An Chúirt Uachtarach

The Supreme Court

Clarke CJ
McKechnie J
MacMenamin J
Charleton J
Finlay Geoghegan J

Supreme Court appeal number: S:AP:IE:2018:000182

[2019] IESC 000

Court of Appeal record number: 2018/309

[2018] IECA 384

High Court record number: 2018/787SS

[2018] IEHC 442

Between

SS (Pakistan)

Applicant/Appellant

- and -

The Governor of the Midlands Prison

Respondent/Respondent

Judgment of Mr Justice Peter Charleton delivered on Monday 27 May 2019

1. Since this is an application under Article 40.4 of the Constitution, the sole issue is as to whether the applicant SS, a former student from Pakistan, was or was not in lawful custody on his arrest pursuant to a deportation order. Since then he has been granted bail. No comment is made herein at to that course.

2. On 30 January 2018, the applicant sought a residence card, claiming to be a qualifying family member dependent on the alleged spouse of his father, she being a European Union citizen. That application was made pursuant to Article 7(1) of the European Union (Free Movement of Persons) Regulations 2015 (SI 548 of 2015). Despite the fact that the applicant is now 26 years of age and that all of his family are from Pakistan, he claimed to be a family member of the Romanian lady whom his father had purported to marry on 10 November 2014. Under the terms of the Regulations, Article 7(6) declares that an "applicant under paragraph (1) may remain in the State pending a decision on the application." The respondent Minister has claimed that this requires a non-literal construction.

3. On 20 June 2018, the applicant was arrested in Portlaoise for the purposes of deportation, having already been served with a deportation notice on 9 January 2018. An application for habeas corpus was then made on his behalf.

4. In the High Court, Humphreys J in a judgment dated 17 July 2018 held that the applicant was in lawful custody. This was appealed to the Court of Appeal. In a judgment dated 4 December 2018, Kennedy J again held that the applicant was in lawful custody. Her judgment centred on section 5 of the Interpretation Act 2005 and on the necessity to interpret the Regulations in accordance with Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States. She held that the applicant was in lawful custody notwithstanding that an application had been made by him for a residence card. Her reasoning is set out in the judgment thus:

> 48. I am satisfied that the correct construction of Regulation 3(5) of the Regulations, requires that an applicant establish to the satisfaction of the Minister that he/she is an actual qualifying family member where such an application is made on the basis of an adult dependency. This must be done by providing to the Minister, at the time of application, evidence of sufficient cogency to demonstrate the prima facie existence of such dependency.
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> 49. To interpret Regulation 7(6) as applying to every person who merely applies for a residence card pursuant to Regulation 7(1) would not reflect the intention of the legislator. I am satisfied on a consideration of the entirety of the Regulations, and the legislative scheme under which they were made, that it was not the intention of the Minister to provide a temporary right of residence to any person who simply submits a form seeking a residence card on the basis of dependency without first establishing on a prima facie basis that he/she is an actual qualifying family member.
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> 50. It follows, accordingly, that it is not necessary that the Regulations expressly provide that an individual making an

application on the basis of dependency must firstly establish that he/she is a qualifying family member and in that respect establish a relationship of dependency. It is clear from a consideration of the Regulations that, before an applicant can be considered as an applicant for a residence card, he/she must be a qualifying family member. Regulation 3(5) provides that a person is a qualifying family member where the person is a direct descendant of the Union citizens' spouse, and is a dependent of the Union citizens' spouse. Therefore, the applicant must establish both elements to the satisfaction of the Minister before one can be considered to be an actual qualifying family member. Any other construction of the Regulation would be contrary to the intention of the Minister.

5. In summary, both the High Court and the Court of Appeal held that there should be read into the Regulations a requirement that in order to render a stay in Ireland lawful under Article 7(6), a person applying for a residence card must first establish that he or she is an actual qualifying family member. This, however, was not the procedure pursued by the Minister in dealing with this application. Furthermore, there is no basis either from the plain words of the text or from the context for reading such an interpretation into the plain words of the Regulations. Following an application for habeas corpus, the applicant has been on bail since an early stage. By determination dated 15 January 2019 this Court gave the applicant leave to appeal the decision of the Court of Appeal. During the case management hearings pending this appeal, the applicant expressly stated that he wishes to return to Pakistan of his own motion but not in circumstances where he had been lawfully arrested. This judgment makes no comment as to whether that statement is genuine or as to whether the deportation order against him should not be enforced notwithstanding that his arrest was unlawful.

Background facts

6. The background facts to this matter are set out in the judgment of Humphreys J in the High Court. The apparent lack of merit in the claim may have influenced the interpretation of the relevant subsidiary legislation both there and in the Court of Appeal. These are the facts as found by the High Court:

> 1. The applicant is a citizen of Pakistan. His father claims to have been present in the State unlawfully between 2005 and 2009, although this is not recorded on the Minister's records. All-too-conveniently, during this period of unrecorded alleged presence, he claims to have met a Romanian citizen here in 2007. The applicant's father had a U.K. visa issued in Abu Dhabi between 1st August, 2013 and 1st February, 2014. The applicant also had a U.K. visa valid between 1st January, 2012 and 24th March, 2013.
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> 2. The applicant arrived in the State and applied for asylum on 27th June, 2013. On 22nd August, 2013 he was informed that the U.K. was the State responsible for his application. On 6th September, 2013 he was informed of the requirement to present to GNIB to permit his transfer to the U.K. He did not so present and was classified as an evader. He claims he did not get this notice but that was in circumstances where he wrongfully failed to give notice of his change of address. In such circumstances, service on his last notified address is good and valid in law.
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> 3. On 13th March, 2014 the applicant's father came, or returned, depending on whether one wishes to accept his account, to Ireland. On 15th March, 2014 the father applied for asylum. On 1st August, 2014, that is slightly over four months after re-entering or entering the State at all, the father gave notice of intention to marry the alleged EU national partner. The applicant's father's asylum claim was deemed withdrawn on 19th August, 2014. On 10th November, 2014 the father "married" an EU national, a Ms. N.M. At the time he was illegally present here and married only some eight months after re-entering the State. She was born in 1972 so was 41 at the time, he was born in 1961 and was 53. No one identifiably associated with the wife was listed as a witness on the marriage certificate.
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> 4. The applicant's claim for asylum was deemed withdrawn on 25th February, 2015 as he failed to attend the Refugee Application Commissioner for interview. On 5th March, 2015, the applicant was formally refused refugee status. On 1st July, 2015, the father was granted a residence card based on his "marriage" to a Romanian national.
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> 5. A deportation order was made against the applicant on 2nd July, 2015. That was notified on 5th August, 2015 to the GNIB rather than directly to the applicant because the latter had unlawfully left Balseskin reception centre without a forwarding address. On 29th April, 2016, the father made an application to permit his teenage children to come to the State. On 14th July, 2017, the father, after a visit abroad, came back through Dublin airport. According to the Minister's letter of 20th April, 2018, addressed to him, "you hesitated for a considerable period of time before stating that your wife is Polish". The "wife" was telephoned and said she was not expecting anyone arriving through Dublin airport. The applicant's father could not explain why the "wife" was not aware of his movements. After being allowed to proceed, an unidentified male repeatedly phoned immigration authorities to claim that Ms. N.M. did not understand the question that had been put. Conveniently, the applicant's father's solicitors now claim that he has memory issues, although the G.P.'s letter in that regard is extremely vague.
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> 6. On 9th January, 2018, notice was served on the applicant of the deportation order with a direction to leave the State by 9th February, 2018 and failing that to present to the GNIB on 14th February, 2018. He failed to leave the State but did so present. On 16th January, 2018 the visa application for the applicant's brothers was refused. An appeal is pending. On 30th January, 2018 the applicant made an application under reg. 7(1) of the European Union (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015) as a qualifying family member on the basis that he was dependent on an EU citizen, being his step-mother, and her husband, his father. On 14th February, 2018 he presented to GNIB and was given further directions. On 20th April, 2018 the father was written to, pointing out serious anomalies in his story and inviting submissions as to why his permission should not be revoked. Some submissions were made.
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> 7. On 20th June, 2018, the applicant was arrested at an address in Portlaoise for the purposes of deportation. On 27th June, 2018, in a letter misdated as 21st June, 2018, the Minister refused the applicant's application under reg. 7 of the 2015 regulations on the basis that he was not a qualifying family member because he was not dependent on the EU citizen. It was noted that documents were submitted to the effect that the EU national's place of employment was Ballymount but in the EU 1 Form it was stated that it was Duleek. A P60 form for Ms. N.M. for 2014 was submitted, yet she had no employment record for 2014. Her limited earnings did not support the contention that the alleged employment was genuine given the place of the alleged employment. The Minister was not satisfied she was exercising EU law rights.
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> 8. As regards the claim that the father and the EU citizen were living together in Portlaoise, the landlord was unaware of her living in the property. That letter does not state that the marriage was one of convenience because that decision had not, as of that point, been made. However, on 27th June, 2018, the applicant's father's residence card was revoked on the basis that the marriage was one of convenience. The father has indicated an intention to apply for review. On 28th June, 2018, the applicant's solicitors wrote indicating that a review of the residence refusal would be sought. On 16th

July, 2018, the applicant submitted the application for review of the refusal of his residence application. An application for review by a person who does not have an actual EU law entitlement does not in itself confer any right to remain, although that is often afforded in practice. In any event, the review is not hugely relevant to the Article 40 application because the focus in the proceedings is on the legality of the original arrest.

The procedure

7. If there is to be read into Article 7 of the Regulations a requirement that a person should first of all establish a prima facie case before an application is taken to be valid, thus enabling them to stay in the country, that is not, in fact, the procedure followed by the respondent Minister. By letter dated 30 January 2018 to the EU Treaty Rights Unit of the Irish Naturalisation and Immigration Service in the Department of Justice and Equality, the solicitors on behalf of the applicant's father stated to the respondent Minister that they were now acting on the applicant's behalf. They claimed that "he is the dependent child of the spouse of a European Union National over the age of 21" and that his dependency was "ongoing." The letter claimed that the applicant was "completely dependent" on his father "for his personal maintenance" and that prior to this, he had resided in the UK as a student, relying "on support from his father and family to fund his studies in the UK." Thus, the argument was made that he was "a long term dependent of his father and step-mother as outlined" in an application for a residence card which was enclosed with this letter. It was claimed in the letter that the applicant, his father and the Romanian lady whom his father purportedly married "continue to reside happily together" as an address in Portlaoise. The Minister, it was said, "already conducted an assessment in relation to those circumstances and granted a permission" for his father to remain in the State. In correspondence sent on the same date to the Repatriation Unit, his solicitors asked for an undertaking that the deportation order against him would not be enforced. By letter dated 2 February 2018, the Minister replied that the enforcement of any deportation order "remains an operational matter for the Garda National Immigration Bureau". A letter then followed on 8 March 2018 from the Garda National Immigration Bureau to the applicant requiring him to present himself on 10 April 2018 "in order to facilitate your deportation from the State." No decision was made on the application until after the applicant had been arrested. The decision as of 21 June 2018 was to refuse the applicant a residence card.

8. The decision arose out of the fact that on checking the residence of the applicant's stepmother and father at the address given in Portlaoise, no sign of his father's new wife had ever been spotted. Furthermore, the place where she was supposed to be working could not be verified. He was therefore not a dependent child of a European Union national. There is nothing to indicate that this reasoned refusal was anything other than a thorough and careful analysis of the situation. The problem is that it came a day after the applicant's arrest.

9. Nothing indicates that the respondent Minister ever had in mind that applications of this kind should be run in two stages: a first stage establishing a prima facie basis for the application and then a second stage analysing the application on the basis of it having some preliminary validity to it. Nothing in the legislation supports such an analysis. Even if it did, as a matter of fact, this did not happen. While it has been accepted by counsel on behalf of the applicant that if a person made a fraudulent application claiming that he, for instance, as a young man in his 20s, had married an elderly nun whom he had never met, the application could be taken to be unlawful from the start. It was not conceded, however, that this was such a case. No comment is made in this judgment on the suggestion in Costello - The Law of Habeas Corpus in Ireland (Dublin, 2008) at pages 100-104 that an application under Article 40 of the Constitution can be dismissed on a discretionary basis as being an abuse of the process of the court. Nor is any comment made as to whether an abuse of rights under European Union law can nullify a fraudulent application; see *Cussens v Brosnan* [2008] IEHC 169, [2015] IESC 48, (Case C-251/16) [2017] BVC 61. This case purely depends upon the interpretation of the Regulations.

Interpretation

10. The Regulations must be interpreted, as far as possible, in the light of the underlying Directive. In applying for a residence card, that is an administrative step. The right of residence, if an applicant is a qualifying member, is conferred by the Directive and the residence card is simply evidence of status. Any interpretation of the Regulations cannot be strained to the extent that the plain words of national legislation are undermined so that they are read to mean something which they plainly do not. Where a national measure gives effect to an obligation of the State which arises by reason of membership of the European Union, that legislation must be construed so as conform to that legislative purpose. In *Marleasing SA v La Commercial Internacional de Alimentacion SA* [1990] 4 ECR I-4135 (C-106/89), the European Court of Justice held:

> 6. With regard to the question whether an individual may rely on the directive against a national law, it should be observed that, as the Court has consistently held, a directive may not of itself impose obligations on an individual and, consequently, a provision of a directive may not be relied upon as such against such a person (judgment in Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723).
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> 7. However, it is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.
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> 8. In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.
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> 9. It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question.

11. Such an obligation applies even in a domestic dispute between private parties or national undertakings. From the joined cases of *Pfeiffer and Others v Deutsches Rotes Kreuz* [2004] ECR I-08835 (C-397/01-403/01), the following observations are pertinent:

> 111. It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.
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> 112. That is *a fortiori* the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20).
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> 113. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see to that effect, inter alia, the judgments cited above in *Von Colson and Kamann*, paragraph 26; *Marleasing*, paragraph 8, and Faccini Dori , paragraph 26; see also Case C-63/97 BMW [1999] ECR I-905, paragraph 22; Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 30; and Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-2537, paragraph 21).

12. However, as a principle, conforming interpretation between Irish statute law and the European legislation which necessitated that measure cannot be used beyond the scope of its proper purpose so as to impose a solution which contradicts the plain terms of national law, even though such a strained or even contradictory interpretation may possibly be seen to be in conformity with an obligation under a Directive. There is a limit to the duty of the national courts, who must interpret national law in the light of any European law obligation as far as this is possible. This cannot enable a distortion of what the enactment means or be, as the European Court of Justice has put it, *contra legem*. In *Pupino* [2005] ECR 1-05285 (C-105/03) this was made clear at paragraph 47:

> The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law contra legem. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.

Section 5 of the Interpretation Act 2005

13. It is worthy of mention at this point that some reliance is placed by the submissions of the applicant and of the respondent Minister on section 5 of the Interpretation Act 2005. Emphasis was placed in particular on section 5(2). Section 5 in full provides as follows:

(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.

(2) In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction)-

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,

the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment.

14. This section was inserted into the Act to give effect to both a recommendation of the Law Reform Commission in its consultation paper 'Statutory Drafting and Interpretation: Plain Language and the Law' (LRC-CP14-1999) and to the decision in *Mulcahy v Minister for the Marine* [1994] 11 JIC 0401. The principle stated in the case of *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 (Case 14/83) at paragraph 28 that "it is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of community law" has become a tenet of European Union law. The correct approach to the interpretation of a statutory instrument implementing the provisions of a directive of the European Union is that laid out by O'Donnell J in *NAMA v The Commissioner for Environmental Information* [2015] 4 IR 626 at paragraph 13:

> It does not seem to me to be possible, and if possible, would not be correct, to approach the question of interpretation solely through the prism of national law, and the sometimes elaborate approach to statutory interpretation of Irish law in particular… this specific obligation undertaken by the Ireland as a member of the European Union requires that the courts approach the interpretation of legislation in implementing a directive, so far as possible, teleologically, in order to achieve the purpose of the directive.

15. As a matter of principle, the duty of fidelity and cooperation that every Member State owes to the European Union is fulfilled by transposing a directive into national law, through the choice of whatever method conforms with national legal tradition, so that all of

the rights conferred become operative. Thus, in many but not all instances, a directive establishes a floor of rights. Depending on the text of a directive, it may require to be transposed unaltered. In other instances, more, but not less, rights than European Union law provides for may be conferred by Member States in the transposition. That makes sense because, after all, jurisdictions have competence to confer or alter rights and Member States may so act provided this is not in derogation or contradiction of European obligations. Specific mention is made of the principle, though that is not necessary, in this Directive. Article 37 allows provisions of national law to confer more rights than those contained in the Directive, and Irish law in this instance has conferred greater rights. Normally, an ambiguity in the interpretation of a statutory provision may be resolved through a consideration of the legislative purpose, the background to the law and the context in which the provision appears. It could be that an apparently contrary meaning to that manifestly intended might appear in a statutory context by mistake. Were that rare circumstance to arise, consideration as to whether the Interpretation Acts might assist could be given. Where, however, in black and white terms, an additional right is conferred to supplement those within European Union law, there is no ambiguity and nor is there an absurd situation, simply the exercise of legislative autonomy. Section 5 of the 2005 Act thus has no application to this matter.

The Directive

16. Hence, the first issue in this case is as to whether there is anything in the Directive which requires a two-stage procedure.

17. As stated in Recital 4, the Directive was passed with the objective of securing freedom of movement within the European Union:

> With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act to amend Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (5), and to repeal the following acts: Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (6), Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (7), Council Directive 90/364/EEC of 28 June 1990 on the right of residence (8), Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (9) and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (10).

18. Recital 6 concerns the necessity for Member States to clarify and settle the position of family members of European Union nationals so that they may achieve a status that enables travel on a visa-free basis.

19. Recital 5 notes as the objective of the Directive that a family should not be separated where a family member, who is not a citizen of the European Union, is already in the Member State and a dependent child wishes to join him or her. Family unity is the principle therein set out:

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

20. The fundamental applicable rights are set out in Article 3. This establishes freedom of movement and the necessity to reunify those family members who come within the terms of the Directive:

> 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.
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> 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:
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> > (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;
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> > (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.
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> 3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.
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> 4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.
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> 5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

21. Formalities are specifically addressed in the Directive. Those applying should not abuse rights and this is addressed by requiring that any application should be supported and not simply made on the basis of assertions. Hence, standardisation arises from the Directive so that each Member State may take an approach which conforms with standards throughout European Union territory. Even

so, there is nothing to say that there is any kind of a two-stage procedure. Furthermore, it seems that an application is not valid unless it conforms with the requirements laid down in the legislation. An application may be rejected on that basis, or it can be analysed and subsequently either granted or rejected. What matters is that there is no requirement in the Directive that a pending applicant should be deemed to be lawfully in the country where the application is made and they are awaiting the outcome of an application. Article 10 provides:

> 1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.
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> 2. For the residence card to be issued, Member States shall require presentation of the following documents:
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> (a) a valid passport;
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> (b) a document attesting to the existence of a family relationship or of a registered partnership;
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> (c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;
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> (d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;
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> (e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
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> (f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

22. Clearly, it is an entitlement of Member States to analyse such an application from the point of view of validity and to reach a decision based on issues such as dependency or the existence of a durable relationship. Article 5 concerns rights of entry. What is noteworthy about this provision is that family members who arrive at the territory of a Member State, say in an airport having flown from within the European Union, are subject to verification requirements but may be granted time to produce the necessary documentation. There is nothing to suggest in the Article that granting such facility means that any two-stage procedure is being required of Member States. Article 5 states:

> 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.
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> 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.
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> 3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.
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> 4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.
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> 5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

The Regulations

23. As a core principle of European Union law, where rights are granted by a regulation or directive of the European Union, the duty of sincere cooperation requires all Member States to grant such rights contained therein, where transposition is necessary as in the case of a directive, and not anything less than such rights. Where this has not been done, an individual may have an entitlement to remedies under European law from their Member State. In relation to some directives which provide for minimum harmonisation, it is also open to a Member State to grant further, or additional rights, than the European legislation requires (see, for example, Article 15 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, and Article 1(2) of Council Directive 2006/88/EC of 24 October 2006 on animal health requirements for aquaculture animals and products thereof, and on the prevention and control of certain diseases in aquatic animals). This is not, however, a general rule of directives. Some directives, depending on their content, do not expressly say that Member States can adopt more protective standards and in those cases it may not be possible to go beyond what the directive requires, as it could impact on some other right or interest. It is, as stated previously, a matter of construction. In this case, however, the 2004 Directive clearly states at Article 37 that "the provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive."

24. Bearing that principle in mind, it is not a proper approach to simply ask whether the right granted by a national transposition is actually required by European legislation. It may or may not be. What matters is conformity with the core of what is required.

Thereafter, any Member State may, in addition to the form of the grant of the rights or procedural autonomy relating to the methodology, if that is open, give further or better entitlements beyond what is required by the obligation of sincere cooperation.

25. The central features of the Regulations are that Article 2(1) defines a family member as either "a qualifying family member or a permitted family member". The former is defined "in relation to a particular Union citizen, a person who is, under Regulation 3(5), a qualifying family member of the Union citizen", while a permitted family member is "in relation to a particular Union citizen, a person who is, under Article 2(6), a permitted family member of the Union citizen". The operative section granting rights is Article 3(1) which provides that it applies to "Union citizens entering or remaining in the State in accordance with these Regulations" and "a family member of a Union citizen" as defined and anyone who "becomes a family member while in the State and seeks to remain with the Union citizen in the State." Article 3(5)(b)(ii)(II) of the Regulations defines in the same terms as the Directive those who are entitled to be regarded as family members. These include "the Union citizen's spouse or civil partner" and "a direct descendant of the Union citizen, or of the Union citizen's spouse or civil partner" where that person is below "the age of 21" or, if he or she is not, then that person is a qualifying family member where he or she is "dependent of the Union citizen, or of his or her spouse or civil partner". Clearly, on the application made by the applicant in this case, he is over 21 and he is not a dependant of the supposed spouse of a Union citizen. That is the analysis made by the respondent Minister. There is nothing to suggest that this is invalid and that point is not made in these proceedings.

26. Applications for residence cards are made under Article 7 of the Regulations thus:

(1) A family member who is not a national of a Member State:-

(a) may, within 3 months of the relevant date, apply to the Minister for a residence card, and

(b) shall, where an application under paragraph (a) has not been made within the period specified in that paragraph, before the expiry of 4 months after the relevant date, apply to the Minister for a residence card.

(2) In paragraph (1), the "relevant date" means:-

(a) in the case of a qualifying family member, the date on which he or she:-

(i) entered the State as a qualifying family member, or

(ii) having already been in the State, became a qualifying family member,

and

(b) in the case of a permitted family member:-

(i) the date on which he or she first entered the State as a permitted family member, or

(ii) where he or she was present in the State on the date on which the Minister decided that he or she should be treated as a permitted family member, that date.

(3) An application under paragraph (1) shall contain the particulars specified in Schedule 2 and shall be accompanied by such additional information requirements provided for in that Schedule as are applicable.

(4) The Minister shall cause to be issued a notice acknowledging receipt of an application under paragraph (1).

(5) The Minister shall, within 6 months of the date of receiving an application under paragraph (1):-

(a) where he or she is satisfied that it is appropriate to do so, issue a residence card containing the particulars set out in Schedule 3 to the family member concerned, or

(b) notify the family member concerned that his or her application has been refused, which notification:-

(i) shall be accompanied by a statement of the grounds for the refusal, and

(ii) may be accompanied by a notification under Regulation 21(1) or 23(3), or both.

(6) An applicant under paragraph (1) may remain in the State pending a decision on the application.

Result

27. On the argument in this appeal, it is not contended that Ireland failed in any way to properly transpose the Directive. It is thus unnecessary to further construe the Directive. No view is expressed on whether the right to stay, contended for here by the applicant, on making an application for a residence card, is part of European law. What is involved on this appeal is an issue of the interpretation of domestic legislation. That issue can be resolved by posing the following question: did the Regulations grant the right to stay pending the resolution of an application? The answer is clearly that the Regulations, in the replication of rights, did what was required by the Directive, but also granted that right. The phrase "may remain in the State pending a decision on the application" does appear in the Regulations but is not replicated in the Directive. Instead, the Regulations replicate the entitlement of a person applying for refugee status to remain in the State pending the outcome of that application and the determination of any appeal. This, perhaps coincidentally, is to be found in section 9 of the Refugee Act 1996, as amended. This provision states at subsection 3 that:

> The Minister shall give or cause to be given to a person referred to in subsection (2) a temporary residence certificate (in this section referred to as "a certificate") stating the name and containing a photograph of the person concerned, specifying the date on which the person's application for a declaration was referred to the Commissioner and stating that, subject to the provisions of this Act, and, without prejudice to any other permission or leave granted to the person concerned to remain in the State, the person referred to in the certificate shall not be removed from the State before the final determination of his or her application.

28. It is understandable that in dealing with a similar aspect of immigration law, the State decided to reproduce that right. What was not made integral to the national legislation was any concept of a two-part test: that of demonstrating on application a prima facie case of entitlement by virtue of being a family member of a European Union national, as defined, followed by proof of dependency and relationship.

29. That cannot be read into the national legislation. Thus, his arrest was unlawful and at the date of the application under Article 40 he was not detained in accordance with law and the order of the Court will reflect that.