

**IN THE MATTER OF ARTICLE 267 OF THE TREATY ON THE
FUNCTIONING OF THE EUROPEAN UNION AND
IN THE MATTER OF A REFERENCE
TO THE COURT OF JUSTICE OF THE EUROPEAN UNION**

THE CHIEF JUSTICE
MR JUSTICE O'DONNELL
MR JUSTICE MC KECHNIE
MR JUSTICE CHARLETON
MS JUSTICE O'MALLEY

Court of Appeal A:AP:IE:2018: 00362
High Court 2016 No. 707 JR

BETWEEN

S R S AND A A

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

ORDER DATED THE 12th DAY OF JANUARY 2021
FOR REFERENCE TO THE
COURT OF JUSTICE OF THE EUROPEAN UNION PURSUANT TO
ARTICLE 267 OF THE TREATY

The Notice of Appeal by the Applicants filed on the 6th day of May 2020 by way of appeal from the Judgment of the Court of Appeal (Ms Justice Baker Ms Justice Whelan Mr Justice McGovern) given on the 19th day of December 2019 and the Order made on the 5th day of February 2020 which dismissed the appeal from the Judgment and Order of the High Court (Mr Justice Keane) given on the 25th day of July 2018 and made on the 31st day of July 2018 (refusing Certiorari by way of application for Judicial Review quashing the decision of the Respondent dated 15th August 2016 refusing the second named Applicant's application for an EU Family residence Card as a 'permitted family member' of the first named Applicant and refusing Mandamus compelling the Respondent to reconsider the said application) and for an Order setting aside the said Judgment and Order on the grounds and as set forth in the said Notice of Appeal having come on for hearing before this Court on the 5th day of November 2020

Whereupon and having read the Determination of this Court the 20th day of July 2020 granting leave to appeal herein the said Notice of Appeal the said Orders the documents therein referred to the judgments of the Court of Appeal and of the High Court and the written submissions filed on behalf of the respective parties and having heard Counsel for the Applicants and Counsel for the Respondent

IT WAS ORDERED that the case should stand for judgment

And the matter having been listed for judgment on the on the 21st day of December 2020 and judgment having been delivered electronically on that date

And It Appearing that the facts and proceedings are as set forth and included in the Order for Reference annexed hereto

And it further appearing to this Court that the determination of the issues between the parties on this application raise questions concerning the correct interpretation of certain provisions of European Union Law namely Article 3 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 OJ
L158/77 30.4.2004

THE COURT HAS DECIDED TO REFER to the Court of Justice of the
European Union pursuant to Article 267 of the Treaty on the Functioning of the
European Union as set out in the said Order for Reference the questions:

1. Can the term member of the household of an EU citizen, as used in Article 3 of Directive 2004/38/EC, be defined so as to be of universal application throughout the EU and if so what is that definition?
2. If that term cannot be defined, by what criteria are judges to look at evidence so that national courts may decide according to a settled list of factors who is or who is not a member of the household of an EU citizen for the purpose of freedom of movement?

AND IT IS ORDERED that the further hearing of this Appeal do stand adjourned until after the said Court of Justice shall have given its preliminary ruling on the said questions or until further Order in the meantime


JOHN MAHON
REGISTRAR


CHIEF JUSTICE

Perfected this 13th day of January, 2021

An Chúirt Uachtarach**The Supreme Court**

Clarke CJ
O'Donnell J
McKechnie J
Charleton J
O'Malley J

Supreme Court appeal number: S:AP:IE:2020:000059
[2020] IESC 000
Court of Appeal record number 2018/362
[2019] IECA 330
High Court record number 2016/707JR
[2018] IEHC 458

Between

S R S and A A
Appellants/Applicants

- and -

The Minister for Justice and Equality
Respondent

Order for Reference by the Court of certain questions on the interpretation of European Union law to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union

Introduction

1. The specific issue which is before the Supreme Court in these proceedings is the meaning to be ascribed to defining or describing who is a “member of the household” of an European Union citizen, whereby if that citizen moves to another EU country, that other person or persons as non-EU citizens should be facilitated in accompanying him or her as part of the EU citizen’s freedom of movement. This reference consequently centred on the meaning of what it is to be a member of an EU citizen’s household as a matter of European Union law and on the definition or description whereby, under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006), the national regulations, which in turn implements 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, OJ L158/77 30.4.2004, a person is assessed as being a “permitted family member” of a Union citizen by the Minister for the purposes of considering whether or not the Minister will grant a residence card to him or her.

2. Ireland has correctly transposed the Directive into national law through the national regulations. The only differences are as to nomenclature and are insignificant. Hence, this reference concentrates on the relevant background, on the Directive and then sets out the questions which the Supreme Court would like answered by the CJEU.

Background

3. These proceedings arise as a result of the movement of S R S, originally from Pakistan, a British subject since 2013, to Ireland. Shortly after moving here, he was joined without a visa by his first cousin A A, a national of Pakistan, whose visa to study in Britain for four years had just expired. Since the definition of who is a member of the household of an EU citizen for the purposes of free movement may not easily allow for precise definition, but may more properly be delineated by a set of criteria laid down for application throughout the EU by the CJEU, it is necessary to refer to the fundamental facts in some detail.

4. It is appropriate to identify the parties. The respondents are the responsible Member State actors who have the task of facilitating the movement to Ireland of a member of a household of an EU citizen in moving from one EU country, Britain, to another, Ireland. The applicants are a British subject, of origin in Pakistan, Mr S, and his first cousin Mr A, a citizen of Pakistan who is not an EU citizen but was present in an EU country on a study visa.

5. Both Mr S, born 1978, and Mr A, born 1986, were born and raised in Pakistan. Mr S moved to Great Britain with his parents in 1997, age 19, and became a naturalized British subject on 8 February 2013. Mr S moved to Ireland in January 2015. He was employed thereafter for a few months, and since October 2015 has been self-employed within the State. After he came to reside in Ireland he married a woman who is a Pakistani citizen and who resides in Pakistan, and in respect of whom an application has been made to the Minister for family reunification. Mr A asserts that he is the first cousin of Mr S and also claims that both were brought up in the same multi-family compound in Peshawar until Mr S moved to Britain. Mr A would then have been 10 or 11 years old. Mr A has a third level degree in economics from a university in Pakistan. It is asserted that Mr S funded, which is unspecified and unvouched, his study in Pakistan. Ostensibly to pursue a further degree, Mr A sought a visa for foreign study in Britain. In 2010 he travelled to the Britain on a four-year student visa, to follow a course in accountancy and business administration. While he was studying, it is claimed that he resided for four years with Mr S and with Mr S's parents and other family members. This is asserted to be in a house which was owned by the brother of Mr S, also a British subject. It is asserted that Mr S paid a rental out of his income to that brother. Mr S and Mr A entered into a joint tenancy agreement for one year with that brother on 11 February 2014, some four years after Mr A came to reside in England, and less than one year before Mr S came to reside in the Ireland. Then Mr A's British visa expired within that year, on 28 December 2014.

6. On 5 March 2015, Mr A entered the State without a visa by travelling through Northern Ireland. Mr A went to reside with his cousin Mr S in a residence in midlands Irish town. On 24 June 2015, Mr A applied to the Minister for an EU residence card as a permitted family member of Mr S. Mr A claimed that he was dependent upon Mr S, a citizen of another EU country, Britain, exercising his free movement rights, and was, for the purposes of the Irish 2006 Regulations, both a family member and a member of the household of Mr S, in Britain, the country from which he had come within the EU. The respondent Minister disagreed: Mr A was not a member of Mr S's household. She refused to grant a residence card. An initial decision was issued to Mr A on 21 December 2015. The reasons for refusal may be summarised as follows:

1. There was a failure to provide satisfactory evidence that Mr A was a family member of the Union citizen, a member of his household, or dependent upon him in the manner provided in the 2006 Regulations;

2. that the Union citizen obtained United Kingdom citizenship in February 2013 and that, therefore, the time Mr A and he resided together for material purposes is less than two years. This observation is presumably to take account of the caselaw and, in particular, the decision in *Moneke v. Secretary of State for the Home Department* [2011] UKUT 341, [2012] INLR 53, that what is to be assessed is the living arrangements of the Union citizen since that person became a Union citizen, wheresoever this occurred;

3. that the Union citizen's father, brother, and sister shared the same address, and that whilst documentation did show that Mr A and Mr S shared a mutual address, this was not sufficient to demonstrate that Mr A was a member of the household of the Union citizen;

4. that the bank statements submitted did not explain Mr A's financial dependence between 2010, the date on which the last direct transfer of funds was made, and November 2014. There was a failure to provide satisfactory evidence that the Union citizen's business was actively trading in the State and, thus, that the Union citizen was exercising EU rights.

7. After that decision, further documentation as to money was furnished to the Minister and this shows the payments outlined above and an assertion of Mr A living off the earnings of Mr S, as detailed above, is made as of the time when Mr A was lawfully a student pursuant to a student visa in Britain. The Minister's review decision of 21 December 2016, which is the decision under challenge in these proceedings, states that the applicant (Mr A) had not established that he was dependent upon Mr S in the United Kingdom and did not qualify as a member of the household of Mr S, because while he had provided evidence that he resided at the same address as the EU citizen Mr S he had "not however, established that the EU citizen was in fact the head of that household in the United Kingdom". This was communicated to him by letter of 15 August 2016:

The Minister has examined the supporting documentation submitted in support of your application for residence in the State under EU Treaty Rights. I am to inform you the Minister is satisfied that you have not established that you are in fact dependent [on] the EU citizen S R S. In respect of your residence in the United Kingdom you have provided evidence that you resided at the same address as the EU citizen Mr S, however, you have not established that the EU citizen was in fact the head of that household in the United Kingdom.

8. That letter also states that Mr A had failed to submit satisfactory evidence that he was a family member of the EU citizen and set out the facts above. The Minister's decision declining a residence card to Mr A was appealed to the High Court by both Mr S and Mr A. The application for judicial review was grounded on affidavits of Mr S and of Mr A sworn on 8 September 2016. The affidavit of Mr S sets out that he had lived in the Britain for fifteen years before he was naturalised there in February 2013, that he is married to a Pakistani citizen in February 2016, and that she continues to reside in Pakistan. He says that he moved to Ireland in January 2015 for employment in the IT sector, and the affidavit asserts that he has been, since October 2015, self-employed in a business importing and selling mobile phone accessories, a business he previously operated from his residence in an Irish midlands town. That business is now run, the affidavit asserts, from a storage centre in an industrial estate in Dublin city. Mr S avers to the financial support that he afforded to his first cousin, Mr A, and claims that he was dependent upon him for all his living expenses and college fees whilst they lived under the same roof in London between July 2010 and January 2015.

He says it was “expected of me by my family in Pakistan to look after my cousin”. He says he, his parents, his brother, and his sister lived with Mr A in a house which was owned by one of his brothers. Mr S claims that his move to Ireland was “specifically for employment purposes”, and that since Mr A came to reside with him in Ireland in March 2015, he is “fully and totally dependent” upon him. Claiming that Mr A was part of “his household” in Britain, it is sworn by Mr S that it was he and he alone who had responsibility for looking after and financially supporting his cousin, that his brother, who owned the house, was in fact spending more time in Pakistan than in London, and that his parents are elderly, and his father retired from employment. He claims he was the only person in the household working and the only person paying household utility bills.

9. In his affidavit of 8 September 2016, Mr A avers he is unemployed. He exhibits copies of receipts for seven money transfers from Mr S to him in Pakistan between 3 February 2009, when Mr A was approximately 22 years old, and 13 May 2010, when Mr A was 24, amounting in the aggregate to £4,675 over that fifteen-month period. For the greater part of the four years Mr A spent in Britain studying accounting and business administration, he claims he did not have a bank account and that his cousin, Mr S, covered his rent, paid for his studies, and gave him money for his general living expenses. It is in consequence of the absence of a bank account, it is claimed, that no transfers of money are evidenced for the period May 2010 to November 2014, a period of 52 months. In November 2014, Mr A opened a British building society account into which Mr S made four transfers, totalling £700, between 6 November 2014 and 13 January 2015, and copies of Mr A's account statements are exhibited for that period.

10. Central to the claim is that since Mr S is an EU citizen since 2013, he is entitled to move from Britain to Ireland and that since Mr A is his cousin aged 34 who is not working, and in respect of whom there is no evidence of working within the EU, and who lived with him then as a member of what is asserted to be his household as an EU citizen, Mr A is entitled to come to Ireland with Mr S. Mr A is not a qualifying family member, since this applies only to parents and children up to the age of 21, with exceptions. The assertion is that Mr S is a permitted family member due to being part of the asserted household of Mr S.

The Directive

11. The Directive recites as its purpose to lay down the law within which the exercise of the right of free movement within the territory of Member States by an EU citizen and their family members may be exercised. The text of the Directive at Article 3 reads:

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

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

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

12. Article 2 reads:

For the purposes of this Directive:

- 1) "Union citizen" means any person having the nationality of a Member State;
- 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);
 - (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
- 3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

13. This is about freedom of movement of persons as EU citizens. In Case C-83/11 *Secretary of State for the Home Department v Rahman*, it was emphasised that the Directive does not oblige the Member State to grant every application for entry or residence submitted by people who show they are family members who are dependents. The Directive provides the framework within which permanent residence in the territory of a Member State for Union citizens and their family members is to be considered. This may be seen from Recital; that the right to move and reside freely within the territory of the Member States is a "primary and individual right" of every citizen of the Union, subject to the limitations and conditions laid down in the Treaties. Free movement, within the Directive, is described as constituting "one of the fundamental freedoms of the internal market", an area "without internal frontiers". Recital 5 of the Directive provides that the proper exercise of the right to move and reside freely within the territory of other Member States means the right should also be granted to their family members irrespective of nationality:

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.

14. Recital 8 gives as one of the objectives of the directive that of "facilitating the free movement of family members who are not nationals of a Member State." Recital 10 notes the need to reconcile a number of competing interests, including the undesirability that persons exercise their right of residence becoming an "unreasonable burden on the social assistance system of the host Member State". In this regard it may be important that Mr S is earning money in the State as a self-employed person. Mr A is not qualified to work, having no status enabling him to gain employment. That depends on the decision on this appeal. Recital 17, having noted that the enjoyment of permanent residence by Union citizens who have chosen to settle long term in a host Member State "would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion", provides that a right of permanent residence should be laid down for all Union citizens and their family members subject to the conditions in the Directive.

15. The Directive provides for a different approach to family members and extended family members. Family members who come within the definition in Article 2(2) of the Directive are afforded the right of entry and residence in the Union citizen's host Member State, provided certain conditions are met. A family member is clearly defined as a spouse, a civil partner, a direct

descendant under the age of twenty-one, or dependent, and those of the spouse or partner, and any dependent direct relatives in the ascending line of the Union citizen and of the spouse or partner, meaning dependent mother or father. Mr A is not a relation in the first degree. He shares two grandparents with Mr S. Hence, Mr A is in the category of permitted family members who do not come within the definition of family member in Article 2 of the Directive, and whose application for entry and residence in the host Member State is to be facilitated, but who cannot be said to have a right of entry or to remain.

16. Hence it is Article 3(2) of the Directive which is the focus of this reference. Neither Mr A nor Mr S assert that, vis a vis each other, they are a family member within the definition of Article 2 of the Directive. It is common case that if Mr A has any rights to be considered under the Directive, they arise if he can properly be considered to be a family member who was dependent upon, or a member of the household of, the Union citizen, namely Mr S.

17. The Directive was given effect in the State by the 2006 Regulations which, like the Directive, makes a distinction between a “qualifying member” and the category relevant to the present case, a “permitted family member”. The definition of a permitted family member under r. 2(1) of the 2006 Regulations is that a

“permitted family member”, in relation to a Union citizen, means any family member, irrespective of his or her nationality, who is not a qualifying family member of the Union citizen, and who, in his or her country of origin, habitual residence or previous residence

- (a) is a dependant of the Union citizen,
- (b) is a member of the household of the Union citizen,
- (c) on the basis of serious health grounds strictly requires the personal care of the Union citizen, or
- (d) is the partner with whom the Union citizen has a durable relationship, duly attested.

18. There is no assertion that the 2006 Regulations fails to transpose the Directive. The only change is that what is a family member becomes classified as a “qualifying member” while a “permitted family member” is so defined and classified. The difference is of nomenclature and not of legal substance. Mr A is not the child of Mr S. Further, Mr A is not his dependant. Further, Mr A does not suffer from serious health issues as a person over 21 years of age. Mr A claimed that he is a permitted family member of his first cousin as he is dependent upon his first cousin, but that has been dismissed and leave to appeal was not granted on that issue. Dependency is not in this reference. The sole remaining issue is whether Mr A migrated from Britain to Ireland with Mr S and did so because Mr A is a member of the household of Mr S, an EU citizen in Britain. Mr S claims, in those circumstances, to be entitled to the benefit of Article 5 of the 2006 Regulations, and to be entitled therefore to enter the State and to apply for a residence card.

Judicial review of the Minister’s refusal of residence

19. The court for judicially reviewing the decision of the Minister is the High Court. Proceedings were commenced in September 2016. The judgment of the High Court was given on 25 July 2018; [2018] IEHC 458. The High Court dismissed the application for judicial review of the Minister’s decision. The law was correctly applied by the Minister, the High Court ruled, and any findings of fact were within the bounds of fundamental reason and common sense and were based on an analysis of the papers submitted by Mr S and Mr A. In the High Court, Keane J dismissed the argument of Mr A that he was a dependent of Mr S. Arrangements in Britain, the High Court held, were not such as to constitute Mr A a member of the household of Mr S.

20. Mr S and Mr A appealed to the Court of Appeal, which gave its decision on 19 December 2019; [2019] IECA 330. The Court of Appeal also dismissed the application. Dealing with the concept as to who is a member of the household of an EU citizen, Baker J did not consider that who was a member of the household of an EU citizen, and consequently should be facilitated in moving to another EU Member State with that EU citizen, was a formula capable of definition. Her comments are descriptive and are worth stating here as helpful to the reference:

67. Of itself, however, it seems to me, for the reasons that will appear, that the principle is not met by the perhaps formulistic identification of a “head of household”, but rather by ascertaining whether the cohabitation or co-living arrangements are more than merely convenient, and whether the non-Union citizen family member is part of a cohesive, long term, coherent and single unit which might generally be called a “household”. With that in mind, it seems to me that the living arrangements are not to be viewed with a bird’s eye view of a single moment in time but must rather have some regard to the durability of the co-habitation, and also of what future intentions can be objectively presumed regarding the continued existence of the household.

68. It may be more useful to consider the notion of household by reference to what it is not. Persons living under the same roof are not necessarily members of the same household and they may well be what we colloquially call housemates. An element of sharing that is necessary in a household may well be met in that the persons living together may agree on a distribution of household tasks and a proportionate contribution towards household expenses. But because, for the purpose of the Citizens Directive, one must focus on the living arrangements of the Union citizen, the members of the household of the Union citizen must, on the facts, be persons who are in some way central to his or her family life, that those family members are an integral part of the core family life of the Union citizen, and are envisaged to continue to be such for the foreseeable or reasonably foreseeable future. The defining characteristic is that the members of the group intend co-living arrangement to continue indefinitely, that the link has become the norm and is envisaged as ongoing and is part of the fabric of the personal life of each of them.

69. It is not a test of with whom the Union citizen would choose to live, but rather, with whom he or she expects to be permitted or facilitated to live in order that his or her family unit would continue in being, and the loss of whom in the family unit is a material factor that might impede the Union citizen choosing to or being able to exercise free movement rights. That second element, it seems to me, properly reflects the core principle intended to be protected by the Citizens Directive.

70. It may be dangerous to give an example, and I do so by way of illustration only. A family member who had resided in the same house as a Union citizen for many years before free movement rights were exercised might well have become a member of the family with whom there has developed a degree of emotional closeness such that the person is integral to the family life of the Union citizen. That person could be a member of a household because the living arrangements display connecting factors that might, in an individual case, be termed a “household”. If the rights of free movement of a Union citizen within the group are likely to be impaired by the fact of that living arrangement, whether for reasons of the moral duty owed to the other members of the group or otherwise, then the rights under the Citizens Directive fall for consideration.

71. The averment by Mr S that it was “expected of me by my family in Pakistan to look after my cousin” suggests factors at the other end of the spectrum, where Mr S asserts an

obligation to provide for his first cousin to enable him to study and gain his own independent living arrangements, or to help him to “get on his feet”. It does not support an argument that Mr A’s continued presence under the roof of his first cousin was core to the exercise of free movement rights, and that this perceived imperative to offer help means that Mr S was impaired in the exercise of his free movement rights as a Union citizen.

72. It is true that recital 6 of the Citizens Directive includes the facilitation of family unity as a purpose of the Directive, but that is because a proper approach to free movement requires support to the person seeking to exercise free movement rights so that his or her family is preserved. The objective is not to keep families together, but rather to permit a Union citizen to have his or her family enter and reside the host Member State for the purpose of the ongoing family life of the Union citizen. The difference might appear subtle when seen in the abstract, but in a concrete case the degree of interconnectedness and the identification of what I might call a “core family” is often less difficult.

73. The colloquial use of the term “head of a household” might seem, in modern parlance, to be somewhat unfortunate, blunt, or even politically incorrect, and Keane J. was right, in my view, to recognise that the head of a household might not always be one person and does not, of course, have to be the male member or even the member of the household who, by reason of personality or otherwise, sets the rules of daily co-existence. The correct approach, it seems to me, is to look at the core family connections of the Union citizen and how those core connections may properly be understood and supported to enable free movement and establishment of the Union citizen in the host Member State. There must, in those circumstances, be at least an intention or an apprehension that the permitted family members would continue to reside under the same roof in the host Member State not merely for reasons of convenience, but for reasons of emotional and social connection, affection, or companionship.

21. The Supreme Court may grant leave for a further appeal from the Court of Appeal where the interests of justice require that another appeal be taken or where there is a point of law of general public importance. Leave was granted on the membership of a household point on 20 July 2020; [2020] IESCDET 89. The appeal was heard on 5 November 2020 and the judgment and reference are dated above. The points on appeal were as to use of language in other languages of EU legislation, “the true meaning to be given to the term ‘member of household’ in the Directive, and in the Regulations applying that term.”

Summary of submissions of the parties

22. In summary, much of the argument from Mr A and Mr S and from the Minister in reply centred on the wording of the Directive, the Recitals to the legislation and the analysis of the meaning of the central term of member of a household given by the Court of Appeal. Since this is quoted in full above, it is unnecessary to be repetitious. Mr S and Mr A argue that a level of financial assistance coupled with living under the same roof constitutes Mr A a member of the household of Mr S, the EU citizen moving to Ireland. Great emphasis is placed on their early life in proximity together, which ended when Mr A was 10 or 11 years old, and the continuing assertion of family ties whereby Mr S helped Mr A when he came to Britain from Pakistan in consequence of wanting to do further study. It is a combination of factors that is asserted to move sharing living arrangements into some more permanent state of being a member of not just a household, which many people are, whether sharing accommodation for a particular purpose such as study or work or out of economic necessity or from convenience, whereby Mr S would be inhibited from moving from Britain to Ireland without the company of Mr A. The Minister, on the other hand, rejected

the application because Mr A was not demonstrated to be the head of the household in which Mr S lives, and this approach is contended to be wrong.

23. While Mr A and Mr S are not in an emotional relationship with each other, in the sense of an enduring physical relationship, it is argued on their behalf that there is no appropriate analogy to what may be referred to as a partnership, where two men are a couple. Nor, it is argued, is there any true inference as to interpreting the Directive to be drawn whereby under the directive, a person is a family member by virtue of being a parent to a child up to that child's 21st birthday unless dependency continues beyond. It is not the purpose of the Directive, the argument goes, to draw a line but rather to broadly describe a flexible situation. Thus, while Mr A is 34 years old, that does not matter, it is claimed, nor that he may be expected to marry and move on or find gainful employment of his own.

24. For the State, it is asserted that there is an appropriate analogy to be drawn as between family member and permitted family member. It would be senseless, the argument runs, that a family member be so well defined, a parent a spouse or a child who ceases to be a child at age 21 unless dependent, or that relationships must be duly attested, if it be the case that cousins in middle age can claim because of some help given by the EU citizen cousin to the other and shared accommodation, that the one helped is in the household of the other. Especially when the entire purpose of the arrangement is for study on a visa, a necessarily temporary arrangement, and study for a higher degree, a necessarily finite educational course. For the State, the argument is that house sharing is finite, a visa is finite, a university course comes to an end and so does help to someone who may be trying to improve himself/herself. For all these reasons, the State contends, on no permissible interpretation of the Directive, is Mr A a member of Mr S's household. It was only when Mr A's visa for Britain ended that he came to Ireland and not because of some kind of interdependency that would qualify, the State claim, for him being a member of Mr S's household.

The need for a reference

25. The test as to who is a member of the household of an EU citizen could depend on whether that person is the principal person or head of the household. While this is an old-fashioned term, it may none the less be of some use in distinguishing family relationships that are covered by the Directive and those which are not. What are the criteria is the issue. Just because cousins are close, as many cousins are emotionally and in terms of time spent together while growing up, does that necessarily mean that if one is an EU citizen the others are members of that citizen's household? In Ireland, it is common in the older generation, over 50, to have two or even three dozen first cousins. Where people have multiple marriages, that number may be equally large for cultures which support such customs.

26. It is perhaps to be noted that family members in the Directive centre on the nuclear family, two parents and their children. Children grow up and it is possibly significant that aged 21, unless there is dependency, perhaps due to health issues or because of extended study funded very substantially by the parents, the state of childhood ceases. Children do not then move as of right with their parents. What is the position of cousins in middle age? It may be relevant to question whether these could constitute permitted family members where both are in good health and capable of working? The concepts of family members and permitted family members perhaps should be considered as a package of legislative rules and not in isolation.

27. Reference to other languages may or may not be helpful, a literal translation is possible but the resonance in that language may be lost. This Directive illustrates this. The phrase that someone is a member of the household of an EU citizen: in German is "oder der mit ihm im Herkunftsland in häuslicher Gemeinschaft gelebt hat" which literally says or who lives with him in the same house

in their country of origin; in Greek “ἡ ζει υπό τη στέγη του στη χώρα προέλευσης” which literally says or lives under his roof in the country of origin; in French, perhaps most eloquently “si, dans le pays de provenance, il est à charge ou fait partie du ménage du citoyen de l'Union bénéficiaire du droit de séjour à titre principal” declaring that the right emerges from dependency or being part of the household; in Italian “se è a carico o convive” which might literally only mean people living together; and in Spanish “o viva con el ciudadano de la Unión beneficiario del derecho de residencia con carácter principal”, literally saying lives with the Union citizen beneficiary with the principal right of residence.

28. What is a household may not be capable of a precise definition. But it is an EU-wide concept which requires clarification. Perhaps that may be best done by a set of criteria, the existence of which may enable national courts to achieve a uniform interpretation. One criterion which is important is time. The length of time spent in the household of the EU citizen is important. This may indicate a transitory or a settled embeddedness in the household of the EU citizen. But does there have to be a principal person or head of a household, who is the EU citizen, as opposed to friends or siblings sharing accommodation? Could everyone sharing quarters with everyone else be mutually members of that other's household where one is an EU citizen? Hence, another important criterion may be purpose. Where a cousin comes to a household for a purpose, as is very common in Ireland, for instance to study at a university, or to assist for a time with child rearing, that relationship is not settled but is dependent on externals; how long a course will last or when a child may be ready to go to school. A further criterion may be intention. Is there a settled purpose in the EU citizen to accept a non-EU citizen into their household as a member of the household or was there some transitory or task-specific reason behind the non-EU citizen being there? What also may be important as a criterion is the relationship as between those sharing accommodation, be they cousins or friends or work colleagues. Who is the dominant party, is it the EU citizen? Or is it the non-EU citizen. By dominant, here might be meant with authority to accept the non-EU citizen into the EU citizen's household. Could that EU citizen ask the non-EU citizen to leave? On the other hand, is this a house or flat sharing arrangement, many of which endure for years because it suits both parties, but does that make each person sharing accommodation a member of the household of the other, and on what basis? Finally, it is suggested as a possible criterion that since the purpose of the Directive is to facilitate free movement, it has to be asked if Mr S, as an EU citizen, moves from Britain to Ireland, how would it inhibit him if Mr A did not come with him? If an inhibition is alleged, is this because of a sexual relationship, which perhaps is based on another legal aspect of being an “enduring relationship properly attested” equivalent to espousal and hence not relevant here, or because of emotional ties (how hard are they to break?) or because an arrangement suited, if so why and for what reason and over what time?

Questions posed

29. The Supreme Court therefore asks the assistance of the Court of Justice of the European Union by referring the following questions:

1. Can the term member of the household of an EU citizen, as used in Article 3 of Directive 2004/38/EC, be defined so as to be of universal application throughout the EU and if so what is that definition?
2. If that term cannot be defined, by what criteria are judges to look at evidence so that national courts may decide according to a settled list of factors who is or who is not a member of the household of an EU citizen for the purpose of freedom of movement?

Signed

30. This reference is signed by the presiding judge of the Supreme Court of Ireland sitting on this case.

Frank Clarke

Handwritten signature of Frank Clarke in black ink, consisting of a stylized 'F' followed by 'Clarke'.

Dated: Monday 21 December 2020