

**THE HIGH COURT  
JUDICIAL REVIEW**

[2022] IEHC 258  
[2019 No. 740 JR]

**BETWEEN**

**SA, SS (A PERSON OF UNSOUND MIND NOT SO FOUND), MNS (A PERSON OF  
UN SOUND MIND NOT SO FOUND) AND SDA (A MINOR SUING BY HIS GRANDFATHER  
AND NEXT FRIEND, SA)**

**APPLICANTS**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**JUDGMENT of Mr. Justice Mark Heslin delivered on the 14th day of April 2022**

**Introduction**

1. This case comes before the court in circumstances where, by order dated 27 May 2020 (Humphreys J.), the Applicants were given leave to seek judicial review in respect of the relief set out at para. [D] on the grounds set out at para. [E] in their Statement of Grounds.
2. The primary relief, as appears from para [D] of the Applicant's Amended Statement of Grounds dated 27 May 2020 is as follows: -

*"1. Certiorari by way of an application for judicial review to quash the decision of the Respondent dated the 23rd July 2019 to refuse the Second and/or Third and/or Fourth Applicant's visa appeals submitted pursuant to the European Communities (Free Movement of Persons) Regulation 2015 and/or Council Directive 2004/38/EC".*
3. The title to the proceedings was amended pursuant to the aforesaid order which was made at the 'leave' stage, on 27 May 2020. The circumstances in which the title to the proceedings was amended appear to be as follows. Counsel for the Applicants queried the capacity of the Second and Third Named Applicants to swear affidavits in support of the proceedings. The court directed the application for leave to proceed on notice to the Respondent and so that further medical investigations concerning their capacity could be conducted. Two medical reports were initially procured, being reports both dated 23 September 2019 concerning the Second and Third Named Applicants, respectively. These reports comprise Exhibit "MT 1" to the affidavit sworn by the Applicants' solicitor, Ms. Mary Trayers, in her affidavit which was sworn on 13 December 2019. In circumstances where it appears that the court was not satisfied that the aforesaid reports addressed the question of the Second and Third Named Applicants' capacity to swear affidavits, the leave application was adjourned to permit the Applicants to procure further reports. In a Second affidavit which was sworn by Ms. Trayers on 22 May 2020, she exhibits two further reports, both of which are dated 25 March 2020 and relate to the Second and Third Named Applicants. Both reports conclude by stating that each of the Applicants do "not have the capacity to swear or understand an affidavit".
4. Insofar as the applications on behalf of the Second and Third Applicants should be brought by a "next friend", it was indicated in written submissions that, if necessary,

appropriate consents would be obtained from the First Applicant, such that an application could be made at the hearing to amend the title of the proceedings accordingly. No issue was taken at the hearing in respect of the title of the proceedings. That said, it was not accepted on behalf of the Respondent that the Second and Third Applicants are not capable of swearing affidavits. This is clear from the averment made by Ms. Melissa Brennan, Higher Executive Officer in the Visas Division of the Respondent's department, who swore an affidavit on 27 October 2020 for the purpose of opposing the present applications and verifying the contents of the Respondent's Amended Statement of Opposition dated 29 October 2020. It is fair to say, however, that, although Ms. Brennan avers at para. 6 of her affidavit that the Respondent does not accept that the Second and Third Applicants are not capable of swearing affidavits, no medical evidence is proffered by or on behalf of the Respondent in support of that averment. Nothing, however, would appear to turn on the foregoing insofar as the core questions which this Court is asked to determine.

### **Three questions arising for determination**

5. I have carefully considered the contents of the Applicant's Statement of Grounds and the Respondent's Amended Statement of Opposition. In addition to indicating, at the outset of the hearing, that the Applicants were no longer proceeding with the legal grounds detailed in paras. [E] 4, 6, 7, and 11, three questions were identified as comprising the three 'core issues' which this Court was called upon to determine, having regard to the pleadings exchanged. In response to my questions, it was confirmed that there was no dispute between Counsel for both sides that the following questions fell to be determined: -

- (i) *Was the Minister entitled to have regard to the public policy imperative of maintaining the integrity of the State's immigration system, including the integrity and security of the Common Travel Area with the United Kingdom, as well as the overall security of the State, when making the visa appeal decisions of the Applicants and/or each of them?*
- (ii) *Was the Minister entitled to refuse a visa to the Fourth Applicant on the ground that the Second Applicant's visa appeal had been refused?*
- (iii) *Did the Minister lawfully assess whether the Second and/or Third Applicants are dependent upon the First Applicant under the European Communities (Free Movement of Persons) Regulations 2015 and Council Directive 2004/38/EC?*

### **Council Directive 2004/38/EC**

6. Before looking at the relevant facts in this case, it is useful to refer to the relevant legal framework. Of particular relevance is "Directive 2004/38/EC of the European Parliament and of the Council of the European Union of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States" ("the Directive"). The Directive sets out conditions which govern the exercise of the right of free movement and residence within Member States by EU citizens and their family members.

### **Recital 5**

7. The fifth recital provides as follows: -

*"(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage".*

8. It is uncontroversial to say that the provisions of the Directive are interpreted in light of the recitals, including the foregoing. As regards the articles themselves, Article 1 makes clear that the Directive lays down the conditions governing the exercise of the relevant free movement and residence rights; the right of permanent residence within the relevant territory for Union citizens and their family members; and the limits placed on the foregoing "on grounds of public policy, public security or public health". At this juncture, it is appropriate to note that each of the three decisions, of 23 July 2019, which are challenged in the present proceedings, employed the terms "public policy" and "security". Whether such considerations played any part in the Respondent's decision is disputed.

#### **Article 2**

9. Article 2 of the Directive sets out a number of definitions. It is fair to say that a distinction is made between a "family member" as defined in Article 2 (2) and "any other family members" as referred to in Article 3 (2) (a). It is useful to quote from Article 2 (2) as follows: -

"(2) *"Family member" means:*

(a) *the spouse;*

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

(c) *the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b) . . .".*

#### **Descendant / Dependants**

10. In the present case the First Applicant is a UK national and a Union citizen, currently living in Galway. The Second Applicant is his daughter. The Third Applicant is his son. The Fourth Applicant is a minor, aged 16, who is the child of the Second Applicant and the grandchild of the First. Thus, the Fourth Named Applicant relies on the first part of the definition of "family member" in Article 2 (2) (c) (as a direct descendant under the age of 21), whereas the Second and Third Applicants rely on the second part of that subsection (i.e. claiming to be dependants of the First Applicant Union citizen).

### **Article 3**

11. It is important to note that, as made clear in Article 3, a "family member" is entitled to enter and reside in a host Member State where the Union Citizen has relocated, whereas any other family members who do not come within the Article 2 (2) definition enjoy the lesser right of having their entry and residence facilitated.

### **Article 5**

12. Article 5 deals with the "Right of Entry" and it is useful to quote Article 5(2) as follows: -

*"2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.*

*Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure".*

13. Regulation (EC) No. 539/2001 is not applicable. Thus, for present purposes, Article 5(2) requires family members of non-nationals of a Member State to have entry visas in accordance with national law. The Applicants lay particular emphasis on the final sentence in Article 5(2).

### **Article 6**

14. Article 6 of the Directive concerns the right of residence for up to three months enjoyed by Union citizens and their family members, providing: -

*"1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.*

*2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen".*

### **Article 7**

15. Article 7 goes on to deal with the right of Union citizens to reside in another Member State for a period longer than three months, so long as certain conditions are satisfied. This right extends to family members in the manner provided for.

### **Articles 8 and 9**

16. Article 8 deals with administrative formalities for Union citizens. Article 9 concerns administrative formalities for family members who are not nationals of a Member State. It makes clear that Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State where the planned period of residence is for more than three months, and sets out the relevant deadline.

### **Article 10**

17. Article 10 provides that the right of residence for family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a residence card, and the criteria for the issuing of same is set out.

#### **Article 15**

18. Moving ahead to Article 15, it begins in the following terms under the heading "Procedural Safeguards: -

*"1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health. . ."*

#### **Article 27**

19. Article 27 is also of relevance and under the heading "General principles", it begins in the following terms: -

*"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.*

*2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.*

*The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted. . ."*

#### **Public policy / Security / personal conduct of the individual / serious threat**

20. At this juncture it seems appropriate to observe that Article 27 of the Directive makes clear that relevant decisions taken on the grounds of public policy or security must "be based exclusively on the personal conduct of the individual concerned". Furthermore, that personal conduct of the relevant individual "must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". In the present proceedings, a central contention made on behalf of the Second, Third and Fourth Named Applicants is that the Respondent neither invoked Article 27, nor complied with same. On this issue, the principal argument made on behalf of the Respondent is that public policy and security considerations did not form part of the impugned decisions. In essence, it is submitted that, although referred to in the three decisions which are challenged, "public policy" and "security" considerations played no part in what was characterised by Counsel for the Respondent as the "actual" decision in each case.

21. It will be recalled that Article 15 made specific reference to Articles 30 and 31, in circumstances where Article 15 made clear that the procedures set out in Articles 30 and

31 apply by analogy to all decisions restricting free movement of Union Citizens and their family members on grounds other than public policy, public security or public health.

**Articles 30 & 31**

22. Articles 30 and 31 provide as follows: -

*"Article 30*

*Notification of decisions*

- 1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.*
- 2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.*
- 3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.*

*Article 31*

*Procedural safeguards*

- 1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.*
- 2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:*
  - where the expulsion decision is based on a previous judicial decision; or*
  - where the persons concerned have had previous access to judicial review; or*
  - where the expulsion decision is based on imperative grounds of public security under Article 28(3).*
- 3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure*

*is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28. . .”.*

### **The 2015 Regulations**

23. The provisions of the Directive are reflected in the European Communities (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations') which came into operation on 1 February 2016. The 2015 Regulations distinguish between, on the one hand, "a qualifying family member" and, on the other, "a permitted family member".

### **Regulation 3 (1)**

24. Regulation 3(1) provides as follows:

*"3.(1) This paragraph applies to –*

*(a) Union citizens entering or remaining in the State in accordance with these regulations and*

*(b) a family member of a Union citizens referred to in sub. (a) who –*

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

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

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

### **Regulation 3 (5) – qualifying family member**

25. Regulation 3(5) goes on to provide that: -

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

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

*(b) the person is –*

*(i) the Union citizen's spouse or civil partner*

*(ii) a direct descendent of the Union citizen, or of the Union citizen's spouse or civil partner, and is –*

*(I) under the age of 21 or*

*(II) a dependent of the Union citizen or of his or her spouse or civil partner..." (emphasis added)*

26. As regards Regulation 3(5)(a), it is submitted that sub. (a) of Regulation 3(1) applies in circumstances where the First Named Applicant is a Union citizen remaining in the State in exercise of his rights.

### **Regulation 3 (6) – permitted family member**

27. Whereas Regulation 3(5) concerns a qualifying family member, Regulation 3(6) provides as follows in respect of a permitted family member:

"(6) For the purposes of these regulations, a person is a permitted family member of a particular Union citizen where –

- (a) subparagraphs (a) and (b) of paragraph (1) apply, respectively, to the Union citizen and the person, and
- (b) the Minister has in accordance with Regulation 5, decided that the person should be treated as a permitted family member of the Union citizen for the purposes of these regulations, which decision has not been revoked pursuant to Regulation 27." (emphasis added)

#### **Regulation 4**

28. It is also appropriate to quote Regulation 4 of the 2015 Regulations which addresses "Permission for Union citizens and qualifying family members to enter State" and provides *inter alia*, as follows: -

"4....

- (2) A qualifying family member who is not a national of a Member State and who is in possession of a valid passport as evidence of his or her nationality and identity may not be refused permission to enter the State unless he or she -
  - (a) is suffering from a disease specified in Schedule 1, or
  - (b) represents a danger for public policy or public security by reason of the fact that his or her personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
- 3(a) A qualifying family member who is not a member of a class of non-nationals specified in an order made under s.17 of the Immigration Act 2004 (No. 1 of 2004) as not requiring an Irish visa shall be in possession of a valid Irish visa as a condition of being granted permission to enter the State.
- (b) The Minister shall grant qualifying family members every facility to obtain an Irish visa and, on the basis of an accelerated process, consider an application for an Irish visa from a qualifying family member referred to in sub-paragraph (a) as soon as possible and if the Minister decides to issue an Irish visa that visa shall be issued free of charge."

29. It seems fair to say that, reflecting the provisions in the Directive, the 2015 Regulations make clear that a reliance on "public policy or public security" considerations must be referable to the "personal conduct" of the individual concerned. Moreover, that personal conduct must represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" (per Regulation 4(2)(b)). The foregoing wording, as found in the 2015 Regulations, mirrors the wording used in Article 27(2) of the Directive.



30. For the sake of clarity and completeness, the Second to Fourth Named Applicants, as nationals of Pakistan, are not members of a class (referred to in Regulation 4(3)(a)) not requiring an Irish visa.

**Regulation 25 – Review of decisions**

31. Before leaving the 2015 Regulations, it is important to refer to Regulation 25 which concerns the “Review of decisions”, and which begins in the following terms: -

*“25. (1) A person who has, or who claims to have, an entitlement under these Regulations to enter or reside in the State may seek a review of any decision concerning such entitlement or claimed entitlement.”*

32. Regulation 25(2) deals with time limits with the submission of an application for review, whereas 25(3) concerns the granting of an extension if warranted. Regulation 25(4) provides that a review shall be carried out by an “officer of the Minister” who must be someone other than the person who made the First instance decision and who must also be senior to them.

**Regulation 25 (5)**

33. Regulation 25(5) goes on to provide the following: -

*(5) The officer carrying out the review shall have regard to the information contained in the application and may make or cause to be made such enquiries as he or she considers appropriate and may –*

*(a) confirm the decision the subject of the review on the same or other grounds having regard to the information contained in the application for the review, or*

*(b) set aside the decision and substitute his or her determination for the decision.”*

**Relevant background**

34. It is unnecessary to comment on the pleadings and affidavits on a paragraph by paragraph basis, but the following emerges from an analysis of same.
35. The First Named Applicant was born in 1958 in Pakistan. He and his wife (born in 1960) travelled to the UK, in 2010, and applied for asylum. They and another son (who is not a party to these proceedings) were granted leave to remain and became naturalised UK citizens in 2016. The Second, Third and Fourth Named Applicants did not accompany the First Applicant to the UK and they continue to reside in Pakistan.
36. The First Named Applicant currently resides lawfully in this State along with his wife. He is lawfully employed as a caretaker in a Mosque. He asserts his right of free movement pursuant to the Directive and the 2015 Regulations.
37. The Second Named Applicant, who was born in 1982 and who is the daughter of the First Applicant, resides in Pakistan. The Third Named Applicant, born in 1985, is the son of the

First Applicant and also resides in Pakistan. The Fourth Applicant, who was born in 2006 is also a national of Pakistan and resides there. He is the child of the Second Applicant and the grandchild of the First.

38. The First Applicant claims that he has been supporting the Second and Third Named Applicants emotionally and financially all their lives and both have significant medical conditions. It is claimed that the Second Applicant has congenital deafness in both ears and mental health issues since birth. She has been diagnosed with schizoaffective disorder. The Third Applicant is also congenitally deaf and mute with multiple physical abnormalities. He developed bilateral retinal pigmentosa in both eyes and has schizoaffective disorder. It is claimed that he can only communicate in sign language.
39. The Second to Fourth Applicants claim they are qualifying family members of the First Applicant in accordance with the provisions of the Directive and the 2015 Regulations.
40. It is not in dispute that the Second and Third Named Applicants are required to establish that they are dependent on the First Applicant in order to constitute qualifying family members.

**30 March 2018- online visa application forms**

41. The Second, Third and Fourth Named Applicants applied for long stay "Join-Family" visas in 2018 by means of "online" applications using the relevant forms. These application forms comprise exhibit "SA2" to the First Named Applicant's affidavit which he swore on 16 October 2019. The top left - hand corner of each form bears the date 30 March 2018. The proposed dates in respect of which each Applicant wished to enter Ireland is stated to be 1 June 2018 on each of the three forms. In each case, the relevant Applicant identified the First Named Applicant as the family member living in Ireland. The applications by the Second and Third Named Applicant identified him as their "father", whereas the application of the Fourth Named Applicant identified the First Named Applicant as "grandfather". Among the questions and answers appearing on these "online" applications were the following in respect of the applications made by the Second and Third Named Applicants, respectively:

"Have you ever been refused a visa to another country? *Yes*

Have you ever been refused entry to, deported from, or otherwise required to leave another country? *No*

If yes to any of the above please give details. *UK Join Family Visa*

Have you any criminal convictions in any country? *No*

42. As regards the application concerning the Fourth named (minor) Applicant, the following answers were given in respect of similar questions: -

"Have you ever been refused a visa to another country? *No*

Have you ever been refused entry to, deported from, or otherwise required to leave another country? No

If yes to any of the above please give details.

Have you any criminal convictions in any country? No

43. Only copies of the three online application forms are exhibited by the First Named Applicant at "SA2". In other words, no documents said to have accompanied those applications were included in exhibit "SA2". However, in her Third affidavit, which was sworn on 11th December 2020, the Applicant's solicitor, Ms. Trayers makes the following averments: -

"(1) I am the principal in the firm of Trayers & Company Solicitors, solicitors for the Applicants herein and I make this affidavit for and on behalf of the Applicants from facts within my own knowledge save where otherwise appears and where so appearing I believe the same to be true.

This is the Third affidavit I have sworn in these proceedings. *I make this affidavit for the purpose of exhibiting medical and financial documentation submitted in support of the visa applications at issue in the present case, but which were omitted in error from the original verifying affidavit.* I beg to refer to this documentation upon which pinned together and marked with the letters "M1" I have signed my name prior to the swearing hereof." (emphasis added)

44. Exhibit "M1" to the foregoing affidavit comprised 68 pages of documentation. On its face, the material is from the following sources and in respect of the following Applicants: -

- Rehabilitation Centre for Hearing Impaired, Lahore (1/7/2017) regarding Second Applicant;
- Bridge Rehab and Psychiatric Services, Lahore (02/03/2018) regarding Second Applicant;
- Kirdar Academy, Lahore (March 08, 2018) regarding Fourth Applicant;
- Dr. Muhammad Javaid, Eye Clinic, Lahore (7/3/2013) regarding Third Applicant;
- Bridge Rehab and Psychiatric Services, Lahore (02/03/2018) regarding Third Applicant;
- Rasheed Hospital, Lahore (14-12-16) regarding Third Applicant;
- Government of the Punjab Disability Certificate (05/10/2017) regarding Third Applicant;
- Audiology Section, Puretone Audiometry, Lahore General Hospital (8/29/2017) regarding Third Applicant;

- Rehabilitation Centre for Hearing Impaired, Lahore (8/5/2017) regarding Third Applicant;
  - Sir Ganga Ram Hospital, Lahore (23/12/16 & 6/1/17) regarding Third Applicant;
  - Services Institute of Medical Sciences, Services Hospital, Lahore (24/12/2016) regarding Third Applicant;
  - Services Institute of Medical Sciences, Services Hospital, Lahore (7/1/2017) regarding Third Applicant;
  - Rehabilitation Centre for Hearing Impaired (1/7/2017) regarding Third Applicant.
45. In addition to the foregoing, the balance of the documentation exhibited by Ms. Trayers comprises documents which appear to relate to transfers of money, in particular via "Western Union". Certain information is not legible on the copies furnished to the court, but among the documents appear references to both the Second and Third Named Applicants who are described on the relevant "Western Union" documents as "receiver". Other documents bear the logo "UBL" and refer to financial transactions wherein the Second and Third Named Applicants are referred to as "beneficiary". Further documents bear the logo "UBL United Bank UK" and describe either the Second or the Third Named Applicant as "beneficiary". The exhibit also contains documents bearing the logo "Allied Bank" with a Lahore address, and these would appear to be bank statements which refer, variously, to the Second and Third Named Applicants. The last of the documents bear the logo "Ria Financial Services Ltd" and "Small World Financial Services" and refer to certain financial transactions wherein either the Second or Third Named Applicants are described as "beneficiary".
46. In submissions on behalf of the Respondent, it is disputed that the documentation comprising exhibit "M1" was before the decision maker when the First-instance was made in relation to the original applications for visas made in March 2018. That does not appear to me to be a submission I can accept, given the state of the evidence. An officer of the court has sworn an affidavit in which she averred that it was made from facts within her own knowledge, save where otherwise appearing and where so appearing, she believed the same to be true. Ms. Trayers positively averred that she was "...exhibiting medical and financial documentation submitted in support of the visa applications at issue in the present case, but which were omitted in error from the original verifying affidavit". There is no averment to the contrary. It seems to me that it was open to the Respondent or her designated officer to aver that the material exhibited by Ms. Trayers never reached the First-instance decision maker, if that was the position. No such averment has been made. In circumstances where the Third affidavit sworn by Ms. Trayers on 11 December, 2020 comprises the very last in the series of affidavits sworn in respect of the present application, the averments made by Ms. Trayers are uncontroverted.

**Typographical errors**

47. Before moving on from the documentation comprising exhibit "M1", it is appropriate to note that two letters comprised in that exhibit (both of which are dated "02/03/2018") and which, on their face, were from the "Bridge Rehab and Psychiatric Services" Lahore, contain typographical errors. These two letters refer to the Second and Third Named Applicants, respectively. The letter which refers to the Second Named Applicant is entitled "TO WHO IT MY CONCERN [sic]". The body of the letter also contains misspellings of the words "evaluation"(mis-spelled as "evolution") and "schizoaffective disorders" (mis-spelled as "SCHIZO-AFFECTOVE DOSPRDERS"). The letter in respect of the Third Applicant is entitled "To Home it may concern" (sic). At the foot of both letters, reference is made to "Col. (R) Dr. M. Javed Hameed". In addition to a reference to certain qualifications, Dr. Hameed is referred to as a "Consultant Psychiatrist".
48. In the manner which will presently be explained, the contents of these two documents, in particular the typographical errors, gave rise to a number of issues of concern on the part of the Respondent who proceeded to carry out their own investigations, as a result of which the Respondent came to the view that the veracity of the documentation pertaining to the Second and Third Named Applicants' medical condition was called into question and little evidentiary weight could be associated with the documents. A significant feature of the present proceedings, and something which is not in dispute is that the Respondent did not, prior to making the impugned decisions, draw the attention of the Applicants to the investigations which the Respondent had carried out, and the results of those investigations, which the Respondent relied upon as a basis for attaching little evidentiary weight to the documents in question. The Applicants submit that this was a fundamental breach of fair procedures. The Respondent contends that the investigations carried out by the Respondent "made no difference" because the Applicants failed to establish dependence. I will return to this issue in due course but, for present purposes, it is appropriate to continue looking at the factual background in sequence.

**13 September 2018 letter – the reasons for refusing the visa applications**

49. By means of letters dated 13 September 2018, the Respondent notified each of the Second, Third and Fourth Named Applicants of the decision to refuse their visa application. The reasons provided for the three refusals were that: -
- The Applicants had not provided NADRA birth certificates and they had not been duly attested;
  - The quality of the Fourth Applicant's birth certificate was very poor and it was not attested;
  - The divorce papers for the Second Applicant were of poor quality and illegible;
  - No consent had been obtained permitting the Fourth Applicant to travel; and
  - The marriage certificate submitted had not been duly attested.
50. It was stated at the end of each of these first-instance decisions that, as they had failed to prove their relationship with their "sponsor" (i.e. the First Named Applicant EU citizen),

the Minister "...did not fully assess all documentation submitted by you in support of your application. Should you wish to appeal this decision, you should note that the Visa Appeals Officer will process your appeal taking all documentation before him/her into account".

**13 November 2018 'appeals'**

51. By letter dated 13 November 2018, an 'appeal' against the aforesaid refusals was submitted on behalf of the Second, Third and Fourth Applicants. That letter was sent by Trayers & Company and it is appropriate to quote the body of same verbatim and in full as follows: -

*"Re: SS . . . (daughter)*

*MNS . . . (son)*

*SDA . . . (grandchild and son of SS)*

*Dear sirs,*

*We are instructed to appeal the decision of the 13th September, last, refusing our clients a visa to enter the State. They are the children of SA, a national of the United Kingdom. The reasons for refusal raise similar issues and therefore it is proposed to deal with them together.*

*SA is a British national, resident and exercising rights in the State through employment. His children are members of his household and are also financially, medically and emotionally dependent on him. There are significant medical issues in the family which are documented.*

*We are instructed to submit the following supporting documentation:*

- 1. Original birth certificate for MNS DOB . . . '85*
- 2. Original birth cert for MB DOB . . . '60.*
- 3. Original birth cert for SA DOB . . . '58.*
- 4. Original birth certificate for SS DIB (sic) . . . '82*
- 5. NADRA document for SDA DOB . . . '06*
- 6. Marriage certificate for MB and SA for the . . . '78*
- 7. NADRA confirming that SS is the daughter of SA*
- 8. NADRA confirming link between all family members*
- 9. NADRA confirming that SDA (DOB . . . '06) is the son of SS*

10. NADRA confirming that MNS is the son of SA.

*The grounds of appeal are as follows: -*

**SS**

This case was refused for the reason that NADRA birth certificates for the Applicant and sponsor had not been submitted. These are now attached, duly attested by the MOFA.

**MNS**

This case was refused for the reason that NADRA birth certificates for the Applicant and sponsor had not been submitted. These are now attached, duly attested by the MOFA.

It is further noted that the Applicant was previously refused a UK family visa. However, it is submitted that this is not a good and sufficient reason to interfere with rights arising pursuant to Directive 2004/38/EC and the Regulations.

**SA (sic)**

Again, this case was refused for the reason that NADRA birth certificates for the Applicant and sponsor had not been submitted and these are now attached.

We would submit that these cases should be considered favourably and that there are no sufficient or sustainable grounds to reject them. The primary reason for refusal of these applications was that the Visa Officer was not satisfied as to the relationship between the Applicants and their sponsor but we would submit that this issue has been resolved with the documentation enclosed.

*If there are any other issues or concerns which need to be addressed, we would be obliged if they could be put to us in advance of a decision being reached. We look forward to hearing from you and thank you for your attention to the matter". (emphasis added)*

52. At this juncture it is appropriate to observe that none of the three first-instance decisions raised any concerns or reservations in respect of any documentation which had been furnished with a view to evidencing dependence, be that medical or financial. Rather, each of the First instance decisions dated 13 September 2018 stated inter alia: -

*"In order to prove you are a beneficiary under the Directive, it is essential that you submit appropriate evidences of the stated relationship. In this case, you have failed to prove your relationship to the sponsor".*

**Audi alteram partem**

53. The letter from the Applicants' solicitor dated 13 November 2018 was plainly a response to the single issue which underpinned the first-instance refusal in each case. It is also a matter of fact that the Applicants' solicitor called on the Respondent to put to the Applicants any "issues or concerns in advance of a decision being reached". Viewed objectively, I cannot regard the final paragraph in the letter from the Applicants' solicitors dated 13 November 2018 as a request that the Respondent advise the Applicants on their "proofs". A material element of the request by Trayers & Company to the Respondent was that, if the latter had a concern of which the Applicants were not aware, the Applicants

wanted that concern to be put to them before a decision was reached. In other words, the final paragraph was, in essence a request that the audi alteram partem principle be observed as regards the decision to be made by the Respondent in respect of each Applicants' appeal.

54. By letter dated 19 November 2018, the Respondent requested signed authorities to act. By letter dated 12 December 2018, Trayers & Company solicitors submitted signed authorities to the Respondent in addition to the Second Applicant's original Divorce Certificate dated 7 February 2009 (confirming that the relevant divorce was effective from 26 November 2007); as well as what was described in the letter as the "Original Order of the court giving permission to Ms. S to bring her child to travel and reside in Ireland". A copy of the said order (in English) comprises one of the documents at Exhibit "SA 7" to the First Named Applicant's affidavit.

#### **Court Order 22/11/2018, Lahore**

55. The title of the Order is "SS Vs. Public at large". The order is dated 22 November 2018. It records that SS, (described as the "petitioner") ". . . has filed instant application for permission to take the minor SDA to abroad/Ireland". The Order goes on to note that the petitioner was appointed guardian on 26 February 2013. It records that, on 17 November 2018, a named individual [AA] appeared as "Respondent" indicating that he had no objection (and this may well be the Fourth Named Applicant's father). The Order also records that the petitioner appeared as a witness and it notes the documentation furnished, including copy guardianship certificate and copy passports in respect of the Second and Fourth Named Applicants. It records that arguments were heard and the record was perused. The final paragraph of the order includes the following: -

*"Petitioner wants to go abroad/Ireland for Six years (2018 to 2024) along with her minor. So, in these circumstances, application in hand is accepted. The petitioner is also directed to furnish surety in the sum of Rs. 50,00,000/ - (Fifty Lac) to the satisfaction of this court to the effect that she will remain bound to produce the minor before the court whenever it is required".*

56. The foot of the order names a particular judge who is identified as "Guardian Judge – IV, Lahore" and appears to bear a signature. No issue is taken in these proceedings with the veracity of this document, notwithstanding the fact that the word "has" appears to be missing from the First sentence in the operative part of the order which records: - "It is evident that the present petitioner already (sic) been appointed as guardian . . ."

#### **The decisions challenged in this case**

57. The three decisions challenged in the present proceedings are dated 23 July 2019 and were in the form of letters sent to the Second, Third and Fourth Named Applicants to the same address in Lahore, Pakistan. There are significant similarities as between all three letters, particularly the adverse decisions in respect of the Second and Third Named Applicants. For this reason, it is appropriate to quote one of the refusal decisions, in full, and to make certain observations in respect of its contents.

#### **The decision refusing the Second Applicant's appeal**



58. The decision in respect of the Second Named Applicant, SS, began in the following terms:

-

*"Dear Ms. S,*

*I am to inform you that the Irish Naturalisation and Immigration Service (INIS) have considered your appeal against the refusal of an application for an Irish visa.*

*As stated in the original refusal letter, as you failed to provide sufficient evidence if (sic) your family relationship with your EU sponsor, no further documentation as supplied by you with your application had been assessed. Having considered your appeal and all documentation submitted with your initial application, a decision has been taken to refuse the appeal and uphold the original refusal decision.*

*You based your application for an Irish visa on the provisions of Article 3(1) of Directive 2004/38/EC i.e. that you qualify as a Family Member of an EU citizen exercising Free Movement Rights and your application has been considered strictly in accordance with the Directive i.e. not under national (Irish) law insofar as Directive 2004/38/EC was transposed into Irish law by way of Statutory Instrument No. 656 of 2006 and Statutory Instrument No. 548 of 2015 European Communities (Free movement of persons) Regulations 2015. Regulation 3(5) defines a "qualifying family member" as follows: -*

*"Qualifying family member*

*(i) The Union citizen's spouse or civil partner*

*(ii) A direct descendant of the Union citizen or of the Union citizen, or of the Union citizen's spouse or civil partner, and is -*

*(i) Under the age of 21 or*

*(ii) A dependent of the Union citizen, or of his or her spouse or civil partner*

*Or*

*(ii) A dependent direct relative in the ascending line of the Union citizen or of his or her spouse or civil partner.*

*In order to qualify under the provisions of Article 3(1) of the Directive, you must prove that you meet the criteria for "qualifying family member" as outlined above. You have failed to prove that you qualify as a beneficiary of the Directive for the following reasons: -*

*Proof of Dependency*

*To qualify under the Directive, as a dependant of an EU citizen, for your essential needs, sufficient evidence of said dependency must be provided. The test applied*

by this State in terms of determining your "essential needs" is that as outlined in *Jia v. Migrationsverket* (Case 1/05) [2007] 1 KB 545, wherein the European Court stated: -

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

"43 In those circumstances, the answer to Question 2(a) and (b) must be that Article 1(1)(d) of Directive 73/148 is to be interpreted to the effect that 'dependent on them' means that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join the Community national. Article 6(b) of that directive must be interpreted as meaning that proof of the need for material support may be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence".

59. It is appropriate to pause at this juncture to note that no issue is taken, on behalf of the Applicants, with the principle which emerges from *Jia v. Migrationsverket*. As the Respondent's letter notes, the relevant assessment is not one confined to the issue of financial support. Rather, as *Jia* makes clear and as the Respondent's letter states: "...the host Member State must assess whether, having regard to *their financial and social conditions* they are not in a position to support themselves". (emphasis added)

60. Having cited the *Jia* case, the Respondent's decision continued in the following terms:

*"It is noted by this office that your stated sponsor fled to the UK with your mother and another sibling in 2010 where they claimed asylum on 09/02/2010 and were naturalised UK citizens on 09/05/2016. We can conclude therefore that you have not been a member of your UK citizen's household for nine years. In addition, it appears from the documentation that you submitted in support of your application, that you were married on two separate occasions and were therefore a member of your respective husband's households during the periods of your marriages.*

*Evidence submitted to this office suggests that you are claiming dependence for your essential needs on your sponsor both from a financial perspective, and based*

*on serious health grounds which requires the personal care of your Union Citizen sponsor.*

*As evidence of your financial dependency on your EU National sponsor, you have provided a number of receipts and payment advices regarding transfers from your sponsor to you in Pakistan. Approximately 30 payments have been documented between 2011 – 2018. However, it is noted that these payments are for irregular amounts at irregular intervals.*

*In addition, you have not provided any documentary evidence to show that you are unable to meet your day – to – day expenses for your essential needs. You have not provided evidences of your household finances/outgoings, (e.g. utility bills, day – to – day expenditure, maintenance etc.) or indeed evidence in relation to your own means, e.g. whether you own property, have any other source of income such as social welfare benefits, savings, a salary or indeed financial support from other family members, including maintenance payments from your former spouses.*

*In the circumstances, it has not been proven that the financial support you claim to have received from your sponsor is either necessary, or sufficient to meet your essential living costs. As Mr. Justice MacEochaidh found in Kuhn v. Minister for Justice [2013] IEHC 424, Mr. (sic) (para. 25): -*

*"As we have seen from the decision of the ECJ, the mere fact that support is given does not establish dependence. . . ."*

61. It is appropriate to pause at this juncture to note that it is submitted on behalf of the Respondent that the foregoing paragraphs constitute the "crux" of the decision. Great emphasis is laid on the findings by the Respondent set out above, namely, that evidence disclosed 30 payments over a period of some eight or nine years which were found by the Respondent to be "for irregular amounts at irregular intervals".
62. Counsel for the Respondent submitted that there was "little or no evidence of financial need" and rhetorically posed questions such as, "Where are the Applicants living?" and "Who owns their property?" It was also submitted that "The Applicants are living their lives, day to day, while they were getting irregular ad hoc payments. There is no evidence that this was essential financial assistance". Counsel for the Respondent stressed that the need for essential financial assistance is the "core element" of dependence and the "core decision" in the present case, as evidenced by the passages quoted thus far, is that dependency was not established. Submissions on behalf of the Respondent included that, in order to decide if dependency exists, it is natural that the full picture be looked at, but in this case the First Named Applicant as well as his wife and another of their children have not been with the Second to Fourth Applicants for nine or ten years. Thus, it was submitted that it is not the case that they assist any of the Applicants "to get out of bed" or "to make purchases" and "there is no evidence that others do", according to the Respondent's Counsel.

63. In a range of submissions made with force and skill, it was emphasised that there is a single concept of dependency and, in the present case, the Respondent decided, lawfully, and on the basis of the evidence, that none of the Applicants had established dependency in circumstances where they failed to establish financial need. It was also submitted that "we don't know" if the First Applicant and his wife are helping the Second, Third and/or Fourth Named Applicants "in some small way". Counsel emphasised that the foregoing words were used deliberately, given that the evidence was of just 30 irregular payments, with Counsel also emphasising that the First Named Applicant's job was as a "caretaker". That being so, it was submitted that "there must be some reality to the situation".
64. Central to the Respondent's submissions, both written and oral, was the proposition that the "actual" or "core" decision was that dependency was not established, due to the failure of the Applicants to establish financial dependence. That being so, contended Counsel for the Respondent, the various points raised on behalf of the Applicants "are entirely academic". The foregoing comments seem important to make at this stage given that the decision made by the Respondent continues in the following terms: -

*"While financial dependence is not the sole factor for determining dependency, it is an important criterion. That said, I have also examined your dependency claim based on the documentation submitted by you attesting that you require the personal care of your Union citizen sponsor on serious health grounds". (emphasis added)*

65. In my view, the foregoing statement by the Respondent undermines the submissions made on her behalf to the effect that the "actual" decision flowed from the failure on the Applicant's part to establish financial dependence and, in essence, nothing else mattered. By contrast – and reflecting the principal in *Jia* that regard must be had to both financial and social conditions – the Respondent made explicit that she examined the dependency claim in light of social conditions, namely, that this Applicant required personal care on the basis of "serious health grounds". In other words, it is a fact that there was more to this decision than the Respondent coming to the view that financial need and financial dependence had not been established. Why this is so, is because the Respondent made that very clear in the manner just quoted. The fact is that the analysis did not end with the section of the judgment on which Counsel for the Respondent placed the emphasis. An analysis in respect of what can fairly be considered to be social (as opposed to financial) conditions undoubtedly took place and comprised an essential element of the decision reached.
66. The examination by the Respondent of the First Named Applicant's dependency claim with reference to non-financial issues, namely, that she required "the personal care of [her] Union citizen sponsor on serious health grounds" was dealt with as follows in the Decision:

"To that end, it is noted that a letter from 'BRIDGE Rehab and Psychiatric Services' was submitted outlining your medical condition(s). A number of issues of concern arose upon my examination of these documents, including many typographical

errors, which would not be expected, in such a document. For example, the letter opens with the heading entitled, 'TO WHOH IT MY CONCERN'.

This letter lists a number of medical concerns, which ends stating that, a 'psychiatric evolution revealed SCHIZO-AFFECTOVE DOSPRDERS'. It is unexpected that a qualified doctor would be unable to correctly spell such a serious health condition.

*Due to these issues, this office sought to verify the contents of this letter. On consulting the 'BRIDGE Rehab and Psychiatric Services' website, a number of further issues arose, namely that the letterhead differs significantly from the font and header on the website. It would be expected, for business purposes, that a business' headed paper and website (in particular when depicting the name), would be similar in layout (e.g. font, colour, etc.).*

In addition, 'COL. (R) DR. M. JAVED HAMEED' who purportedly signed the letter provided does not appear on the BRIDGE Rehab and Psychiatric Services website, as a member of their medical team. *Upon further investigation conducted by this office, we found that Dr. Hameed is associated with another medical practice, namely, 'Ali Razi Healthcare', at a premises that does not appear to be linked in any way to 'BRIDGE Rehab and Psychiatric Services'.*

*As a result of the investigation carried out by this office, the veracity of the documentation pertaining to your medical condition is called into question. Consequently, little evidentiary weight can be associated with this document.*

In addition to the above, a handwritten letter was submitted, which is signed by your father. It refers to the medical documentation however much of the content is illegible. This letter opens with the salutation entitled 'To Home it May Concern', a similar salutation containing similar errors, as per the letter submitted in regard to your own alleged medical conditions (i.e. 'TO WHOH IT MY CONCERN'). In addition, this salutation is the same salutation that is noted in the letter from Bridge Rehab and Psychiatric Services submitted with your brother's application, which reads, 'To Home it may concern', (note: both you and your brother submitted your appeals together to this office received, both of which are stated to have been provided by the same healthcare provider)." (emphasis added)

67. I pause at this juncture to make a number of observations in relation to the foregoing. Firstly, it is entirely clear that a consideration of documentation relating to health formed a material part of the Respondent's decision. To hold otherwise would be to ignore the very explicit statement made by the Respondent, namely "I have also examined your dependency claim based on the documentation submitted by you attesting that you require the personal care of your Union citizen sponsor on serious health grounds". In addition to the foregoing, the following facts emerge from objective reading of the Respondent's decision:

- (1) A number of issues of concern arose as a result of the Respondent's examination of documents relating to the Applicant's medical conditions;
- (2) The Respondent took the view that the documents included many typographical errors which would not be expected in same (e.g. "TO WHOH IT MY CONCERN")
- (3) The Respondent found it to be unexpected that a qualified doctor would be unable to correctly spell a serious health condition (i.e. schizoaffective disorder);
- (4) These issues caused the Respondent to believe that the relevant documents needed to be verified by way of independent investigations by the Respondent;
- (5) The Respondent did not inform the Applicant or her solicitor of the foregoing concerns or of the fact she was conducting independent investigations into her concerns;
- (6) The Respondent consulted the "Bridge Rehab and Psychiatric Services" website and, as a result of so doing, formed the view that differences between (a) the 'font' and 'header' on the website and (b) the letterhead of the document submitted by the Applicant gave rise to "further issues" of concern, namely, the Respondent took the view that both the headed paper and website of a business, in particular when depicting the name, would be similar in layout as to font, colour, etc.;
- (7) A further result of the Respondent's independent inquiries was that Dr. Hameed did not appear on the Bridge Rehab and Psychiatric Services website, but was associated with another medical practice. As a consequence, the Respondent formed the view that Dr. Hameed did not appear to be linked in any way to Bridge Rehab and Psychiatric Services;
- (8) As well as not having alerted the Applicant or her solicitor to the concerns which prompted the Respondent to conduct the aforesaid investigations, the results of those investigations (including the Respondent's further concerns arising from the investigations conducted) were not put to the Applicant or her solicitor.
- (9) Furthermore, the views formed by the Respondent, based on the results of her independent investigations were not put to the Applicant or her solicitor;
- (10) In short, the Applicants were wholly unaware of: (i) the fact that the Respondent's concerns gave rise to independent investigations; (ii) the results of those investigations; (iii) the additional concerns arising from those investigations; (iv) the adverse views formed as a consequence of those investigations; and, thus (v), the Applicants were given no opportunity to comment in any way on same.

68. It seems to me appropriate to distinguish between two types of concern or, perhaps more accurately, two distinct ways in which the Respondent formed and dealt with concerns. The First has just been described i.e. concerns which gave rise to investigations carried out by the Respondent's office which, themselves, gave rise to further issues of concern

and the views formed in respect of the foregoing. Even at this juncture, it seems to me that the foregoing involved a breach of the fundamentally important principle of *audi alteram partem*, being a principle which underpins all lawful decision-making.

69. A Second category of concern is where the Respondent formed certain adverse views, not on the basis of independent investigations which, but based on a consideration of the documents put before her. There seems to me to be a very material difference between the two categories.
70. As to the latter, it is clear from the Decision that the Respondent formed the view that a typographical error in a letter from the First Named Applicant ("To Home it May Concern") was a similar error to that found in a letter submitted regarding the Second Named Applicant's medical conditions ("To Whom it My Concern") and this undermined the veracity of the documentation. In addition, the Respondent took the view that the mistakes in the salutations contained in two letters from Bridge Rehab and Psychiatric Services, submitted in relation to the Second and Third Named Applicants, respectively, called into question the veracity of the documents.
71. In my view, it was open to the Respondent to form such a view and there does not seem to me to any difficulty with not informing the relevant Applicants of the fact that this is a view she was coming to. Why? Because the Applicants were plainly aware of what they had submitted and it cannot be in doubt that the Respondent was entitled to consider it and to make decisions based on it, including what weight to give to documentary evidence, in light of its content and, indeed, form. Thus, there was no breach of the *audi alteram partem* principle in the case of the latter category, whereas, in my view, there was in the case of the former, (involving the results of independent investigations).
72. In short, a plain reading of the decision entitles me to find that, as a matter of fact, the Respondent had a range of concerns which arose, not only from her examination of the material before her, but out of her independent investigations and that, without ever alerting the Applicant or her solicitor to the results of the investigations, she proceeded to form views which were averse to the Applicant. It was as a consequence of these adverse views that the Respondent was satisfied that documents, which were otherwise relevant and material to her determination of the dependency claim, should be disregarded. This is perfectly clear from the Respondent's statement that: "As a result of the investigation carried out by this office, the veracity of the documentation pertaining to your medical condition is called into question. Consequently, little evidentiary weight can be associated with this document."
73. For the reasons explained, I am satisfied that there was a breach of the *audi alteram partem* principle. Doubtless this was an innocent error made by someone intending and attempting to interrogate evidence thoroughly and appropriately. It was, however, a material error which in my view renders the decision unlawful. The *audi alteram partem* principle is one of the cornerstones of lawful decision making and, in the present case, I am satisfied that its breach renders the decision unsound.

74. Among the submissions made on behalf of the Respondent is that the documents in question contained errors such that "no reasonable person would have been persuaded that the documents were reliable". Counsel for the Respondent went on to submit that the investigation which appeared to confirm this initial view was "neither here nor there". Why the investigation by the Respondent and the views formed by her are submitted to have made no difference is because, according to the Respondent, the Applicants "failed to establish dependency". That proposition relies, of course, on financial dependency being the sole factor for determining dependency. However, as the Respondent herself made clear, this is not so.
75. The submission that the Respondent's investigations on foot of her concerns (and the results of those investigations) "was neither here nor there" is entirely undermined by the facts in this case. This is because the Respondent plainly relied, for the purpose of the decision to refuse the appeal, on the very matter which her Counsel now submits made no difference. Returning to the text of the Respondent's decision, it continued in the following terms:

"I have also considered social and emotional dependency and find that again, insufficient documentation has been submitted in support of such a claim. I am mindful that your parents have been absent from your Home State for nine years and that you have been a member of the households of two spouses, prior to your sponsor having left the State. I also note that you are the named sole guardian of your minor son, which would indicate a degree of independence and self-sufficiency on your part give that you are the carer of another person, who is a minor. This indicates that you have not been in physical, emotional and ongoing social contact with your sponsor over a number of years.

Having taken into consideration all documentation before me, I find that you have not proven that you are dependent on your EU national sponsor as claimed.

It is also noted that on your application form, when asked, 'have you been refused a visa to another country?' you answered, 'yes - a UK join family Visa'. Information made available to this office suggests that you were in fact, previously refused four UK Visas, as follows:

- A six-month visit visa to the UK in 2007, which was refused on 13/06/2007.
- A six-month visit visa, which was again refused on 24/07/2007.
- A six-month visit visa in 2008 but this too was refused on 07/07/2008. It is understood that on this occasion, you were to be accompanied by your minor son. It is understood the reasons for refusal is that your claimed income which is not reflected in the bank statement shows deposits in excess of your stated income and you did not provide reasonable evidence of income or assets in your home state. In addition, it was noted that while you intended on travelling with your only child that you failed to provide any evidence that you had other family members in Pakistan as you had claimed.



- A six-month visit family visa which was refused on 08/02/2017. Your sponsor on that occasion was your brother AMR, who has a London address.

*Therefore, in reaching this decision on appeal, as with the initial decision to refuse your visa, due regard has been had to the public policy imperative of maintaining the integrity of the State's immigration system, including the integrity and security of the Common Travel Area with the United Kingdom, as well as the overall security of the State... (emphasis added)*

76. At this juncture it is appropriate to pause in order to make a number of observations. It is perfectly clear that the Respondent took into account, in reaching her decision, the fact that, under UK national law, the Second Named Applicant had been refused four visas on various dates, with reliance also placed on what the Minister understood to be the reasons for certain of those refusals.
77. On behalf of the Respondent, Counsel submitted that the UK visa-refusal decisions "were not revealed save for one". Even if this is entirely accurate, it does not detract from the fact that the Minister relied on the UK visa - refusals in reaching her decision. This is put beyond doubt when the Respondent states: "Therefore, in reaching this decision on appeal ...".
78. With regard to the UK decisions, Counsel submits that several applications were made and there was insufficient evidence of dependency in respect of them. He emphasises that, in the present case, there has been no evidence contesting the Minister's understanding based on the information which the Respondent had received, (presumably from UK authorities), in respect of the visa refusals. It was emphasised that the Respondent had before her, insufficient evidence of financial dependence, whereas prior applications in the UK "showed abnormalities" in bank and financial records. The thrust of the submission was again to emphasise the failure on the part of the Applicant to show financial dependence.

**Public policy imperative**

79. A focus on that aspect seems to me to ignore the reality that, in reaching her decision, the Respondent relied to a material extent on UK visa - refusals as well as what the Respondent regarded as the public policy imperative which arose. This, she identified as having three aspects, namely (a) maintaining the integrity of the State's immigration system; (b) maintaining the integrity and security of the common travel area with the United Kingdom; and (c) maintaining the overall security of the State.
80. In submissions made with subtlety and great skill, Counsel for the Respondent suggested that these issues played no part in the actual decision. The thrust of the submission was that the Minister made a 'stand-alone' decision and, entirely separate and divorced from same, she merely "noted" public policy and security issues, which was not at all impermissible. That is a submission which I simply cannot accept, given the facts before this court.

81. The paragraph which begins "Therefore, in reaching this decision on appeal ..." and which goes on to refer to the relevant public policy, including State security, to which the Respondent had regard, is far more than the Respondent merely 'noting' something. I am entitled to hold that, in reaching her decision, the Respondent relied, to a material extent, on what she described as the public policy imperative, in its threefold aspects.
82. In submissions, Counsel for the Respondent also stressed that the Minister did not say: "I accept that you have established dependency, but I am satisfied that you are trying to obtain a visa in order to relocate to the UK". The foregoing submission does not distract from the reality of the factors which the Respondent, in fact, relied upon in reaching her decision. One was the results of independent investigations, the outcome of which the Applicants were never aware. Other factors included the 3-fold public policy objectives to which the Respondent Minister referred in her decision, and information from the UK was material to that consideration.
83. In a further submission, Counsel for the Respondent characterised this aspect of her decision as being no more than the Respondent minister expressing "legitimate concerns in a very general way" that visas should not be used as "Trojan horses" to undermine the integrity of the immigration system. Counsel went on to emphasise that there is "a world of a difference" between such general concerns and "the actual decision". Again, despite the subtlety of this submission, it is undermined by the facts in the present case as to reasons upon which the Respondent based her decision. What the Respondent's Counsel calls the "acutal" decision was not one made exclusively based on financial considerations. Nor, to be lawful, could it have been. Having made the foregoing observations, it is appropriate to quote the balance of the decision in respect of the Second Applicant, which was in the following terms:

*"As we advise all Applicants, you should further note that, pursuant to Regulation 9 of the UK Immigration (European Economic Area) Regulations 2016, the UK immigration rules governing the circumstances in which UK citizens may return to the UK following residence in an EEA Member State have changed. That regulation now provides that, in order for family members of returning UK citizens to benefit from EU free movement rights, the UK citizen's residence in the EEA Member State must have been genuine, and not for the purpose of circumventing immigration law. The full text of the Regulations is available at <http://www.legislation.gov.uk/> [Applicants with a query concerning the new UK Regulations are advised to contact the UK Home Office. This letter does not purport to offer legal advice on those Regulations.]"* To reiterate, this information regarding UK Regulations, should only be considered as advisory in nature, in order to alert you as to how the UK Immigration Authorities process applications made by returning UK nationals (to the UK) and their family members, who have exercised their free movement rights in another member State.

*Only one appeal per application is allowed. As there is no mechanism whereby an appeal can be appealed bar via Judicial Review via the Irish National Courts, you*

*should note that it is entirely open to you to make a fresh application under the Directive, at any time. We will advise however that the contents of this refusal be taken (sic) into consideration, should you wish to reapply under the Directive.*

*Furthermore, if you wish to submit a fresh "visit" visa application for consideration under Irish national law you will find full details including the documentation required, fee etc. on our website [www.visas.inis.gov.ie](http://www.visas.inis.gov.ie).*

*Any such application will be considered completely separately from your application under the terms of the Directive."*

**Reasons for the Respondent's decision concerning the Second Applicant**

84. Having looked closely at the Respondent's decision in respect of the Second Named Applicant, it is fair to say that the reasons relied upon in the decision included, as a matter of fact, the following:-

- The Second Applicant had not resided with her father for nine years and she had been a member of her then husband's household on the two occasions she had been married;
- The evidence of financial transfers was for irregular payments at irregular intervals;
- No documentary evidence had been provided to show that the Second Applicant was unable to meet her daily expenses for her essential needs;
- It had not been established that the financial support she claimed to have received from the First Applicant was either necessary or sufficient to meet her essential living costs;
- Due to concerns arising out of a review of documentation pertaining to the Second Applicant's medical condition, the Respondent carried out independent investigations, which gave rise to further concerns; and based on the results of those investigations, the Respondent formed views, adverse to the Second Applicant, namely, that little evidentiary weight could be associated with the documents;
- A similarity with typographical errors in a letter from her father gave rise to concerns, with additional concerns arising from typographical errors in both letters from Bridge Rehab and Psychiatric Services submitted in respect of the Second and Third Named Applicants, respectively;
- The fact that the Second Applicant is the named sole guardian of her minor son indicates a degree of independence and self-sufficiency on her part and indicates that she has not been in physical, emotional and ongoing social contact with her father over a number of years;
- The Second Applicant had been refused four UK visas since 2006 and, therefore, due regard was had to the public policy imperative of:

- maintaining the integrity of the State's immigration system;
- including the integrity of the Common Travel Area with the UK;
- as well as the overall security of the State.

Reading the decision as a whole, I am entitled to hold that each of the foregoing reasons were material to the ultimate decision reached. If that were not the case, it is impossible to understand why these reasons were explicitly referred to by the Respondent in the manner found in her decision.

#### **The decision to refuse the Third Applicant's appeal**

85. It is fair to say that the letter, dated 23 July 2019, refusing the Third Named Applicant's visa appeal was in very similar terms to the Second Applicant's. That being so, it is unnecessary to set it out verbatim. Suffice to say that the self – same reasoning is employed by the Respondent in respect of the concerns she had as regards the veracity of the documentation pertaining to the Third Named Applicant's medical condition. Indeed, the relevant paragraphs are identical in that regard. Thus, the findings I made earlier apply equally in respect of the Third Named Applicant, insofar as a breach of the *audi alteram partem* principle is concerned.

#### **Disability Certificate**

86. In addition, the final paragraph on the third page of the Respondent's decision in respect of the Third Named Applicant stated the following: -

*"I note you supplied this office is (sic) a Disability Certificate from the Assessment Board for the Disabled Person's District issued by the Government of Punjab Social Welfare and Balt – UI – Maal Department (Provisional Council for the Rehabilitation of Disable Persons). This certificate is dated 05/10/2017, however, some fields in this document are typed and others are handwritten, in particular the handwritten elements of the certificate related specifically to your disability, including, type, cause and nature. While it is stamped that you are verified disabled, it would be disabled that the nature of your disability would also be typed and indeed that it be clear on the certificate as to whether you are fit or not to work. It also brings into question as to whether you are in receipt of social welfare assistance in your Home State".*

87. The Respondent plainly formed views based on her consideration of the Certificate furnished to her. It cannot be disputed that this is something she was entitled to do. I make this point because it seems to me that the foregoing adverse views of documents were formed without any breach of the *audi alteram partem* principle. The relevant Applicant plainly knew what documents he submitted and what they contained, both in form and substance. These views the Respondent came to were not based on the results of independent investigations of which the Applicant was unaware. The Respondent's decision to refuse the Third Applicant's appeal then continued as follows: -

*"I have also considered social and emotional dependency and find that again, insufficient documentation has been submitted in support of such a claim. I am mindful that your parents have been absent from your home state for nine years. It*

*is known to this office that your parents fled Pakistan in the company of your sibling and claimed asylum in the UK on 09/02/2010. Had you have been (sic) dependent on the personal care of your sponsor, on the grounds of serious illness, it would have been expected that you would have been in the company of your parents at that time. It is also clear that your sponsor would not have been permitted to leave and re-enter the UK since they claimed asylum up until since a time (sic) as he was granted Leave to Remain. This indicates that you have not been in physical, emotional and ongoing social contact with your sponsor over a number of years.*

*It is further stated that your sister is your sole carer, however, from the documentation submitted and from information made available to this office via the UK, you have lived at a different addresses (sic) to your stated carer, your sister and fellow Applicant, which indicates a degree of independence and self-sufficiency on your part."*

### **UK visa – refusals**

88. Just as with the decision in respect of the Second Applicant, however, the Respondent went on to refer to UK visa – refusals and it is plain that these were relied upon, to a material extent, in coming to the decision to refuse the Third Applicant's appeal. It is appropriate to quote, verbatim, the relevant extract: -

"It is also noted that on your application form, when asked, "Have you been refused a visa to another country?" you answered "yes" – a "UK family visa". Information made available to this office suggests that you were in fact, previously refused five UK visas, as follows: -

- A six – month visit visa to the UK in 2007 which was refused on 03/05/2007.
- A six – month visit visa which was again refused on 12/06/2007.
- A six – month visit medical treatment visa in 2008 but this too was refused on 04/02/2008.
- A Family Reunion visa (Other Dependents outside rules EC), which was refused on 10/05/2011 and refused on appeal on 12/04/2012. It is understood that the UK authorities were of the view that while it was stated that your parents and brother had fled to the UK, it was not clear why you were left in Pakistan. I understand that in addition you failed to present sufficient evidence to show contact or that you were dependent on your stated relatives.
- A Family Reunion visa (Outside rules) which was refused on 09/10/2014 and the appeal was dismissed on 02/09/2015. Again, your application was refused on the basis of insufficient documentation pertaining to dependence and the extent to (sic) your disability or any documentary evidence as to why you could not receive care in Pakistan even if your sister were to stop caring for you.

*Therefore, in reaching this decision on appeal, as with the initial decision to refuse your visa, due regard has been had to the public policy imperative of maintaining the integrity of the State's immigration system including the integrity and security of the Common Travel Area with the United Kingdom as well as the overall security of the State..."* (emphasis added)

89. In light of the foregoing, the comments which I made earlier (when looking at the decision relating to the Second Applicant) as regards the reliance by the Respondent on public policy including security issues in reaching her decision, apply equally here.

**Reasons why the Respondent refused the Third Applicant's appeal**

90. Carefully considering the decision, it can be said that the reasons relied on by the Respondent for refusing the Third Applicant's appeal included, as a matter of fact, the following: -

- The Third Applicant had not resided with his father in nine years;
- The evidence of financial transfers was for irregular payments at irregular intervals;
- No documentary evidence had been provided to show that the Third Applicant was unable to meet his daily expenses for his essential needs;
- It had not been established that the financial support he claimed to have received from the First Applicant was either necessary or sufficient to meet his essential living costs;
- Due to concerns arising from a review of documentation pertaining to the Third Applicant's medical condition, the Respondent carried out independent investigations, which gave rise to further concerns; and based on the results of those investigations, the Respondent formed views adverse to the Applicant, namely, that little evidentiary weight could be associated with the documents;
- A similarity with typographical errors in a letter from his father gave rise to concerns; with additional concerns arising from typographical errors in both letters from Bridge Rehab and Psychiatric Services submitted in respect of the Second and Third Named Applicants, respectively;
- The Disability Certificate from the Assessment Board for Disabled Persons District, issued by the Government of Punjab, dated 5th October 2017, was partly typed and partly handwritten, giving rise to a concern on the part of the Respondent, namely, it was to be expected that the nature of his disability would be typed and that the Certificate would also make clear whether or not he was fit for work; and the Disability Certificate also called into question whether he was in receipt of social assistance in Pakistan;
- If the Third Applicant had been dependent on the First, it would be expected that he would have travelled to the UK with him in 2010;

- The Third Applicant had lived in a different address in Pakistan to his sister and sole carer, the Second Applicant, which indicated that he had a degree of independence and self – sufficiency
- The Third Applicant had been refused five UK visas since 2006 and, therefore, due regard was had to the public policy imperative of:
  - maintaining the integrity of the State’s immigration system;
  - including the integrity of the Common Travel Area with the UK;
  - as well as the overall security of the State.

It is clear from a reading of the entire decision concerning the refusal of the Third Named Applicant’s appeal that each of the foregoing reasons were material to the decision which is challenged in the present proceedings.

**The decision to refuse the Fourth Applicant’s appeal**

91. The Minister also wrote to the Fourth Named Applicant by letter dated 24 July 2019, refusing his visa application. It is a much shorter letter. The first page is in similar terms to the letters which were sent to the Second and Third Applicants. It is appropriate to quote, verbatim, what the Respondent stated in her decision from the end of the first page onwards: -

*"Proof of family relationship*

*You have submitted an application to join your EU National sponsor, your stated grandfather, SA, in Ireland along with your stated mother, Ms. SS.*

*As evidence of your family relationship, you submitted a copy of your birth certificate, two court documents, and a copy of your stated mother’s birth certificate, duly attested by the Ministry of Foreign Affairs in Pakistan. Also submitted was a copy of your stated mother’s birth certificate as proof of her relationship to your EU National sponsor.*

*While these documents have proven your stated relationship to your EU sponsor, the contents of the court documents reveal that, in the present circumstances, you cannot legally be granted an Irish visa under the Directive at this time.*

*While the First court document, issued on 26/02/2013 names your mother, Ms. SS, as your sole guardian, this document also stipulates that Ms. S is not permitted to take you beyond the jurisdiction of the Court without prior permission except for occasional visits and that she will inform the Court about any change of your address promptly. In other words, she is not permitted to take you outside of the State of Pakistan without prior permission.*

*While it is acknowledged that, the Second Court document, as issued on 22/11/2018, re-affirms that Ms. SS is your sole guardian and importantly does*

*grant permission for you to travel with the intention of relocating to Ireland for "six years"; you must do so in the company of your stated mother. It also stipulates that she will remain bound to produce you before the said Court whenever it is required. However, as your stated mother, has not been granted a visa for travel in this instance, you do not therefore have the necessary legal permission to travel outside your home State".*

### **The Directive, the Regulations and 'Family Law' Orders**

92. It is appropriate to pause at this juncture to make the very obvious point that nowhere in the Directive or the 2015 Regulations does it state that an entitlement to apply for or obtain a visa is in any way precluded to those who are the subject of orders made in Family Law or other proceedings.
93. Nor is there a requirement in the Directive, or in the 2015 Regulations, which places an additional obstacle in the way of a person finding themselves in the Fourth Applicant's position, namely, the burden of proving "the necessary legal permission to travel outside your Home State". It is uncontroversial to say that a grandchild of an EU citizen who is under the age of 21 comes within the definition of a "qualifying family member". In the present case the Respondent made very clear that she had decided that the documents submitted on behalf of the Fourth Applicant "have proven your stated relationship to your EU sponsor". That being so, the provisions of Regulation 3(5) which I quoted earlier in this judgment apply.
94. In short, it is not in dispute that the Fourth Applicant is a "qualifying family member" within the meaning of the Regulations which give effect to the Declaration. Thus, the Fourth Applicant is entitled to enter and reside in Ireland to join his grandfather, as a beneficiary of the Directive within the meaning of Article 3.1.
95. It will be recalled that Article 5 deals with the "right of entry", whereas Article 6 provides for the "right of residence for up to three months". It is unnecessary to repeat, here, the relevant Articles and provisions in the Regulations. Suffice to say that this State is obliged to grant, to a qualifying family member, every facility to obtain the necessary visa (see Regulation 4(3) (b) in particular). The obligation to grant a qualifying family member every facility to obtain an Irish visa is on the basis of an accelerated process, with explicit reference being made that this be done as soon as possible and free of charge.

### **Refusal of a visa to a different person**

96. It is also uncontroversial to say that nowhere in the Directive or the Regulations is it provided that a qualifying family member shall not be entitled to a visa by reason of the refusal of a visa application in respect of an entirely different person. Nor does Counsel for the Respondent identify any provision in EU Law which might justify such a refusal. Yet a material reason for the refusal of a visa to the Fourth Applicant was, without doubt, because a visa was refused to the Second Applicant.

### **The Lahore Court Orders**

97. Returning to the terms of the Respondent's refusal decision regarding the Fourth Applicant, it seems fair to say that, implicit in the Respondent's observation that the First



court order (of 26/02/2013) stipulated that Ms. SS was not permitted to take her son beyond the jurisdiction of the Court without prior permission, is the suggestion that if such court permission were to be obtained, the Fourth Applicant would be in a materially different (i.e. better) position as regards his visa application. It is a matter of fact that such permission was obtained, as the Second court order (22/11/2018) confirms. Earlier in this judgment I referred to that document specifically. The Respondent has never questioned the veracity of that Lahore court order.

98. It is also fair to say that at no stage did the Respondent alert the Fourth Applicant (a) that a refusal of the Second Applicant's visa would automatically result in a refusal of the Fourth Applicant's visa appeal; and (b) that the Respondent intended to refuse the Second Applicant's visa appeal. Thus, both of those Applicants were deprived of the opportunity of, for example, seeking to petition the relevant court in Pakistan to authorise the Fourth Applicant to travel with another person, be that the First Applicant, or otherwise.

**The right to a visa -v- the fact of travelling on foot of a visa**

99. It is also appropriate to make another very obvious point, namely, that the receipt of a visa which permits travel does not carry with it any obligation to actually travel, still less to travel in breach of any court order.

100. The balance of the Respondent's decision in respect of the Fourth Named Applicant, was in the following terms: -

"It is also noted that on your application form, when asked, "Have you been refused a visa to another country?" you answered "no". Information made available to this office suggests that this is not the case and in fact, you were previously refused three UK visas as follows: -

- A six – month visit visa to the UK in 2007 which was refused on 13/06/2007;
- A six – month visit visa which was again refused on 24/07/2007;
- A child accompanied six – month visa in 2008 but this too was refused on 07/07/2008.

*Therefore, in reaching this decision on appeal, as with the initial decision to refuse your visa, due regard has been had to the public policy imperative of maintaining the integrity of the State's immigration system, including the integrity and security of the Common Travel Area with the United Kingdom, as well as the overall security of the State..." (emphasis added)*

**Conclusions on the issues**

101. I want to make clear at this juncture, that although I have very carefully considered inter alia the 22 pages of written submissions filed on behalf of the Applicant and the 26 pages of written submissions filed on behalf of the Respondent, I am satisfied that it is not necessary to refer to those, and the numerous authorities cited, in exhaustive detail. This is in circumstances where the present case is one which turns on its very particular facts. I have already identified and looked closely at the facts and I now turn to focus on the

specific questions raised in these proceedings and which the parties agreed between themselves as arising for determination.

### **The First question**

102. As to the First question, the facts in this case require me to reject the submission that the applications were not refused on the basis of public policy, including security considerations. On the evidence in this case, public policy, including State security considerations, formed a material part of the decision reached.
103. An analysis of the Respondent's decision as a whole undermines the proposition that references to public policy and security were simply "noted at the end" after definitive findings had been made regarding the failure to establish dependency. On the contrary, the Respondent Minister made very clear, in each of the impugned decisions, that public policy including State security were had regard to "in reaching this decision on appeal".
104. It is fair to say that much of the Respondent's submissions, written and oral, focused on the issue of dependency and concentrated only on the assessment of financial dependency in that regard. This is no answer to the fact that public policy concerns, including State security, was also had regard to in reaching the decision. In other words, it formed part of the reasoning employed by the Respondent in coming to her decision. In so doing, the Respondent fell into error.

### **Restrictions must comply with Articles 27 and 35**

105. Counsel for the Applicants drew this court's attention to the decision in Case C 127/08 *Metock & Ors* [2008] ECR I-6241, wherein the CJEU held:

*"95. From the time when the national of a non-member country who is a family member of a Union citizen derives rights of entry and residence in the host Member State from Directive 2004/38, that State may restrict that right only in compliance with Articles 27 and 35 of that Directive.*

*96. Compliance with Article 27 is required in particular where the Member State wishes to penalise the national of a non-member country for entering into and/or residing in its territory in breach of the national rules on immigration before becoming a family member of a Union citizen.*

*97. However, even if the personal conduct of the person concerned does not justify the adoption of measures of public policy or public security within the meaning of Article 27 of Directive 2004/38, the Member State remains entitled to impose other penalties on him which do not interfere with freedom of movement and residence, such as a fine, provided that they are proportionate." (see, to that effect, MRAX paragraph 77, and the case-law cited)".*

### **Genuine, present and sufficiently serious threat**

106. As seen earlier in this judgement, when I looked at specific Articles in the Directive, Article 27 makes clear that measures taken on grounds of public policy or public security "shall be based exclusively on the personal conduct of the individual concerned".

Moreover, such “personal conduct” on the part of the individual, “must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”. In the present case, Article 27 was neither invoked, nor complied with. It is clear from the evidence in this case that the conduct which gave rise to concerns on the part of the Respondent concerned numerous failed applications for UK visas. That is not conduct coming within Article 27. Thus, the Minister fell into error in taking into account, for the purposes of reaching her decision, the information as to failed UK visa applications. Furthermore, the possibility that the Applicants, or any of them, might relocate from this State to the UK at a future point is not sufficient to justify a visa refusal under the Directive or the Regulations giving effect to same. It is fair to say that the foregoing issue was represented by the “Trojan horse” metaphor employed by the Respondent’s Counsel.

107. The Applicants also drew the court’s attention to the decision in Case C – 370/90 *Surinder Singh* [1992] ECR I-426, wherein the ECJ held, at para. 19:

*“A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or Secondary law in the territory of another Member State.”*

#### **Proportionate sanctions**

108. Para. 97 of the decision in *Metock & Ors* made reference to the judgment in Case C-459/99 *MRAX* and it is useful to quote the following paragraphs from the latter:

“77. ... Community law does not prevent the Member States from *prescribing, for breaches of national provisions concerning the control of aliens, any appropriate sanctions* necessary in order to ensure the efficacy of those provisions (*Royer*, cited above, paragraph 42), *provided that those sanctions are proportionate* (see, in particular, Case 157/79 *Pieck* [1980] ECR 2171, paragraph 19).

78. On the other hand, *refusal of a residence permit*, and a fortiori an expulsion order, *based solely on the failure of the person concerned to comply with legal formalities concerning the control of aliens would impair the very substance of the right of residence directly conferred by Community law and would be manifestly disproportionate* to the gravity of the infringement (see, by analogy, in particular *Royer*, paragraph 40).” (emphasis added)

#### **Breaches of Irish immigration law**

109. In light of the foregoing, even if all three of the Applicants had broken UK or Irish immigration law (and there is no evidence whatsoever to suggest that they did) only proportionate sanctions could be imposed. In other words, it would be disproportionate, in those circumstances, to refuse a residence card. It is uncontroversial to say that to make an application for a visa is the first step in what might become an application for a

residence card. Thus, the refusal of a visa based on the failure of a person to comply with legal formalities concerning the control of aliens would impair the very substance of the right of residence and would be manifestly disproportionate to the gravity of the infringement, as the decision in MRAX makes clear. To my mind, the principle applies with at least equal force insofar as a visa application is concerned (as opposed to a residence permit).

110. In the manner explained earlier, I am entirely satisfied that policy imperatives including State security formed a material part of the Respondent's reasoning in the decision she came to. It is appropriate to make the additional observation that no affidavit has been furnished by or on behalf of the Respondent in which it is averred that public policy including State security considerations did not form part of the basis for refusing each of the three visa appeals. The reason for this seems to me to be entirely obvious, given the contents of each decision.

### **Simple logic**

111. As a matter of simple logic, the Respondent cannot: (a) have had "due regard" to the "public policy imperative" (of maintaining the integrity of the State's immigration system/security of the Common Travel Area/the overall security of the State) "in reaching this decision on appeal" and simultaneously; (b) have had no regard whatsoever to same in reaching each decision challenged. Her Counsel argues that (b) represents the factual position here, whereas the Respondent's decisions in all three cases plainly state that (a) is the case. Furthermore, and at the risk of stating the obvious, I cannot hold that when a decision-maker stated that they had due regard to something in reaching a decision, the proper interpretation of that statement is that they meant no regard was had.
112. For the reasons explained in this decision, I am satisfied that, as regards the First question, the Minister fell into error by having regard to public policy including State security issues in reaching her three decisions, in the manner she did. This court's finding is not at all inconsistent with the decision by Barratt J. in *Sadiq v Minister for Justice* [2019] IEHC 517 to which Counsel for the Respondent refers, in which case, the learned judge (at para. 8) stated the following:

*"There is nothing wrong with the Minister having due regard to this public policy imperative. If truth be told, the court would be surprised if the Minister did not have due regard to this public policy imperative. But if the Minister thinks some specific issue to present for the Applicants by reference to this public policy imperative it requires to be identified. Otherwise the Applicants really have no idea what issue is perceived to present; in truth, the quoted text is so generic that it may actually be that no such issue presents as regards the Applicants. Upon receiving an administrative decision, the recipient is entitled to know why the decision taken has been taken; when it comes to the public policy dimension of the Impugned Decisions the Applicants are left with no idea as to how that public policy imperative was brought to bear in respect of them."*

113. I am also satisfied that the Respondent's reliance on the decision in *Straczek v Minister for Justice & Equality* [2019] IEHC 155 provides no basis for refusing the relief sought. That decision speaks to the importance of subjecting documentary evidence to qualitative assessment. No issue is taken with that principle. Nor does the fact that the Second and Third Named Applicants answered "yes" to the question "have you ever been refused a visa to another country?" but gave only the answer "UK join family visa" in response to the question "if yes to any of the above please give details" render an unlawful decision lawful. This is in circumstances where public policy including State security was not merely "noted" as a "general" aside or addendum. Rather, it formed part of the basis for the decision or, as the Respondent stated explicitly: "in reaching this decision on appeal...due regard has been had to the public policy imperative of..."

### **The Second question**

114. Turning to the Second question, I am entirely satisfied that the Minister was not entitled to refuse a visa to the Fourth Named Applicant on the ground that the Second Applicant's visa appeal had been refused. The reasons for this view have already been set out when I looked in some detail at the decision concerning the Fourth Named Applicant. It is not necessary to repeat those reasons here. It is appropriate, however, to note that in support of the submission that the Fourth Named Applicant – being under 21 and a direct descendant of a UK citizen – automatically falls within the definition of a qualifying member, the Applicant draws this court's attention to several authorities (see *Bigia v Entry Clearance Officer* [2009] EWCA – Civ. 79, para. 3. See also *S.M. v Entry Clearance Officer, UK Visa Section* [2019] 1 WLR 5505, wherein the ECJ held *inter alia* that the expression "direct descendant" can include both biological and adoptive children). This court's attention was also drawn to the decision in *Badshah v The Minister for Justice and Equality* [2018] IEHC 759. In that case, the Third Named Applicant was a UK national, resident in Ireland. The First Applicant was his daughter and she was an Indian national, resident in the UAE. Her minor son (i.e. the Union citizen's grandchild), being the Second Applicant in that case, was an Indian national, living with his mother, Ms. Badshah. Mr. Justice Barratt held (at para. 3) the following:

*"3. The sentence 'You have failed to prove that you qualify as a beneficiary of Directive 2004/38/EEC' is vague; however, it appears to connote that neither Ms Badshah nor Master Badshah derive any advantage under the 2015 Regulations. This is not true of Master Badshah. He is a 'qualifying family member' under the 2015 Regulations, reg.3(5), being Mr Badshah's direct descendant and under the age of 21. That he enjoys that status places him in an at least somewhat advantaged position under the Directive. (In passing, no dependency test falls to be undertaken in respect of him, as an under-21 year old direct descendant, when assessing whether he is a 'qualifying family member' within the meaning of reg.3(5), though it appears that such a test was applied when one has regard to point (3) above). Master Badshah is entitled to be assessed on the basis that he is a 'qualifying family member' and thus being, to that extent, advantaged under ('a beneficiary of') the Directive."*

115. The foregoing comments apply, *mutatis mutandis*, insofar as the position of the Fourth Named Applicant in the present case. Counsel for the Applicants also draws the court's attention to the "Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States" which states (at para. 2.1.2 under the heading "Family Members in Direct Line") that: "There is no restriction as to the degree of relatedness".
116. The Applicants also drew the court's attention to Article 10.1 of Council Regulations 1612/68 which preceded the Directive, and which extended the right of free movement to a Union citizen's "spouse and their descendants who are under the age of 21 years or are dependent." As regards the aforesaid Regulations, the ECJ observed (at para. 59) of the decision in *Metock & Ors* [C-127/08]:
- "The same interpretation must be adopted a fortiori with respect to Directive 2004/38, which amended Regulation No 1612/68 and repealed the earlier directives on freedom of movement for persons. As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to 'strengthen the right of free movement and residence of all Union citizens', so that Union citizens cannot derive less rights from that directive than from the instruments of Secondary legislation which it amends or repeals." Thus, the term "direct descendants" in the Directive cannot be interpreted more restrictively than the term "descendants" in Regulation 1612/68. On this point, the Applicants also submit that the official website of the European Union, "Your Europe", states, as of 24th August 2020, that in order to obtain a right of residence under the Directive: "for (grand) children, [you need] proof they are under 21 or dependent on you".
117. In light of the foregoing, the Fourth Applicant (as a direct descendant of a Union citizen and a person under 21) is entitled to enter and reside in this State to join his grandfather, as a beneficiary under the Directive. It seems to me that the Respondent fell into error by, in effect, impermissibly limiting his rights under the Directive, as reflected in the 2015 Regulations, by determining his visa appeal by reference to a separate application by a different individual, namely his mother. I am also satisfied that the Respondent's decision to refuse a visa to his mother was not lawfully made. This created a second flaw, in circumstances where the inevitable consequence (as the Respondent saw it) of a refusal of a visa to the Second Applicant was that the Fourth Applicant's appeal must be refused.
118. Among the submissions made by the Respondent is that the use, by the Fourth Named Applicant, of a visa would breach an order of the Pakistan court. That submission seems to me to ignore the very material distinction between, on the one hand, obtaining a visa and, on the other, travelling on foot of such a visa, taking into account such particular circumstances as might pertain to the individual who has obtained the visa.
119. The submission also ignores the reality that, in the present case, it was never put to the Fourth Named Applicant that the Respondent saw his application as inextricably linked to his mother's or that the Minister proposed to refuse his mother's appeal with the

inevitable consequence of the Fourth Applicant's appeal also being refused. Therefore, as I observed earlier, the Fourth Applicant was deprived of any opportunity to, for example, make an application to the relevant court in Lahore to seek permission to travel with another family member, be that his Union citizen grandfather, or otherwise.

120. For these reasons I am obliged to reject the range of submissions made with undoubted skill on behalf of the Respondent but all centred around a single theme, namely, the proposition that this State could not countenance the breach of a court order made in a different jurisdiction. There is simply no evidence before this court of any intention to breach an order, nor was there before the Respondent.

### **Intention**

121. For reasons already made clear, I am also bound to reject the submission made on behalf of the Respondent wherein it is argued that the Fourth Named Applicant "is not a qualifying family member" because "he cannot intend to join his grandfather", by reason of the Lahore Court Order. It is a statement of the very obvious to say that the existence of a court order in family law proceedings does not mean that the Fourth Named Applicant ceases to be a grandchild of the First Named Applicant Union citizen. Furthermore, it does not seem to me that either the Directive or the 2015 Regulations impose any test of "intention" to travel.
122. Among the other submissions made with regard to the Second question is that, by virtue of the fact that it was possible for the Fourth Named Applicant to apply for a visa, he has been granted "every facility to obtain the necessary visa, in compliance with Article 5(2) of the Directive and Regulation 4(3)(b) of the 2015 Regulations." The foregoing submission ignores several things. It ignores (i) the impermissible linking of the fate of the Fourth Named Applicant's appeal to that of the appeal made in respect of a separate individual; (ii) the unlawful refusal of the Second Named Applicant's appeal; and (iii) the fact that the Fourth Named Applicant has EU free movement rights by virtue of his status as a person under 21 years who is grandson of the First Applicant.

### **The explicit consent of both biological parents**

123. Insofar as it is submitted that the Respondent "would never approve of a minor moving to and residing in the State without the explicit consent of both biological parents", nowhere did the Respondent put the Fourth Named Applicant or his solicitor or, for that matter, his mother, on notice of her attitude in that regard. It will, of course, be recalled that the Applicant's solicitor, when lodging the three appeals, made the explicit request that "any other issues or concerns" "be put to us in advance of a decision being reached". That the aforesaid request made in the final paragraph of the Trayers & Company Solicitors letter dated 13 November 2018 could not fairly be considered an illicit request that the Minister provide an "advice on proofs" to the Applicants is perfectly illustrated with reference to the submission made that the Minister would never approve of a minor moving to and residing in the State without the explicit consent of both biological parents.
124. The foregoing clearly comes within the category of "issues" which Ms. Trayers sought to have notice of, in advance of a decision being reached. For very obvious reasons, neither

she nor the Applicants knew, or could have known, of the existence of this issue. However, the submission by the Respondent's Counsel indicates that it was an issue which had a fundamental bearing on the decision made in respect of the Fourth Named Applicant's appeal (leaving aside the fact that it is not put in those terms in the text of the Respondent's decision to refuse the Fourth Named Applicant's visa appeal). Indeed, the significance of the issue, insofar as the Respondent is concerned, is underlined by the averment made at para. 9 of the affidavit sworn by Ms. Brennan, Higher Executive Officer at the Department of Justice, wherein she states:

*"The Respondent carefully considers all of the visa applications but particularly where it is intended to take a minor out of the jurisdiction. A visa would not be granted to a minor where to do so would breach a foreign court order in respect of that child."*

125. Doubtless, the foregoing view is one held bona fide by the Respondent. However, this averment ignores the fundamentally important fact that to grant a visa does not constitute a breach of a foreign court order. Moreover, neither the Directive nor the Regulations prevent the Fourth Named Applicant from availing of his EU free movement rights in the present circumstances. The Respondent, very appropriately, acknowledges the view expressed by Baker J. in *Safdar v Minister for Justice & Equality* [2019] IECA 329 that ordinarily "the qualifying family member has a right to enter and remain which automatically vests", but I cannot agree that any other comments made by the learned judge in that decision bolsters any of the Respondent's submissions in the present case.

**Advising on proofs**

126. There is no dispute as to the fact that it is not for the Minister to advise any Applicant on their proofs. That issue is simply not at play in the present proceedings. Nor is this case one where the Applicants complain that the Minister was obliged to, but failed to, give them advance notice of conclusions derived from an examination of documents which they provided. On the facts of the present case, the matter goes much further. As examined earlier, the Respondent was prompted by concerns to carry out independent investigation as a result of which she had further concerns. The Respondent formed adverse conclusions based on the results of her independent investigations and the further concerns they gave rise to, yet none of this was put to the Applicants or their solicitor. Whilst the foregoing was undoubtedly true in relation to independent investigations conducted and adverse findings made, the Respondent also failed to draw to the Fourth Named Applicant's attention that, inter alia: (a) his application was tied to his mother's; (b) if her application failed, so would his; (c) the Respondent took the view that for her to issue a visa to the Fourth Applicant would be to breach a foreign court order; and (d) the Fourth Named Applicant was not a qualifying family member as he could not intend to join his grandfather. To my mind, these were "all issues" which neither the Fourth Applicant, nor his solicitor, were, or could have been, aware of. These were not issues which arise from the information or documentation submitted. Rather, they reflect a specific approach or policy adopted by the Respondent, yet, they were plainly "issues" which Ms. Trayors, solicitor, explicitly asked to be put on notice of (in her



13 November 2018 letter) prior to a decision being reached. The Respondent did not put her on notice of any of those issues, and in my view, this represented a breach of fair procedures and constitutional justice, further rendering the decision in respect of the Fourth Applicant infirm.

127. For the reasons detailed in this judgment, the Second question must be answered in the negative and the Respondent's refusal of the Fourth Applicant's appeal was unlawful.

**The Third question**

128. Turning, finally, to the Third question, I am satisfied that the Respondent did not lawfully assess whether the Second and/or Third Applicants are dependent upon the First, under the 2015 Regulations and the Directive. The reasons for this view can be found throughout this judgment, but I will attempt to summarise them here with reference to certain authorities to which the court's attention was drawn.

129. In order to be treated as a qualifying family member in accordance with the provisions of the Directive and 2015 Regulations, in addition to satisfying the Respondent that they are the daughter and son, respectively, of the First Named Applicant EU citizen, they were required to satisfy the Minister that they are dependent on the First Applicant. Although "dependency" is not defined in the Directive or the Regulations, European authorities provide clarity with regard to the appropriate test. The Respondent's three letters refusing the appeals correctly refer to the test developed in Case C-1/05 Jia v Magrationsverket, wherein the Grand Chamber held:

"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 applied to join the Community national." (emphasis added)

Later in the same decision the court provided the following guidance as to the meaning of dependency in the context of Directive 73/148 stating:

"... that 'dependent on them' means that members of the family of a Community national established in another Member State within the meaning of Art 43 EC *need the material support of that Community national or his or her spouse in order to meet their essential needs* in the State of origin of those family members or the State from which they have come at the time when they applied to join that Community national." (emphasis added)

130. Some years later in Case C-423/12 Reyes [2014] ECRI – 000, wherein the Applicant was an adult child, the CJEU stated the following:

"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, Gia para. 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 the citizen (see, to that effect, Jia (para. 37)).*

131. In the present proceedings, the Second and Third Applicants claimed to be both socially and financially dependent on the First. They submitted evidence relating to both financial assistance and medical conditions. A principal submission to this court was that the Applicants failed to establish dependency in circumstances where they failed to demonstrate either that they were not in a position to support themselves financially, or that the First Applicant provided support to meet essential financial need.
132. The submission was made that the Respondent's (i) engagement with the medical evidence, including (ii) the independent investigations carried out, (iii) the findings of those investigations, including (iv) the further issues of concern, and (v) the views formed on foot of those investigations which were adverse to the Applicants, mattered not at all. That submission is undermined by the facts which emerge from an analysis of the evidence before this Court.
133. It is a fact that the Minister considered not merely the Second and Third Named Applicants' financial, but also their social conditions, specifically, evidence furnished in respect of their medical conditions. The Applicants acknowledge that it is a matter for the Minister to assess the weight to be attached to the evidence proffered by the Applicants. However, the particular facts in this case include the following:
  - (1) The First-instanced refusal was squarely based on the failure of the Applicants to prove their relationship with the First Named Applicant. No other issue, concern, deficiency or flaw in the Applicant's evidence was identified.
  - (2) Having regard to the fact that there is an uncontroverted averment before this court to the effect that both the medical as well as financial information was submitted in support of the visa applications, I am satisfied that all this evidence was, in fact, before the Respondent.
  - (3) It is a fact that the first-instance refusals of the visa applications concerning the Second and Third Applicants did not rely on the ground that either Applicant had failed to adduce adequate evidence of social and financial dependency.
  - (4) In appealing the first-instance refusals, the Applicant's solicitor addressed the reason for those refusals by providing the original birth certificates and marriage certificates etc., as referred to in the letter from Trayers & Company dated 13

November 2018. This was followed by a letter dated 12 December 2018 in which Trayers & Company Solicitors addressed the only other reason cited for refusing the Fourth Applicant's visa (namely that he did not have consent to travel) by providing the Lahore Court Order (dated 22 November 2018).

- (5) The Applicants had no opportunity, when lodging their appeals, to address any issue or concern or flaw or deficiency with regard to the evidence proffered in support of dependency.

This is because none were cited as a ground for refusal of the visas at First instance. Let me say at this juncture that none of the foregoing facts, of themselves, entitle the Applicants to relief. Rather, it is what occurred thereafter which renders the decisions unsound.

134. The Applicants' draw this court's attention to the decision of Meenan J. in *Singh v The Minister for Business Enterprise and Innovation* [2018] IEHC 810, wherein, at para. 16, the learned judge stated:

*"In the instant case, the First named Respondent confirmed the decision but gave entirely different reasons from those which were given when the decision was First made. To my mind, there is an obvious problem with this in that the Applicant was given an opportunity to make representations in respect of the First decision but there was no such opportunity afforded to him in respect of the reasons given for the reviewed decision. Fair procedures would dictate that if different reasons were going to be given to confirm the First decision on review then the Applicant must be afforded an opportunity to be heard. This is what is provided for in s.13(4) and, in my view, is not limited only to the First decision. If the First named Respondent is intending to confirm the First decision but for different reasons then the Applicant should be afforded an opportunity to make representations on these different reasons before the review decision is taken."*

135. The context in which the foregoing case was decided involved a national of India who arrived in Ireland in January 2008 on foot of a student visa, who married an EU citizen in 2011 and was granted a "Stamp 4" permission to reside and work in this State for a five-year period. The couple divorced in 2014, but the Applicant wished to remain in Ireland and he applied to the Respondent for the retention of his residence card due to his status as the former spouse of an EU citizen. That application was unsuccessful and the specific reason given in July 2017 was that, based on the Applicant's current immigration permission, he was precluded from working in the State and, consistent with s. 12(1)(i)(c) of the Employment Permits Act, 2006 (as amended), an employment permit would not be issued. On appeal, the attention of the Respondent was drawn to the fact that the Applicant had Stamp 4 status with an entitlement to work at the time of the initial application and the First-instance refusal. The review decision of August 2017 indicated that holders of a Stamp 4 permission come within the provisions of s. 2(1)(d) of the Employment Permits Act, 2003 (as amended) and, as such, have no requirement for an employment permit. The appeal decision made no reference to s. 12(1)(i)(c) of the

2006 Act. It was accepted by both sides that the first-instance decision was in error because the Applicant enjoyed Stamp 4 status at the time. It is also of relevance that s. 13 of the 2006 Act provides a procedure for the review of a decision to refuse a work permit. Section 13(4) entitles the party seeking the review to make representations in writing. The reviewer may either confirm the decision and give reasons, or cancel the decision and grant the employment permit.

136. Although the facts and statutory context in which the *Singh* case was decided differ markedly from those in the present proceedings, there seems to me to be a fundamental principle which is equally applicable, namely *audi alteram partem*. In light of the particular facts in this case, I am satisfied that this fundamentally important principle was breached in the present case.
137. Earlier in this judgment when discussing the Lahore Court order of 22 November 2018, I noted that it contained an (admittedly very small) typographical error, in that a word is missing. This was not merely the observation of a pedant. Nor was it to suggest that there is any equivalence whatsoever between a missing word in a Lahore court order and the various significant spelling mistakes in documents submitted in respect of the First and Second Named Applicants' medical conditions. It is simply to observe that many of the documents exhibited in the present proceedings contain typographical errors, including, for that matter, the Respondent's own decisions. It is no function of this Court to make any findings as to the veracity of documents and nothing in this judgment should be interpreted as such. Having said that, it seems to me appropriate to make certain observations, at a level of principle, on the topic of typographical errors, with a view to illustrating how fundamentally important the *audi alteram partem* principle is, in practice.
138. It seems to me that, at least in principle, there are a range of potential explanations as to why documents would contain typographical errors, from the minor to the most significant. A non – exhaustive list of reasons might include (a) the document has been falsified; (b) it was typed by an assistant or secretary and the typographical error was missed by the professional in question when they signed the document; (c) it was produced by a person for whom English is not their First language; (d) the error was contained in a draft and, in error, a draft was provided as opposed to the final approved version.
139. I want to emphasise in the clearest of terms that to say the foregoing is not, for a moment, to suggest that, when considering documentation put before her, the Respondent is not entitled to decide what weight to attach to it. Plainly she is and (subject only to concepts such as rationality in the judicial review sense) she is perfectly entitled to draw adverse inferences from documents, including in respect of the form as well as the content of the documentation. Nor am I suggesting which, if any, of the foregoing theoretical explanations, (a) to (d), apply in the present case. These are simply examples of conceivable possibilities, but they seem to me to be worth identifying because the very fact that such possibilities can be conceived of, underlines how essential it is that any decision-maker who has concerns which prompted them to carry out

independent investigations, the result of which gave rise to further concerns, should alert the relevant Applicant to the outcome of those investigations before reaching conclusions. Not only does fundamental fairness require it, the benefits of so doing are obvious.

140. Firstly, it ensures that no finding is made without the affected party having had an opportunity to address the results of the investigations and the totality of the decision-maker's concerns as they then stand. Secondly, it ensures that the decision - maker is armed with all information necessary to make a valid decision. In the present case, by (no doubt unwittingly) breaching the audi alteram partem principle, the Respondent was deprived of relevant information (namely, the response of the relevant Applicants to the results of the Respondent's investigations, including the further concerns they gave rise to).
141. It seems entirely fair to say that, at all stages, the Respondent's concerns were bona fide held and there is no evidence which would entitle the court to hold that there was any intention on the part of the Respondent to prejudice the position of any Applicant. However, on the particular facts and circumstances of this case, that was what occurred.
142. In submissions on behalf of the Applicants, the court's attention was drawn to the two medical reports, both dated 23 September 2019, which comprised Exhibit "MT 1" to the affidavit sworn by Ms. Trayers, solicitor, on 13 December 2019. It will be recalled that, earlier in this judgment, reference was made to the concerns on the part of the Applicants' Counsel that the First and Second Applicants lacked the capacity to swear affidavits. Those medical reports, as well as two further reports dated 25 March 2020, were exhibited in that context. Without for a moment expressing any view as to the veracity of any document (including those of 23 September 2019) or whether the following constitutes any explanation for the typographical errors in the documents from "BRIDGE Rehab & Psychiatric Services" which the Respondent referred to in her decisions concerning the Second and Third Applicants, the following note appears at the foot of the 23 September 2019 medical report from the "BRIDGE Rehab & Psychiatric Services", immediately under what appears to be the name and signature of "Dr. Nisar Hussain Khan, Consultant Neuro Psychiatrist":

*"Note:*

*Certified that col. Dr. M. Javed Hameed was our visiting consultant and the medical certificate written by Dr. M. Javed Hameed regarding SS. Please ignore that was a rough draft".*

143. A similar note appears at the foot of the 23 September 2019 medical report in respect of the Third Named Applicant, MNS. Whilst, as I say, making no comment whatsoever as to the acceptability, or otherwise, of the foregoing by way of an explanation for what were very significant typographical errors in prior documents (or, for that matter, making any finding in respect of the veracity of the 23 September 2019 report itself) it is entirely uncontroversial to say that this is information which, by not alerting the Applicants to the results of her investigations (prompted by her genuinely held concerns, which

investigations confirmed those concerns and raised further issues), the Respondent decision-maker deprived herself of receiving and considering prior to making her decision.

144. Counsel for the Applicants also drew this court's attention to the observations made by Barratt J. in *Chittajallu v The Minister for Justice* [2019] IEHC 521 wherein, at para. 9, the learned judge stated:

*"However, although (a) the Minister is not required to advise Applicants throughout the application process as to the evidence they need to provide (they apply, lawyers advise, and the Minister decides), (b) as a matter of basic fairness of procedures, the Minister, with respect, does need to be specific in an initial decision as to his specific expectations, if he expects that particular documentation will be produced."*

145. The relevance of the foregoing in the present case is not to say that, as regards the First - instance decisions, the Applicants were entitled to more than they received at that point. Rather, it is to emphasise the basic fair procedures requirement of being put on notice of the results of independent investigations and on notice of the further issues of concern which were revealed by those investigations (in the case of the Second and Third Applicants) as well as the right to be put on notice of, for example, the Respondent's view that a grandson could not be a qualifying family member of an EU citizen, as he could not "intend" to join his grandfather (in the case of the Fourth Named Applicant).
146. Among the submissions made on behalf of the Respondent is that "as is clear from the medical documents submitted, there is little if any evidence that showed how the Second and Third Applicants' are dependent on their First Applicant father as a result of their medical conditions and disabilities. The First Applicant has not lived with those Applicants since 2010 and no evidence was provided that the First Applicant has been paying for their accommodation, medical treatment or medication." The foregoing comments speak to a qualitative assessment of medical evidence provided. It is not at all in dispute that the Minister is entitled to subject evidence to a qualitative assessment (see for example, Keane J. in *Straczek v Minister for Justice and Equality* [2019] IEHC 155 at paras. 45 and 46). The foregoing principle and the Respondent's submission with regard to it, does not appear to me to address, however, the separate and distinct issue which speaks to fairness of procedure.

**Shishu v Minister for Justice and Equality [2021] IECA 1**

147. As to the latter issue, I find to be highly relevant the views expressed by the Court of Appeal in *Shishu v Minister for Justice and Equality* [2021] IECA 1. That case concerned brothers, the younger of whom claimed to be dependent on the older. At issue, was the question of whether he was a permitted family member, the obligation on the State being to facilitate applications. At para. 122, Mr. Justice Haughton emphasised that:

*"... the onus is on an Applicant to prove that they are a person to whom Reg.5(1) applies, and their case to be treated as a 'permitted family member'. The process is*

*not a joint venture, in which there is some ill-defined obligation on the Minister to assist Applicants.*

*123. Having said this, the process is not adversarial – it is intended to be facilitative in the narrower sense of that word – it is to enable an application to be made, and not to put undue obstacles in the way of an Applicant establishing their case. Further it is by its very nature interactive: even if the Minister does not correspond on ‘concerns’ or require the production of additional evidence under Reg.5(4), the obligation to justify and give reasons for a First instance refusal has the effect that at the review stage an Applicant can make submissions and furnish further supporting documentation with their Form EU4 Review Request, and the Minister has the power to pursue further enquiries under Reg.25(5).”*

148. I would pause here to make the point that, in the present case, the reasons for a first-instance refusal did not, in fact, have the effect that, when seeking an appeal, the Applicants were able to know and, therefore, address the concerns which comprised a material part of what became the appeal refusals. It also seems to me that the description by Haughton J., at para. 123, highlights the fact that, even though Meenan J. in the *Singh* case was dealing with a situation where an appellant had a statutory entitlement to make representations in writing, the process under the 2015 Regulations is one which facilitates the making of submissions by an Applicant at the review stage. Thus, the underlying principle articulated by Meenan J. which speaks to basic fairness of procedure seems to me to be equally relevant regardless of the different legislative frameworks.

149. It is entirely true to say that, at para. 124 of the Court of Appeal’s decision in *Shishu*, Mr. Justice Haughton made clear that the Respondent Minister is not under an obligation to adopt a procedure “... that would enable the Applicant to know what evidence he was required to adduce” as this would “create very real and practical difficulty for the Minister in assessing and deciding applications”. Notwithstanding the foregoing, the court went on to state the following from, para. 126, onwards, having referred to the wording in Regulation 5(3), Art. 3(2) and Recital 6 of the Directive:

“126. What I take from this is that the Citizens Directive and the 2015 Regulations create the obligation to extensively examine the personal circumstances, but do not go so far as to impose an investigative obligation, or an obligation to raise queries or concerns or seek additional evidence. While I have considerable sympathy for Applicants who may feel, as was the case here, that they were not given the opportunity to respond to concerns about proofs that were not raised with them, and were indeed “operating to some extent ‘in the blind’”, in my view the trial judge erred in answering this question in the affirmative.

127. Having said *this 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. This will arise where, for example, the Minister obtains relevant information from a source other than the Applicant and is contemplating*

using that information to refuse a residence card. This in fact occurred in the present case where information 'available to the Minister' indicated that Mr. Mohammed Jewel Miah, whose name appeared as landlord on the Castleblaney tenancy agreement provided with the application, was not in fact the landlord. In accordance with the requirement of fair procedures this was put to Mr. Miah in the letter of 17 August 2018 to "provide you with an opportunity to address these concerns prior to making a determination." - and it was duly answered. However, I am satisfied that the matters which informed the Impugned Decision to refuse, while they can be criticized on other grounds, did not relate to new information or documentation sourced by the Minister which he was obliged (and failed) to put to the Applicants to elicit their response.

128. I would also observe that the corollary to the Minister in general not having the obligation to advise an Applicant of his thinking as to what further information or documentation might be required to satisfy him on the application is that the Minister must justify a refusal, and must do so on a rational basis and the decision must have a solid factual basis. As I have found earlier in this judgment the Minister failed to do so in the Impugned Decision." (emphasis added).

150. In the manner examined earlier, it is certainly a matter of fact that the Respondent Minister obtained what she regarded to be relevant information from a source other than the relevant Applicants, in particular, by doing what the Respondent described in the relevant decisions, as follows:-

- (a) "consulting the 'Bridge Rehab and Psychiatric Services' website";
- (b) as well as what is described as "further investigation conducted by this office"; and
- (c) "information made available to this office".

Although no specific details are provided as to the source(s) consulted in respect of (b) and (c), it seems clear from the Respondent's decisions that information from the foregoing three sources played a material part in the decisions reached by the Respondent to refuse the visa appeals concerning the Second and Third Applicants. The Respondent did not raise such matters with either of the Applicants at any stage prior to reaching the decisions which are challenged in the present proceedings. These matters are not referred to in any of the first-instance decisions. Furthermore, no such matters were put to any of the Applicants, even though their solicitor took the trouble to make the explicit request in her 13 November 2018 letter that "if there are any other issues or concerns which need to be addressed we would be obliged if they could be put to us in advance of a decision being reached".

As I have observed more than once, that was not a request that the Minister advise the Applicants on their proofs. It was, however, a request that if "other" matters (i.e. not referred to in the first-instance refusal) were to play a part in the appeal decision, the Applicants' solicitor wanted to be on notice of same. The "other issues or concerns" to



which the Applicants' solicitor referred plainly included (i) information independently sourced by the Respondent which (ii) she regarded as supporting a view that medical evidence lacked veracity, and (iii) raising further issues of concern and (iv) was to feature in the Respondent's decision making. In the present case I am satisfied that, as a matter of fact, the decisions relating to the Second and Third Named Applicants were based to a material extent on new information sourced by the Minister which, having regard to fundamental principles of fair procedures, she was required to put to the Applicants, so that they could be afforded an opportunity to respond, prior to any final decision being taken. Doubtless, the failure to do so was entirely innocent but it was a failure nonetheless and a fundamental one insofar as the audi alterem partem principle was breached.

151. A theme in the Respondent's submissions is that no reasonable individual could have regarded the medical documents in question as reliable and the Respondent also submits that her "investigation elicited even more discrepancies". The clear implication of these submissions is that, firstly, the investigation and what it revealed made no difference to the decision and, secondly, the documents in question so plainly lacked veracity that no opportunity afforded to the Applicants to address the matter could or would have been meaningful. Indeed, the Respondent's written submissions contain a further critique of the medical evidence provided in support of the visa applications, with reference to the medical certificates dated 23 September 2019 which, as explained earlier, were obtained in the context of a concern on the part of the Applicants' Counsel that the Second and Third Applicants might lack the capacity to swear affidavits. It is clear from the following submission that the Respondent asserts that it is simply impossible for the relevant Applicants to explain the discrepancies with respect to the medical documentation, the implication being that it did not matter that the Respondent did not share the results of her investigations or the concerns they gave rise to and confirmed:

"It is important to note that the medical certificates exhibited in the Second affidavit of Mary Trayers from Bridge Rehab & Psychiatric Services are dated 23rd September 2019 and signed by a Dr. Nisar Hussain Khan, were not before the decision maker either at First instance or at appeal so the Applicants cannot rely on them now (as they seek to at paragraph 71 of their Legal Submissions). At the end of these 'certificates', there is a 'Note' stating the following: "Certified that Col. Dr. M. Javid Hameed was our visiting consultant and the medical certificate written by doctor M. Javid Hameed regarding MNS/SS. Please ignore that was a rough draft." It appears that these certificates are attempting to explain some of the discrepancies identified in the appeal decision, yet even *these certificates contain a different logo and heading to the certificates that were put forward with the applications.*" (emphasis added)

152. It is plain from the foregoing submission that, whilst at no stage accepting that any fair procedures breach occurred, it is contended that it would and could have made no difference. That is not a proposition I can accept. In saying this, I want to stress that the present proceedings do not involve a complaint as to the way evidence before the Minister

was assessed. Rather, the complaint is made with regard to the process by which the Respondent arrived at her decisions. For the reasons identified in this decision it appears to me that the process was flawed arising from, inter alia, a breach of fair procedures and for the reasons explained in this judgment, I cannot take the view that, where a fundamental breach of fair procedures has been established, this court should ignore it on the basis of an assertion that it made no difference.

153. The rights pursuant to the Directive and reflected in the 2015 Regulations are significant and the consequences for the Applicants of a decision, either way, is a serious matter. Regulation 25(5) which requires the Respondent to have regard to the information contained in the application undoubtedly entitles her to "make or cause to be made such enquires as ... she considers appropriate". The Minister's options are either to set aside the decision or to "confirm the decision the subject of the review on the same or other grounds having regard to the information contained in the application for the review". The ability to confirm the decision on the same "or other grounds" does not seem to me to be an answer, from a fair procedures perspective, to the fact that the Respondent obtained relevant information from a source other than the Applicant and, without raising the relevant issues of concern at any stage, reached a decision which relied, to a material extent, on information never put to the Applicants. This is, of course, against the backdrop of the first-instance decision not having raised the issues either.

**Regulation 25 (5)**

154. A literal reading of Regulation 25(5)(a) fortifies me in the foregoing view. In other words, the situation in the present case is that the Respondent did not simply confirm the first-instance decision on "other grounds having regard to the information contained in the application for the review". Rather, she confirmed the earlier decision on other grounds having had regard, inter alia, to other information as a result of her own investigations which was not contained in the application for review and was not put to the Applicants.

**No general obligation to alert an Applicant to deficiencies**

155. I am not for a moment deciding the matter on the basis of any general principle that the Respondent, in a review pursuant to Regulation 25, is obliged to give advance notice of perceived deficiencies in the Applicants' own proofs. The Minister owes an Applicant no such duty. On this point, it is appropriate to quote as follows from the decision of Faherty J. in *Khan v Minister for Justice, Equality and Law Reform* [2017] IEHC 800:

*"83. Much of the criticism levelled at the Respondent in the course of this application centred around the failure of the Respondent to give advance warning to the Applicants of perceived deficiencies or contradictions in the documents submitted with visa applications prior to the Respondent reaching a decision on the respective appeals. Counsel for the Applicant maintained that had the Applicants been forewarned they would have been able to address the perceived deficiencies or contradictions.*

*84. Counsel for the Respondent submits that it was incumbent on the Applicants to put their best foot forward and to present such relevant facts and evidence as*

*might be necessary to support their applications, including facts and evidence which would tend to prove dependency. Accordingly, the Respondent cannot be criticised, in these proceedings, for the condition of the Applicants' own proofs, because the Respondent was not willing accede to their application while in receipt of insufficient proof of dependency.*

85. *I agree with the Respondent's submissions in this regard. As stated in A.M.Y. v. Minister for Justice [2008] IEHC 306, 'there is no onus on the Minister to make inquiries seeking to bolster an Applicant's claim; it is for the Applicant to present the relevant facts'.*"

**Consideration of further material of which the Applicants were not on notice**

156. Similarly, in *Qureshi v Minister for Justice* [2019] IEHC 446, Keane J. stated as follows in a case where the review decision was made on a different basis to that at First instance:

"61. ... it is important to bear in mind that *both the First instance and review decisions were based solely on the material provided by the Applicants. This was not a case involving the consideration by the decision-maker of further or other material of which the Applicants were not on notice.* Thus, there is no question in this case of the Applicants being deprived of a reasonable opportunity to know the matters that may be likely to affect the judgment of that body against their interest. Once that opportunity has been provided, then, as McMahon J observed in *P.S. (a minor) v Refugee Applications Commissioner & Ors* [2008] IEHC 235, (Unreported, 11th July, 2008), it is clear that not every matter that may inform a decision must be put to the Applicants or their advisers.

62. Further, as Herbert J observed in *D.H. v. Refugee Applications Commissioner & Ors* [2004] IEHC 95, (Unreported, High Court, 27th May 2004) in the more searching context of an application for refugee status:

'The principle of *audi alteram partem* does not require the determinative body to debate its conclusions in advance with the parties.'" (emphasis added)

157. The facts in the present case are wholly different. Here, the decision maker did, in fact, consider further or other material of which the relevant Applicants were not on notice. Thus, they were deprived of a reasonable opportunity to know of matters likely to affect the Respondent's decision. This is perfectly clear from a combination of the fact that (i) the first-instance decision did not raise the issues in question; and (ii) the explicit request made by the Applicants' solicitor to be put on notice of any other issues or concerns was not responded to.

158. If the factual position in the present case was that the relevant decisions of the Respondent were exclusively based on a consideration of the material provided by the Applicants, the outcome of the present proceedings might well be different. But on the facts of the present case, and in a very real sense, the Applicants were deprived of an opportunity to know of matters likely to affect the outcome of the decisions. Thus, the

present case seems to me to represent an example of what Mr. Justice Haughton referred to at para. 27 of the Court of Appeal's decision in *Shishu*.

159. With regard to the decision of Meenan J. in *Singh* to which I referred earlier, it is, of course, very important to note that there is a material difference between the scope of s. 13(4) of the Employment Permits Act 2006, on the one hand, and Regulation 25(5) of the 2015 Regulations, on the other. Pursuant to the former, the decision maker, on review, may confirm or cancel the decision, whereas, pursuant to the latter, a decision maker is entitled to decide the review on the same "or other grounds". The observations made by Meenan J. seem to me to be no less relevant, however, in the present circumstances. The relevant Applicants in this case were deprived of an opportunity to make representations in respect of the reasons which underpinned the refusal of the appeal. This was a breach of fair procedures in circumstances where, notwithstanding the statutory power to decide the review on other grounds, the reasons relied on by the Respondent included information sourced by her which was never put to the Applicants.
160. In other words, it is the very particular facts in this case which determine its outcome. For the sake of clarity, this Court is not holding that there is any general obligation on the Minister to facilitate representations where a decision to refuse a visa appeal is for different reasons than those upon which the first-instance decision was based. Where, however, the different reasons at the appeal stage involved a reliance, *inter alia*, on the results of independent investigations which gave rise to further issues of concern, which results and concerns were not put to the Applicants at any stage, the approach taken by Meenan J. in *Singh* seems to me to be necessary, regardless of the differing statutory provisions. This approach in no way robs the Respondent of their statutory powers. It merely ensures that statutory power is exercised in accordance with fundamental principles of constitutional justice, insofar as fair procedures are concerned.

#### **Theoretical explanations**

161. As to the suggestion made by Counsel for the Respondent that, such are the deficiencies in the documentation, they were, and remain, impossible to explain, it seems to me useful to refer, once more, to a purely theoretical scenario. Among the results of the Respondent's independent investigation was to find that the 'font' and 'header' of the "BRIDGE Rehab and Psychiatric Services" website differed significantly from that used on their letterhead. On foot of the foregoing results, the Respondent formed the view that it would be expected, for business purposes, that a website and letterhead would be similar in layout, as to font colour etc. It is clear that the Respondent formed views adverse to the relevant Applicants based on the foregoing investigations and results. Is it truly the case that it is impossible for there to be any 'innocent' explanation? That is certainly the thrust of the Respondent's submissions. Speaking purely in the theoretical, however, it seems to me that such a difference could conceivably be explained by (a) the letter has been falsified; or (b) the business created (or refreshed) its website branding prior to all existing stocks of its 'old' letterhead- paper being used up and, rather than destroy it, same was used for correspondence until that stock was exhausted; or (c) the business in question ordered paper with a newly-designed letterhead prior to conducting a re-

branding of its website, or (d) the business is happy, for whatever reason, to use a letterhead which differs in style (font, colour etc.) from that employed on its website. It is no function of this court to suggest which if any of the foregoing theoretical possibilities might apply. I merely point out that different scenarios are conceivable, at least in theory, and that very fact underlines the fundamental importance of the principle of *audi alteram partem*. In other words, to the extent that it is suggested that a breach of fair procedures should be overlooked by this Court in the present case, I feel obliged to reject that proposition.

162. In short, although the Respondent owes no general duty to an Applicant to raise issues or concerns or to seek additional evidence, a fair procedures obligation arose in light of the specific facts in the present case, given that the Minister obtained other information as a result of her independent investigation which she relied on in reaching the decisions to refuse the Second and Third Applicant's appeals. These were circumstances in which fair procedures dictated that the Minister raise matters with the relevant Applicants and consider such responses as they might make, prior to coming to a final decision. This did not take place. There was a breach of the *audi alteram partem* principle.
163. I am satisfied that the Applicants are entitled to an order of *certiorari* quashing the decisions of the Respondent, dated 23 July 2019, to refuse the Second, Third and Fourth Named Applicant's review of the first-instance decisions to refuse visa appeals under the Directive and 2015 Regulations.
164. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."
165. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. My preliminary view is that there are no circumstances which would justify a departure from the normal or general rule that costs should "follow the event". In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 21 days (taking account of the Easter vacation). Finally, efforts have been made to redact names to prevent the identification of the Applicants or their family members. In the event that further or other redactions are felt necessary, the parties are invited to furnish agreed proposals within the aforesaid 14 day period.