THE HIGH COURT

[2023] IEHC 206

Record No. 2022/1028 JR

BETWEEN

A.S., P.S. AND G.S.

APPLICANT

AND

MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms Justice Bolger delivered on the 24th day of April 2023.

1. This is the applicants' application for *certiorari* to quash the decision of the Minister dated 9 September 2021 to refuse the first and/or second applicant's visa applicants pursuant to the European Communities (Free Movement of Persons) Regulation 2015 and/or Council Directive 2004/38/EC.

Factual background

2. The first applicant is a national of India who was born in 1987. The second applicant is a national of India who was born in 1991. The third applicant is a national of the United Kingdom who was born in 1965, and is the father of the first and second applicants. He moved to Ireland on or around 18 August 2015 and resides here with his spouse and son who were granted visas to enter the State in 2019. He is currently employed.

3. On 13 November 2019, the applicants wrote to the Minister at the Embassy of Ireland in New Delhi to apply for Join Family (EEA national) visas for the first and second applicants, based upon the third applicant's status as a Union citizen residing and exercising his right of free movement in the State and on the first and second applicants' status as his dependents and therefore qualifying family members. His letter explained that the first and second applicants relied on him for their basic needs such as rent and other living expenses. Documents were enclosed in support of the

application, including bank statements and money transfers from the third applicant to the first and second applicants.

Decision of 16 December 2019

4. By decision dated 16 December 2019, the Minister refused the visa applications. Only the reasons relating to proof of dependency are relevant to the this decision. Payments were made by the third applicant to the first applicant on 5 May 2015, 28 June 2016, and 24 January 2019, but the decision stated that money transfers made in isolation were not proof of dependency and that the first applicant had not provided evidence that she was the sole beneficiary of this financial support. Her bank statements did not show any transfers of cash between 5 May 2015 and 24 January 2019 and she had not shown how she had provided for herself during this time or any documentary evidence to show that she was unable to meet her day-to-day expenses. The support provided from the third applicant was not proven to be necessary or sufficient. The decision raised similar concerns regarding payments made to the second applicant.

Applicants' appeal of 3 January 2020

5. The applicants submitted an appeal against those refusals, citing the Court of Appeal in *V.K. v Minister for Justice and Equality* [2019] IECA 232 in saying that, when assessed in combination, the money transfers constituted a considerable amount of support. The applicants had submitted affidavits that they had no other source of income and were wholly reliant on their father. They were not in a position to submit documentary evidence of income that did not exist. The third applicant's wife and son (their mother and brother) lived in India with the applicants until they were granted visas to join the third applicant in the State in 2019, and it was unsurprising that few cash transfers were made in their names prior to that time.

Respondent letter dated 8 April 2020

6. The Minister's response said that the amount of money transferred was not used as an indicator to determine dependency and that proof of a real need for financial assistance was needed, that the affidavits had little evidentiary weight in the absence of sufficient corroborating evidence, that it was noticeable that a single transfer of 952,998 INR had been made on 5 May 2015 and that

without this lump sum the total transfers amounted to 217,284.73 INR and that sufficient evidence had not been submitted that the second applicant was a beneficiary of any of the money transferred in this transaction.

7. The Minister requested various documentation including details of the second applicant's employment and any documents demonstrating that the first and second applicants used the money transfers from the third applicant to meet their essential needs.

Applicants' reply

8. The applicants' response of 11 May 2020 confirmed that the second applicant had never worked and was always dependent, and that the first applicant had worked sporadically, but earned a very miniscule amount sufficient only for pocket money for non-essential expenditures. They said that there was sufficient information that they had been dependent on the third applicant for a number of years, and that they could not be expected to provide a documentary account of how the support had been spent. The applicants wrote again on 12 December enclosing an original deed which identified their mother as the owner of their residence, and gas bills for that residence addressed to their parents at that address.

Impugned decision of 9 September 2021

9. The Minister refused the appeals for the following reasons:

- The sum transferred on 5 May 2015 could not be considered part of the pattern of transfers from the third applicant as it was unlikely to be for day-to-day expenses and could have been used for other purposes such as the second applicant's education.

- The Minister could only assess transfers to the first and second applicants from October 2018 and August 2018.

- No evidence of proof of payment of rent, a rental contract, evidence of rental payments or documentation detailing their succession from their mother had been submitted.

- No utility bills in respect of their residence had been submitted.

- In the 12 month period from May 2019, the third applicant had provided one tenth of the average cost of living for a person in India to the first and second applicants.

- The first and second applicants may be in receipt of an undisclosed source of income.

Applicants' legal submissions

Fair Procedures

10. The applicants submit that the Minister failed to comply with fair procedures in failing to consider the applicants' response before making the impugned decisions; *Shishu & Anor v. Minister for Justice and Equality* [2021] IECA 1, where the Court of Appeal in finding that the Minister did not have an investigative role in determining review applications, said at para. 127 that "there will be circumstances in which fair procedures dictate that the Minister raise matters with an applicant and consider a response before coming to a decision". They say the Minister did feel the need to issue such a letter in advance of the decision but, unlike the position in *Shishu & Anor*, failed to consider the entire response, evidenced by the fact that the decision makes no reference to the deed of ownership of the first and second applicants' residence or to the gas bills addressed to their parents at that address.

11. The applicants acknowledge that the onus is on them to prove the Minister failed to have regard to these documents (*MNN v Minister for Justice* [2020] IECA 187; *R v Minister for Justice and Equality* [2022] IEHC 142. In *R*, Phelan J. held that there is a "presumption that material has been considered if the decision says so" which may be displaced "on the basis of factors in the case… for example, where a reason given is not reconcilable with the material without further explanation" (at para. 37). They submit that the decision contains reasons that are not reconcilable with the missing documents without further explanation, including the conclusions on the amount received not aligning with the cost of living in India, which the applicants say is only correct if they were paying rent.

12. The applicants takes issue with the affidavit of the Minister's deponent wherein they aver "I can confirm that that [the documents sent on 12 December 2020] were considered [sic] the decision maker". That deponent was not the decision-maker and the only matter of fact which they can properly depose to is that the documents were in the records held by the Department when they were reviewed.

13. The failure to take all sums paid by the third applicant to the first and second applicant and to their mother into account was a further breach of fair procedures. The applicants say that failure meant that the average amount the Minster found had been received by the applicants in the 12 months following the departure of their mother and brother in May 2019 was understated. The Minister acknowledges that some transfers were not listed but denies they were not considered, pointing to a reference to the June 2019 transfer in earlier correspondence.

Irrationality and lack of sufficiently solid factual basis

14. The applicants rely on *L v Minister for Justice* [2019] IESC 75 which held that a review of a decision is required to be capable of ascertaining whether the refusal decision was "based on a sufficiently solid factual basis", which did not entail a full review but did necessitate a "searching review" (at para. 70).

Failure to assess the application from the perspective of a Union citizen and his free movement rights

15. The applicants submit that the Minister failed to consider the decision from the perspective of the free movement rights of the first applicant, as a Union citizen, and the visa appeal decisions are therefore irrational on this basis, as per *Shishu*.

Disregarding of 952,998 INR sum

16. The applicants contend that the Minister erred in disregarding the large sum of money transferred in May 2015 by the third applicant to the first applicant. The test of dependency does not require evidence of a pattern and in any event, the decision does not explain what, if any, pattern must be demonstrated to exist. Financial assistance can be provided by way of a lump sum that is topped up thereafter. The Minister's conclusion that the money could have been "for any reason" was irrational and/or the Minister failed in his duty to give transparent reasons and an objectively reasonable engagement with the facts, as per *V.K.*.

Failure to assess the application in the round

17. The applicants submit that the Minister failed to consider the appeals in the round, and failed to consider the ownership of their residence, their rent-free living arrangement, utility bills in their parents' names and the omitted financial transfers.

Minister's submissions

18. The Minister submits that dependency is not defined in the 2015 Regulations or the Citizens Directive but has been considered in case law of the CJEU; *Jia v Migrationsverket* (C-1/05); *Reyes v Migartionsverket* (C-432/12) Opinion of the Advocate General which was cited with approval by the Court of Appeal in *V.K*. The Minister state that these decisions correctly summarises the dependency test as presented by the Minister in the letter to the applicants:

> "Essentially, it requires you, as the applicant, to demonstrate that you need the support from your stated father in order to meet your essential needs. There must be a real need for the financial assistance. It is a test of the facts and not an interrogation of the reasons for the support. While showing that transfers are made, might be a start to establishing dependency, it is not dispositive of the issue, as this office requires proof that the asserted dependency is 'something of substance, support that is more than just fleeting or trifling, and support that must be proven, concrete and factually established.'
>
> To that end, it is for you and your sponsor to factually establish to the satisfaction of this office the needs actually met by this support was essential to life and were more than "merely welcome", in order to qualify under the Directive as a dependent of an EU citizen".

19. The Minister further contends that the applicants failed to give sufficient information about their own circumstances and/or what the financial transfers were used for, to establish they were actually dependent on their father. The Minister relies on *Dar v Minister for Justice* [2021] IECA 339 where Donnelly J. applied *V.K.* and concluded that the focus of the dependency test must be on what is actually provided by way of financial assistance and whether same is material (para. 41).

20. The Minister differs from the applicants in what she says are the legal issues which arise:

<u>Were the documents submitted by the applicants on 12th December 2020 of such significance that the decision maker was obliged to specifically reference them in the decision?</u>

21. The Minister acknowledges that it was appropriate for the Minister's deponent to aver that all documentation and information before the office had been reviewed. Where an applicant challenges such a statement they must satisfy the court to that effect (*GK v Minister for Justice* [2002] 2 I.R. 418).

22. The Minister challenges the applicants' entitlement to rely on the absence of references to the deed of ownership or the gas bills from the decision as those points were not made during the application. In support of this, the Minister cites *J.M.N. (A Minor) v. Refugee Appeals Tribunal and the Minister for Justice and Equality* [2017] IEHC 115; *Voivod v Minister for Justice and Equality and ors* [2018] IEHC 647; *SO (Nigeria) v. Minister for Justice and Equality* [2019] IEHC 573. The applicants claimed to be dependent on the sponsor for their material needs in life, including rent, food, transport, council tax, clothes and utility bills. The Minister takes issue with the applicants' not claiming that they were dependent on the sponsor's spouse.

Reasons are reconcilable with the documentation

23. Given that the applicants stated that they rely on their father to pay utility bills, it might have been expected to see utility bills in their name for their residence, or indeed any kind of utility bills as they must have received. The decision stated that the applicants did not provide any utility bills in their own names or received by them, or evidence that they discharged any utility bills through remittances from the sponsor.

24. The applicants impermissibly seek to deconstruct the decision and parse individual phrases. The decision should be assessed in full and in context. In support of this, the Minister cites *G.T. v. Minister for Justice Equality and Law Reform* [2007] IEHC 287 (unreported, High Court, Peart J, 27th July 2007); *Re Comhaltas Ceoltóirí Éireann* (unreported, High Court, Finlay P., 14th December, 1977); *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88; *The State (Divito) v. Arklow Urban District Council* [1986] I.L.R.M. 123; and *M.R (Bangladesh) v The International Protection Appeals Tribunal* [2020] IEHC 41.

25. The rationale for the decisions can be readily identified i.e. that the applicant failed to submit sufficient evidence of their own circumstances to establish dependency. The Minister says this was clear from the first instance stage and the fair procedures letter, and quotes the conclusion that the applicants "…have provided not one document to show how, where or with how, you live".

Was the Minister entitled to not take account of the large financial transfer of 5 May 2015?

26. The reasoning behind not considering these transfers is clearly discernible from the decisions, namely that if the applicants needs were being catered for by their mother before she left

in 2019, it is unlikely that the lump sum was for day to day essential needs and could have been for any purpose such as the second applicant's education. It cannot be considered as part of the pattern of transfers from the sponsor. Only the payments started in 2018 in the applicants' names could be assessed.

27. The Minister accepts that the financial transfers of 28 June 2019 and 17 February 2020 to the applicants, and 2 April 2019 to the applicants' mother, were omitted from the decision, but argues that this is was not determinative, given the relatively small sums involved and the central reasoning for the decision that the Applicants failed to submit enough evidence of their own circumstances to establish dependency.

Was the Minister's decision rational/based on a sufficiently solid factual basis

28. Dependency must be assessed having regard to the particular circumstances of the applicant. The lack of information provided by the Applicants meant it was not possible to assess whether there was a real dependency. No documentation was provided to indicate the Applicants' outgoings and/or what the remittances from the sponsor were used for. Evidence of financial transfers alone is insufficient. The Minister lawfully concluded that the applicants had not established dependency.

29. The right of the sponsor to freely move and reside within the EU was considered. That does not affect the fundamental reasoning behind the decision which the failure of the Applicants to provide sufficient documentation to establish dependency.

Decision

30. The issue here is whether the Minister complied with fair procedures and furnished a rational and facts-based decision in determining that the first and second named applicants had not established the necessary dependency on the third named applicant to allow their application for a visa to succeed.

31. What is required to establish dependency has been addressed by the CJEU and the jurisdiction is well summarised in *V.K.* at paras. 81-85. In that case, Baker J. went on to say the following at paras. 94 and 99;

"94. It is, of course, true that the concept of 'dependency' hinge upon the establishment of an identifiable and meaningful contribution to the alleged dependent person. Mac Eochaidh J. found that a contribution, even a minimum one, provided to a family member to meet needs to sustain life, even if that contribution is minimal. This approach is consistent with the decision of the CJEU in *Jia v. Migrationsverket*, that dependency means the provision of material support by a Union citizen or his or her spouse to meet the essential needs of the family member in the State of origin."

"99. In the appeal from the decision of Faherty J., the Minister argues that she subjected the evidence concerning the personal and financial circumstances of the parents to an 'extensive examination'. Faherty J. found this approach to be wrong. Counsel for the appellant argues that the Minister did not intend any pejorative or unduly restrictive meaning by the phrase 'extensive examination' and that, in truth, the Minister engaged a liberal exercise."

32. The impugned decision determined that the applicants had not established dependency because they failed to provide sufficient evidence in relation to their own circumstances and/or evidence of what the financial transfers from their father were actually used for. The Minister is entitled to assess the applicants' asserted dependency and to dispute it on the basis of insufficient documentation but as Baker J. properly points out in V.K., "this must be done by reference to a test which requires engagement with that documentation." (at para. 97). In addition, she said at para. 111;

"I do not accept that it is necessarily the case that a test stated in the negative that requires an applicant to show that it was impossible to live without support from a Union citizen family member is the same as a more positively expressed test which asks whether a person needs support to meet their essential needs. The test stated in the negative imposes a burden which is more onerous than that justified in the light of the authorities of the CJEU analysed above."

33. Information and documentation requested by the Minister and provided by the applicants was not sufficient or properly engaged with, as a result of which the decision to refuse their application was neither reasonable nor rational.

34. The impugned decision does not refer to the deed of ownership of the applicants' residence (held in their mother's name) or to the gas bills addressed to the third named applicant and his wife at that address, even though those documents were furnished by the applicants' solicitors as part of the additional documentation requested in the fair procedures letter of 8 April 2020. Neither does the decision refer to or take express account of three transfers of money from the third named applicant to the first and second named applicants and their mother in 2019 and 2020. Even though the amounts were not particularly large, their omission meant that the impugned decision understated the average amount of money received by the first and second named applicants after May 2019, which was relied on by the Minister in reaching her decision.

35. The decision stated at p. 8 "No utility bills were provided". That is simply wrong. Utility bills were provided, but not in the first and second applicants' names.

36. In spite of the matters set out at paragraphs 35 and 36 above, the decision maker says that all documents and information that was before the office were reviewed. That decision maker has not sworn an affidavit but a Higher Executive Officer in the Visa Division of the Immigration Service Delivery Function of the Department has, in which she confirms having reviewed the Department's records and avers that all of the documents and information were before the office and were considered by the decision maker. She goes on to question the applicants' assertion that the deed of ownership demonstrated that they were not required to pay rent given that they had previously averred in their application that they relied on the third named applicant to pay the rent.

37. It is difficult to see how that deponent can aver that the decision maker did consider documents and transfers that are not mentioned in the decision. It is verging on the "extrinsic evidence of what was intended to be conveyed by the decision ex post facto" in *Sheharyar* [2018] which led Keane J. to disregard averments that sought to clarify what the Minister's decision was intended to convey.

38. More recently in *H.A. v The Minister for Justice* [2022] IECA 166, Donnelly J., in the Court of Appeal, upheld a decision of Ferriter J. where he had found there was no evidence that the decision maker had considered a relevant document on the basis *"that the decision did not refer to it at all"* (at para. 17). The same criticism can be made of this decision which did not refer to the documentation or information set out above.

39. In *M.N.N. v. The Minister for Justice & Equality* [2020] IECA 187, Power J., in the Court of Appeal, identified one of the principles from the case law on assessing an application for naturalisation as "information that is presented to the Minister in a Submission or recommendation must be accurately recorded, complete and seen in context and considered in full by the decision maker before reaching a determination". She found the onus of proof shifted from the applicant to the Minister to satisfy the Court that the Minister did have regard to all of the information, where the decision did not take account of the contextual and exculpatory information that had been provided (at para. 98).

40. In this case, the decision maker's failure to refer to the documentation and transfers (set out at paragraphs 35 and 36 above) brings it into a similar arena and, in my view, constitutes evidence of the decision maker's failure to consider them. I find further support for this in the decision's conclusion;

> "[T]he average amount received per month by each visa applicant amounted to one tenth of the estimated monthly living costs per person in India. However, this conclusion is correct only if the estimated monthly living expenses includes rent, which the [first and second] applicants were not paying as they were living in their parent's property.
>
> The decision states that the first and second applicants failed to provide documentation detailing succession of the rental tenancy from [their] mother. However, no such evidence could exist having regard to the fact that the evidence submitted on the 12th of December 2020 demonstrated their mother was the legal owner of the property.
>
> Further, the decisions also state that no utility bill of any kind had been submitted by the applicants. Again, this is simply incorrect having regard to the utility bills submitted on the 12th of December 2020."

41. This is, therefore, a case where the presumption that the material has been considered if the decision maker says so "may be displaced on the basis of factors in the case …such as, for example, where a reason given is not reconcilable with the material without further explanation." as per Phelan J. in *R. v. Minister for Justice and Equality* at para 37.

42. The documentation and information submitted by the applicants should have been at least referred to and considered and, if and as appropriate, taken into account. The fact that the first and

second named applicants had earlier deposed to their father paying their rent did not obviate the need for the decision maker to do that. In fact it suggests a responsibility on the decision maker to seek to resolve the apparent inconsistency between those statements made by the applicants and the documentation later provided by them. That is part of what Haughton J. in *Shishu* [2021] IECA 1 described as the Minister's "duty not just to consider this documentation but also to assess it in the round" (at para. 95).

43. The impugned decision was not that of a rational and reasonable decision maker because of the failure to consider documentation and information furnished, as set out above, but also insofar as the decision excluded a substantial transfer of money made in 2015 for the stated reasons that it was unlikely to have been for the applicants' day to day needs as they were residing with their mother at the time, that it could have been for any number of purposes and that it was not part of a pattern of transfers. A similar finding discounting evidence of co-habitation because the applicant was named as a co-tenant on a lease, was condemned by Haughton J. in *Shishu* as irrational and a failure to *"consider the application in the round"* (para. 98). Haughton J. also criticised the decision's failure to consider the decision from the perspective of the Union citizen. A similar criticism can be levelled here having regard to the third named applicant's status as an EU citizen and his right to move and freely reside within the Member State.

44. For those reasons, I am granting an order of *certiorari* quashing the Minister's decision of 9 September 2021 refusing the first and second named applicants' visa applications.

Indicative View on Costs

45. My indicative view on costs is that costs should, in accordance with s. 169 of the Legal Services Regulatory Act 2015, follow the cause, but I will put the matter in for mention before me on 9 May 2023 to allow either of the parties to make such further submissions as they may wish whether in relation to costs and/or final orders to be made.