:

> *"(5) Subject to any provision to the contrary in the relevant enactment, the notice of motion shall be issued:*
>
> *(a) not later than twenty-one days following the giving by the deciding body to the intending appellant of notice of the deciding body's decision, or*
>
> *(b) within such further period as the Court, on application made to it by the intending appellant, may allow where the Court is satisfied that there is good and sufficient reason for extending that period and that the*

*extension of the period would not result in an injustice being done to any other person concerned in the matter."*

14. It will be recalled that the impugned decision was notified on 8 January 2021. The originating Notice of Motion was issued on 7 April 2021 and was served on 21 April 2021. The respondent submits that time expired on 29 January 2021, 21 days after the notification, but the proceedings were not served until some 82 days or eleven and a half weeks later, which is substantially outside the limit imposed by Rule 2(5).

15. The appellant responds by saying that the delay in issuing the proceedings in February and March has been explained with reference to the Covid-19 pandemic. She relies on the decision of Ferriter J. in *XS and JT v IPAT* [2022] IEHC 100 where the Court accepted that difficulties caused by Covid-19 restrictions and technological constraints on taking instruction justified a five-week delay beyond a 28-day time limit. The appellant notes that in *XS* the applicants were legally represented at the relevant time, whereas in this case both the appellant and her son-in-law have averred to the difficulties they encountered attempting to instruct legal representatives during the same period. It is submitted that such evidence warrants an extension of the 21-day limit.

16. Beyond this, the appellant states that following the issuing of the proceedings, this matter was given a return date of 10 May 2021. She submits that under Order 84C, Rule 5(1) the respondent was required to deliver opposition papers prior to that date which she ultimately failed to do. The appellant accepts that a hearsay objection arose in the interim and a number of adjournments were made on consent but the appellant notes that she consented to an adjournment to 18 October 2021 subject to the requirement that the opposition papers be delivered by 27 September 2021. The respondent did not file those papers until 15 October 2021. Finally, it is noted that no prejudice is pleaded

by the respondent and that this is a case of significant public importance, raising important EU law issues.

17. The respondent contends that the appellant has not established that there is good and sufficient reason to grant an extension of time. She notes that the appellant did not initially address the issue of an extension on affidavit, though the affidavit grounding the originating Notice of Motion indicated the appellant was isolating as a close contact of a positive Covid-19 case between 9 and 17 January 2021. It was indicated that she sought to instruct a solicitor, through her daughter, on 17 January 2021, but no details were provided explaining the delay between that date and the issuing of the papers in April 2021. The affidavit of Mr. Cojanu, the son-in-law of the appellant outlines a number of steps taken to obtain legal advice, but the respondent submits that the timeline set out demonstrates a lack of urgency in taking the appropriate steps to comply with the requirements of Rule 2(5).

18. The respondent relies on the consideration of the circumstances in which an extension should be granted by Baker J. in *Keon v Gibbs* [2015] IEHC 812 where the Court held that the requirements of the RSC are cumulative; that there be both an analysis of the explanation provided for the delay but also whether it could be said there were sufficient reasons permitting the extension, in other words whether there was sufficient reason to extend the time in all the circumstances. Relevant factors included;

    (i) The reason for the delay and whether there was a justifiable excuse (fault on the part of a legal advisor not generally being a sufficient excuse);

    (ii) The length of the delay;

    (iii) Whether there was the formation of an intent to appeal within time;

    (iv) Whether the appeal is arguable, or conversely, vexatious;

    (v) Whether the extension of time is likely to prejudice another party.

The respondent submits that in light of the foregoing criteria, an extension of time should not be granted in this case. She submits that the delay in question was a significant multiple of the time allowed under the RSC and that while the Covid-19 pandemic may have justified a short extension, it cannot justify one of over eleven weeks.

19. Beyond this the respondent contends that the decision of Ferriter J. in *XS*, properly interpreted, does not avail the appellant. It is submitted first that the five week delay in that case is simply not comparable to that of eleven and a half weeks in this case and that in *XS*, the justification for the delay related to the technological difficulties experienced by persons living in the Direct Provision System, which do not arise here. Nor does *XS* stand as authority for the proposition that Covid-19 will justify a delay of any length.

20. Finally, the respondent notes that where the appellant consented to extensions of time, it cannot now be open to her to plead this as a justification for refusing an extension.

21. In my view, the appellant has not identified a justifiable excuse for the delay. Mr. Cojanu avers that he and his mother-in-law were self-isolating because of Covid-19 between 9 and 19 January. He details his efforts to contact solicitors between 12 January 2021 and 19 January 2021. He refers to contacting Sinnott solicitors in mid-February. He refers to the first appointment being on 19 March 2021 because of his work schedule and the availability of Sinnott solicitors. He refers to the appeal being prepared as quickly as possible after advices were obtained from counsel and it being lodged on 7 April 2021. He says that the Covid-19 lockdown restricted and delayed his mother-in-law's search for a solicitor because most law offices were closed to the public and because of travel restrictions. He refers to the need to balance his support of his mother-

in-law with his own household family and work commitments at the time. He mentions that his mother-in-law is 67 and has very limited English and thus requires support.

22. When considering whether to grant an extension I must look at the time period identified by the legislature and then the extent to which the delay exceeds that time period. Here the time period is a short one, being only 21 days. The period of delay was almost 4 times longer than the time period allowed. Thus, the delay must be treated as a considerable one.

23. In relation to the reasons for the delay, there was an early flurry of activity seeking a solicitor during the period of self-isolation but that tapered off after the family were no longer required to isolate. There was then a period of 2 months before they met with Sinnott solicitors. Even after that there was no particular urgency in bringing the application. I appreciate that finding legal representation can be difficult, particularly for non-English speakers, but the evidence establishes that there were early attempts to locate a solicitor but those attempts then lapsed for some considerable time.

24. I can understand the reasoning of Mr. Cojanu where he says that he had to balance his own family obligations against the needs of his mother-in-law in sourcing a solicitor. However, that in my view is not a substantive excuse which justifies the delay.

25. In relation to the other factors identified in *Keon* that I should consider, I fully accept that there was an intention to appeal formed within the applicable time period. The appeal is not vexatious. Nor would an extension prejudice any third parties.

26. Nonetheless, I conclude that no extension of time should be granted in this case. I place particular emphasis on the fact that the delay is very significant, having regard to the 21-day time period and that no justifiable excuse has been provided in my view. Where the legislature has made a policy decision to set very short limitation periods, as it has done in the instant case, it would undermine those limitation periods were I to ignore

the significant delay in this case and to grant an extension of time despite the lack of a substantive excuse.

27. Despite my conclusion that no extension of time should be granted, I have decided the substantive issue in case I am incorrect in this conclusion.

**Substantive appeal**

***Legislative background***

28. The appellant is appealing against a decision to refuse her application for a non-contributory pension. To qualify for the pension, an applicant must satisfy the criteria set out in s.153 of the 2005 Act. Particularly relevant to this case is the requirement in s.153(c) that the applicant must be habitually resident in the State. Habitual residence is defined in s.246(1) of the 2005 Act to include a family member of a person working in the State who is residing here pursuant to Article 7 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (the "2004 Directive" or the "Citizenship Directive") i.e. a family member of an EU citizen exercising their free movement rights.

29. Under s.246(5) of the 2005 Act, if a person does not have a right to reside in the State they will not be considered habitually resident. Accordingly, the appellant satisfying the habitual residence requirement is contingent upon her having a right to reside in accordance with the terms of the Directive. The Directive is implemented in this jurisdiction by way of the European Communities (Free Movement of Persons) Regulations 2015 S.I. 548/2015 (the "2015 Regulations"). Under the terms of both the Directive and the 2015 Regulations, the appellant must be dependent on her daughter to enjoy a right of residence in the State and to thus qualify for the pension. The dispute between the parties is whether dependency within the meaning of the Directive requires

that the appellant must have been dependent on her daughter in Romania prior to her move to Ireland.

**Arguments of the appellant**

30. The appellant's arguments against pre-dependency are made both positively and negatively. To begin, she makes a positive, what I will call textualist, argument as to why there is no such requirement and in the negative, she argues that the two judgments of the CJEU relied on by the respondent are distinguishable from her circumstances.

***The textualist argument***

31. The appellant argues that an analysis of the relevant provisions governing the rights of residence of those dependent on EU citizens demonstrates that the requirement for pre-dependency arises only in respect of those dependent on EU citizens who are students, and not workers, as in this case.

32. Turning first to the Directive, the appellant outlines that it distinguishes between "family members" as defined by Article 2(2) and "other family members" as defined by Article 3(2). To avoid confusion, it is helpful to know that "family members" are also sometimes described as "qualified family members" and "other family members" as "permitted family members". A more favourable regime under the Directive applies to the former.

33. Under Article 2(2) "family members" of an EU citizen include, at subsection (d), their dependent direct relatives in the ascending line. With respect to "other family members" the Directive provides under Article 3(2) that Member States shall facilitate the entrance and residence of, *inter alia*:

> *"(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen*

*having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;"*

34. After drawing attention to this distinction, the appellant then notes that under Article 7 of the Directive, all EU citizens shall have a right to reside beyond three months, *inter alia*, if they are workers or self-employed in the host Member State or if they are family members accompanying or joining an EU citizen who has such a right of residence.

35. The appellant then outlines that this distinction has been replicated in the 2015 Regulations using the terms "qualifying family member" and "permitted family members". I should note at this point that the applicant's arguments in relation to the alleged illegality of the 2015 Regulations were not pleaded in any way and only entered the case by way of the written legal submissions. I find these arguments are inadmissible as they are not pleaded.

36. Nonetheless, for the sake of completeness, I will summarise them. Regulation 3(5) outlines that a person will be a qualifying family member where they are, per 3(5)(b)(iii), "*a dependent direct relative in the ascending line of the union citizen*". Regulation 5(1) applies to permitted family members and identifies that it applies to family members, other than qualifying family members, irrespective of nationality, *"who in the country from which the person has come – (i) is dependant on the Union citizen, (ii) is a member of the household of the Union citizen, or…".*

37. After identifying the foregoing scheme, the appellant then notes that the decision to refuse her application invoked Regulation 6(5) which provides, *inter alia*, as follows:

*"(5) (a) Where a Union citizen has an entitlement to reside in the State under paragraph (3)(a)(iii), a person to whom subparagraph (b) applies may apply to the Minister for a permission to remain in the State with that Union citizen.*

*(b) This paragraph applies to a direct relative in the ascending line of the Union citizen, or of the Union citizen's spouse or civil partner, who is dependent on the Union citizen, or on the Union citizen's spouse or civil partner.*

*(c) In order to decide whether to grant a permission under paragraph (a), the Minister shall cause to be carried out an extensive examination of the personal circumstances of the applicant and shall have regard to the following:*

*(i) the extent and nature of the dependency;*

*(ii) in the case of financial dependency, the extent and duration of the financial support provided by the Union citizen or his or her spouse or civil partner to the applicant prior to the applicant's coming to the State, having regard, amongst other relevant matters, to living costs in the country from which the applicant has come, whether the financial dependency can be satisfied by remittances to the applicant in the country from which he or she has come and other financial resources available to him or her;"*

38. It is noted that Regulation 6(3)(a)(iii) applies to EU citizens who are students and thus the requirements for an "extensive examination" under (c) arises if and only if the EU citizen is a student. It is accepted by the respondent that the reference to Regulation 6(5) was erroneous as the anchor EU citizen i.e. the appellant's daughter, was a worker and not a student. However, as I note above, there is no challenge in the pleadings to the Regulations or to the reliance by the respondent on Regulation 6(5) and it cannot be introduced into the case by way of submission. I should note in this regard that the main thrust of the appellant's case remains unaffected by my decision

not to permit her to plead an erroneous reliance upon Article 6(5). The core of the appellant's argument is that pre-dependence is not required for permitted family members when analysing dependence.

39. The appellant submits that to come within the scope of Article 2(2)(d) one needs simply be dependent on the EU citizen and nothing more. She argues that there is no requirement for pre-dependency identifiable and thus it follows that the commensurate implementing provision, Regulation 3(5)(b)(iii), cannot impose such a requirement as to do so would significantly circumscribe the application and effectiveness of the Directive. Beyond this, the appellant contends that the prior dependency requirement is entirely confined to "other family members" in the parlance of the Directive or to "permitted family members" under the Regulations and this is so because this category is not entitled to join or reside with an EU citizen as of right.

40. The appellant again stresses that the authority for imposing the pre-dependency requirement, Regulation 6(5), is explicitly engaged only where the EU citizen in question is a student. She further contends that Regulation 6(5) is derived from a derogation found in Article 7(4) which provides as follows:

> *"By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner."*

41. In essence, this derogation applies Article 3(2) to dependent direct relatives in the ascendant line, such as the appellant, where the EU citizen meets the conditions of 1(c) which provides a right of residence for those who are students.

42. The appellant claims that if the respondent is correct in reading a pre-dependency requirement into Article 2(2)(d) in all cases, this derogation becomes meaningless as the dependant direct ascendant relatives of workers will be treated, as in this case, in a manner expressly reserved to the relatives of students.

***The argument on the case law***

43. The appellant observes that the respondent has fallen back on a broader argument in its opposition papers that the case law of the CJEU implies a pre-dependency requirement in Article 2(2)(d) (and thus Regulation 3(5)(b)(iii)), in circumstances where the inadequacy of Regulation 6(5) as a justification is apparent. The appellant emphasises that the reason provided in the decision was the applicability of Regulation 6(5) and that this is an error of law given the EU citizen upon whom the appellant is dependent is a worker and not a student. She argues that the legal basis for the refusal on appeal is different to that which was provided in the decision under challenge. With this foundation laid, the appellant seeks to analyse and distinguish Case C-1/05 *Jia v Migrationsverket* (ECLI:EU:C:2007:1) and Case C-423/12 *Reyes v Migrationsverket* (ECLI:EU:C:2014:16).
44. *Jia* concerned Council Directive 73/148/EEC of 21 May 1973 (the "1973 Directive"), which provided for the abolition of barriers to movement and residence between Member States for the establishment and provision of services. Articles 1(1) and 1(2) of the 1973 Directive contained a similar distinction between types of family members to that discussed above. Article 1(1) covered ascending and descending relatives; "*which relatives are dependent on them*", whereas 1(2) required that the other family member category be "*dependent on that national or spouse of that national or who in the country of origin was living under the same roof*".
45. The Court, facing a dependency claim under Article 1(1), held that:

*"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."*

46. The appellant argues that this finding must be contextualised, given the further observation of the Court:

*"That is the conclusion that must be drawn having regard to Article 4(3) of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition, 1968(11), p. 485), according to which proof of the status of dependent relative in the ascending line of a worker or his spouse within the meaning of Article 10 of Regulation No 1612/68 is to be provided by a document issued by the competent authority of the 'State of origin or the State whence they came', testifying that the relative concerned is dependent on the worker or his spouse."*

47. The appellant argues that this context is vital. The 1973 Directive was interpreted by reference to Regulation No. 1612/68 (the "1968 Regulation") and Council Directive 68/360/EEC (the "1968 Directive"). She submits that although the 1968 Regulation refers to prior dependency in respect of other family members only, the 1968 Directive imposed the requirement for a pre-dependency certificate onto both categories. In circumstances where the 1973 Directive was silent as to dependency certificates, the appellant submits that the Court was simply applying the prevailing legislative scheme in noting the requirement for pre-dependency in both categories.

48. The appellant contends however that the Court's interpretation of the prior Directives in *Jia* does not map directly onto the 2004 Directive in circumstances where that Directive explicitly requires dependency certificates only in the context of other family members. In highlighting this distinction, the appellant points to Article 10 of the 2004 Directive which governs the issuing of residence cards. This provides that dependent family members under Article 2(2)(d) need only provide "*documentary evidence that the conditions laid down…are met*". In contrast, "other family members" who fall under Article 3(2)(a) must provide a pre-dependency certificate. The appellant further notes that an identical procedure is found in Article 8 for the issuing of registration certificates: "family members" need only prove they meet the condition of dependency whereas "other family members" must provide a dependency certificate.

49. The appellant therefore submits that the position of a dependent subject to the 1973 Directive, as in *Jia*, must be contrasted with the position of a dependent under the 2004 Directive. She argues the former was required to provide a dependency certificate, but no such requirement is found under the 2004 Directive. A passage from Jackson et. al., *Immigration Law and Practice* (4th ed. Tottel) is further cited in support of the distinction between the pre-2004 regime and the present, noting that the requirement for a dependency certificate "*is repeated in the Citizen's Directive but only for those family members falling under Art 3(2)(a) of the directive*.". Thus, in summary, it is argued that *Jia* is simply a reflection of what was then the prevailing legislative regime, which has been replaced by the 2004 Directive.

50. In contrast to *Jia*, *Reyes* dealt with a situation governed by the 2004 Directive, specifically with a family member under Article 2(2)(c), that is a direct descendant either under 21 or who is dependent. The questions referred to the CJEU asked whether it was permissible to require a direct descendant 21 years or older to have attempted to

obtain employment or help in supporting themselves before they could be considered dependent. The appellant submits that given the subject matter, *Reyes* cannot offer an answer to the question before this Court.

51. She notes that although the CJEU referred at paragraph 22 to the need for material support existing in the State of origin of the descendant or the State from whence he came at the time when he applies to join that citizen, this observation was made in the course of stating general principles established previously by the Court and was not, and nor was it intended to be, a definitive interpretation of Article 2(2)(d). Rather, the issue facing the CJEU was whether a dependent who has reached the age of 21 must attempt to support him or herself.

52. The appellant argues that in the circumstances of this case, a reference to the CJEU under Article 267 TFEU is required, where the question of the correct interpretation of dependency arises in a context not yet considered by the CJEU i.e. whether a person who has lived in a Member State for a significant period can claim a pension.

**Arguments of the respondent**

53. The respondent submits that to enter or reside in the State, a direct relative in the ascending line must be dependent on an EU citizen exercising their free movement rights. Contrary to the position of the appellant however, the respondent submits that as a matter of EU law, dependency must be established prior to the family member coming to the State. It is argued that this is an integral part of the definition of a family member in the Directive and in national law. The respondent submits that the appellant's contention that the requirement for pre-dependency is confined to "other family members" is not a proposition that finds support in either the jurisprudence of the CJEU or of the Courts in this jurisdiction.

54. The respondent notes that it is a principle of EU law identified by the CJEU that dependency must be established in the country of origin. It is submitted that it is a factual scenario characterised by material support being provided by an EU citizen who is exercising their free movement rights. The standard requires that there be a situation of real dependency with the Member State being required to assess whether, having regard to their financial and social conditions, the family member is not in a position to support themselves. Beyond this, the need for material support must have existed in the State of origin prior to the family member applying to join the EU citizen.

55. The respondent notes that this requirement was established in *Jia*, and notes the same passage at paragraph 37 identified by the appellant:

> *"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."*

56. The respondent argues that the appellant's attempt to distinguish *Jia* on the basis of the change of wording between the previous directives and the 2004 Directive is misconceived in circumstances where the principle has been applied consistently by the CJEU in its analysis of the 2004 Directive. It is submitted that *Reyes* is just such an example of the manner in which the CJEU has determined that dependency should be considered. That case makes it clear that a right of residence of a dependent family member under Article 2(2)(d) is contingent on that family member establishing that they were dependent in the State of origin. In circumstances where there is no dispute between the parties that the appellant was not so dependent in Romania, it is argued

that consequently she does not have a right of residence and does not therefore have an entitlement to any social welfare payment.

57. The respondent contends that the appellant's attempt to distinguish *Reyes* on the basis that it dealt with an inapplicable requirement for a descendant dependent to seek work or because it did not seek to set out a binding interpretation of Article 2(2)(d) is based on a mistaken interpretation. The respondent submits that to resolve the question referred in *Reyes,* the CJEU was required to assess the circumstances in which dependency arises and, in that context, it provided a specific answer to the question arising in this case. It is submitted that it is clear the CJEU analysis related to the general requirements of dependency from paragraph 20 where the Court refers to the overall requirement that "a situation of real dependence" exist. The respondent argues that the subsequent analysis then goes on to explain how such a situation of real dependence can be demonstrated in the State of origin.

58. In addition to the foregoing, the respondent notes that the argument that *Reyes* is distinguishable from this case in dealing with a relative in the descending as opposed to ascending line was rejected by Simons J. in *Voican v Chief Appeals Officer* [2020] IEHC 258. The respondent dismisses the argument of the appellant that *Voican* cannot be relied on as it is subject to an appeal to the Court of Appeal. This is so as the appeal is purely in respect of whether there is a requirement for ongoing dependency. It was common case that there was a requirement for prior dependency.

59. The respondent submits that not only is this understanding of dependency clear in the jurisprudence of the CJEU, it is also reflected in the decisions of the Courts in this jurisdiction. By way of example, the respondent notes that this can be seen clearly at paragraphs 66 and 77 of the decision of the Court of Appeal in *VK v Minister for Justice, Equality and Law Reform* [2019] IECA 232 which was followed more recently in *Dar*

*v Minister for Justice and Equality* [2021] IECA 339. The respondent notes that *VK* specifically deals with a dependent relative in the ascending line, just as in this case, and while much of the analysis in both *VK* and *Dar* relates to the factors to be considered in assessing dependency, each start from and accept the premise that as a matter of EU law, dependency must exist in the State of origin.

60. The respondent submits that, in light of the foregoing, it is notable that the appellant has been unable to find any authority supporting her interpretation of dependency either from the CJEU or in this jurisdiction. The respondent submits that in those circumstances, the appellant has fallen back on an argument seeking a reference to the CJEU despite the weight of authority against the proposition rendering the issue *acte clair*.

61. As identified above, the appellant argues that Regulation 6(5) – and the reliance upon same in the impugned Decision - is impermissible in circumstances where it does not accurately reflect EU law. The respondent submits that this is not a ground of appeal found in the Notice of Motion and therefore it is not a matter that arises in this appeal. It is argued that where there is no ground pleaded in relation to Regulation 6(5), it is not open to the appellant to raise the issue in submissions. The respondent submits this is so, both with respect to Order 84C, Rule 3 of the RSC and in respect of the general rules of pleading, relying on *Casey v Minister for Housing, Planning and Local Government* [2021] IESC 42 by way of example.

**Discussion and decision**

62. I agree that the appellant is not entitled to invoke an allegedly impermissible reliance upon Regulation 6(5) where same is not pleaded and I will not entertain that argument. In any case, that argument would only be important if I accepted the appellant's

arguments in relation to the correct interpretation of dependency and for the reasons set out below, I do not.

63. The essence of the appellant's argument is that the wording of the Citizenship Directive, properly construed, indicates that the requirement for pre-existing dependency only applies in relation to permitted family members and not qualified family members. That argument is made in the face of a long line of case law from the CJEU that makes it clear that, when considering dependency for the purpose of assessing whether a person is a family member and thus entitled to the considerable benefits of same under the Citizenship Directive, the state of dependency is evaluated prior to the family member coming to the EU Member State where the Union citizen is living.

64. It is certainly true that, as the appellant observes, this interpretation of dependency was first arrived at by the CJEU in the case of *Jia* in the context of the legislation preceding the Citizenship Directive i.e. the 1973 Directive. It is equally true that the 1973 Directive was interpreted in the light of other legislation extant at the time, namely the 1968 Regulation and 1968 Directive. In my view, had no decision been handed down by the CJEU after the enactment of the Citizenship Directive in relation to when dependency must be assessed in respect of qualified family members i.e. those addressed by Article 2(2), the appellant could plausibly - though not necessarily successfully - have argued that dependency does not require to be assessed prior to the person moving or joining the Union citizen.

65. Insofar as Case C-83/11 *Rahman* (ECLI:EU:C:2012:519) is concerned, although that was decided on the basis of the Citizenship Directive, arguably that did not put the matter beyond doubt either as it considered the question of dependency in the context of Article 3(2) as opposed to Article 2(2) i.e. in respect of "any other family members" rather than "family members". The appellant might have argued that *Rahman*, which

held that the question of the existence of dependency for permitted family members arises prior to moving or joining the Union citizen, did not consider the position of family members within the meaning of Article 2(2) and therefore that the question had not been resolved in relation to that group.

66. However, the decision in *Reyes* has comprehensively answered the issue that the appellant seeks to raise. At paragraph 22 of *Reyes* the CJEU identified the state of the law in this respect as follows i.e. "*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).* At paragraph 30 the CJEU observes:

> "*In that regard, it must be noted that the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent (see, to that effect, Jia, paragraph 37, and Case C-83/11 Rahman [2012] ECR, paragraph 33).*"

67. Thus, the law on when dependency must be analysed for the purpose of identifying family members falling within Article 2(2) is quite clear. The fact that the appellant may not agree with the approach of the CJEU or would like to advance arguments to persuade the CJEU that its chosen approach is incorrect cannot alter this state of affairs.

68. The appellant naturally seeks to distinguish *Reyes*. She argues that the decision was provided in the course of stating general principles established previously by the CJEU and was not, and nor was it intended to be, a definitive interpretation of Article 2(2)(d). She says the issue was specific to whether a dependent who has reached the age of 21 must attempt to support him or herself. She seeks to distinguish the position as between people in the ascending line, such as the present, from people in the descending line, such as in *Reyes*. She further argues that although the above statement from *Reyes* was

recited by Simons J. in *Voican* that is not a binding precedent on this Court and further, the Court of Appeal has since referred some questions to the CJEU concerning the conditionality of the derived right of residence on continuing dependency.

69. In response, the respondent identifies that to resolve the question referred in *Reyes,* the CJEU was required to assess the circumstances in which dependency arises and, in that context, it provided a specific answer to the question arising in this case. It is argued that it is clear the CJEU analysis related to the general requirements of dependency from paragraph 20 where the Court refers to the overall requirement that "*a situation of real dependence*" must exist. The respondent points out that the subsequent analysis goes on to explain how such a situation of real dependence can be demonstrated in the State of origin. Further, the respondent notes that the argument that *Reyes* is distinguishable from this case in dealing with a relative in the descending as opposed to ascending line was rejected by Simons J. in *Voican*, while noting that this aspect of *Voican* was not appealed and therefore may be relied upon.

70. When one considers *Reyes* in more detail, the attempt by the appellant to distinguish it is unpersuasive. *Reyes* concerned a Filipino citizen who was left in the care of her grandmother in the Philippines because her mother had moved to Germany to work to support her family. The mother subsequently moved to Sweden. Ms. Reyes and other family members in the Philippines received money from their mother to support them. Some years later, Ms. Reyes sought to join her mother in Sweden, claiming that she was dependent on her mother. Her application was rejected on the basis that she had failed to prove economic dependence on her mother and other family members in Sweden. The court in Sweden referred two questions.

71. The first was whether a Member State could require that a descendant seeking to be regarded as dependent must show they have tried to obtain employment or otherwise

seek to support themselves. In answering this question, the CJEU, with specific reference to Article 2(2)(c), summarised the conditions in respect of dependency for the purposes of coming within the definition of a family member as follows:

> *"21. That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, Jia, paragraph 35).*
>
> *22. In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant, who is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, Jia, paragraph 37).*
>
> *23. However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support. That interpretation is dictated in particular by the principle according to which the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly (see, to that effect, Jia, paragraph 36 and the case-law cited)."*

72. Paragraph 22 expressly identifies that the need for material support must exist in the State of origin of that descendant or the State from whence he came when at the time when he applies to join the Union citizen. The clarity of that statement of principle is fatal to the appellant's case.

73. The position is even more clearly set out in the answer to the second question which explicitly required a consideration of the time at which dependency is to be assessed.

The national court had asked whether, in interpreting the term "dependent" in Article 2 (2)(c) of the Citizenship Directive, any significance should be attached to the fact that a family member is deemed to be well placed to obtain employment, with the potential effect that the conditions for them to be regarded as a dependent are no longer met. In other words, this question considers whether a future where the person will no longer be dependent can preclude them from being considered dependent at the time of assessment. The CJEU made it clear that a Member State in assessing dependency cannot look to the future and conclude that a person is unlikely to remain dependent. At paragraph 30 the CJEU stated that the situation of dependence must exist at the time when the family member applies to join the Union citizen in the country from whence they come. Thus, the Court was clearly required to turn its mind to the question of when dependence should be assessed to answer the question and it confirmed the previous position as identified in *Jia*. Moreover, it is clear from the reasoning that the Court attached no significance to the fact that the person in question was in the descending rather than the ascending line.

74. The CJEU in *Reyes* did not explain the thinking behind the approach to the time at which dependency is assessed, but when one looks to the Citizenship Directive its underpinnings are apparent. The preamble to the Citizenship Directive explains why Union citizens moving to a Member State other than their own are permitted to be accompanied by family members. It refers to the free movement of persons constituting one of the fundamental freedoms of the internal market. It notes the right of Union citizens to move and reside freely should also be granted to their family members if that right is to be exercised under objective conditions of freedom and dignity. The purpose of permitting family members (irrespective of nationality) to join the Union citizen is to facilitate the right of those citizens to move and reside freely within the territory of

the Member States. This entitles dependent members of the Union citizen's family i.e. persons dependent upon the Union citizen at the time the family member moves, to enjoy certain rights. Article 7 of the Directive refers to family members "accompanying or joining a Union citizen" who is entitled to reside in the territory of another Member State and gives those family members the right of residence in the territory of another Member State. Their dependency is to be assessed at the date they move to be with the Union citizen, as it is at that point they gain the right to reside in the Member State. That is because permitting such persons to accompany or join the Union citizen facilitates the free movement of citizens across the European Union. Without such a provision, free movement of Union citizens across the European Union might be inhibited.

75. In summary, I consider *Reyes* is an authoritative statement of the law by the CJEU on when dependency must be assessed, by which I am bound. Unsurprisingly, given the clarity of the law in this respect, the Irish courts have applied and restated this principle in a number of judgments, most notably in the judgment of Baker J. in *VK* where she observed that the test for dependence involves an assessment of the need for material support in the State of origin, or the "State whence they came" (paragraph 66, and again at paragraph 74). That decision was followed in the decision of Donnelly J. in *Dar* where she refers to the decision in *VK* as an authoritative interpretation of the CJEU case law (see paragraph 43). Those decisions of the Court of Appeal are binding upon me, as are the decisions of the CJEU.

76. Finally, I should deal with some miscellaneous arguments made by the appellant. First, there is no basis either in the wording of the Directive or the case law for suggesting, as was done by counsel for the appellant at the hearing, that there might be a different regime for identifying the time at which dependency is to be assessed depending on

whether the person joining the Union citizen was themselves an EU citizen. No principled reason was advanced as to why there ought to be a more benign regime for EU citizens in relation to the date as to when dependency is to be evaluated.

77. Moreover, the Citizenship Directive makes it clear that there is to be no distinction between Union and non-Union family members in this respect. Article 7(2) expressly provides that the right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State who accompany or join the Union citizen in the host Member State. Accordingly, this argument - unpleaded - must fall away.

78. Equally, the arguments of the appellant in relation to the position of a student under Article 7(4) are a red herring. She seeks to argue that this provision makes it clear that only direct relatives in the ascending lines of students are required to establish pre-existing dependency as opposed to relatives of workers. The argument is based on a false premise. Article 7(4) simply makes it clear that the regime applicable to permitted family members i.e. Article 3(2), applies to direct relatives in the ascending line where the Union citizen is a student under Article 7(1)(c). The CJEU has already made it clear, as discussed above, that the conditions applicable to evaluating dependency apply whether a person comes under Article 2(2) or Article 3(2). Indeed, the proposition that different tests as to dependency apply depending on whether a person is a family member or other family member has been expressly rejected by Baker J. in *VK*. There, she observed that she saw no difference in 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 European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (the Regulations that preceded the 2015 Regulations).

79. Finally, the appellant also sought to rely on a decision of the Court of Appeal of England and Wales, *Pedro v. Secretary for State for Work and Pensions* [2009] EWCA CIV 1358. This concerned a claim for state pension made by a Portuguese national, who joined her son in the United Kingdom where he had worked and received benefits. The Court concluded that the combination of the language used in Article 2(2)(d) and Article 8(5)(d) of the Citizenship Directive indicated that dependency in the State of origin need not be proved for family members and that it was sufficient if the dependency arises in the host state. In reaching that conclusion the Court of Appeal relied on the decision of the CJEU in Case C-127/08 *Metock (*ECLI:EU:C:2008:449), while concluding that the analysis in *Jia* could be distinguished as the language used in the 1968 Directive was different to that which is used in the Citizenship Directive (see paragraph 63).

80. However, as pointed out by the respondents in their submissions on the point, *Pedro* was decided prior to the decision of the CJEU in *Reyes*. Nor did the CJEU consider *Metock* to be relevant to the issues in *Reyes* and it is not cited therein. As the decision in *Pedro* conflicts with the conclusions reached in *Reyes* and *VK*, I agree that it cannot be regarded as having any persuasive authority as a matter of either European or domestic law, irrespective of whether it is still considered to be good law in England and Wales.

**Conclusion**

81. For those reasons the appellant's case must fail, as must her application for a reference. The case law from the CJEU is absolutely clear in respect of the question as to when dependence is to be evaluated. Where a question is *acte clair*, there is no basis for a reference. I therefore dismiss the appeal.

**Costs Hearing**

82. I propose 7 October at **10am** for a **remote hearing** on costs. The parties have liberty to apply for a different date but if they wish to do so, they should agree a date and propose same in writing to the Registrar.