High Court of Ireland Decisions

Judgment

Title:	Ahsan -v- Minister for Justice and Equality
Neutral Citation:	[2016] IEHC 691
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Neutral Citation [2016] IEHC 691

THE HIGH COURT

JUDICIAL REVIEW

[2016 No.144 J.R.]

BETWEEN

MOHAMMED AHSAN

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 731 J.R.]

BETWEEN

MOHAMMED HAROON AND NIK BIBI HAROON

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 634 J.R.]

BETWEEN

NOOR HABIB, DILBARO HABIB, QUADRATULLAH HABIB, SHAHER HABIB, ABDUL RAHMAN HABIB (a minor suing by his grandfather and next friend NOOR HABIB), FATIMA HABIB (a minor suing by her grandfather and next friend NOOR HABIB), AEISHA HABIB (a minor suing by her grandfather and next friend NOOR HABIB), and MAREUM HABIB (a minor suing by her grandfather and next friend NOOR HABIB)

APPLICANTS

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 28th day of October, 2016

1. The three cases which are the subject of this judgment are concerned with the time which may lawfully be taken by the respondent to determine applications for visas for non-national family members of EU citizens to join such EU citizens in the State. The rights asserted by the applicants arise pursuant to Directive 2004/38/EC ("the Directive"). In each case, the first named applicant is the EU citizen who is living and working in the State.

Background and pleadings

The visa application - Ahsan

2. The factual background referred to by Mr. Ahsan in his statement of grounds, and as averred to in his affidavit sworn on 23rd May, 2016, is that he is a British and EU citizen who arrived in the State on 16th March, 2015. He avers that he took up employment on 18th May, 2015. Initially, he worked in a restaurant/takeaway and then commenced his current employment as a commercial cleaning operative on 8th June, 2015. He rented a room on first arriving and on 23rd May, 2015 he entered a fixed-term 12 month residential leasing agreement in respect of the property in which he presently resides. He avers that he married on 4th June, 2012, in Lahore, Pakistan and that his wife is a Pakistani national. He has a 3-year old son, also a Pakistani national.

3. On 7th August, 2015, the applicant's wife submitted in person (having previously completed an online application) applications for Category C visas for herself and her son via the Visa Applications Centre in Lahore which serves the Irish Consulate in Karachi, Pakistan. The documents which were lodged for the purposes of the visa applications (in order to show that the applicant's wife and son were beneficiaries of the Directive) comprised:

i. the current passports of the applicant's wife and son;

ii. an attested copy of the applicant's marriage certificate;

iii. an attested copy of the applicant's son's birth certificate;

iv. a copy of the applicant's British passport;

v. copies of the applicant's tax credit certificate from Revenue for 2015 and following years;

vi. copies of payslips in respect of the applicant's employment in the State; and,

vii. a copy of the applicant's tenancy agreement, together with a declaration from the applicant dated 10th July, 2015, stating that he was a British citizen presently exercising free movement rights by living and working in the State and that he intended to continue exercising EU Treaty rights in the State.

4. According to the applicant, between 31st August, 2015 and 1st February, 2016, he engaged in a series of email correspondence with the respondent in respect of the visa applications. The response to his query of 31st August, 2015 from the Irish Visa Information Centre advised that the standard time for the processing of EU Treaty Rights ("EUTR") visa applications was 8 to 12 weeks and that in some cases the concerned authorities take more time to take a decision. On the same date, the applicant sent a further email querying the projected timeline of 8 to 12 weeks and querying whether this was a breach of the provisions of the Directive. On 11th September, 2015, the Visa Office in Dublin advised that "join family" applications received on 6th April, 2015, were currently being considered. It further advised that all applications are processed in order of date received in the Office. A further email of the same date advised that while the Office was aware that the application was an EEA application, the Office was experiencing a huge increase in the amount of such applications and that "unfortunately processing times have increased due to this."

5. On 18th September, 2015, the Visa Office advised that "as a qualifying/permitted family member where all the required supporting documentation has been received and no queries remain outstanding, a decision can be expected within 12 weeks."

6. On 28th September, 2015, the Office was advising that a decision could be expected "within 16 weeks" where all supporting documents had been received and no queries remain outstanding.

7. On 22nd December, 2015, the applicant sent an email stating that four months had elapsed since the applications were made and enquiring whether the respondent could advise if a decision had been issued or whether any request for further information has issued that perhaps was not received. On 20th January, 2016, the applicant sent a further email in respect of which a response was received on 26th January, 2016, which stated that "due to the large volume of applications of this type, the visa office is currently processing applications received in May 2015. While every effort is made to process these applications as soon as possible, processing times will vary, having regard to the volume of applications, their complexity and the resources available." By reply of the same date, the applicant queried the discrepancy between the May 2015 date, as advised in the respondent's email, with information on Visa Office's website as of January, 2016, namely that the respondent was processing applications received on 25th August, 2015. On 1st February, 2016 the respondent advised that it was unable to provide any more updates.

8. On 18th March, 2016, the applicant was granted leave to apply for judicial review for

the following reliefs:

(i) An order directing the respondent to issue a decision in the matter of the visa applications of the applicant's wife and son;

(ii) An order awarding the applicant damages in respect of costs incurred arising from the respondent's failure to issue a decision;

(iii) An order awarding the applicant damages for suffering caused from the respondent's breach of the applicant's convention rights; and

(iv) An order that the respondent pay the applicants' costs.

9. In summary, the grounds relied upon are:

- The applicant is an EU citizen exercising his Treaty rights by living and working in the State;

- That the provisions of the Directive require the respondent to consider the applications of qualified non EU family members to join or accompany their EU family member in the State by way of an accelerated process within 28 days and that a decision issued under the Directive attracts an accelerated right of appeal;

- That the respondent has failed to issue a decision notwithstanding the repeated requests made by the applicant to do so;

- That by virtue of the respondent's failure, the applicant's Article 8 ECHR rights are engaged and that the respondent has caused the applicant and his family considerable suffering by way of the respondent's disproportionate interference in the applicant's private and family life;

- That the applicant has incurred justifiable expense directly arising from the respondent's negligence and breach of duty in failing to issue a decision.

10. In the statement of opposition, by way of preliminary objection, the respondent pleads that since neither the applicant's wife or son, who made the applications the subject of the within proceedings, are applicants, the applicant has no standing and is not entitled to seek the reliefs sought. Furthermore, the respondent puts the applicant on strict proof of every factual and legal matter asserted by the applicant, in particular that the applicant satisfies the conditions of Arts. 7, 14 and 23 of the Directive such that the applicant and his family members are beneficiaries of the Directive. It is further asserted that the respondent is concerned that, insofar as the applicants reside in and may intend to move to Ireland, the purpose of so doing is not the genuine exercise of EU free movement rights by the applicant. The respondent attests that it is rather for the purpose of artificially creating conditions purportedly triggering rights on the part of the applicant and his family, in particular, a purported right on the part of the applicant's wife and son in the first instance to enter the State and then in due course enter and reside in the UK.

11. It is further pleaded: (a) that the respondent has not acted in breach of duty or in a manner interfering with the applicant's Article 8 rights; (b) that she has not failed or neglected or refused to make a decision as soon as possible; and (c) that she is in fact making decisions on the basis of an accelerated process. It is thus denied that the

respondent is in breach of Art. 5 (2) of the Directive.

12. The respondent pleads that she has continued to process qualifying members of Union citizens (and in particular UK nationals such as the first applicant) in light of a rapidly rising number of such applications in 2015; that, save in special and limited circumstances, such applications are dealt with chronologically according to the date on which they are received; that at the point an application reaches the point in the queue where it is processed by Officers of the Irish Naturalisation and Immigration Service ("INIS"), a decision is typically made in an accelerated procedure within four weeks (save in respect of applications requiring checks within national authorities outside Ireland, and provided that no concerns of fraud or abuse of rights exist); that the accelerated procedure applies such that less documents are required and less checks performed than in respect of comparable family reunification visa applications not involving EUTR; and that decisions have been made as soon as possible having regard to the sudden rise in applications and the limited resources available to the respondent. It is pleaded that the resources of INIS are limited and that the visa applications for qualifying family members of union citizens have had a uniquely and disproportionately large increase in 2015. The respondent asserts that any alleged delay is not attributable to the time it takes to process an application from a qualifying family members of an EU citizen, which remains accelerated but rather: (i) the time it takes to commence the examination of each application, which is unavoidably subject to the volume of applications received; and, (ii) the time required by the respondent to ensure that the conditions for exercise of the right of free movement set out in the Directive are satisfied, and that the rights granted by the Directive are not being abused.

13. It is pleaded the respondent is entitled to investigate whether or not the conditions set out in Arts. 7 and 14 of the Directive are satisfied, to have regard to and investigate reports of potential abuse and fraud, to impose necessary checks in respect of certain applications (including for the prevention of abuse and fraud, for the security of the State and for the protection of the integrity and security of the States Immigration Policy and of the Common Travel Area), and to take the necessary time to do so in a thorough manner.

14. It is also pleaded that the nature of the relief sought in the within proceedings is to direct or tend to direct the respondent as to the manner in which resources should have been allocated, and that an order made by the court would constitute a breach of the separation of powers.

15. It is further pleaded that if, which is denied, the applicant is entitled as a matter of law to the reliefs pleaded, an order of *mandamus* or any like relief is inappropriate and the court should decline to grant same and that an order of *mandamus* would undermine the appropriate investigation of underlying issues (including those which may affect the application for a visa in this case) and "the assessment of the checks and policies which may be necessary to put in place upon completion of investigations".

16. It is denied that the applicant has made out the claim for damages. It is denied that the applicant has suffered injury or loss or damage as a result of any action or omission on the part of the respondent. Further, the respondent objects to the bringing of the within proceedings in circumstances were the applicants have demonstrated no prejudice and were at all times informed of the situation as regards the applicant's wife and son's applications.

17. In the affidavit of Gerry McDonagh of INIS in the respondent's Department, sworn 6th May, 2016, the factors on which the respondent relies to show that she was not in breach of the Directive and that she has a rational system to process visa application for

non national family members of EU citizens are set out. He avers:

> " First, the service provided is subject to limited financial resources available to the respondent giving the range of her responsibilities under the Naturalisation and Immigration system. Secondly, the fact that the respondent operates an accelerated procedure for the processing of visa applications from qualifying family members of EU citizens exercising their free movement rights. The normal practice is to process such applications in four weeks save in respect of those applications which require checks and provided no question of fraud or abuse of rights arises. However, there is no obligation for prioritisation of such applications over other types of obligations. Rather it is the procedure itself that is accelerated. Insofar as other types of visa applications are decided first in time, this is a natural result of separate decision-making procedures. Furthermore, a slowdown in the processing of other types of visa applications to accommodate the present application would not be in the best interests of the State and could have potentially serious consequences from both a humanitarian and economic perspective.
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> The third factor is the unprecedented and unexpected increase in the number of EU Treaty rights visa applications in the period 2013 to 2015, in particular as and from the second quarter of 2015 and in particular concerning family members of UK citizens. This has put pressure on the resources and has contributed to an unavoidable delay in commencing the examination of some applications. That notwithstanding, steps were taken to reassign resources to deal with the EU Treaty rights caseload.
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> Fourthly, the respondent is entitled to make necessary checks on documents to ensure that there is no abuse of rights or fraud. This process involves liaising with national authorities in the UK and those of the family member of the UK citizen. Until such time as those checks are completed, it is not possible for the respondent to be satisfied that the applicant to whose application the checks pertain does not present a risk of abuse of rights. This precludes the making of a decision on some applications.
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> The fifth factor is the potential for abuse of the State's immigration law and policy, as well as an abuse of the Common Travel Area between Ireland and the UK. The respondent and U K authorities share a common and serious concern that the present rise of applications constitutes artificial conduct entered into solely for the purpose of obtaining a right of entry and residence under EU Law, and accessing the UK through the land border on the island of Ireland. Concerns specifically exist in respect of human trafficking, organised crime and security.
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> The sixth factor is that an order of mandamus in this application and in similar cases could undermine the rigorous nature of the process for determining EU Treaty rights applications and cause disruption in their assessment and this, in turn, could undermine the integrity and security of the State's borders and of the Common Travel Area."

18. In compliance with the requirement for an "accelerated" process, the respondent asserts that EUTR applications remain "inherently advantageously treated" insofar as the documentation required to be submitted is considerably less than that required from family members of non EU nationals and even in respect of Irish nationals seeking reunification with non EU nationals.

The evidence put before the court by the respondent is that there has been a 1,417% increase in the volume of applications for EUTR visas in the period 2013 to 2015, in particular from Afghanistan, Pakistan and Iraq and most particularly occurring in the second quarter of 2015. The respondent states that given that increase she cannot discount the potential for terrorist threat attack in Ireland or elsewhere in Europe if such checks as are presently being conducted are not permitted. Furthermore, the respondent has specific concerns in respect of the potential for abuse of Ireland's immigration law and policy occasioned by applications for short stay visas for third country national family members of EU citizens.

19. According to Mr. McDonagh, the respondent and the UK authorities apprehend that organised criminal operations are also exploiting vulnerable persons, a serious issue presently under investigation by the relevant authorities. An investigation by the Gardai, "Operation Vantage", has identified a number of criminal networks based in Ireland and the UK who are engaged in the facilitation of marriages of convenience through the provision of false information and documentation. In excess of 55 formal objections to pending marriages have been made by the Gardaí through "Operation Vantage".

20. At para. 57, Mr. McDonagh avers that the respondent is aware that many visa applications are being handled and serviced by for-profit immigration service companies. This, he says, causes two concerns. First, that applications are being made by Union citizens travelling to Ireland solely for the artificial purpose of generating an obligation for Treaty rights for their third country national family member in another Member State (and in particular the United Kingdom). Secondly, for the same artificial purpose, but in circumstances in which the Union citizen never comes to Ireland, a false identity is created in the Irish State for the union citizen as if they were relying upon EU Treaty rights in this jurisdiction. Mr. McDonagh avers that in light of ongoing Garda investigations he has been advised by An Garda Siochana that some such companies are knowingly or unknowingly facilitating applications in which false employment (including false payslips and false Revenue returns and remittals) and fictitious residences are established in the Irish State for the Union citizen. Examples of payments made by Union citizens to such immigration service companies are in the order of £15,000 to £20,000.

21. Mr. McDonagh avers:

> "I say and I am advised that such applications have been made in order to ground a false application for the Irish and/or United Kingdom authorities for EU Treaty rights status for third country national family members and/or a false application for entry of the third-country national to the United Kingdom under the *Surinder Singh* principle. I say and am advised by Counsel that such applications potentially constitute abuse of rights under the Directive or fraud (including fraud upon the Union citizens and their family members)."

22. Dealing with the specifics of the applicant's case, Mr. McDonagh refers to the applicant claim to have contacted the respondent on behalf of his wife and son on 31st August, 2015, 11th and 15th September, 2015, and 22nd December, 2015. However, the correspondence which issued to the respondent on those dates did not bear his name thus causing the respondent to be unsure of the identity of the correspondent and whether it was the applicant, his alleged wife or an unknown third party. Mr. McDonagh notes that the applicant's wife and son claimed in their applications not to be assisted by an agent notwithstanding the legal language used in the application form and in accompanying correspondence. A matter of further concern was that the applicant had written to the respondent on 25th June, 2015, in advance of the visa applications with an Irish address as his contact address, yet he had provided a UK mobile number by way of telephone contact. Furthermore, publically available information disclosed that

the applicant continued to act as an assistant Football Association referee in Birmingham with a stated address in that city and the same UK mobile telephone number, and that the applicant was stated on the Birmingham FA website to have refereed a match on 15th November, 2015. Furthermore, the applicant's statement of grounds and affidavit provide "extremely scant" evidence to verify his assertion to work and reside in the State. Mr. McDonagh avers that for the foregoing and other reasons set out in his affidavit the respondent is concerned that the applicant may not be engaged in a genuine exercise of EU free movement rights.

23. In his replying affidavit of 23rd May, 2016, the applicant accounts for having a UK mobile telephone number as of June, 2015 on the basis that he had not at that time availed of an Irish mobile telephone number which he now has although he continues to retain his UK number for the purpose of maintaining contact with family and friends to whom this telephone number is known. He further avers that as set out in the statement of grounds, it was he, assisted by a friend in formulating the wording, who had sent the email correspondence to the respondent in his wife's name. This, he states, was at the request of his wife who had limited ability in the English language.

24. The applicant goes on to aver that at the time of the leave application, 34 other decisions had been published on the respondent's online database in respect of entry visa applications to join/accompany any EU citizen that have a notably more recent transaction reference number than those of the applicant's wife and son. He further avers that since that time the respondent has continued to issue and to publish 21 further decisions in respect of EUTR visa applications which again have a notably more recent transaction reference number than those of his wife and son.

25. He thus contends that the lack of resources to which the respondent refers has not precluded the respondent from being able to allocate resources to examine and to continue to examine selected EUTR applications out of chronology of the date received and on an expedited basis, said by the applicant to be discriminatory. He avers that a lack of resources does not relieve the respondent of her duty to operate an accelerated procedure. The applicant takes issue with the respondent's contentions as to the bona fides of his application for a judicial review of the failure to issue a decision. He avers that it is a highhanded position for the respondent to seek to infer any ill motive by reason of his having enlisted "informal advocacy and support from a third party, in a very open manner" when corresponding with the respondent. He avers that his reasons for choosing to engage in the exercising of his EU free movement rights are many and varied. He further avers that it should not reasonably give rise to any undue suspicion that he is married to a Pakistani national as his ethnicity is Pakistani and that he was born and raised in Pakistan. He further avers that the applications of his wife and son hold no degree of complexity in nature or substance in the supporting documentation. It is further averred that his wife and son declared in their respective online visa applications that they had been previously refused a visit visa by the UK on two separate occasions. The applicant avers that on two separate occasions, in the first and second quarters of 2016, he took annual leave to visit his wife and family in Pakistan as a result of which he has occurred quantifiable costs. He avers that the respondent's failure to issue a decision has caused himself and his family significant and avoidable suffering and that his young son particularly has been extremely distraught by the applicant returning to the State without him.

26. On 13th July, 2016, Mr. Tom Flynn of INIS swore an affidavit in response to the applicant's claims.

The visa applications - Haroon

27. According to his grounding affidavit sworn on 17th December, 2015, the first named applicant is a national of the United Kingdom and a Union citizen who is currently residing in the State as a self-employed person. He avers that the second named

applicant, his spouse, is a national of Afghanistan where she resides.

28. By letter dated 4th June, 2015, the second named applicant applied for an EU Treaty rights visa to enter the State. The following documents were filed in support of this application:

- The second named applicant's original Afghan passport and photographs;
- A copy of the first named applicant's UK passport;
- The applicants' marriage certificate with a certified translation;
- The second named applicant's birth certificate and national identity card with certified translations.

29. In addition, they submitted the following documentation as evidence of the first named applicant's economic activity and residence in the State:

- The first named applicant's PPS number;
- A copy of his Business Name Registration certificate;
- Recent bank statements;
- Letters from the Revenue Commissioners confirming his Tax Registration;
- Utility bills for the business;
- An original lease agreement for his home address.

30. In the letter of 4th June, 2015, the applicants' solicitor reminded the respondent of the requirement, pursuant to Article 5(2) of the Directive, to process the application as soon as possible pursuant to an accelerated procedure.

31. By email dated 9th June, 2015, the respondent acknowledged receipt of the application noting that the original passport and photographs were not contained in the application.

32. By email dated 16th June, 2015, the applicants replied stating that those documents had been sent in a separate letter and requested acknowledgement of receipt of same.

33. Having received no further correspondence from the respondent, the applicants wrote on 16th September, 2015, noting that four months had elapsed since the filing of the application and providing further documentation with regard to the first named applicant's residence in the State. The letter again referred to Art. 5 of the Directive and warned that unless a decision was received within 21 days, appropriate High Court proceedings would be instituted.

34. By email dated 17th September, 2015, the respondent acknowledged receipt of this correspondence and advised that due to a very large increase in the number of applications, and the strain that this had placed on resources, long delays of several months in the processing applications should be expected.

35. On 25th September, 2015, the applicants requested a rough indication as to when a

decision would issue, noting that they had already experienced several months of delays.

36. On 29th September, 2015, the applicants were advised that for the time being no precise dates could be given.

37. On 22nd October, 2015, the applicants sent a final warning letter asking for a decision within 14 days failing which legal proceedings would be instituted.

38. By email dated 26th October, 2015, the respondent advised that "the Abu Dhabi Visa Office has experienced a very large increase in …(EUTR) visa applications" which had put "huge strains on…capabilities...leading to long delays" and that "delays are ongoing and should be expected until further notice".

39. By order dated 21st December, 2015, MacEochaidh J. granted leave to the applicants to seek judicial review.

40. The primary reliefs sought by the applicants are:

> (i) A declaration that the respondent is obliged to issue a decision on the second named applicant's application for a visa within the meaning of Council Directive 2004/38/EC and or the European Communities (Free Movement of Persons) Regulations 2006 and 2008.
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> (ii) If necessary, mandamus and/or a mandatory injunction compelling the respondent to determine the second applicant's application for a visa as a family member of a Union citizen.
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> The grounds upon which the reliefs are sought are as follows:
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> (i) In failing to issue a decision on the second named applicant's application for a visa the family member of a Union citizen within the meaning of Council Directive 2004/38/EC and or the European Communities (Free Movement of Persons) Regulations 2006 and 2008, the respondent has acted in breach of Article 5(2) in conjunction with Articles 5(1), 6(2) and 7(2) Council Directive 2004/38/EC and or Regulation 4(3) (b) in conjunction with Regulation 6(1) and Regulation 6(2)(a) of the 2006 and 2008 Regulations.
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> (ii) Further, and or in the alternative, the respondent's delay in delivering a decision on the second named applicant's application for a visa as a family member of a Union citizen is, in all the circumstances, unreasonable, unconscionable and unjustifiable and, in those circumstances, the respondent has acted disproportionately and /or ultra vires, unreasonably and /or in breach of European Communities (Free Movement of Persons) Regulation 2006 and 2008 and/ or Council Directive 2004/38/EC and /or in breach of constitutional justice and natural and fair procedures.

41. Similar to the *Ashan* case, the statement of opposition puts the applicants on strict proof that both of them come within the scope and application of Union law, and in particular that the first named applicant satisfies the conditions of Articles 7, 14 and 24 of the Directive. The respondent takes issue with the applicants' motives in residing in or intending to move to the State. The applicants are put on strict proof that they have an extant marital relationship such as would otherwise entitle the second named

applicant to derived rights as a qualifying family member under the Directive. It is pleaded that until such proofs are adduced, the applicants do not have any entitlement to rely on Art. 5(2) or Reg. 4(3). The remaining pleas are the same as those in the *Ahsan* case.

42. The affidavit verifying the statement of opposition sworn by Mr. McDonagh of INIS on 26th February, 2016 sets out the same factors being relied on as in the *Ahsan* case and otherwise avers to matters specific to the applicants.

43. At para. 6 of his affidavit Mr. McDonagh avers :

> "I say and believe and have been informed by the relevant authorities in the United Kingdom that on 18th October 2005 the First Applicant obtained permission to reside in the United Kingdom based on marriage to a national of Poland. No information has been received as to whether that marriage has been dissolved. Moreover, I say and believe and am advised that the First Applicant's son was issued entry clearance to the United Kingdom in August, 2008, and in the course of that application for a U.K. visa informed the U.K. authorities that his mother [B.K.] died in 1998. No information has been received as to the relationship between the applicant and [B.K.] or - if married - whether it was dissolved or otherwise lawfully ceased to exist."

Mr. McDonagh goes on to state that the visa application "exhibits certain further features which *prima facie* raise concerns and require further investigation." He avers:

> "[I]t would seem from the copy of her passport...that, as at March, 2015, the Second Applicant was unable to sign her name in writing could and only do so by means of fingerprint. By May of that year, however, it would seem that she was able to write and sign her name on the visa application… [T]he purported official documents on which the Applicants rely display conflicting information as to the circumstances and date of the Applicants' marriage. In particular, the document which appears to be the Applicants' marriage certificate states that the Applicants were married on 21st April, 2013… However, the document which would seem to be the Second Applicant's identity certificate states that, the date that this certificate was issued (22nd August, 2010), the Second Applicant was already married. I say that the Respondent is further concerned that the photographs of the Second Applicant in her passport...and in the passport sized photographs provided to the Respondent for the purposes of her visa application...do not, on the face of it, appear to be of the same person as the photograph in her marriage certificate, which is also dated March, 2015."

44. In response to the contents of Mr. McDonagh's affidavit, the applicants' solicitor wrote to the respondent on 17th May, 2016, noting that specific concerns were being raised about the visa application although the respondent simultaneously appears to argue that she is unable to investigate the application due to lack of resources. The solicitor advised that the first named applicant's divorce from the Polish national had been made final on 18th November, 2010, and that they had a son from that marriage, a British citizen, born 7th June, 2007, who resides in the U.K. with his mother. A copy of the bio-data page of the son's passport was enclosed.

45. Additionally, reference was made to another other marriage of the first named applicant (to an individual [B.K]) and that [B.K.] had passed away on 25th December, 1998. A copy of [B.K.'s] death certificate was enclosed. The respondent was advised that the original death certificate had been submitted to the U.K. authorities in the context of the visa application in respect of the first named applicant's and [B.K.'s] son, now an adult and a naturalised British citizen and residing in the U.K. A copy of the bio-

data page of his passport was also enclosed.

46. The different modes of signature used by the second named applicant was explained on the basis that an Afghan passport can be signed by way of written signature or fingerprint impression, both of which are valid and common in Afghanistan. The conflicting information regarding the date of the applicants' marriage was addressed on the basis that the date of 22nd August, 2010, was the initial registration date of the second named applicant for the purposes of obtaining her I.D. document and at that time she was not married. However, the actual identity document which had been submitted with the visa application had been issued by the Afghani authorities on 17th February, 2015, and it provided the second named applicant's current civil status, i.e. married. A copy of the said document and translation was furnished. The concern raised in Mr. McDonagh's affidavit with regard to the second named applicant's photographs was addressed on the basis that they were taken from different angles and featured different headscarves. A recent bank statement was submitted in response to concerns regarding the first named applicant's resources.

47. For the purposes of the within proceedings, the first named applicant swore an affidavit on 1st June, 2016, deposing to the matters which were the subject of the letter of 17th May, 2016.

The visa applications-Habib

48. As averred to in his grounding affidavit sworn 12th November, 2015, the first named applicant is a British and EU citizen who arrived in the State in February 2015. He avers that he was born in Afghanistan on 1st January, 1968 and was married in 1990 and that following his marriage he and his wife resided with his parents in Afghanistan and that they had three children. He avers that on 31st August, 1996, his wife passed away due to illness. He further states that in 2000, he departed Afghanistan due to political problems and sought international protection in the United Kingdom where he resided until 2015. He became a naturalised UK citizen in 2007. He avers that he worked as a hygiene supervisor for ten years but in 2012, resigned from that position and commenced working on a self employed basis operating a delivery business. Following his move to Ireland in February, 2015, he established a leaflet distribution business. He avers that he is currently engaged in genuine economic activity as a self-employed person in the State.

49. The second to eighth named applicants are nationals of Afghanistan who presently reside in Kabul. Their relationship to the first named applicant is said to be as follows:

1. The second named applicant is the mother of the first named applicant with a date of birth of 1st January, 1947;

2. The third named applicant is the first named applicant's son with a date of birth of 1st January, 1995;

3. The fourth named applicant is the first named applicant's son with a date of birth of 12th August, 1996;

4. The fifth named applicant is the first named applicant's grandson with a date of birth of 3rd June, 2011;

5. The sixth named applicant the first named applicant's granddaughter with a date of birth of 1st November, 2012;

6. The seventh named applicant is the first named applicant's

granddaughter with a date of birth of 1st January, 2014;

7. The eighth named applicant is the first named applicant's granddaughter with a date of birth of 7th January, 2015.

50. By letter dated 22nd June, 2015, the second to eighth named applicants, through their solicitor, made an application for short stay visas to enter the State. On 24th June, 2015, the first named applicant, in person, lodged in the respondent's Visa Office in Abu Dhabi, visa documentation, identification and relationship documentation, documentary evidence of his residence in the State and evidence of the other applicants' dependency on him. On 24th June, 2015, the respondent acknowledged receipt of the applications and undertook to inform the applicants' solicitor of the decision on the applications once made.

51. By two emails dated 24th August, 2015, the applicants sought clarification as to the status of the visa applications. No response was received to this correspondence.

52. On 25th September, 2015, the applicants' solicitor wrote to the respondent noting that completed applications for entry visa had been submitted in June, 2015. The letter reminded the respondent of the need, pursuant to Reg. 4 (3)(b) of the European Communities (Free Movement of Persons) Regulations 2006, ("the 2006 Regulations") to process the application pursuant to an accelerated procedure. A decision was requested within 21 days failing which instructions would be taken in respect of the issuing judicial review proceedings.

53. On 19th October, 2015, the respondent replied stating that the "Abu Dhabi visa office has experienced a very large increase in … (EUTR) visa applications. This increase has put huge strains on our capabilities and is leading to long delays in processing these applications. Delays of several months should be expected."

54. By letter dated 22nd October, 2015, the applicants noted that an increase in applications was not a valid reason for breaching the State's obligations under EU law. The letter afforded a further seven days within which to make a decision the applications failing which, proceedings would issue.

55. By order dated 16th December, 2015, MacEochaidh J. granted leave to the applicants to seek judicial review. The reliefs sought and the grounds relied on are similar to the *Haroon* case.

56. On 29th February, 2016, the respondent delivered her statement of opposition denying the applicants entitlement to the reliefs sought and putting them on full proof of all factual and legal matters and asserting that the applicants' purpose in residing or intending to reside in the State is not a genuine exercise of free movement rights. The applicants are put on strict proof that the second named applicant constitutes a dependant direct relative in the ascending line of the first applicant within the meaning of Article 2 (2)(d) of the Directive and/or the Regulations and that the third, fourth, fifth, sixth, seventh and eighth named applicants constitute direct descendants under the age of 21, or are dependant on the first named applicant within the meaning of Art. 2 (2)(c) of the Directive and the transposing Regulations. The balance of the statement of opposition replicates the pleas in the *Ahsan* and *Haroon* cases.

57. Mr. McDonagh's verifying affidavit sworn 26th February, 2016) replicates the factors upon which the respondent relies to oppose the within proceedings, as referred to elsewhere in this judgment.

58. He also avers therein to a number of alleged discrepancies in the visa applications relating to the first named applicant's residence and place of business in the State, his marital status, date of marriage and number of children. These are to be taken together with other concerns pertaining to the dates of birth provided for some of the applicants and the question of the dependency of the second to eighth named applicants on the first named applicant. The latter concern is said to be in circumstances where the documentation provided by the applicants disclosed only two money transfers to Afghanistan during the first named applicant's time in the State. Mr. McDonagh further queries as to how the first named applicant could have lodged the visa application in the Irish Embassy in Abu Dhabi when claiming to be residing in the State at the time of the making of the application. It is further averred that the evidence provided by the first named applicant is insufficient to demonstrate that he is exercising a genuine and effective economic activity in the State. There is also a concern that he may not be residing in the State, in that he had not provided evidence of any lease or rental contracts and that a utility bill relied upon was not in the first named applicant's name and did not relate to any period in which he alleged he was in the State. Further concern is expressed about the first named applicant's ability to support the other applicants without them becoming a burden on the State.

59. On 26th May, 2016, the applicant's solicitor swore an affidavit in reply to Mr. McDonagh's affidavit. The contents of this affidavit were verified by the first named applicant's second affidavit, sworn 13th July, 2016.

60. The discrepancy in the first named applicant's addresses for his residence and place of business was accounted for on the basis that he had moved address since the lodging of the visa applications in June, 2015, and the bringing of the within proceedings. His solicitor exhibits, *inter alia*, evidence of his current address in the State together with a registered tenancy agreement in respect of his business tenancy, and other documents referable to his residence at his current address.

61. The replying affidavit deals with the concerns regarding the first named applicant's marital status by stating that the first named applicant did not understand why his Afghan identity card did not describe his marital status as a widower given that his wife had died in 1996. It is stated that this may be because records were not updated by the Afghan authorities to reflect the change in his marital status following the death of his wife. It was accepted that Mr. McDonagh correctly identified that the marriage certificate exhibited in the first named applicant's grounding affidavit contains factual errors. It is averred that this document was exhibited in error. It had been sent to the first named applicant by the Afghan authorities after he requested a copy of his marriage certificate. When the errors were brought to the attention of the Afghan authorities they reissued the marriage certificate with the correct information. The correct version had been submitted to the Visa Office with the visa applications. The error in describing the age of the third named applicant was accounted for as a typing error which counsel had brought to the attention of the court at the time of the application for leave and liberty was given to rectify the said error. With regard to Mr. McDonagh's concerns regarding the fact that three of the visa applicants are stated to have been born on 1st January in separate years, this is accounted for on the basis that it is standard practice in Afghanistan to give the 1st January as the date of birth when an exact date of birth is not known. It was acknowledged that Mr. McDonagh had correctly identified factual errors in the identity document in respect of the sixth named applicant. The first named applicant had identified those errors and had requested that they be corrected and the Afghan authorities had reissued the identity card with the correct factual information. A copy of the correct version of the original identity card was submitted to the Visa office. It is further averred that the birth certificate of the eighth named applicant is an authentic document issued by the Afghan authorities, containing no factual errors, and that such discrepancy as appears on the face of the document is accounted for by the

fact that the Afghan calendar spans over two different years of the Gregorian calendar.

62. Regarding the second named applicant's dependency on the first named applicant, it is averred that a large volume of documentation was submitted to the visa office in this regard. It is further averred that the second named applicant's other four children do not provide financial support to her, nor are they in a position to do so. It is averred that the third named applicant continues to be dependant upon financial support from the first named applicant to maintain him, his wife and his children in Afghanistan. In this regard a significant volume of documentation was provided with the visa application submitted in June 2015. While the third named applicant presents himself for casual labour daily locally in Afghanistan, the work is casual, poorly paid and not guaranteed and thus the third named applicant remains dependant on the first named applicant's support. With regard to the level of remittances to his family in Afghanistan, it is averred that the first named applicant was supporting his family prior to his move to the State.

63. As appears from the replying affidavit, on 18th May, 2016, the applicants' solicitors wrote to Visa Office in Abu Dhabi addressing Mr. McDonagh's concerns.

The submissions in the Ahsan case

64. It is submitted that the respondent's contention that the applicant has no locus standi, since neither the applicant's wife nor son are applicants in the within proceedings, is misconceived. The visa applications in issue in these proceedings were made on the basis of the applicant's rights as an EU citizen engaged in free movement from the UK to Ireland, thus giving him "a sufficient interest in the matter to which the application relates" , for the purposes of O.84, r. 20(5) the rules of the Superior Courts.

65. Counsel submits that given that the applicant is living and working in the State, the respondent has a very shaky basis for intimating that he is not exercising EUTR. The respondent seems to suggest that due to the fact that the applicant has refereed a football match in Birmingham, this would deprive him of his Treaty rights.

66. While it is acknowledged that there has been an increase in EUTR visa applications in 2015, the actual number of such visa applications (approximately 10,000) is nonetheless only a percentage of the 115,000 or so total visa applications received for the same year. Even on the respondent's own evidence, the number of visa applications from non-national members of EU citizens present at most 9% of all visa applications.

67. It is clear from Mr. McDonagh's affidavit that visa applications other than EUTR applications are being dealt with more quickly than those of non- national family members of EU citizens. It seems to be the case that the applications of family members of Irish citizens are being processed more quickly, including applications from such family members from Pakistan or Afghanistan (which are processed in four to six months), yet the applications from non-national family members from the same countries in the case of EU citizens are now exceeding twelve months. It is also submitted that the benefits to the State which accrues from processing business and other visas is not a reason not to direct resources to deal with visa applications from non national family members of EU citizens. It is clear that there is a lack of enthusiasm on the part of the respondent to provide the resources to deal with visa applications from non national family members of EU citizens. Mr. McDonagh has not set out how many officers of the respondent's department are engaged in the processing of visa applications. Nor has he put forward evidence of how many more people might be needed, or to what extent it would impact on other applications, if resources were moved to the processing of visa applications from non-national family members of EU citizens.

68. Given the requirements of Art. 5(2), the respondent's assertion that she operates an accelerated procedure is untenable. The crux of the present case is whether it can be said that visa applications are being issued as soon as possible and on the basis of an accelerated procedure. This must be answered in the negative. This is clear even from Mr. McDonagh's affidavit. Additionally, paras. 9 and 10 of the respondent's guidelines on the "Processing of Applications for Visas for Persons applying as Family Members of EU Citizens exercising or planning to exercise Free Movement Rights under Directive 2004/38/EC" ("the Guidelines") state that a visa application for non-national family members of EU citizens must be accelerated within four weeks from the date of first receipt in the Irish Visa Office or Mission, with a similar timeframe for an appeal of a refusal. Yet, it took almost three weeks for the visa application just to reach the Visa Office in Dublin from Karachi. In all of the circumstances, it cannot be said that a delay of eleven months as of the date of the within hearing equates to the "as soon as possible" requirement of Article 5(2).

69. Furthermore, the respondent's assertion that the applicant should not count the time which it is taking for the visa applications to be processed is fundamentally wrong and contrary to the provisions of Art. 5(2) of the Directive and EU case law. The respondent is not entitled to divide overall period of delay into two parts as she seeks to do. It is entirely contrived for the respondent to claim that an application will have been considered on the basis of an accelerated process and within a reasonable time so long as the examination (when it commences) takes a maximum of four weeks, when the applicant's family members' applications remain unprocessed for almost a year.

70. Insofar as the respondent, in explaining the delay, relies on the necessity for checks to avert potential abuse of rights or fraud, none of this can apply to the applicant given that his wife and son's visa applications have not, according to the respondent, yet been examined. Thus, the explanation proffered by Mr. McDonagh cannot serve as an excuse for the delay in respect of the applicant's family members' visa applications.

71. The respondent is saying that on the one hand, she continues to process visa applications for non-national family members of EU citizens and issue decisions, yet the contents of Mr. McDonagh's affidavit suggest that the respondent is awaiting the results of Garda "Operation Vantage" before putting resources and checks in place and then applying those resources and checks to pending applications, in order to combat potential abuses. These are said to be abuses on which light may be cast as a result of those investigations. It is submitted the respondent is not entitled to suspend or delay the processing of applications on this basis. Art. 5(2) does not permit the respondent to await the outcome of general investigations so as to put in place a revised checking procedure. If that is the case, it raises a very real issue of systematic checks which are prohibited by the Directive and by the case law of the ECJ, including *Commission v. United Kingdom (Case C-308/14)* upon which the respondent relies. The respondent in effect is pleading for time to be allowed to carry out systematic checks on certain British citizens with spouses from particular countries. This, counsel submits, is contrary to the Directive. In this regard counsel relies on the decision of the ECJ in *Sean Ambrose McCarthy v. Secretary Of State for the Home Department (Case C-202/2013)* [2015] QB 651. Furthermore, it appears that Mr. McDonagh accepts that decisions should issue within four weeks but he avers that the respondent is prioritising the necessity to ascertain "underlying difficulties" over the actual processing of visa applications for non-national family members of EU citizens. Counsel submits that the respondent's priority supports the applicant's belief that a brake has been put on the processing of, at least, certain visa applications from non- national family members of EU citizens.

72. Mr. McDonagh also avers that the visa applications in issue here will be subject to checks by the respondent by contact with the Pakistani and the UK authorities and that this may take some time in circumstances where the respondent is not in a position to

give directions to those authorities in respect of a response time. This however is predicated on the visa applications reaching the top of the queue, which has not happened to date. It is not the applicant's case that checks cannot be carried out by the respondent.

73. Giving effect to EUTR is a serious matter which was recognised by the respondent herself in the case of *Metock v.Minister for Justice, Equality & Law Reform* [2009] Q.B.318 when an application was made to the ECJ for an accelerated hearing before that court.

74. Insofar as the respondent asserts that the applicant's residence in Ireland has been for the purpose of artificially creating conditions purportedly, to trigger rights on the part of the applicant and his family, (in particular a purported right on the part of the applicant's wife and son in the first instance to enter the State and in due course to enter and reside in the UK), it is submitted that the respondent is making this claim in circumstances where the visa applications have not even been processed. It is submitted that the use by non-national family members of EU citizens of the *Surinder Singh* route (*The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*. (Case C-370/90) [1992] E.C.R. 1-04265), to ultimately move to the EU citizens' Member State is not an abuse of EU law, given that the right to do so comes from the decision of the ECJ itself in *Surinder Singh*.

75. Furthermore, while the respondent may have uncovered abuse via "Operation Vantage", the concerns to which those investigations give rise are quite different to the case of Mr. Ahsan and should not be used as an excuse for the delay. It is unfair to categorise Mr. Ahsan's case as a sham or fraudulent case. He is married for several years and has a child.

76. Moreover, the respondent's plea regarding abuse of rights is at odds with the well-settled principles applicable to the exercise of free movement rights as set out in *Secretary of State for the Home Department v. Akrich (Case C-109/01)* [2003] E.C.R. 1-09607.

77. It is further submitted that in *Chen v. Secretary of State for the Home Department (Case C-200/02)* [2004] E.C.R. 1-9925, the ECJ took the view that it is only in exceptional circumstances that the exercise of a EU right will be held to be abusive, even where the exercise is formally seen as such by one or more Member States.

78. The applicant has a right under Art. 7(1)(a) of the Directive to reside in Ireland, given his employment in the State. His wife and son have derivative rights under Arts. 5(1) and (2) to enter the State in order to join him. Provided that they are not engaged in something of the nature of terrorism, human trafficking or other criminality - and there is no suggestion whatsoever that they are - their purpose of entry to residence in the State is irrelevant. Whether they intend to install themselves here in order to obtain residence in the UK under EU law, is also irrelevant. Insofar as issue is taken with level of the applicant's earnings, that is wrong and immaterial and, moreover, contrary to the wide definition given to "worker" by the ECJ. The question of the exercise of free movement is a question of fact and is not an issue of intention. Mr. Ahsan does not make the case that he intends to return to the UK. It cannot thus be for the respondent to consider whether Mr. Ahsan has such an intention in the future. This is clear from what the ECJ has stated in Akrich. The fact that he might ultimately avail of *Surinder Singh* rights is irrelevant. While the respondent may be unhappy with this prospect, that is not a reason to delay his spouse and son's applications for entry visas.

79. What is at issue in the present proceedings is the question of an entry visa to the State. The key application (the residence card application) comes later when the family

member is in the State. It is submitted that EU law, in making provision as it does in the Directive for derived rights for family members of EU citizens, is facilitating family life by allowing family members to, *inter alia*, "join" EU citizens already in the State such as is the case with each of the applicants in the within proceedings.

80. In many non-visa required applications, family members just have to arrive at the airport and they are allowed entry once they satisfy the requirements as to identity and family relationships. Had the applicant's family members come from a non visa required third country, they would be able to get a visa at the airport from the immigration officer. It is noteworthy that there is no mention in Mr. McDonagh's affidavit that applications from such individuals cause any particular problems.

The respondent's contention that she is not requested to prioritise EU Treaty applications at the expense of other visa applications is a clear misunderstanding of the provisions of the Directive which provide for an accelerated procedure. It is further submitted that the admissions made by Mr. McDonagh, namely that business visas are processed within eight weeks and that non-EU Treaty family member applications are processed in four to six months, effectively makes the case for the applicant, given that these visa applications are being processed in circumstances where applications from family members of EU citizens are not being so processed. The consequence for the applicant, his wife and son is that the delay now stands at eleven months. Thus, it is clear that EUTR visa applications are now been dealt with in a manner opposite to an accelerated process, with EU citizens now being disadvantaged as opposed to Irish citizens. Mr. McDonagh's affidavit makes it clear that economic factors now outweigh EU citizens' free movement rights. Furthermore, insofar as Mr. McDonagh's avers to the need for checks on Pakistani family members of EU citizens, he does not aver that similar checks are being carried out on Pakistani family members of Irish citizens.

81. While the respondent has raised the issue of limited resources, a full examination of Mr. McDonagh's affidavit suggests that it is not wholly a lack of resources that is delaying the processing of certain applications. Rather, it appears that the respondent may be awaiting the conclusion of certain general investigations into suspected abuse of rights or fraud before embarking on the processing of certain applications. Furthermore, the respondent's preference not to put in place "an increasing volume of resources" to clear the backlog but rather to seek to determine the underlying causes for the increase in visa applications means that the processing of applicant's family members' visa applications will continue to be unlawfully delayed.

82. It is further submitted that to the extent that the respondent is relying on a lack of resources, is well-settled as a matter of EU law that this cannot form the basis for non-compliance with EU obligations. In this regard counsel cites *Commission v. France (Case C-144/97)* [1998] E.C.R. 1-613 and *Commission v. Ireland (Case C-39/88)* [1990] ECR 1-4279.

83. Contrary to the respondent's contention, the applicant has not been kept informed of the progress of the visa application. While he was variously advised that a decision would issue in four weeks, twelve weeks and sixteen weeks, the ultimate communication from the respondent did not provide any time span for the processing of the visa application. Thus, the applicant has suffered prejudice. In support of the argument that the respondent is in breach of Art. 5(2), counsel relies on the decision of Hogan J. in *Raducan v. Minister for Justice, Equality and Law Reform* [2011] IEHC 224. Furthermore, it is clear from Raducan that Hogan J., in finding that such visas should be available at the airport, was unconcerned about any question of resources.

84. Counsel refers to *Saleem v. Minister for Justice, Equality and Law Reform* [2011] IEHC 49 where Cooke J. granted mandamus requiring the respondent to make a

decision following unreasonable delay in deciding a request for a review of the refusal to grant a residence card under the Directive. It is further submitted that there is no merit in the respondent's contention that an order of this court directing mandamus would breach the principle of the separation of powers. As a matter of Irish and EU law it is open to the court to direct *mandamus*, as evidenced by the decision of Cooke J. in *Saleem*.

85. In failing to make a decision on the application, the respondent is acting in breach of the applicant's right to have a decision taken in accordance with natural justice and constitutional fairness of procedures. Thus, the respondent is in breach of the applicant's right to an effective remedy within a reasonable time under Art. 47 of the Charter of Fundamental Rights of the EU. Furthermore, the respondent is acting in breach of the applicant's rights arising from Art. 41 of the Charter to good administration and in particular his right to have his affairs handled impartially, fairly and within a reasonable time. It is further submitted that the respondent's failure to process, consider and make a decision on the visa application constitutes a breach of the legitimate expectation of the applicant that the application would be processed within a reasonable period.

86. It is submitted that the applicant is entitled to an award of damages in circumstances where he has been deprived of family life with his wife and child for a long period.

The submissions on behalf of the Haroon and Habib applicants

87. Counsel submits that what the applicants want from the respondent is a decision on their respective applications in circumstances where the delay in issuing a decision is thirteen months in the case of the *Haroon* applications and eleven months in respect of the *Habib* applications, as of the date of the within hearing.

It is submitted that insofar as the respondent requires strict proof that the applicants come within the scope of the Directive and insofar as the applicants' *locus standi* is challenged, there is no basis to this argument.

88. Contrary to the respondent's written submissions, the grant of a visa is not a matter of discretion for the respondent. Subject to satisfying the requirements of the Directive, and unless Arts. 27 or 35 are invoked, the applicants are entitled as a matter of right to entry visas. Counsel cites the *dictum* of the ECJ in *Mrax v. Etat Belge (Case C-459/99)* [2002] E.C.R. 1-6591 as authority for the proposition that a visa has to issue without delay and as far as possible at the place of entry into national territory. Counsel submits that the provisions of the Directive do no more than codify the earlier legislation as interpreted by the ECJ.

89. In both the *Haroon* and *Habib* cases, the EU citizens' rights to have their family members with them in the State are affected by the delay in processing the applications. No decision has been taken in regard to these applications and no decision has been communicated to the applicants. Thus, there is no basis or evidence for the provisions of Art. 27 or Art. 35 of the Directive to be invoked against them.

90. It is acknowledged that Art. 35 of the Directive permits Member States to adapt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in the case of an abuse of rights or fraud, such as marriages of convenience. However, insofar as Mr. McDonagh's affidavit alludes to concerns arising from Asian men marrying Eastern European women, which is the subject of Garda "Operation Vantage", that is of no relevance to the applicants' visa applications. Moreover, the respondent has not advanced any evidence of fraud on the part of the applicants such as might merit reliance on Art. 35. In this regard, counsel cites *McCarthy v. Secretary for State for the Home Department (Case C-202/13)* where the ECJ has stated that the refusal,

termination or withdrawal of a right conferred by Directive 2004/38/EC "*must be based on an individual examination of the particular case."*

91. Thus, if Mr. McDonagh seeks to rely on factors such as national security or fraud or abuse of rights, it must be in accordance strictly with Arts. 27 and 35 and not be on the basis of measures of general application. As regards the present applications, such individual examinations of the applications, as required by *McCarthy*, have not taken place.

92. While it is acknowledged that the State is entitled to rely on the provisions of Protocol 20 to the EU Treaties to restrict rights under the Treaties, any such restriction requires "concrete" evidence of fraud, as also set out in *McCarthy*. The respondent has not advanced such concrete evidence with regard to the applicants in the within proceedings. Aside from some specific comments set out in Mr. McDonagh's respective affidavits, his concerns as to the possible abuse of rights or fraud are of a general nature only and are not based on the facts of the applicants' case or any analysis of their position. In all of the circumstances, the respondent has no lawful justification for the delay in processing the visa applications. Insofar as in the context of these proceedings, issues of concern have been raised about the visa applications, such concerns have been addressed by or on behalf of the applicants.

93. It is submitted that the respondent's failure to process the visa applications is utterly without justification. Had the respondent indicated that the applicants' documents have been have submitted for verification, then some justification might arise for the delays. However, that has not occurred. Nor has the respondent set out on affidavit her procedure for the handling of the visa applications of non national family members of EU citizens. At best, the only glimpse of the procedure is the statement from the Visa Office to the *Habib* applicants that all birth and marriage certificates issued by the Afghani authorities must be verified by three different agencies.

94. Furthermore, nowhere does the respondent outline what additional checks are required to be carried out. As a matter of fact, the respondent had not put in evidence the procedure intended to be utilised in assessing the visa applications. In those circumstances she has not adduced any practical reasons for the delays now being experienced. Given that the applicants are left simply without any examination of their applications, there can be no justification for the delay. It is submitted the respondent's interpretation of "as soon as possible", as provided for in Art. 5(2), is untenable. In support of his argument, counsel cites the decision of the ECJ in *Commission v. Spain (Case C-157/03)* [2005] E.C.R. 1-2911, where the Court found a delay of ten months in issuing a residence card breached the Directive, even where the family member in that case was already provisionally residing in the Host Member State. If a ten month delay in issuing a residence card has been held to be in breach of EU law, *a fortiori*, a delay in excess of this period in issuing a visa is in breach of the Directive.

95. In support of how Art. 5(2) of the Directive must be interpreted counsel also relies on the decision of Hogan J. in *Raducan,* and on the decision of the ECJ in *Metock (Case-127/08)* 2008 E.C.R. 1-6241.

96. While it is for the second and third named applicants in the *Habib* case to establish that they are dependents for the purpose of the Directive, it is not for the respondent to query whether they have other family members in Afghanistan to support them. That is an irrelevant consideration as held by the ECJ in *Reyes (Case C-423/12).* As stated in *Reyes*, the applicable test for dependency under the Directive is that:

> *"22. [T]he 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."

23. However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support. That interpretation is dictated in particular by the principle according to which the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly (see, to that effect, Jia, paragraph 36 and the case-law cited).

24. The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.

25. In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself."

97. It is submitted that this is not in any event an issue for the court; rather the determination as to dependency it is a matter for the respondent in the context of the decision-making process on the visa applications.

The respondent's submissions

98. Counsel submits that there are two limbs to the respondent's case. The first is the upsurge in the number of applications for visas from non-national family members of EU citizens. Thus, time is required to process the applications and the time lines set out in the respondent's guidelines have long been overtaken. The length of time the applications in issue here took to be processed by Embassy staff for transmission to Dublin is accounted for by the difficulties encountered by the Embassy staff due to the upsurge in numbers. It is accepted that the visa applications of non-national family members of EU citizens are taking longer than those of family members of Irish citizens. However, applications in the latter category are not characterized by an upsurge in numbers; nor do they present the concerns which the applications from non-national family members of EU citizens currently present.

99. Secondly, the free movement rights guaranteed in the Directive are enjoyed by persons who are genuinely exercising those rights. As developed by the Treaties and EU case law, the emphasis is now on social integration and the aim is now for people to move freely and establish themselves and prove genuine activity. The respondent has uncovered matters of serious concern through the ongoing Garda investigation "Operation Vantage". The increase in the number of applications for visas in this jurisdiction has come about because of the approach adopted by the UK authorities. If visa applications had been granted in the UK this State would not have received 10,000 plus applications of which 7,000 are presently pending and the ensuing delays would not have occurred. The respondent is entitled on behalf of the State to ascertain whether EU citizens are genuinely seeking to establish themselves in this State or otherwise attempting to gain an illicit advantage.

100. It is accepted that there cannot be a general denial or a blanket or general approach to such applications and that an individual proportional assessment of all visa applications is necessary. However, the respondent's concern is not just an abstract question of abuse or fraud; it is an issue for this State in the context of the Common Travel Area. It is of regret that some genuine applications are being delayed but the cause of this is the upsurge in the number of applications. However, it cannot be the

case that just because documents appear authentic that there cannot be a question mark over them, or that further examination is not required, contrary to the applicants' submissions. Member States are entitled to carry out checks in order to see if individuals meet the criteria set out in the Directive and the Regulations transposing the Directive. Insofar as it is suggested that such checks are discriminatory, that is not the case. In *Commission v. UK (Case C-308/14)* the ECJ has stated that indirect discrimination will not fall foul of the Directive if there is a need to protect a Member State's finances.

101. In the present cases, there is a legitimate public policy justification in preventing fraud and abuse of rights under Art. 35 of the Directive, albeit that the visa applications are not at the verification stage as to whether such conditions have been met.

102. Notwithstanding that the EU citizens in the within proceedings are presently in the State, there are anomalies in the visa applications submitted by their respective family members, as deposed to by Mr. McDonagh in his respective affidavits. Mr. McDonagh's concerns illustrate what the respondent is confronted with, in the context of the upsurge in the number of visa applications, and why checks are necessary where applications show signs that raise suspicion. While the applicants have put forward information and/or explanations which they say alleviate the concerns raised, that ultimately is a matter for the respondent when the applications are actually considered. Mr. McDonagh's purpose in raising issues of concern is to illustrate the difficulties that exist for the respondent and to show that visa applications cannot be taken at face value. By way of example, as deposed to in Mr. McDonagh's affidavit, Mr Ahsan's P60 for the year ended 2015 shows €5,022 earned over twenty nine weeks. Yet his monthly rent is €750. Furthermore, Mr. Ahsan has travelled to both the UK and Pakistan on this income. The discrepancy between his income and his activities and the amount of his monthly rent thus throws a question mark over the genuineness of his activities in the State. While at this juncture the respondent is not probing whether Mr. Ahsan is exercising EU Treaty rights or not, these issues come to mind from a reading of the papers, thereby giving reason to question the application for a visa for his spouse.

103. It is not the respondent's case in the within proceedings that any individual applicant is committing fraud or abusing EU Treaty rights, but the fact of the matter remains that documents that appear genuine may not be. Conflicting dates which appear in documents can illustrate that they are false and thus it cannot be the case that the respondent has to accept them at face value. The specific concerns raised in Mr. McDonagh's affidavits draw attention to the fact that there is cause for concern, particularly in circumstances where there are some 7,000 or so applications currently pending. This is where the issue of resources become critical.

104. The respondent's 2015 guidelines set out the general mode of processing EUTR visa applications applicable at the time of their production, i.e. January 2015. This was prior to the unprecedented surge in EUTR applications. Thus, the said guidelines cannot possibly bind the hands of the State so as to prevent it, at any point in the future, investigating potentially serious issues of abuse of rights. The applicants' reliance on the guidelines is thus misplaced. While those guidelines refer to a bare set of documents which are required to accompany visa applications from non national family members of EU citizens, in the wake of the 10,000 plus applications which the respondent was confronted with in 2015, either she has to wave every application through (including such applications as may be an abuse of EU Treaty Rights) or she must carry out personal checks as is required by law. The former scenario cannot be the case. Thus, the respondent is entitled to check to see whether EU citizens are coming to the State to establish themselves in the exercise of their free movement rights or whether their arrival is just a ruse for other purposes. If it were the case that every applicant was just waved in the respondent would be failing in her duty to the State, particularly when some of the 10,000 plus applications involve children, and given concerns regarding

child trafficking. If no checks were necessary, a single officer in the respondent's department would perhaps process a hundred or so applications per day.

105. It is further submitted that insofar as the respective applicants in these proceedings take issue with the respondent's pleadings which, *inter alia*, put them on proof that they are beneficiaries under the Directive, if there is an abuse of rights going on, the respondent cannot concede that any of the applicants are beneficiaries under the Directive.

106. It is not being suggested that the respondent has a power or discretion under the Directive to decide a visa application any way she wishes; what she must decide is whether the applicants fall under the scope of the Directive (i.e. are they beneficiaries) and whether there are indicators which would exclude them under Art. 27 or Art. 35 of the Directive.

107. There is no requirement for the respondent to set out on affidavit the procedure utilised for the processing of applications. In any event, Mr. McDonagh's affidavits refer to the procedure utilised by the respondent which involves the checking of documents to ensure that there is no abuse or fraud. Such checking typically involves the respondent liaising with the EU citizen's national State and with the authorities in the family members' country of origin. As deposed to by Mr. McDonagh, the respondent is not in a position to give directions as to the response times from the non-national's or EU citizen's home State. The difficulty in obtaining information from some third countries is illustrated by the report by the EU dated 13th April, 2015, on "Local Schengen Cooperation … in Afghanistan". It reports, *inter alia*, that "the accuracy of the requested supporting documents remain an ongoing concern" and it is recognised that "taking into account the volatile political, economic and security environment, it will remain very demanding and time consuming to analyse and take the right decision of the numerous visa applications".

108. It is submitted that in the present cases, the EU citizens have not established that they have engaged in the genuine exercise of free movement rights in the State which is a prerequisite for an assertion of derivative rights on behalf of family members. In this regard, counsel cites the jurisprudence of the ECJ in *McCarthy v. Secretary of State for the Home Department (Case C-434/09)* [2011] E.C.R. 1-3375, *Dereci & Ors (Case C-256/11)* [2011] E.C.R. 1-11315 and *Ymeraga & Ors v. Ministre du Travail de l'Emploi et de l'Immigration (Case C-87/1).* Thus, in the context of determining the visa applications on behalf of the family members the respondent is entitled to assess the eligibility of the EU citizens under the Directive.

109. It is a matter of EU law that Member States are fully entitled to refuse entry, or indeed the benefit of other rights claimed under the Directive, in circumstances where they consider that there is evidence of abuse of rights. This entitlement is provided for in Art. 35. This may be seen as a particular application of Art. 27 of the Directive, which entitles Member States to restrict rights under the Directive on grounds of, *inter alia*, public policy. Accordingly, the protection of the State's borders against entry claimed on abusive or fraudulent grounds constitutes an important reason of public policy. It must, a *fortiori*, be the case that the State is entitled to investigate potential cases of abuse prior to taking relevant free movement decisions.

110. Since the entry into force of Directive, the prerogative of Member States to restrict free movement rights in the case of potentially abusive or fraudulent purported exercise of free movement rights by family members of EU citizens has been repeatedly confirmed and emphasised by the ECJ, as is evident from its decision in *McCarthy v. Secretary of State for the Home Department (Case C202/13)*. Furthermore, even in *Akrich*, the ECJ was cognisant of the necessity for a worker to be pursuing an effective

and genuine activity in the host Member State. (Para.55) In *McCarthy (Case C-202/13)*, the ECJ has held that the derived rights conferred by the Directive on family members of EU citizens arise only where the EU citizen has genuinely exercised his or her right of free movement. This is also expressly noted in the ECJ's judgment in *Metock*, on which the applicants rely. Accordingly, the applicants' reliance on *Akrich*, which pre-dates the Directive, must be read in the light of the provisions of Art. 35. While marriages of convenience constitute one example of abuse of rights, this is by no means the sole example. As stated in *McCarthy*, abuse comprises a combination of objective and subjective factors. (Para. 54)

111. It is not therefore a case of a refusal of a visa on grounds of general prevention. The point is quite the opposite: the respondent requires sufficient time to undertake adequate and detailed investigations into serious concerns of abuse and fraud. This includes investigations into the present applications which, as averred to the affidavits of Mr. McDonagh, exhibit a variety of features which *prima facie* raise concerns and require further investigation. The effect of a grant of *mandamus* would be to short circuit such investigations.

112. The distinction between a (permissible) "*sufficiently genuine*" exercise of an EU citizens free movement rights, and an (impermissible) artificial abusive exercise goes to the heart of the respondent's concerns in the present cases. It is for this reason that the respondent requires adequate time to undertake further investigations. Just because the EU citizens in the present proceedings are in the State and that documents have been presented which show on their face family relationships that does not of itself establish proof of a genuine exercise of EU rights.

113. As a matter of EU public policy, in the Schengen Area, external border controls for nationals from a number of states are mandatory. These include Afghanistan, Iraq and Pakistan. Thus, public policy considerations which Member States may legitimately take into account in interpreting the rights and obligations contained in the Directive include the Schengen visa requirements. There is also the entitlement of the United Kingdom and Ireland to impose entry visa requirements pursuant to Protocols 20 and 21 to the TEU and TFEU. In *Kweder v. Minister for Justice, Equality and Law Reform* [1996] 1 I.R. 381, Geoghegan J. recognised that there is a strong public policy interest in maintaining the Common Travel Area.

114. It is submitted that a Member State cannot be in breach of the Directive while dealing with EUTR visa applications *bona fide* in accordance with Art. 5(2) of the Directive if unavoidable exigencies - such as an exceptional and unexpected surge in applications - mean that typical timeframes may not be met.

115. Contrary to the applicant's submissions, Art. 5(2) does not require prioritisation of EUTR visa applications over other classes of visa applicants. Within each visa category, applications are processed by date received in the Visa Office. Accordingly, EUTR visa cases are separately processed from other (typically more complex) visa applications. Applications from qualifying family members of EU citizens continue to be processed by the respondent on an accelerated basis. Mr. Ahsan's affidavit exhibits a schedule of visa applications from non-national family members of EU citizens which were decided in January and February 2016.

116. The requirement to adopt an "accelerated procedure" relates to procedural expedition when the examination of an application commences. This is a concept found in analogous provisions of EU law and one which is entirely distinct from prioritisation. In this regard counsel cites *dictum* of Cooke J. in *D (H.I.)(a minor) v. RAC & Ors* [2011] IEHC 33. To prioritise and assign resources exclusively to considering qualifying family applications would require, in effect, the restructuring of INIS and significant

expenditure. Thus, the effect of an order of *mandamus* would be to direct the respondent as to the manner in which resources should be allocated, and would constitute a clear breach of the principle of the separation of powers.

117. It is submitted that the applicants' reliance on *Raducan* is misplaced. In that case, Hogan J. found as a fact that Mrs. Raducan was in possession of a residence card and was thus entitled to enter the State. Accordingly, Hogan J.'s consideration of Art. 5(2) of the Directive is *obiter*. Moreover, the learned Judge did not have in mind issues of potential abuse. It is further submitted that in *Mrax* the ECJ did not deal with issues of potential abuse or fraud, to which Art. 35 of the Directive, which postdates *Mrax*, refers. While it may be the case that the State should have a facility at the airport for simple straightforward visa applications, issues such as dependency or anomalies in earnings cannot simply be checked at the airport.

118. Insofar as Mr. Ahsan relies on Raducan as authority for an entitlement to damages, his circumstances are not comparable to the situation in *Raducan* where the non-national had been detained by the Irish authorities for three days.

119. It is submitted that for mandamus to issue the delay must be so egregious as to amount to a refusal to issue the decision, a threshold which has not been reached in the present cases.

120. The applicants' reliance on the jurisprudence of the ECJ in *Commission v. Ireland* and *Commission v. France* is misplaced. The issue in *Commission v. Ireland* was the State's failure to fulfil an obligation under EU law in that the State did not provide necessary statistical information. While it is correct that the ECJ held that a lack of resources could not be raised as a defence that was in the context of a simple breach of EU law. In the present cases, there is not a simple breach of EU law. Whether there is a breach of EU law is dependent upon the court finding that the delay in making a decision on the visa applications is so unreasonable and egregious as to warrant *mandamus*. In such circumstances, the jurisprudence relied on by the applicants is not on point and can be distinguished.

Considerations

121. In the context of the within proceedings, the applicants' circumstances are to be considered by reference to Directive 2004/38/EC.

122. Art. 3 of Directive defines the beneficiaries of the Directive, as follows:

> "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."

Pursuant to Art. 2(2) of the Directive, "family member" includes a Union citizen's spouse or partner, "direct descendants who are under the age of 21 or are dependants" and "dependent direct relatives in the ascending line".

123. An EU citizen's right of entry to a Member State is set out in Art. 5 of the Directive:

"1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

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…."

124. Art. 6 of the Directive provides:

"Right of residence for up to three months

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."

125. Art. 7(1) provides for the right of residence of EU citizens in the host Member State for more than three months if they are: (a) workers or self-employed persons in the host Member State; (b) have sufficient resources for themselves and their family members not to become a burden on the host Member State; or (c) are enrolled in an accredited establishment for the purpose of study, including vocational training, and provided they have comprehensive sickness insurance such as not to become a burden on the host Member State. Art. 7(2) extends the right of residence provided for in Art. 7(1) to non-national family members accompanying or joining the EU citizen in the host Member State provided the EU citizen satisfies the conditions for residence in excess of three months, as referred to.

126. At the time of the initiation of the within proceedings, the Irish provisions which gave effect to the Directive were the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (as amended) (S.I. No. 656 of 2006/S.I. No. 310 of 2008) ("the 2006 Regulations No.2").

127. From 1st February, 2016, and subject to certain transitional provisions, the 2006 Regulations No.2 have been replaced by the European Communities (Free Movement of Persons) Regulations 2015 ("the 2015 Regulations").

Both in the 2006 Regulations No. 2 and the 2015 Regulations, a qualifying family member is defined in like terms as in the Directive.

128. Reg. 4 (3)(b) of the 2006 Regulations, which transposed Art.5 (2) provided:

> "The Minister shall, on the basis of an accelerated process, consider an application for an Irish visa from a qualifying family member referred to in subparagraph (a) as soon as possible and if the Minister decides to issue an Irish visa that visa shall be issued free of charge….."

129. Reg. 4 (3)(b) of the 2015 Regulations is phrased in similar terms.

130. The rights provided for in Arts. 6 and 7 of the Directive were transposed into Irish law by Reg. 6 of the 2006 Regulations, and more recently by Reg. 6 of the 2015 Regulations.

131. For ease of reading, the Court will refer to the provisions of the Directive in the course of its considerations hereunder.

Are the applicants entitled to invoke Art. 5(2) of the Directive?

132. With regard to the Ahsan application for judicial review, the respondent pleads that Mr. Ahsan has no standing to maintain the proceedings since neither his wife nor son are applicants. There is no merit in this argument. By virtue of his position as an EU citizen resident in the State, and in respect of whom by virtue of their status as qualifying family members his wife and son derive a right of entry to the State, Mr. Ahsan has a sufficient interest in the proceedings for him to seek judicial review of the respondent's failure to date to issue a decision on the visa applications.

133. Additionally, the respondent puts all the applicants on strict proof that the respective family members constitute beneficiaries for the purposes of the Directive and/or Regulations and that the respective EU citizens satisfy the conditions of Articles 7, 14 and 24 of the Directive and the transposing Regulations. She asserts, effectively, that until these matters have been established, the applicants cannot invoke Art. 5(2) of the Directive. I am satisfied that the respondent's pleas in this regard are misconceived. Judicial review is a review of the legality of the respondent's action or inaction. The within proceedings concern the respondent's alleged inaction in taking decisions on the visa applications on family members of EU nationals. They are not a vehicle for the High Court to be invited to make findings of fact regarding the applicants' family relationships, their ages, or the extent of their dependency, or indeed whether the EU citizens' residence in the State complies with Art. 7. The respondent is seemingly putting the applicant on strict proof in circumstances where she has not yet considered the visa applications for mere entry into the State. I find that the respondent cannot lawfully oppose judicial review proceedings by putting it up to the applicants to prove to the court on judicial review the very matters that are going to be a subject of decisions by the respondent. There is no question in my mind but that the applicants, albeit that their respective visa applications have yet to be determined, are entitled to invoke the provisions of Art. 5(2) of the Directive.

Is the respondent in breach of Art.5 (2) of the Directive and Reg. 4 (3) (b) of the Regulations?

134. As I said in my judgment in *Atif Mahmood and Shabina Atif v. Minister for Justice and Equality* (delivered 14th October, 2016) ("*Mahmood/Atif*"), what is contemplated by Art.5 (2) and Reg.4 (3) (b) is a speedy processing of visa applications for qualifying family members of EU citizens. No other reading of the relevant provisions can be contemplated. While there is no specific time limit set out in Art.5 (2), its language has been interpreted as importing into the provision certain urgency in the issuing of visas, of which this court must be mindful. In *Raducan*, Hogan J. interpreted Art. 5(2), and its precursor, in the following terms:

> *"21. But over and above this factual question, it is clear from the evidence in this case that the procedures employed at Dublin Airport with regard to the procedures to be followed in the case of the admission of the spouses of EU nationals are seriously wanting. In Case C-459/99 MRAX v. État belge [2002] ECR I - 6591 the Court of Justice was quite emphatic (at pars. 60-62 of the judgment) as to what the corresponding provisions of earlier free movement Directives (which were ultimately replaced by Directive 2004/58/EC) required in this regard:-*
>
> > *'However, Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148 state that the Member States are to accord to such persons every facility for obtaining any necessary visas. This means that, if those provisions of Directives 68/360 and 73/148 are not to be denied their full effect, a visa must be issued without delay and, as far as possible, at the place of entry into national territory.*
> >
> > *In view of the importance which the Community legislature has attached to the protection of family life……, it is in any event disproportionate and, therefore, prohibited to send back a third country national married to a national of a Member State where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148.' (Emphasis supplied)*
>
> *22. It is plain from this judgment that Member States were required under the old free movement Directives to have in place a facility whereby visas could be issued immediately at a major airport such as Dublin Airport. If anything, however, the Union legislator went further with Article 5 (2) of the subsequent 2004 Directive which provides:-*
>
> > *'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 (emphasis supplied)'"*

135. Hogan J. went on to say that the requirement that a third country spouse had to apply on-line for a visa was "*clearly a manifest breach of Art. 5 (2)*".

136. He was also of the view that in the absence of an airport facility, *"it could hardly be said that the State has afforded 'such persons every facility to obtain the necessary visas.' One need hardly add that the absence of such a facility means that the State is also plainly failing in its obligation to issue such visas 'as soon as possible and on the basis of an accelerated procedure.' There was thus a clear breach of the Directive in that Ms. Raducan was not offered the possibility of securing a visa on her arrival at Dublin Airport."*

137. The respondent contends that notwithstanding the significant upsurge in applications and the sudden pressure on resources, visa applications from non-national family members on EU citizens continue to be processed on an "accelerated" basis, as provided for in Art. 5 (2), in that much less documentation is sought from these applicants, compared to other types of visas and that this accelerated procedure is put in place once an examination of the visa application commences. She asserts that even greater numbers of qualifying members of Union citizens (and in particular UK citizens such as the first named applicant) have been processed, notwithstanding a rapidly rising number of such applications.

138. The applicants maintain that it is an entirely artificial approach for the respondent to define the period of delay by dividing the visa application into two parts, with the clock running only when the period of actual examination of a particular application begins. I agree with the applicants' contention. In light of the provisions of Art. 5 (2), there is no merit in the respondent's suggestion that any period of delay prior to the actual examination of the application should be disregarded by the court for the purpose of establishing whether applications are being issued "as soon as possible and on the basis of an accelerated procedure". Such an approach would not be in accordance with the letter or spirit of Art. 5(2), as interpreted by Hogan J. in *Raducan*. Moreover, I note that the respondent's own guidelines state (at para. 9.1):

> *"[a]pplications from qualifying family members must be accelerated i.e. processed within four weeks from the time that the application is first received in an Irish Visa Office or Mission. This four week period includes all time spent transferring documents in relation to the application between offices e.g. in diplomatic bags."* (Emphasis added)

139. I should say by way of general observation that the issues in the present case fall to be assessed having regard to what is set out in the relevant provisions of the Directive, as opposed to fixing the respondent's obligation to the actual wording of the guidelines, albeit that the guidelines in large part adequately reflect the provisions of the Directive.

140. I now turn to the delay in the processing of the visas applications in the present cases.

141. The evidence put before the court by the respondent shows that there has been 1,417% increase in the volume of applications for EUTR visas in the period 2013 to 2015, in particular from Afghanistan, Pakistan and Iraq and particularly occurring in the second quarter of 2015. In 2013, the total number of EU Treaty rights applications was 663, in 2014 it was 1,763 and in 2015 it has risen to 10,062 of which 3,420 applications were from Afghanistan, 2,748 from Pakistan, 1,206 from Iraq, 293 from India, 254 from Nigeria and "other" applications at 2,141. The respondent states that given that increase she cannot discount the potential for terrorist threat attack in Ireland or elsewhere in Europe if such checks as are presently being conducted are not permitted. Furthermore, the respondent has specific concerns in respect of the potential for abuse of Ireland's immigration law and policy occasioned by applications for short stay visas for third

country national family members of EU citizens.

142. According to Mr. McDonagh, in light of the number of visa applications by family members of UK citizens, the respondent and the UK authorities apprehend that the rise in applications constitutes "artificial conduct" of the type described by Mr. McDonagh and further apprehend that organised criminal operations are also exploiting vulnerable persons, a serious issue presently under investigation by the relevant authorities. An investigation by An Garda Siochana, "Operation Vantage", has identified a number of criminal networks based in Ireland and the UK who are engaged in the facilitation of marriages of convenience through the provision of false information and documentation. In excess of 55 formal objections to pending marriages have been made by the Gardaí through "Operation Vantage".

143. In his respective affidavits, Mr. McDonagh also avers that the respondent is aware that many visa applications are being handled and serviced by for-profit immigration service companies. This, he says, causes two concerns. First, that applications are being made by Union citizens travelling to Ireland solely for the artificial purpose of generating an obligation for treaty rights for their third country national family member in another Member State (and in particular the United Kingdom). Secondly, for the same artificial purpose, but in circumstances in which the Union citizen never comes to Ireland, a false identity is created in the Irish State for the Union citizen as if they were relying upon EU Treaty rights in this jurisdiction. Mr. McDonagh avers that in light of ongoing Garda investigations, he has been advised by An Garda Síochána that some such companies are knowingly or unknowingly facilitating applications in which false employment (including false payslips and false Revenue returns and remittals) and fictitious residences are established in the Irish State for the Union citizen. Examples of payments made by Union citizens to such immigration service companies are in the order of £15,000 to £20,000.

144. The respondent is anxious to be apprised of the extent of any wrongdoing by such agencies for the purposes (if necessary) of strengthening the checking systems presently in place in her department. In the present cases, however, there is no evidence of use by the applicants of such agencies or even if they were used, of anything untoward on the part of the applicants such as might delay the processing of their individual visa applications.

145. Mr. McDonagh outlines the respondent's position as being that "rather than allocating an increasing volume of resources for the sole purposes of processing the backlog applications, it is imperative to determine the cause of this rapid increase and ascertain whether there are underlying, and potentially criminal, issues permeating a number of such applications."

146. It is clear that the respondent has considerable concerns regarding possible abuse of the Directive, particularly in the context of the increased number of applications by the spouses and other family members of UK citizens for visas. This, the respondent acknowledges, has infected all elements of these cases. It is against this backdrop that the respondent seeks to defend the present applications for judicial review. The respondent says that she is entitled to investigate every visa application by a third country non-national family member where there exists the possibility of a breach of public policy or abuse of EUTR. Moreover, she is of the belief that some of the unprecedented number of applicants whose applications are presently pending may not be genuine.

147. Undoubtedly, the very significant increase in the number of applications for visas from family members of EU citizens is a logistical difficulty for the respondent. The court also accepts in circumstances where the respondent apprehends that there may be

underlying factors which would suggest potential or actual abuse, of for example, marriages of convenience or other "artificial conduct" for the purposes, "of obtaining a right of entry and residence under EU Treaty Rights , and accessing the UK through the land border of the island of Ireland" (as Mr. McDonagh puts it), or otherwise accessing the UK, that the respondent and other agents of the State such as An Garda Síochána are entitled to investigate such factors.

148. Part of the respondent's plea in respect of the within proceedings is that she requires "sufficient time" to carry out the checks presently being undertaken with regard to individual applications from non-national family members of EU citizens. She further states that she may, in due course, glean further information as to the State's capacity to operate an appropriate immigration system when the outcome of the current Garda investigation "Operation Vantage" and other investigations are fully known. She asserts that all of this is necessary to preserve the State's immigration policy and the Common Travel Area. The case is also made that a court order in favour of the applicants would place undue strain on the resources of INIS.

149. While these arguments are *prima facie* compelling, the court must determine whether they, and indeed the other factors referred to in Mr. McDonagh's affidavit, are sufficient to justify the delay in the processing of the visa applications which are the subject of the within proceedings and to sustain the respondent's argument that she is in compliance with Art. 5(2).

150. In *Nearing v. Minister for Justice* [2010] 4 I.R 211, in considering the question of delay on the part of a state agency in issuing a decision, Cooke J. had occasion to consider what might give rise to a finding of "*egregious and unjustified delay*". As to what might constitute a reasonable timeframe, he stated:

> *"[20] It goes without saying, perhaps, that what is reasonable depends on the circumstances. It goes without saying, perhaps, that what is reasonable depends on the circumstances of each case, including the nature of the decision sought, the particularities of the applicant's position, and the impact that any delay may have and also on the conduct of the administrative decision maker in dealing with such applications, together with any explanation given for the time taken. Mandamus does not issue against an administrative decision maker simply because there is a duty to make a decision. Mandamus lies to make good an illegal default in the discharge of a public duty. There must have been, either expressly or by implication, a wrongful refusal to make a decision or such an egregious and unjustified delay in dealing with the application as to be tantamount to a refusal in its effect. The matter was put as follows by Geoghegan J. in Point Exhibition Co. Ltd. v. The Revenue Commissioners [1993] 2 I.R. 551, at p. 555:-*
>
> > *'…the applicant was entitled to a decision one way or another within a reasonable time. The respondents quite obviously did not make such a decision within any time span that could be regarded as reasonable. Accordingly, the applicant is entitled to treat the delay as refusal and to seek an order of mandamus directing the granting of the licence.'*
>
> *…*
>
> *[25] Once it is clear that the department has in place a particular system for the administration of such a scheme, it is not the role of the court in exercise of its judicial review function to dictate how a scheme should be managed or to prescribe staffing levels or rates of productivity in the*

> *relevant section of the department. Once it is clear from the evidence that there is in place an orderly, rational and fair system for dealing with applications, the court has no reason to infer any illegality in the conduct of the Minister unless some specific wrong doing or default is demonstrated in a given case."*

151. It is perhaps of note that *Nearing* did not concern the exercise of rights under EU law, but rather a non-statutory administrative scheme being operated by the respondent to address applications for long term residency from non-nationals legally in the State in excess of five years.

152. The respondent contends that she has in place a rational system to process visa applications for qualifying family members and that they are processed in a manner which is fair, consistent and reasonable and that she thus meets the test set by Cooke J. in *Nearing*.

153. As to what might be considered a reasonable period of delay in the present cases in light of the factors alluded to by Cooke J. in *Nearing*, it is necessary, first, to consider the nature of the decision sought from the respondent. It pertains in the first instance to the EU citizens' rights to exercise one of the fundamental rights granted under EU law, that of free movement across the territory of the Union and to their qualifying family members' entitlement to join them in the State. In this regard it is worth noting that in *Metock* the ECJ has emphasised (at para. 93) "*the necessity of not interpreting the provisions of Directive 2004/38/EC restrictively and not depriving them of their effectiveness*".

154. For the purposes of Art. 5 of the Directive, family members of EU citizens (including visa required non-nationals) need only to provide evidence of identity and proof of their family link (including their age where there are claimed dependents and which may include other evidence of dependency, as it does here with regard to the second and third named applicants in the *Habib* case) to the EU citizen exercising his or her EU treaty rights. As visa required non-nationals, the *Ashan, Haroon* and *Habib* family members are required by the State to make their applications from outside the State. This was done and information was provided in June, 2015, by the *Haroon* and *Habib* applicants and in August, 2015 by Mr. Ahsan's family members. The information provided included identity documentation pertaining to the respective family members and the respective UK citizens and marriage and birth certificates. In the case of the *Habib* visa applications, the information supplied included details of the second named applicant's dependency on the first named applicant which is required for the purposes of establishing whether she comes within the definition of beneficiary, as defined by the Directive. As of the date of the hearing of the within proceedings, the third named *Habib* applicant had reached the age of twenty one and he must now establish evidence of his dependency on his father, the EU citizen.

155. On the face of it (and the Court is not making any determination as to the substantive content of the information provided in the respective cases or any issue that might arise from the information supplied), by the time the information was received, the respondent had data for her perusal. The data may be used by the respondent for the purpose (if necessary) of initiating contact with the Pakistani, Afghani and UK authorities, in the context of making such checks as might be deemed necessary from the information supplied, based on the principle of proportionality, as provided for in the Directive.

156. As I stated in my judgment in *Mahmood/Atif,* given the relatively limited documentation which is required for mere entry into the State in the case of EU citizens and their family members, the delay in the present case cannot thus be defined by reason of the extensive nature of the documentation which is required to be considered for the purpose of entry visas, or indeed by any particular complexity, such as might

arise in residence card applications in exercise of the derived rights of family members of EU citizens to reside in the host Member State in excess of three months. Furthermore, the present cases are not situations where the respondent has contacted the applicants with regard to any aspect of the information provided and the applicants were dilatory in their respective responses. As attested to in Mr. McDonagh's affidavits (and in Mr. Flynn's affidavit in response to Mr. Ahsan's affidavit of 23rd May, 2016), the respondent has expressed concerns about certain aspects of the information supplied in the applicants' respective visa applications. At the same time, the respondent emphasises that the visa applications have not been processed. The respective EU citizens have put before the court (and the respondent) information which they say answers the respondent's concerns. This is ultimately a matter for the respondent. The court cannot factor in to its considerations the various the matters highlighted by the respondent as a reason for the delays in the processing of the visa applications in circumstances where the respondent clearly acknowledges that the processing of the applications has not yet commenced.

157. I note that it is the respondent's intention to subject the visa applications in issue in the within proceedings to checks from both the Pakistani, Afghani and UK authorities. It is said that this may prolong the processing of the application as, according to Mr. McDonagh, "it frequently takes a considerable amount of time to obtain assistance from external agencies, and the Respondent is not in a position to give them directions as to their response time." I accept that the respondent cannot control the response time of other administrations. However, Mr. Ahsan's family members' applications are not even at the point in time where such a scenario may arise. Furthermore, there is no specific evidence before the court of any particular difficulties in Pakistan such as might delay the processing of Mr. Ahsan's family members' visa applications. With regard to the *Haroon* and *Habib* visa applications, the respondent points to ongoing difficulties in Afghanistan such as may impede the verification of the information supplied by applicants. Counsel for the *Haroon* and *Habib* applicants acknowledges that had the respective visa applications actually been submitted by the respondent to the Afghani authorities for verification, this might, in part at least, account for the delay in processing the applications, but this has not occurred given that the respondent has yet to process the visa applications. As a matter of interest, I note that on 8th June, 2015, the *Habib* applicants were advised by the Irish Embassy in Abu Dhabi that all birth and marriage certificates must be attested by the Afghani Ministry of Foreign Affairs, the Afghani Embassy in Abu Dhabi and the UAE Ministry of Foreign Affairs, which, to my mind, must go some way in enabling the respondent to embark upon whatever checks she may consider it necessary to carry out.

158. Just as I noted in my judgment in *Mahmood/Atif*, the visa applications in the present cases are caught up in the maelstrom of visa applications from non-national family members of EU citizens since early 2015, some of which, the respondent apprehends, may constitute fraud or an abuse of rights. However, as I have said, the apprehension of fraud or abuse of rights to which the respondent alludes cannot be deemed personal to the *Ahsan, Haroon* and *Habib* applicants, at this stage at least, since their applications remains unprocessed.

159. The respondent also apprehends that the motives of the respective EU citizens in the present cases in coming to the State may not be genuine. In *Akrich,* the ECJ had occasion to discuss the question of the motives of an EU citizen in the context of the exercise of free movement rights. The Court stated:

> *"55. As regards the question of abuse mentioned at paragraph 24 of the Singh judgment, cited above, it should be mentioned that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his*

right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity (Case 53/81 Levin [1982] ECR 1035, paragraph 23).

56. Nor are such motives relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national. Such conduct cannot constitute an abuse within the meaning of paragraph 24 of the Singh judgment even if the spouse did not, at the time when the couple installed itself in another Member State, have a right to remain in the Member State of which the worker is a national.

57. Conversely, there would be an abuse if the facilities afforded by Community law in favour of migrant workers and their spouses were invoked in the context of marriages of convenience entered into in order to circumvent the provisions relating to entry and residence of nationals of non-Member States.

…

— Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State." (Para.61)

160. The respondent contends that the *dictum* of the ECJ in *Akrich* is dependent on there being a genuine exercise of EU Treaty rights, which is to be ascertained based on an individual examination of a particular case, as articulated by the ECJ in *McCarthy (Case C - 202/13).* It is submitted that this was also recognised in *Akrich* itself.

161. While that is undoubtedly the case, and while this court acknowledges the respondent's concerns about possible abuse of EUTR, as averred to in Mr. McDonagh's affidavits, the issue which arises, at this juncture, is whether the respondent's general concerns, which are informed from the fruits of the ongoing Garda investigations, can be deemed a sufficient justification for the delay in processing the visa applications.

162. However, given that the visa applications have not been processed, no question arises, at this juncture, as to whether there are any concerns particular to the applicants such as might entitle the respondent to invoke the provisions of Art. 27 or Art. 35 of the Directive, thereby leading to a refusal of the visa applications or otherwise leading to a conclusion that any of the family members concerned in these proceedings are not beneficiaries for the purposes of the Directive, as presently defined in the 2015 Regulations.

163. Furthermore, and while I am not making any finding of fact on this issue, it is I believe of some relevance to the question of the period of delay in these cases that that none of the marital circumstances put before the respondent in the visa applications in issue here match the concerns which gave rise to Garda "Operation Vantage", since neither Mr. Ahsan's spouse nor Mr. Haroon's spouse are said to be EU nationals who have married males from "the Indian sub-continent" which, according to a statement from the Garda Press Office" is a particular focus of "Operation Vantage". According, to Mr. Habib, he is a widower, his Afghani national wife having passed away in 1996.

164. As to the question of the EU citizens' activities in this State, as I have said, if it comes to pass, it will be for the family members in the present cases, in any future applications for residence cards, to show that the EU citizens satisfy the requirements of Art. 7(1) and (2) of the Directive. As stated by the ECJ in *O and B v. The Netherlands (Case-C/456/12):*

> *"39. …Directive 2004/38 establishes a derived right of residence for third country nationals who are family members of a Union citizen, within the meaning of Article 2(2) of that directive, only where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (see, to that effect, Metock and Others , paragraph 73; Case C 256/11 Dereci and Others [2011] ECR I 11315, paragraph 56; Iida , paragraph 51; and Joined Cases C 356/11 and C 357/11 O. and Others [2012] ECR, paragraph 41)."*

165. The ECJ stated that the residence must be:

> *"sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State. Article 21(1) TFEU does not therefore require that every residence in the host Member State by a Union citizen accompanied by a family member who is a third country national necessarily confers a derived right of residence on that family member in the Member State of which that citizen is a national upon the citizen's return to that Member State."* (Para. 51)

166. The ECJ also opined:

> *"52. …it should be observed that a Union citizen who exercises his rights under Article 6 (1) of Directive 2004/38 does not intend to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State. Accordingly, the refusal to confer, when that citizen returns to his Member State of origin, a derived right of residence on members of his family who are third country nationals will not deter such a citizen from exercising his rights under Article 6."*

As to what might constitute a derived right of residence for family members the ECJ noted, at para. 46:

> *"[W]here a Union citizen has resided with the family member who is a third country national in a Member State other than the Member State of which he is a national for a period exceeding two and half years and one and half years respectively, and was employed there, that third-country national must, when the Union citizen returns to the Member State of which he is a national, be entitled, under Union law, to a derived right of residence in the latter State".*

167. If at some point in the future any of the EU citizens in the present cases wish to assert that they have established residence in the State such as to create on their return to the UK a derived right of residence there for their respective family members, it must, as set out by the ECJ in *O and B*, be:

> *"genuine residence in the host Member State of the Union citizen and of the family member who is a third-country national, pursuant to and in conformity with the conditions set out in Article 7 (1) and (2) and Article 16 (1) and (2) of the Directive 2004/38 respectively, which creates on the Union citizen's return to his Member State of origin, a derived right of residence, on the basis of Article 21(1) TFEU, for the third-country national with whom that citizen lived as a family in the host Member State."* (Para. 56)

168. The ECJ has held that it is for the Member State of the Union citizen to determine whether the Union citizen". *…settled and, therefore, genuinely resided in the host Member State and whether, on account of living as a family during that period of genuine residence, [the family member] enjoyed a derived right of residence in the host*

Member State pursuant to and in conformity with Article 7(2) or Article 16(2) of Directive 2004/38." (Para.57)

169. In *O & B*, the Court also recognised that:

> *"the scope of Union law cannot be extended to cover abuses….Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules has not been achieved, and, secondly, a subjective element consisting of the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it.*
>
> *…*
>
> *It should be borne in mind that only a period of residence satisfying the conditions set out in Article 7 (1) and (2) and Article 16 (1) and (2) of the Directive 2004/38 will give rise to such a right of residence…" (Paras. 58 and 59)*

170. As I said in *Mahmood/Atif*, whether the family members in the present cases will be considered to come within the scope of the Directive, as interpreted by the ECJ, upon any return to the UK cannot be pre-empted by the respondent, much less the court, at this juncture.

171. It is not in doubt but that Member States may take action to prevent abuse of EU rights. Recital 28 of the Directive provides that:

> "To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures."

172. The ECJ has had occasion to consider the response of Member States when confronted with situations of fraud and/or abuse. In *McCarthy v. Secretary of State for the Home Department (Case C-202/13),* the ECJ considered a requirement imposed by the UK authorities on the non-national family member of a UK citizen (both of whom resided in Spain) to obtain "an EEA family permit" before entering the UK notwithstanding that the Spanish authorities had issued the family member with a residence card under Art. 10 of the Directive. The ECJ stated:

> *"In the absence of an express provision in Directive 2004/38, the fact that a Member State is faced as the United Kingdom considers itself to be, with a high number of cases of abuse of rights or fraud committed by third-country nationals resorting to sham marriages or using falsified residence cards cannot justify the adoption of a measure…founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned himself."* (Para. 55)

The Court went on to opine:

> *"the adoption of measures pursuing an objective of general prevention in respect of widespread cases of abuse of rights or fraud would mean….that the mere fact of belonging to a particular group of persons would allow the member states to refuse to recognise a right expressly conferred by Directive 2004/38 on family members of a Union citizen who are not nationals of a Member State, although they in fact fulfil the conditions laid down by that directive."* (Para. 56)

173. The ECJ also went on to hold that the provisions of Protocol 20 which allows the UK to verify whether a person seeking to enter its territory in fact fulfils the conditions for entry, including those provided for by EU law, did not permit the UK to determine the

conditions for entry for persons who have a right of entry under EU law or *"to impose on them extra conditions for entry or conditions other than those provided for by EU law".* (Para. 64)

174. As I stated in *Mahmood/Atif*, I appreciate that the circumstances in the present cases are not on all fours with *McCarthy* given that what was in that case was a specific legislative measure imposing requirements on a non-national family member who had otherwise satisfied the requirements of the Directive. Here, it is not a case of the adoption of any particular measure by the respondent, rather it is the respondent's failure, as of yet, to process the visa applications. Nevertheless, I find the ECJ's interpretation of the Directive instructive in circumstances where the contents of Mr. McDonagh's affidavits appear to suggest that leeway should be allowed to the respondent to ascertain the general underlying cause of the increase in the number of applications from non-national family members of EU citizens, (particularly those emanating from certain countries), before any question that the respondent is not complying with the Directive could be said to arise. In the *Ahsan* case, Mr. Flynn's affidavit refers to "the imperative to carry out a full investigation" of, *inter alia*, "the unprecedented nature of the increase in applications" and "the complexity and sensitivity of certain issues raised by the recent upsurge of EUTR applications". However, in circumstances where no examination of the visa applications has commenced and where there is no evidence adduced by the respondent of any factor personal to the applicants which has inhibited or delayed the processing of the applications, I find that the proposition advocated by the respondent cannot be said to accord with either the letter or spirit of the Directive, as interpreted by the ECJ in *McCarth*y, or indeed by Hogan J. in *Raducan*. Moreover, I note that in *Kweder v. Minister for Justice* [1996]1 IR 381, Geoghegan J. held that public policy as a reason to deny a visa application "*cannot lightly be invoked*" and if it is to be invoked it must be in the context of an applicant's personal conduct. (Para.5)

175. Furthermore, in light of the ECJ's approach in *McCarthy*, I cannot accept the respondent's argument that for the court to interpret Art. 5(2) to require the processing of visa applications, absent the completion of the pending Garda operations and the implementation of consequential checks, it may result in EU law being relied on for abusive or fraudulent ends, in circumstances where it is acknowledged that the Garda investigations to which the respondent refers do not relate to the applicants in the within proceedings. In any event, it remains open to the respondent, when processing the respective visa applications, to carry out such reasonable checks as may prove necessary.

176. Since the correspondence which was sent on 19th October, 2015, 26th October, 2015 1st February, 2016, respectively, to the *Haroon, Habib* and *Ahsan* applicants, no indication has been given as to when decisions on the visa applications can be expected. No such indication was intimated during the course of the hearing of the within proceedings. By mid July, 2016, the process of examination of the respective applications had not commenced.

177. The applicants contend that the respondent is prioritising other types of visa applications over those of non-national family members of EU citizens. As I also found in *Mahmood/Atif*, I am not satisfied that this is necessarily the case. I accept however that the upshot of the significant increase in numbers of visa applications from non- national family members of EU citizens means that other visa applications with normally longer processing periods than those pertaining to EUTR applications are now overtaking such applications. I am of the view, from the contents of Mr. McDonagh's affidavits, that the respondent is placing priority on ascertaining why there has been such a rapid increase in visa applications by non-national family members of EU citizens, particularly UK citizens, and from particular countries. This is also clear from Mr. Flynn's affidavit, sworn in the *Ahsan* proceedings. In his affidavit sworn on 23rd May, 2016, Mr. Ahsan avers

that the respondent has published some fifty four decisions in respect of EUTR visa applications which were submitted subsequent to those of his family members. Mr. Flynn, in his replying affidavit, denies Mr. Ahsan's claim that applications are being processed in a discriminatory manner and avers that the respondent has weighty and cogent reasons for the time being taken in processing applications. He further avers that applications continue to be processed chronologically, save in "exceptional circumstances, (principally for humanitarian reasons)". It remains somewhat unclear to the court whether the fifty four decisions in question were "exceptional cases" or whether it is the case that Mr. Ahsan's and perhaps the *Haroon/Habib* visa applications are perhaps being left in abeyance pending the outcome of the general investigations which are still underway in order to ascertain why there has been such an increase in visa applications from particular countries. That being said, however, I am not satisfied that the evidence before the court establishes that the respondent is applying discriminatory practices.

178. As stated, I accept that the respondent has concerns about actual and potential abuse of the State's immigration system and the possible implications for the Common Travel Area. I have also alluded earlier in this judgment to the jurisprudence of the ECJ as to what is required in the context of the derivative rights of a family member of an EU citizen who returns to the Member State of which he or she is a national. If it comes to pass, it will be for the family members in the within proceedings to establish to the British authorities that they have a derived right of residence in the UK based on the respective EU citizens having become established in this State, on foot of "*effective and genuine* [economic] *activity*". The present state of affairs is however removed in time and substance from any such putative assessment since the family members of the EU citizens have yet to arrive in this State, let alone apply for residence cards for this State or assert EU Treaty rights before the British authorities based on the economic activity of their EU citizen and established family life in this State.

179. Similar to the *Mahmood/Atif* case, what is effectively being canvassed by the respondent, given her general concerns arising from the unprecedented surge in applications, and from the information provided to her by An Garda Siochana, (which is not particular to the applicants), is that the ensuing delay in processing the visa applications is not unreasonable in such circumstances and that the applicants should stay in the queue until the fruits of the Garda and other investigations are more fully known.

180. While the respondent contends that EUTR applications are in fact being processed and decisions are being issued (and the court has no reason to doubt that that is the case) and while it is asserted that save in exceptional circumstances all applications are dealt with chronologically, I find (as I did in *Mahmood/Atif*) that Mr. McDonagh's respective affidavits are more nuanced on the question of whether some visa applications from non-national family members of EU citizens may have to await such enhanced checking procedures as the respondent may introduce, following the completion of the ongoing Garda investigation. As I have said, the State's entitlement to pursue the avenues of investigation referred to in Mr. McDonagh's affidavits is not in question. Similar to my finding in the *Mahmood/Atif* case, I also accept that the applicants cannot expect to jump the queue over other similarly situated visa applicants. However, the prospect of their jumping the queue is not the salient issue.

181. As effectively conceded by the respondent, the applicants are facing an open-ended timeframe in terms of when decisions on their respective visa applications can be expected. In my view, the upshot of this is essentially to deprive Art. 5(2) of its effectiveness. Thus, even accepting that some period of delay was to be expected given the surge in number of applications in 2015, I am not persuaded at this point in time that the system being operated by the respondent can be said to comfortably fit in with

the concept of an "*orderly, fair and rational system for dealing with applications*", as contemplated by Cooke J. in *Nearing*.

182. The essential question is whether it is reasonable to allow receipt of decisions on the visa applications to remain open-ended in light of Art. 5 (2), and the manner in which that provision has been interpreted by Hogan J. in *Raducan*.

183. As I observed in *Mahmood/Atif*, fundamentally, what is at issue in this case is, as Cooke J. puts it in Saleem, "*the Treaty-derived right of the Union citizen to move freely within the territory of the Member States and, subject to the conditions of the Regulations, to have family members participate in the exercise of that right. (See, inter alia, recitals 5 and 11 of the Directive.)"*. (Para.17)

184. *Saleem* concerned the failure of the respondent to issue a decision in respect of an application for a review of a refusal to issue a residence card to a family member of the EU citizen concerned. The Directive imposes an obligation, as indeed mirrored in the relevant Regulations, on the respondent, once she is satisfied that it is appropriate to do so, to issue a residence card within six months of receipt of the application. In *Saleem*, the decision to refuse the residence card issued on the final day of the requisite time limit. A review of the decision was sought. There was however no time limit set by the 2006 Regulations for the issuing of decision on a review application. A further six months passed without a decision on this application. Cooke J. rejected the Minister's contention that there was no duty to make the decision on the review application within any particular timeframe. He held that a delay of some seven months could not be considered reasonable in circumstances where the Directive made provision for a period of "*no later than six months*" for the issuing of a residence card. Cooke J. was of the view that *"[w]here the authority has power to make a decision but no time is fixed by law for it to be made there is nevertheless a duty to make the decision within a reasonable time."* (Para.18)

185. It is of note that the Directive provides for the issue of a residence card in an outside time span of six months from the date of application. This is to reflect, presumably, that in the context of the assertion of Art. 7 rights and the more onerous conditions which must be satisfied by an applicant for a residence card (compared with the entry requirements into the State for EU citizens and their family members), the host Member State may require time to check such documentation as may be submitted to satisfy the requirements for a residence card.

186. From a reading Art. 5(1) and (2), my view, albeit that there is no specified timeframe provided in Art. 5(2), is that the framers of the Directive had in mind a considerably shorter time span than six months for the issuing of visas to qualifying family members of EU citizens who have or intend to exercise their free movement rights, given the urgency which informs the language used in the provision. As can be seen from the extract quoted by Hogan J. in *Raducan*, the ECJ certainly interpreted the precursor to the present Directive in that light and, clearly, Hogan J. also appreciated the urgency inherent in the provisions of Art. 5 (2), given his pronouncement as to how and when visa applications by family members of EU nationals should issue. Counsel for the respondent opines that the *dictum* of Hogan J. with regard to Art. 5(2) is *obiter* as the learned Judge found that Mrs. Raducan was as a matter of fact in possession of a residence card. I am not persuaded by counsel's argument in this regard. However, even if I am wrong in finding that the *dictum* is not *obiter*, I regard Hogan J.'s approach to be compelling persuasive authority as to how Art. 5 (2) must be read.

187. In *Saleem*, Cooke J. referred to *Point Exhibition Co. Ltd v. Revenue Commissioners*, [1993] 2 I.R. 551 where Geoghegan J. held that:

> *" The respondents have not either granted or refused the licence under s. 7 of the Act of 1835, but at all material times have informed the applicant the matter is still under consideration. The questions at issue in this case are by no means capable of easy resolution. I have had considerable difficulty in answering them. Nevertheless in my view, the applicant was entitled to a decision one way or another within a reasonable time. The respondents obviously did not make such decision within any time span that could be regarded as reasonable. Accordingly, the applicant is entitled to treat the delay as a refusal and to seek an order of mandamus directing the grant of the licence."*

In *Saleem*, Cooke J. went on to state:

> *"19. Given that there is a duty under both the Regulations and the Directive to issue a residence Card within a defined period, where that period expires without the definitive decision being taken and the Minister maintains that there is no duty to make the required decision within any particular time, the Court considers that the applicants are entitled to treat delay as unreasonable and as justifying an application for mandamus."*

188. Notwithstanding that in *Point Exhibition Company Ltd. v. Revenue Commissioners* [1993] 2 IR 551(as referred to by Cooke J. above) the matter in respect of which a decision was sought was "*still under consideration*", Geoghegan J. saw fit to consider *mandamus*. In the present cases, the visa applications cannot, in any real sense, be said to be currently under consideration. The best that can be said is that they are somewhere in the system, without any projected timeframe for a decision to be made on the applications. This is in circumstances where the applications were received in June and August, 2015 respectively.

189. In circumstances where no time span for even the commencement of the examination of the applications has been forthcoming from the respondent since the last timeframes were advised to the *Ahsan, Haroon* and *Habib* applicants (in February, 2016 and October, 2015 respectively), and where as of July, 2016, at the hearing of the within applications for judicial review, no indication has been forthcoming as to when a decision might be expected, I am satisfied that the applicants are entitled to treat the delay as so unreasonable and egregious as to constitute a breach of the Directive and to justify the application for *mandamus*.

190. The respondent has put the issue of resources before the court in that her department is operating against a background of a significant increase in visa applications for non-national family members of EU citizens, in addition to the demands on resources from other visa applicants. The court has had regard to this argument and adopts the approach of Edwards J. in *K.M. and D.G. v. Minister for Justice* [2007] IEHC 234. The learned Judge addressed a resources argument in the following terms:

> *"Now in general it can be stated that arguments based upon scarce resources are not justiciable and will not be entertained if proffered to excuse a failure to vindicate the constitutional rights of an individual or to afford him fair procedures in a matter in respect of which he is entitled to constitutional justice. However, I think that this statement of general principle, while sound as far as it goes, can only apply in a situation where the delay based upon scarce resources is unreasonable and unconscionable. In other words, the principle undoubtedly must apply where the delay is gross and significantly prejudicial. That said, regard must also be had to the reality that it is in the nature of things that any administrative engine will be to some extent variable in its efficiency. I believe that there has to be a margin of appreciation and I think that the question of demands on the system and the availability of resources is relevant within the bounds of the margin of appreciation. However, once the delay becomes gross and unconscionable an argument based upon*

scarce resources cannot be advanced to justify it." (Pg.20-21)

191. Moreover, in *Commission v. France (Case C-144/97)* [1998] ECR 1-613), I note that the ECJ has stated that "*a Member State cannot rely on provisions, practices or circumstances existing in its internal legal order to justify the failure to respect the obligations and time limits laid down by a directive"* (Para. 98) If the delays in the present cases were perhaps a matter of only a couple months, and if there was a stated timeframe provided to the court for the commencement of the examination of the visa applications, then I think some margin of appreciation, as alluded to by Edwards J. in *K.M. and D.G.,* might have to be afforded to the respondent as to whether *mandamus* should issue. However, in the absence of any projected timeframe at this remove, the question of resources, as averred to in Mr. McDonagh's affidavits, is not sufficient to outweigh the provisions of the Directive, especially given the open-ended timeframe currently contemplated by the respondent for the processing of the visa applications, and also taking into consideration the emphasis which the ECJ places on the preservation of the family life of an EU citizen who exercises his or her right of movement across the territory of the Union.

Are there other factors which preclude the grant of an order of mandamus?

192. The respondent argues that the grant of an order of mandamus effectively means granting the applicants "prioritisation" which she says is not provided for in the Directive, although it is provided for in analogous provisions of EU law which are concerned with the processing of asylum applications. Counsel for the respondent refers to D (H.I.)(a minor) v. RAC & Ors [2011] IEHC 33, where Cooke J. states, at para. 23:

> *"By way of preliminary remark it should be noted that the Procedures Directive refers to both "prioritisation" and "acceleration" as two distinct concepts without defining either of them. On the face of it, an application is "prioritised" when it is examined earlier than in the order which might otherwise apply to asylum applications as received. "Acceleration" would seem to involve an expediting of the process of examination itself so that (whether taken out of order or not), the time taken for the examination is shorter than would otherwise be the case in arriving at the determination. Clearly, an application could be examined in priority without being accelerated and an application reached in ordinary course could then be accelerated in its examination."*

While I note the distinction drawn by the learned judge, in view of my finding that the applicants are entitled to treat the delays in the present cases as to be tantamount to a refusal, I consider that the respondent's prioritisation argument has been rendered moot.

193. The respondent also submits that the effect of the *mandamus* remedy sought by the applicants would be to direct the respondent as to the manner in which resources should have been allocated. It is argued that a grant of *mandamus* would constitute a breach of the principle of the separation of powers and that if the court were to grant *mandamus* it would have the effect of being "*engaged in ... an adjudication of the fairness or otherwise of the manner in which other organs of State had administered public resources". (O'Reilly v. Limerick Corporation* [1989] ILRM 181 at p.195). The court acknowledges that it is not its function to direct the respondent as to her use of resources. Nor does the court do so here. I am not persuaded by the argument that a grant of *mandamus* would breach the principle of the separation of powers. I have set out my reasons for finding that the respondent, at this juncture, is in breach of the provisions of the Directive. Furthermore, there is precedent for the exercise of the court's discretion to make an order of *mandamus*, as can be seen from *Saleem*. I also bear in mind that in *Metock*, the ECJ has emphasised the importance of not depriving the provisions of the Free Movement Directive of their effectiveness.

194. It is also contended that an order of *mandamus* would severely dilute the

necessary appropriate assessment of the visa applications and thus would be detrimental to the public interest. I am not persuaded by this argument. If *mandamus* is granted, what is being directed is that the respondent takes a decision on the visa applications within a given timeframe. The court is not trespassing on whatever checks the respondent may consider it necessary to carry out, in line with the requirements of the Directive, in order to reach a decision on the respective visa applications. Nor is the court directing that the visas be granted, which is entirely a matter for the respondent.

195. The respondent also contends that a grant of *mandamus* in this case would effectively "collapse the system" and it is asserted that a grant would, in effect, be a grant in all the other cases currently pending before the court. I do not find particular weight in this argument. Furthermore, if the court were to decline relief to the applicants purely on this basis, it would, to my mind, infringe the right to an effective remedy, which is provided for in EU law.

196. In all the circumstances, there will be an order directing the respondent to take a decision on the respective visa applications within six weeks of the perfection of the order of the court.

Mr. Ahsan's claim for damages

121. Mr. Ahsan seeks damages for what are said to be expenses directly incurred by reason of the respondent's failure to make a decision on his wife and son's visa applications and on the basis that due to such failure, he has been deprived of family life with his wife and child for a long period. The respondent denies that any entitlement to damages arises and asserts that in any event, such a claim is premature until the visa applications have in fact been considered and until it has been established whether Mr. Ahsan's wife and child are beneficiaries of the Directive and/or the Regulations and are entitled to invoke the right of entry provided for in Art. 5. The respondent says that absent such proof, the only relief Mr. Ahsan can legitimately seek is an order directing that a decision be made. Without making any finding at this juncture as to whether a claim for damages arises, I am persuaded by the respondent's submissions that such a claim is premature until a decision issues on the visa applications.