Neutral Citation: [2016] IEHC 600

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 627 J.R.]

BETWEEN

ATIF MAHMOOD

SHABINA ATIF

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 14th day of October, 2016

1. By order of Mac Eochaidh J., dated 16th November 2015, leave was granted to the applicants to seek judicial review by way of an order of *mandamus* directing the respondent to determine the outstanding Irish visa application made on or about the 24th July, 2015 by the second named applicant. Leave was also granted to seek declaratory relief and damages.

Background

2. The first named applicant is a British and EU citizen. He gives his profession as a Quantity Surveyor. The second named applicant is a Pakistani national. As deposed to in the first named applicant's affidavit sworn 3rd March, 2016, he married the second named applicant on 9th August, 2013, in Pakistan. He avers that although normally resident in the UK, he travelled to Pakistan on 20th July, 2015, and has remained there since. He states that he originally travelled there for a holiday to spend some time with the second named applicant, "intending to accompany her to the State when she received a visa" which it was believed would be granted "within in a few weeks". The first named applicant states that he is not working in Pakistan and that he and the second named applicant are residing with the latter's parents.

3. According to the affidavit sworn by the applicants' solicitor on 11th November, 2015 grounding the within proceedings, in and around the end of June, 2015 an online application was made on behalf of the second named applicant for a short stay single journey Irish visa as a qualifying family member of the first named applicant.

4. On 9th July, 2015, the second named applicant attended the visa application centre in Islamabad where she had her biometric information taken. She provided a number of documents in support of her application, namely a signed visa application summary print out, passport photographs, her original Pakistani passport, a true copy of the bio-data page of the first named applicant's British passport, the applicants' marriage certificate and an attested English translation of the marriage certificate. In response to the question on the visa application as to whether the second named applicant had been refused a visa she disclosed that she had been refused a visa by the United Kingdom. As appears from the affidavit of Mr. Gerry McDonagh, Principal Officer in the Visa Division of the Irish Naturalisation and Immigration Service (INIS) in the respondent's department sworn 12th February, 2016, the second named applicant applied for the UK visa on 17th June, 2014 and it was refused by the British Embassy in Dubai on 29th June, 2014.

5. On 24th July, 2015, the respondent received, via the Honorary Consulate of Ireland in Karachi, a signed "Letter of Application" from the second named applicant dated 13th July, 2015 wherein it was stated that the second named applicant was "applying as the **qualifying SPOUSE** of an EEA citizen to **ACCOMPANY** him when he moves to the Republic of Ireland to exercise his treaty rights by working in the state." The respondent was also provided with a "statement of confirmation to exercise treaty rights in the state" dated 13th July, 2015, which stated "I, [the first named applicant] the British citizen, from whom my spouse, [the second named applicant], derives rights under Directive 2004/38/EC confirm that I intend to exercise treaty rights in the state of Ireland." This document also stated that the first named applicant was presently in Pakistan with his spouse. It went on to recite: "On the grant of my spouse's visa, I will travel to Dublin from Pakistan with my spouse. I intend to stay in a Hotel with my spouse until we can rent suitable accommodation. I request that you grant my spouse's visa application to enable her to accompany me to exercise treaty rights in the State of Ireland." According to the first named applicant's affidavit sworn on 3rd March, 2016, he signed a copy of the "statement of confirmation" that was provided to the respondent in support of the visa application. It appears that the applicants received assistance in making the visa application from Immigration Assistance Services (IAS), an agency with a registered company address in the UK. The full extent of their involvement remains unclear, which the respondent contends is a matter of some concern.

6. On 9th October, 2015 an email and a letter was received by the Irish Consulate in Karachi from IAS, with reference to the second named applicant's visa application. The letter stated, *inter alia*:

> "The application should have been processed by way of accelerated procedure within a period of four weeks pursuant to Regulation 4 (3) (b) and Article 5 (2) of the Regulations/Directive.
>
> Approximately 8 weeks have passed since our clients' application was submitted and a decision is still not forthcoming.
>
> We call upon you to issue a decision on our client's application for a visa to the state within seven days from the date hereof failing which we shall proceed to issue judicial review proceedings in the High Court without further notice to you in circumstances where our client is suffering significant prejudice as a result of your failure to process the application as required by law..."

7. On 12th October, 2015, IAS were informed that the correspondence had been forwarded to the respondent's Dublin visa office and that any "further news or correspondence may be directed directly there" by email.

8. On 30th October, 2015, the applicants' solicitor requested that a decision be made on the visa application within seven days and advised that in default of same judicial review proceedings would issue. On 2nd November, 2015, the respondent's Dublin visa office advised that a signed letter of authority from the second named applicant was required under data protection legislation and on 3rd

November, 2015 the applicants' solicitor forwarded an undated signed statement of authority from the second named applicant.

9. On 13th November, 2015, the respondent advised:

> "The visa application referred to was received in the Visa Office, Dublin on 10/08/2015. The application is currently awaiting examination.
>
> 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 within a reasonable timeframe, processing times will vary; having regard to the volume of applications, their complexity and the resources available.
>
> 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 20 weeks.
>
> As you will appreciate, in order to be fair to all applicants, applications are processed in order by date received in this office."

10. Leave to seek judicial review was sought on 16th November, 2015.

11. The grounds upon which leave was granted are:

> (i) The respondent, in failing to make a decision on the second applicant's application for an Irish visa as a qualifying family member of the first applicant has failed to make a decision as soon as possible and on the basis of an accelerated process, and is acting in breach of Regulation 4 (3) (b) of European Communities (Free Movement of Persons) (No. 2) Regulations 2006 ("the 2006 Regulations") and Art. 5 (2) of Directive 2004/38/EC ("the Directive");
>
> (ii) The respondent, in failing to make a decision on the second applicant's application for an Irish visa as a qualifying family member of the first applicant is acting in breach of the applicant's right to a have a decision taken in accordance with natural justice and constitutional fairness of procedures, which demand that the decision in taken within a reasonable period;
>
> (iii) The respondent's failure to process, consider and decide upon the second applicant's application for an Irish visa and the failure to grant the application constitutes a breach of the legitimate expectation of the applicants that the application would be processed and decided upon and granted within a reasonable period;
>
> (iv) The respondent, her servants or agents have unlawfully prioritised the processing of applications for other types of visas such as business visas, employment visas, and study visas over the processing of the second applicant's visa application.
>
> (v) The respondent is guilty of a breach of the rights of the applicants and each of them under Articles 40.1 and 41 of the Constitution, under Article 8 of the European Convention on Human Rights, under Article 47 of the Charter of Fundamental Rights of the EU, and arising by means of the EU-Law principle of the right to good or sound administration, and in particular their EU-Law right to have their affairs handled fairly and within a reasonable time. By reason of the foregoing, the applicants and each of them have suffered and continue to suffer loss, distress, damage, inconvenience and expense. In view of the breach of the State's obligations under Art. 8 of the European Convention on Human Rights, the respondent has acted in breach of s. 3(1) of the European Convention on Human Rights Act 2003.

12. A statement of opposition was filed on 10th February, 2016 denying that the applicants are entitled to the reliefs sought. In particular, the respondent denies that the applicants come within the scope of Directive 2004/38/EC or the 2006 Regulations. It is pleaded that the first named applicant is not a person who has moved to or resides in Ireland and that save for a bare statement provided by the first named applicant no evidence has been presented of any intention on behalf of either applicant to move to Ireland.

13. It is pleaded that insofar as the applicants may intend to move to Ireland, the purpose of doing so is not a genuine exercise of EU free movement rights but "rather for the purpose of artificially creating conditions purportedly triggering rights on the part of the applicants and in particular a purported right on the part of the (S)econd (A)pplicant (a) in the first instance to enter the State and (b) in due course enter and reside in the United Kingdom".

14. It is further pleaded that "in the premises, the respondent needs adequate time to review and investigate the application and accordingly it would not be appropriate to grant the order of *mandamus* sought. The applicants are put on strict proof that they have a subsisting marital relationship such as would otherwise entitle the second named applicant to derived rights as a qualifying family member and asserts that they cannot seek damages under EU Law.

15. With regard to ground (i) of the statement of grounds, it is pleaded the respondent has not failed to make a decision as soon as possible and that she is in fact making decisions in respect of qualifying family members of EU citizens on the basis of an accelerated process. With regard to ground (ii), the respondent denies acting in breach of any right of the applicants to have a decision taken in accordance with natural justice and constitutional fairness of procedures. Contrary to ground (iii), it is denied that the applicants have or could have any legitimate expectation that the second named applicant's application would be granted with or within a reasonable period or at all. The respondent further denies that she has unlawfully prioritised processing of other types of visas, contrary to what it set out in ground (iv). With regard to ground (v), the respondent does not admit that the applicants or either of them enjoy the rights asserted in that ground.

16. It is pleaded that the respondent is entitled to have regard to reports of potential abuse and fraud and to investigate same, to impose necessary checks in respect of certain applications (including the prevention of abuse and fraud, for the security of the State and for the protection of the integrity and security of the State's immigration policy and of the Common Travel Area) and to take the appropriate time to do so. It is further asserted that insofar as the applicants seek relief in these proceedings the nature of which is to direct the respondent as to the manner in which resources should have been allocated, any such order would constitute a breach of the principle of separation of powers. It is also pleaded that if the applicants are entitled as a matter of law to the reliefs sought, an order of *mandamus* is inappropriate as same "would undermine the appropriate investigation of the underlying issues".

17. The respondent further denies that the applicants are entitled to damages in circumstances were no legal test concerning any of

the provisions pleaded by the applicants is satisfied.

The respondent's position, as set out on affidavit
18. The position of the respondent is set out in the affidavit sworn by Mr. McDonagh. He sets out therein the respondent's contention that neither applicant is a beneficiary for the purposes of the Directive or the relevant Regulations in this jurisdiction transposing the Directive.

19. Without prejudice to the assertion that the applicants are not beneficiaries of the Directive or the Regulations, he asserts that the respondent has a rational, fair and reasonable system for the processing of applications for qualifying family members of EU citizens and that the length of time being taken to process visa applications from qualifying family members of EU citizens is not excessive having regard to a number of factors. 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, 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.

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 those concerning family members of UK citizens. This has put pressure on 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.

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.

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 UK 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. 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.

20. In compliance with the requirement for an "accelerated" process, the respondent asserts that EU Treaty rights 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 submissions advanced on behalf of the applicants
21. At the outset, counsel for the applicants acknowledged that the applicants' ultimate objective is to move from this State to the United Kingdom and live there and that it was in that context that the second named applicant initially applied to the UK authorities for a visa which was denied. However, it is asserted that the application made to the respondent for a visa for the second named applicant constitutes a lawful exercise of the applicants' rights under EU law in circumstances where the first named applicant is an EU citizen who has stated his intention to exercise his free movement rights. It is further contended that the second named applicant as the spouse of the first named applicant is a qualifying family member under Directive 2004/38/EC. As the spouse of the first named applicant, the second named applicant is a beneficiary as defined by Art. 3 of the Directive. There is no basis for the respondent to suggest or intimate that the applicant's marriage is a sham marriage. Even if there was such a concern, that is a basis to refuse the application, not a basis to refuse to process it or delay in processing it. In any event, in circumstances where the application has not been processed, the purported attempt by the respondent to challenge the marriage is disingenuous.

22. As of the date of the within hearing, the visa application has been outstanding for a period of nine months. Such a waiting period cannot constitute the "as soon as possible" requirement of Art. 5 (2) or the requisite "accelerated procedure" provided for by the Directive. Contrary to the respondent's submissions, it now takes longer to obtain an EU family member visa than for any other type of visa, including family reunification visas where income thresholds are required. Notwithstanding the respondent's claim that visa applications are being processed, it appears that while the respondent awaits the results of the Garda "Operation Vantage" investigation, a brake has been put on the processing of such applications and this is evident from Mr. McDonagh's affidavit.

23. The right which the applicants intend to exercise is that which is set out in Art. 6 of the Directive. The first named applicant as the holder of a UK identity card satisfies that requirement, as does the second named applicant as his spouse who is in possession of a Pakistani passport and who will be accompanying the first named applicant to the State. Contrary to the respondent's assertion that the first named applicant is required to be established in the State before the second named applicant can be provided with a visa that is not the legal position. If the respondent is correct in stating that the first named applicant has to be in the State prior to the second named applicant that would mean that the second named applicant would never benefit from the three months provided for in Art. 6 given that, to-date, her visa application remains unprocessed for 9 months.

24. It is contended that the failure of the respondent to process the second named applicant's visa application is not only in breach of Art. 5 (2) of the Directive and Reg. 4 (3) (b) the Irish Regulations, but also breaches the respondent's own 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") which were in place at the time of the visa application in July 2015.

25. Counsel submits that it is abundantly clear from the guidelines that the respondent acknowledges the Directive covers any EU citizens who "intend" to move to the State. It is submitted that the respondent's contention that the applicants are not beneficiaries of the Directive is not supported by the decision of the European Court of Justice (hereafter the ECJ) in *Metock v. Minister for Justice (Case C-127/08)* [2009] QB 318.

26. While the guidelines sets out circumstances under which an application for a visa maybe refused, counsel submits that any such refusal that may ensue can only be in circumstances where an application has been processed, a stage which has not been reached

in the context of the present case. Moreover, the guidelines provide that a visa application such as that made by the second named applicant is to be processed on an accelerated basis within 4 weeks of its receipt.

27. The applicants find themselves in a position where they are now well beyond even the 20 weeks time limit which was advised of in the respondent's email of 13th November, 2015. Counsel submits that what the respondent's guidelines promise in respect of time limits should guide the court in its consideration of whether an order of *mandamus* should be granted. While it may be the case that the respondent is awaiting outcome of a Garda investigation, the respondent is not entitled to suspend the processing of applications from spouses of EU citizens. In any event, the Garda investigation is not particular to the applicants.

28. Furthermore, despite the provisions of the respondent's guidelines, and the entitlement of the applicants under EU Law to a decision as soon as possible on an accelerated basis, the applicants find themselves in a position where the second named applicant's application is now taking longer than other types of visa applications. This is evident from Mr. McDonagh's affidavit.

29. Counsel submits that it is not the case, contrary to the respondent's pleadings, that there is in fact an accelerated procedure in place in circumstances where the delay is ongoing from July, 2015.

30. As to the manner in which the application should be processed, counsel relies on the *dictum* of Hogan J. in *Raducan v. Minister for Justice, Equality and Law Reform* [2012] 1 ILRM 419, as strong authority that visa applications, such as those in issue in these proceedings, should be dealt with quickly. It is submitted that it is difficult to reconcile the respondent's present stance with the approach of Hogan J. in *Raducan*.

31. It is submitted that the applicants' circumstances lend themselves to an order of *mandamus* and in this regard counsel relies on *dictum* of Cooke J. in *Saleem v. Minister for Justice, Equality and Law Reform* [2011] IEHC 49.

32. It may well be the case that if and when the first named applicant becomes established in the State then a question of the applicants' entry into the UK may arise. The applicants however are not at that stage. Provided they are not engaged in something of the nature of terrorism, human trafficking other criminality – and there is no suggestion whatsoever that they are- the purpose of their entry to the State is irrelevant. In this regard, counsel relies on the jurisprudence of the ECJ in *Secretary of State v. Akrich (Case C-109/11)* [2004] QB 756. At this juncture all that is intended to be exercised is a right of entry for up to 3 months.

33. The fact that the applicants used the services of an agency cannot be held against them. While the respondent's grounding affidavit makes raises general concerns regarding possible fraud, the respondent does not ascribe any wrong doing to the said agency. The fact that the agency's website includes testimonials from successful third parties who obtained visas from the respondent cannot, counsel submits, be a determinative factor in these proceedings. Because of the IAS website, the respondent has ascribed certain motives to the applicants. The applicants have never made the case that they will stay in Ireland for 3 months and a day in order to qualify for Art. 7 rights. While they have intimated that it is their aim to go back to the UK eventually, that is a matter that will be ultimately for the UK authorities. Their objective of returning in the long term to the UK is not a fraud or an abuse of rights and it is submitted that the ECJ has said as much in *R. v. Immigration Appeals Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department (Case C-370/90)* [1992] ECR 1.

34. What the applicants wish to do is to come to Ireland. There is no requirement on the first named applicant to have a job in the exercise of his Art. 5 or Art. 6 rights, or to advise the respondent of his accommodation plans. If, following the applicants arrival in the State an application is made for a residence card for the second named applicant that is the point at which the respondent may be entitled to refuse the application for a residence permit if the first named applicant cannot satisfy the provisions of Art. 7. It is further submitted that the respondent is attempting to determine the merits of the visa application in the context of the within proceedings in circumstances where the application has not even been processed.

35. In support of the argument that the respondent is not entitled to suspend the granting of processing of visas on the basis of general concerns, counsel relies on the decision of the ECJ in *McCarthy v. Secretary of State for the Home Department (Case C-202/13)* [2015] QB 651.

36. It is further submitted that the respondent is precluded in EU law from relying on a lack of resources as a reason for delay in processing the application for a visa. In this regard, counsel cites *Commission v. France (Case C-144/97)* [1998] ECR 1-613 and *Commission v. Ireland (Case C-39/88)* [1990] ECR 1-4279.

The respondent's submissions

37. Primarily, the respondent submits that the applicants are not beneficiaries within the meaning of Art. 5 of the Directive and Reg. 4 of the Regulations.

38. There is no entitlement to benefit from the Directive or the Regulations where an applicant has neither moved to nor resides in the State, but is attempting rather to artificially circumvent national immigration laws which, the respondent submits, is an abuse of rights. The applicants' contention that it is sufficient merely to make a bare statement of intention to move to Ireland at some point in the future, that they intend to stay in a hotel once they arrive here and that the State is not entitled to ask for any further explanation or investigate further, is not consistent with EU law. In this regard, counsel cites the decisions of the ECJ in *McCarthy v. Secretary of State for the Home Department (Case C-202/13)* [2015] QB 651 and *McCarthy v. Secretary of State for the Home Department* (C – 434/09) [2011] E.C.R. 1-3375.

39. The first named applicant has not exercised his EU Treaty rights and has not established himself in Ireland. The jurisprudence of the ECJ shows that a short term stay is not sufficient to invoke rights such as those acknowledged by the European Court of Justice in *Surinder Singh*. In this regard, counsel relies on the decision of ECJ in *O and B v. the Netherlands* (C-456/12).

40. Counsel also relies on the jurisprudence of the ECJ in *Dereci & Ors (Case C-256/ 11)*[2011] E.C.R. 1-11315 and *Ymeraga (Case C-87/12)* in support of the proposition that where an EU citizen has never exercised EU Treaty rights, derivative rights under the Directive cannot accrue to his or her family members.

41. While it is acknowledged that the second named applicant's visa application is yet to be processed, it remains the case that once processed the respondent has the right to refuse a visa if an abuse of rights or fraud is established as provided for by Art. 35 of the Directive. Moreover, pursuant to Art. 27, the respondent may restrict freedom of movement and residence of union citizens and their family members on grounds of public policy, public security and public health.

42. In the present case, the applicants' stated intention is to come to Ireland only for a short stay. Thus in those circumstances, it

remains open to the respondent to review the visa application and make such enquiries as are necessary and perhaps refuse it if there is no genuine intention to reside in the State. It is submitted that there must be such genuine intention as acknowledged by the Irish courts in *Kweder v. Minister for Justice, Equality and Law Reform* [1996] 1 IR 381 and the jurisprudence of the ECJ.

43. Insofar as the applicants place reliance on the decision of the ECJ in *Akrich* as authority for the proposition that an intent to return to the country of which the first named applicant is a citizen is not a relevant consideration, counsel submits that the decision of the ECJ in this regard is predicated on the EU citizen pursuing or wishing to pursue "*an effective and genuine activity*". Thus, artificial conduct cannot be regarded as genuine activity so as to bring an applicant under the *Surinder Singh* principle. Counsel submits that in the context of assessing the genuineness of the applicants, the IAS website and its boasts would suggest that people are not moving to Ireland to establish themselves; rather they make that appear to be the case when all they want is to go to the UK. Thus, at stake here is the concern that this State will act as a magnet to persons otherwise not lawfully entitled to go to the UK, a situation which may put the Common Travel Area in jeopardy.

44. Essentially, the respondent's concern is as to whether some of the applications presently pending are affecting false conformity with the Directive or alternatively actual formal conformity which does not accord with EU Treaty rights and which is also contrary to the fundamental policy of the Common Travel Area. Counsel emphasised however, that the present case is not one of a finding of an abuse of rights by the applicants, as the visa application has not been processed.

45. It is submitted that the respondent is obliged to examine each case individually as referred to by the ECJ in its decision in *McCarthy v. Secretary of State for the Home Department (Case C-202/13)* [2015] QB 651 and that the respondent is conducting such individual examinations with regard to the 7,000 or so applications currently pending.

46. The respondent has a concern that all that will happen in respect of the applicants is that there will be a formal observance of conditions and that the first named applicant will come to Ireland for three months and a day and perhaps set up as self-employed and thus establish on the surface formal observance of EU rules. In those circumstances, where the objective of the applicants is to go to the UK ultimately, the purpose of the EU Treaty provisions relating to economic activity will not be achieved. This is what is at the heart of the respondent's concern.

47. In light of the applicants' contention that they do not have to tell the respondent what they will be doing in Ireland, together with their intention to move ultimately from this State to the UK, the respondent apprehends that the applicants' stated intention does not comply with what the Directive provides for, such that they cannot benefit from the Directive.

48. It is submitted that even if the applicants are beneficiaries of the Directive, the respondent has in place a consistent, fair and rational system to process the visa applications of qualifying family members of EU citizens, which meets the requirements of Art. 5 (2). Furthermore, as averred to by Mr. McDonagh, the length of time being taken to process such applications is not excessive having regard to the factors alluded to on affidavit. Counsel reiterates that it is not the case that the respondent is not dealing with or not processing cases; applications are being processed and decisions are being issued. It is however necessary for the respondent to make enquires and conduct investigations regarding underlying issues so that each case can be dealt with on its merits. The time span for such examination will remain unknown until checks are carried out.

49. While Art. 5 (2) requires that visas be issued "as soon as possible", what is "possible" must be looked at in a factual context. Here, the context is the enormous increase in the number of applications and where all applications must be looked at individually. It is submitted that the respondent operates the accelerated procedure called for by the Directive in circumstances where the standard checks of visa applicants are far less than in relation to other types of visa applications. While the processing of EU Treaty rights visa applications would normally be done within four weeks this has not been possible because of the increase in the number of applications. In those circumstances, there has been no breach of the Directive or of the relevant Regulations.

50. It is submitted that the applicants' reliance on the judgment of Hogan J. in *Raducan* is misplaced. That case was wholly different on the facts and concerned visas upon entry at the borders of the State, namely arrival at Dublin Airport. Nothing in that judgment holds that the respondent is not entitled to take into account all relevant circumstances, nor it is authority for the proposition that in an administrative scheme requiring prior visa applications the respondent is required to short circuit necessary investigations. Thus, the requirement that a visa application be determined as soon as possible and on the basis of an accelerated process cannot be read in an artificially narrow manner, divorced from its context, including wider considerations of public policy within the meaning of EU Law.

51. As a matter of EU public policy, in the Schengen Area, external border controls for nationals for a number of States are mandatory. This includes Pakistan. Thus, the public policy considerations which the respondent 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 UK and Ireland to impose entry visa requirements pursuant to Protocols 20 and 21 to the TEU and TFEU. Contrary to the applicants' contention, as each visa application must be thoroughly examined, a Member State cannot be in breach of the Directive while dealing with EU Treaty rights visa applications *bona fide* in accordance with Art. 5 (2), if unavoidable exigencies such as an exceptional and unexpected surge in applications mean that typical timeframes may not be met. Particularly this occurs in those cases involving some countries like Afghanistan where "the accuracy of…requested supporting documentation remains an ongoing concern", "taking into account the volatile political, economic and security environment", and Iraq, which is "a very peculiar and challenging environment as per visa issuing" in the context of "recurring attempts of submission of fake or manipulated documents", as documented in EU "Local Schengen Cooperation" reports published in 2015.

52. Counsel also reiterates that in instances of fraud there is no entitlement to the benefit of EU law, as confirmed by the ECJ in Joined Cases C-131/13, 163/13 and 164/13 *Schoenimport "Italmoda"*, where the Court stated that national authorities are entitled to refuse a person the benefit of a right which has been claimed by fraud or an abuse of a right in circumstances where same was established by objective elements of proof. It is accepted that in the present case fraud has not been established. However, since under EU law the respondent is entitled to have regard to issues of fraud or abuse of rights as may arise in the course of a particular application the consequence of this is that relevant time scales for the processing of applications are affected. Thus, the time being taken by the respondent should not be taken as indicating that the respondent is not making decisions.

53. It is submitted that for *mandamus* to be granted the court must find that there is such an egregious and unjustified delay in dealing with the application as to be tantamount to a refusal in its effect. In the present case, there has been no such egregious and unjustified delay, as is apparent from Mr. McDonagh's verifying affidavit which sets out the challenges faced by the respondent.

54. Insofar as counsel for the applicant places reliance on the decisions of the ECJ in *Commission v. Ireland* and *Commission v. France*, such reliance is misplaced in circumstances where the respondent is not refusing to deal with the visa application.

55. It is contended that what the applicants seek in the present proceedings is prioritisation which is not provided for in the Directive. They are entitled to an accelerated procedure which relates to procedural expedition when the examination of an application commences. As to the distinction between the two concepts, Counsel cites the decision of Cooke J. in *D.(H.I.)(a minor) v. RAC* [2011] IEHC 33. To prioritise and assign resources exclusively to considering qualifying family member applications of EU citizens would require in effect the restructuring of INIS and significant expenditure. The phrase "as soon as possible" is subjective, and not prescriptive of a specific time. For instance, it does not place an express requirement on Member States to maintain sufficient competent staff to deal with EU Treaty rights visa applications. It is submitted that the requirement to ensure applications are dealt with as soon as possible is not breached in circumstances where an orderly, rational and fair system for dealing with applications is affected by unavoidable delays caused by resource constraints and an unprecedented surge in applications. Accordingly, the respondent is acting in compliance with the Directive and the Regulations. Thus, the applicants in this case have not established the threshold set by Cooke J. in *Saleem* for the grant of *mandamus*.

56. Even if the court were to find that the respondent is in breach of Art. 5 (2), *mandamus* would be inappropriate against the background set out in Mr. McDonagh's affidavit. Given that there are some 7,000 applicants for such visas pending, if the court were to direct *mandamus*, it would result in "chaos". It is a discretionary remedy and it should be borne in mind that granting it to one applicant is in effect a grant in all the other cases which are before the court. This, the respondent submits, would collapse the system. It would have the effect that the respondent would not be able to check each application individually in accordance with EU Law and that the respondent may therefore be forced to unlawfully refuse and grant visa applications.

Considerations
57. The first question the court must determine is whether the applicants are persons entitled to invoke the Directive. If they are so entitled, then the next question which arises is whether the respondent has breached her obligations under the Directive. In the event that there has been a breach, the court must determine, *inter alia*, whether a grant of *mandamus* is warranted.

58. Before considering the issues which arise in the present proceedings, it is apposite to set out the relevant statutory provisions which provide the backdrop to the within application.

59. Art. 3 Directive 2004/38/EC 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.

60. An EU citizen's right of entry to a Member State is set out 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….

61. 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.

62. 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).

63. From 1st February, 2016, and subject to certain transitional provisions, the 2006 Regulations have been replaced by the European Communities (Free Movement of Persons) Regulations 2015 (the 2015 Regulations).

64. The 2006 Regulations included an EU citizen's spouse within the definition of "qualifying family member", as does the 2015

Regulations.

65. 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…..

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

66. 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 of the Directive?
67. The first issue which arises for consideration is the respondent's contention that the applicants cannot benefit from the Directive given that the first named applicant is not a person resides or is established in the State and that a mere intention to do so cannot trigger the application of the Directive, thereby also precluding the second named applicant from relying on Art. 5 (2). It is further argued that insofar as the applicants may intend to move to the State it is not a genuine exercise of free movement rights but rather for the purpose of artificially creating conditions purportedly triggering rights on the part of the applicants, in particular a purported right of the second named applicant to enter the State and in due course enter and reside in the UK.

68. For the Directive to be triggered, it is necessary for the EU citizen to demonstrate to another Member State that the right of free movement is being exercised, as the ECT has stated in *McCarthy v. Secretary of State for the Home Department (Case C – 434/09)* [2011] E.C.R 1-3375:

> *"32. … according to Article 3(1) of Directive 2004/38, all Union citizens who 'move to' or reside in a Member State 'other' than that of which they are a national are beneficiaries of that directive.*
>
> *…*
>
> *35. …it is apparent from Directive 2004/38, taken as a whole, that the residence to which it refers is linked to the exercise of the freedom of movement for persons."*

69. The second named applicant's entitlements are dependent on the first named applicant's exercise of his free movement rights, as the ECJ has stated in *McCarthy v. Secretary of State for the Home Department* (Case-C 202/13) [2015] QB 651:

> "34 *Whilst the provisions of Directive 2004/38 do not confer any autonomous right on family members of a Union citizen who are not nationals of a Member State, any rights conferred on them by provisions of EU law on Union citizenship are rights derived from the exercise by a Union citizen of his freedom of movement (see, to this effect, judgment in O. and B., EU:C:2014:135, paragraph 36 and the case-law cited).*"

70. In answer to the respondent's contention that the applicants do not come within the scope of the Directive, the applicants argue that there is no requirement on the first named applicant to have to first move to the State and to be established here before they can come under the scope of the Directive. It is submitted that such a requirement would render both Art. 5 (1) and Art. 6 (2), which provide respectively for the right of non national qualifying family members to enter the State and reside in the host Member State for up to three months entirely ineffective. Counsel asserts that if the first named applicant had to be "*established*" in the State the second named applicant would never be able to enjoy the benefits of Art. 6 (2). He also submits that were it the legal position that the first named applicant was required to be in the State before the second named applicant's visa application could be processed, her application could have been rejected *in liminie* but that has not happened in this case.

71. Clearly, the first named applicant has not yet exercised his free movement rights in the sense of having entered the State or having become established here. He has however indicated his intention to enter the State in his letter dated 13th July, 2015, and that he will travel with the second named applicant to the State. The second named applicant has also stated that she will be accompanied by the first named applicant upon entry into the State. I am satisfied that the provisions of the Directive anticipate such a scenario. This is clear from the provisions of Art. 3, which refer to the Union citizen being accompanied by his or her family member to the host Member State. It appears that the first named applicant is awaiting the provision of a visa to the second named applicant, who as a Pakistani national is required to have an entry visa, before exercising his free movement rights. Since the Directive provides for a derivative right of entry for a visa-required qualifying family member accompanying the Union citizen to the host Member State, it logically follows that the Union citizen does not have to have already moved to the host Member State in advance in order for the second named applicant, as a visa required non-national family member, to be entitled to invoke the provisions of Art. 5 (2) of the Directive. Put another way, if it was intended that the provisions of Art. 5 (1) and (2) could only be relied on by family members *after* EU citizens have moved to the host Member State, then the provisions in the Directive which provide for the rights of entry of qualifying family members who "accompany" EU citizens to the host Member State could be rendered redundant.

72. Thus, it seems to the court that had it been intended that EU citizens and visa required qualifying family members could not to enter the State together and that a visa required family member's entitlement to apply for a visa was dependent on the prior exercise of the EU citizen's exercise of free movement, then the Directive would have made that clear in express terms. Since the second named applicant's entry depends on the procurement of a visa in order to accompany the first named applicant in the intended exercise of his right of entry into the State, it would, to my mind, be an unduly restrictive interpretation of the Directive to preclude the second named applicant from invoking Art. 5 (2). I am satisfied that the position being adopted by the respondent is not supported by a clear reading of the Directive or indeed the Irish Regulations. I find nothing in the case law cited by the respondent to support the argument being advanced. The ECJ's pronouncements in *Dereci* and *Ymeraga* (relied on by the respondent) are distinguishable, in circumstances where the issue in the present case concerns the applicants' intended entry into this State, which by implication means the first named applicant's (a UK citizen) intention to move from the Member State of which he is a citizen. In *Ymeraga*, the ECJ was concerned with circumstances where the derivative rights of residence were claimed in circumstances where "*the Union citizen concerned has never exercised his right of freedom of movement and has always resided, as a Union citizen, in the Member State of which he holds the nationality*." Thus the Court held "*that he is not covered by the concept of 'beneficiary' for the purpose of Article 3(1) of Directive 2004/38, so that that directive is applicable neither to him nor to his family members.*" (Para. 32)

73. Furthermore, the ECJ's interpretation of the Directive certainly envisages that the exercise of an EU citizen's free movement may

commence in the company of family members. In *Metock v. Minister for Justice* [2009] QB 318, the ECJ stated:

> *"51. It must also be pointed out that articles 5, 6(2) and 7(2) of Directive 2004/38/EC confer the rights of entry, of residence for up to three months, and of residence for more than three months in the host member state on nationals of non-member countries who are family members of a Union citizen whom they accompany or join in that member state, without any reference to the place or conditions of residence they had before arriving in that member state.*
>
> *…*
>
> *54. In those circumstances, Directive 2004/38/EC must be interpreted as applying to all nationals of non-member countries who are family members of a Union citizen within the meaning of article 2(2) of that Directive and accompany or join the Union citizen in a member state other than that of which he is a national, and as conferring on them rights of entry and residence in that member state, without distinguishing according to whether or not the national of a non-member country has already resided lawfully in another member state."* (Emphasis added)

74. I am also satisfied that the respondent's own 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" anticipate the concept of planned or intended exercise of EU Treaty rights. Indeed, this is evident from the very title of the guidelines.

The Guidelines provide:

> 2.2 In order for an applicant to establish that they are a qualifying family member or a permitted family member they must prove:
>
> (i) that there is an EU citizen from whom they can derive rights under the Directive,
>
> (ii) the existence of the required family relationship to that EU citizen including where relevant dependency or membership of the household,
>
> (iii) that they will be accompanying or joining an EU citizen who is exercising free movement rights in Ireland or provide a declaration or statement of confirmation that the EU citizen will be exercising those rights at the time of the family member's arrival in Ireland.
>
> 2.5 In relation to 2.3 (iv) the nature of the proof will vary depending on whether: the applicant is accompanying the EU citizen to the State, the applicant is joining the EU citizen in the State and the EU citizen is lawfully present in the State when the application is made; or the applicant is joining the EU citizen in the State and the EU citizen has not moved to the State at the time of the making of the application but intends to do so. In all cases it is a matter for the applicant to provide proof that the EU citizen is exercising free movement rights in Ireland or to provide a declaration or statement of confirmation that the EU citizen will be exercising those rights at the time of the family member's arrival in Ireland.
>
> 2.6 In terms of the type of documentary evidence that may be requested as proof of an EU citizen's lawful presence in Ireland it is important to note that under Article 6 of the Directive EU citizens have the right to reside in the State for up to 3 months without any conditions and that the requirements in Article 7 of the Directive relating to employment, resources etc only arise in the case of EU citizens residing in Ireland for more than 3 months. In view of this it is not appropriate to require evidence of the circumstances of the EU citizen's residence in the State other than in the context of requiring the applicant to prove that the EU citizen is exercising their free movement rights or to provide a declaration or statement of confirmation that the EU citizen will be exercising those rights at the time of the applicant's arrival in the State.
>
> 2.7 Other than the proofs listed at 2.3 above it is not permitted to request the applicant to provide additional proofs (of the sort that would generally be required for an application made other than under the Directive) regarding the purpose of their travel to the State and their means of subsistence while in the State e.g. evidence of employment, invitation letter from host or return ticket.
>
> …
>
> 4.6 In relation to point 4.1 (iv), it is important to note that an application cannot be refused on the basis that the EU citizen is not exercising free movement rights in the State if (a) it is shown that the EU citizen will be accompanying the applicant on their journey to the State, (b) the EU Citizen has been less than three months in the State or (c) it is confirmed that the EU citizen, although not in the State at the time of the visa application, will be lawfully in the State at the time of the applicant's arrival in the State. This is because the EU Citizen and their family members have a right of residence, under Article 6 of the Directive, for up to three months in the State without any conditions (this is, in itself, an exercise of free movement rights under the Directive).

75. Paragraph 4.6 in my view is a clear acknowledgement by the respondent of the import of the right afforded EU citizens and their family members under Art. 5 and Art. 6 of the Directive.

76. The second limb of the respondent's argument that the applicants are not entitled to invoke the Directive relates to the applicants' aim, as acknowledged by their counsel, to ultimately move to the UK from Ireland. Effectively, the respondent contends that the applicants' entitlement to invoke Art. 5 (2) should be negated by their declared intention to move to the UK at an unspecified time, once the first named applicant becomes established in the State. The respondent's contention is that although the second named applicant's visa application is yet to be objectively and subjectively decided upon, a question nonetheless arises as to whether the applicants have set themselves upon a path of abuse of EU Treaty rights. In canvassing this argument, the respondent emphasises that no findings have been made with regard to the applicants (nor could they since the visa application remains unprocessed).

77. The case made by the applicants is that the respondent's approach is to impose the requirements of Art. 7 of the Directive on the first named applicant at this juncture. They argue that while it may well be their ultimate intention to move to the UK, all that is

presently in issue is the exercise of the first named applicant's Art. 5 and Art. 6 rights and the consequent derivative right of entry and residence of up to three months for the second named applicant as a qualifying family member. The applicants submit that the provisions of Art. 7 (1) or (2) do not, at this point, require to be satisfied. They assert that while it will be necessary for the first named applicant to establish himself in this jurisdiction such as to satisfy the requirements of Art. 7 of the Directive, it is nonetheless not permissible for the respondent (even where the applicants have intimated that their ultimate objective is to move to the UK) to ascribe an ill-motive to the first named applicant's intended exercise of his Art. 5 and Art. 6 rights and the second named applicant's derivative rights under Art. 5 and Art. 6 (2).

78. I agree with the applicants' arguments and do not find merit in the respondent's submission. I am satisfied that the mere fact that the applicants have intimated (through their counsel) that their ultimate aim is to move to the UK cannot deprive them of their entitlement to invoke Art. 5.

79. In *Secretary of State v. Akrich (Case C-109/01)* [2004] Q B 756, 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)

80. 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 v. Secretary of State for the Home Department (Case C – 202/13)*[2015] QB 651. It is submitted that this was also recognised in *Akrich* itself.

81. While that is undoubtedly the case, and while this court acknowledges the respondent's concerns about possible abuse of EU Treaty rights, as averred to in Mr. McDonagh's affidavit, I find that, at this juncture, the respondent's general concerns cannot prevent the applicants from invoking Art. 5 of the Directive in circumstances where the first named applicant is entitled as an EU citizen to exercise his right of entry pursuant to Art.5 (1). This also applies in circumstances where the first named applicant as an EU citizen, and the second named applicant as a qualifying family member, "may reside in the State for up to three months", subject to the first named applicant being the holder of a passport or identity card and the second named applicant the holder of a passport, as provided for in Art. 6. This is, of course, subject to the applicants establishing that the second named applicant (for the purpose of entry into the State) is a beneficiary of the Directive, as defined in Arts. 2 and 3. No other conditions or formalities are required. Member States may of course control the entry into their territory of family members of EU citizens. In *Metock*, the ECJ stated:

> *"74 Secondly, Directive 2004/38/EC does not deprive the member states of all possibility of controlling the entry into their territory of family members of Union citizens. Under chapter VI of that Directive, member states may, where it is justified, refuse entry and residence on grounds of public policy, public security or public health. Such a refusal will be based on an individual examination of the particular case.*
>
> *75 Moreover, in accordance with article 35 of Directive 2004/38 , member states may adopt the necessary measures to refuse, terminate or withdraw any right conferred by that Directive in the case of abuse of rights or fraud, such as marriages of convenience, it being understood that any such measure must be proportionate and subject to the procedural safeguards provided for in the Directive."*

82. However, given that the second named applicant's visa application has 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 application, or otherwise leading to a conclusion that the second named applicant is not a beneficiary for the purposes of the Directive, as presently defined in the 2015 Regulations.

83. It will be for the applicants, should the first named applicant assert Art. 7 rights with a consequent application for a residence card for the second named applicant, to show that they meet the requirements of Art. 7 (1) and (2) of the Directive. At the time of the application for the residence card, it will be for the respondent, having carried out reasonable checks, to decide if the basic conditions of Art. 7 are met. As stated by the ECJ in *O and B v. the Netherlands (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).*

84. 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."

85. 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."*

86. If at some point in the future the first named applicant wishes to assert that he has established residence in the State such as to create on his return to the UK a derived right of residence there for the second named applicant, 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 TFEU, for the third-country national with whom that citizen lived as a family in the host Member State*." (Para. 56)

87. 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)*

88. 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)*

89. Whether the second named applicant 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.

90. By reason of all of the foregoing, I find that the respondent's argument that the applicants do not come under the scope of Art. 5 (1) and (2) of the Directive is not sustainable.

Is the respondent in breach of Art.5 (2) of the Directive and Reg. 4 (3) (b) of the Regulations?
91. 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.

92. 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 v. Minister for Justice*, 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)'"*

93. 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)*".

94. 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*."

95. The applicants do not make the case that there should be an entitlement to the visa being processed at the airport but they assert that the respondent is in breach of the Art. 5 given the delay which has ensued with regard to the second named applicant's visa application and in circumstances where the respondent's own guidelines provide for a timeline of four weeks.

96. 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. 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.

97. I agree with the applicants' contention. The last timeframe of twenty weeks for a decision to issue, as advised by the respondent in November, 2015, has come and gone and the time period for a decision remains unspecified. Given 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 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)

98. 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.

99. I now turn to the delay in the processing of the second named applicant's visa application. The forwarding of the application from the Irish Consulate in Karachi to Dublin took a month, in effect the length of time in which, pursuant to the guidelines, the application should have been processed from beginning to end.

100. The affidavit of Ms. Emma Peppard of INIS avers that the application was received by the Consulate on 13th July, 2015 and that further information was received on 24th July, 2015. The application was then processed by the Honorary Counsel on 6th August, 2015 and it was received by INIS on 10th August, 2015. Ms. Peppard avers that in July 2015 there were a total of 312 visa applications from Pakistani nationals compared with a total of 369 such applications for the whole of 2014 (of which 51 were received in July 2014). She states that the unexpected upsurge in applications meant that the Consulate could not process them as quickly as previously.

101. The argument advanced by the respondent with regard to the time it took for the application to reach INIS is part of the wider case being advanced, namely what is described as the "unprecedented" surge in the number of EU Treaty rights applications, in particular from family members of UK citizens coming from Afghanistan, Pakistan and Iraq. The backlog of applications stands at approximately 7000.

102. The evidence put before the court by the respondent shows that there has been 1,417% increase in the volume of applications for EU Treaty rights 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.

103. 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 Gardaí, "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".

104. At para. 44 of his affidavit, Mr. McDonagh avers that the respondent is aware 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) and 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.

105. Mr. McDonagh asserts:

> "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). For this reason, I say and believe that the respondent and agencies accountable to her are presently ascertaining the full scope of the underline issues. However, I say and believe that any Court order resulting in undue prioritisation of certain pending visa applications, which are receiving individual checks, will place an undue strain on the resources of INIS and that the respondent must be afforded a sufficient time to carry out such checks."

He goes on to state:

> "For the avoidance of any doubt, the respondent has not processed the within applications and therefore cannot and is not making any comment on the merits of the Second Applicant's application to INIS (or any of the applications of third country nationals presently before the court)."

106. Mr. McDonagh also avers that while IAS (who has provided assistance to the applicants) "has not been the subject of specific investigation, and no conclusions have been reached regarding the nature of its activities," the respondent has concerns regarding certain claims made on behalf of IAS on its website. At para. 46, he alludes to information gleaned from the IAS website:

> "(a) Immigration Assistance Services claim to guarantee the spouse of a British citizen a UK visa based upon *Surinder Singh*. They claim that they will 'obtain a visa for your spouse in Ireland'. They claim to provide paid employment, or to set the applicant up as self-employed with a website and online business. They claim to assist in finding accommodation. They claim that 'the law defines the minimum time you have to spend in the EU country as three months and a day. After that time we arrange for you to return to the UK with your spouse immediately';
>
> (b) Immigration Assistance Services state: '*The Surinder Singh route has other advantages over directly applying for a UK visa. Ireland usually process EU spouse visa applications within a few months compared to the UK processing time, which can take up to six months and is liable to be refused. The other advantages of the EU route are the ability to claim benefits on the return to the UK, access to NHS free of charge and the ability to obtain a student loan for your spouse. The UK visa route limits access to welfare for five years for both spouses*.'
>
> (c) Immigration Assistance Services provides services for £2,499 for '*guaranteed entry clearance for your spouse in an EEA State and the United Kingdom*' and an advanced package including employment or self employment for £3,999. I say and apprehend Immigration Assistance Services also previously offered on their website (still retrievable from same but not linked to from the visible pages) three so-called "*Surinder Singh*" packages: Silver, for £2,749 for '*guaranteed entry clearance for your spouse in an EEA State and the United Kingdom*'; Gold, including additionally accommodation in the EEA State, for £4,499; and Platinum, for £6,999 including additionally employment or self employment. I say that, no investigation having been concluded, the respondent is not suggesting that Immigration Assistance is not providing such employment or self employment or that its clients are not availing of same;
>
> (d) Immigration Assistance Services stated that: '*want your visa process quickly? If you have waited over the permitted time of four weeks for your visa, then we can help. We will file a mandamus application on your behalf in Ireland in the High Court against the INIS. The process usually takes two weeks and the judge orders the INIS to accelerate the processing of your application. We can legally compel the INIS to issue your decision quickly*'."

107. Mr. McDonagh's affidavit instances testimonials posted by IAS on its website from named individuals to whom it provided assistance. A testimonial of one such individual is recounted on the website as follows: "*I tried to do the SS myself and kept being refused for my UK Family Permit. I spent 6 months in Dublin with no hope and no work. I read about IAS on facebook and they agreed to take over my case. They set me up as self employed and created a website for me and helped me to promote it, this time my FP was approved in 7 days…*".

108. Another such testimonial reads: "*I applied for an accompany EU spouse visa myself for Ireland and I waited eleven weeks for a decision. My emails were ignored and so it didn't help. I read online that there were Ireland EU visa delays. Immigration assistance services took Ireland immigration to court for me and the judge made them process my applications within two weeks*". Mr. McDonagh states that the respondent is unaware of any such judgment by the Irish courts.

109. Mr. McDonagh goes on to aver as follows:

> "I say and believe and am advised that short stay visas for family members of union citizens, and period of residence of just 3 months, are insufficient to ground an application under the *Surinder Singh* principle. I say and believe and am advised that even if no illegality pertains in the provision of accommodation or employment, the artificial nature of the applications is an abuse of the Directive and cannot ground a Union citizen's acquisition of derivative rights in respect of his or her family member."

110. 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."

111. It is clear that the respondent has considerable concerns regarding possible abuse of the Directive in the context, in particular, of the increased number of applications by the spouses of UK citizens for visas. This, the respondent acknowledges, has infected all elements of this case. It is against this backdrop that the respondent seeks to defend the present application. 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 EU Treaty rights. The respondent is of the belief that some of the unprecedented number of applicants whose applications are presently pending may not be genuine.

112. 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 EU Treaty rights, such as for example marriages of convenience or other "artificial conduct" for the purposes, as Mr. McDonagh puts it, "of obtaining a right of entry and residence under EU, and accessing the UK through the land border of the island of Ireland" 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. I further accept that it is entirely understandable as to why the respondent would be perturbed by some of the content of the "testimonials" posted on the IAS website, particularly given the reality of the substantial increase in the number of applications from visa required non nationals family

members of EU citizens.

113. 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 and 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 becomes clearer. 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.

114. 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 second named applicant's visa application and to sustain the respondent's argument that she is in compliance with Art. 5 (2).

115. 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:-*
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> > *'…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."*

116. 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.

117. 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*.

118. As to what might be considered a reasonable period of delay in the present case in light of the factors alluded to by Cooke J. in *Nearing*, it is necessary firstly to consider the nature of the decision sought from the respondent in the present case. It pertains in the first instance to the first named applicant's entitlement as an EU citizen to exercise one of the fundamental rights granted under EU law, that of free movement across the territory of the Union and to the second named applicant's entitlement as his spouse to accompany him. In this regard it is worth noting that in *Metock* the ECJ has emphasised "*the necessity of not interpreting the provisions of Directive 2004/38/EC restrictively and not depriving them of their effectiveness*". (Para.93)

119. The applicants' circumstances require the second named applicant, as a Pakistani national, to obtain a visa in order for her to exercise her derivative right of free movement and enter the State in the company of the first named applicant, as appears to be the applicants' preferred option. Counsel for the applicants make the point, and it is of some note, that if the second named applicant was a non national from a non-visa required third country she could simply turn up with the first named applicant at the airport and her entry into the State would be facilitated, subject presumably to proof of identity and family membership, and absent any concerns as might arise under Art. 27 or Art. 35 of the Directive.

120. For the purposes of Art. 5, family members of EU citizens (including visa required non nationals) need only to provide evidence of identity and proof of their family link to the EU citizen exercising his or her EU treaty rights. Indeed, this is acknowledged by Mr. McDonagh at para. 29 of his affidavit. As a visa required non national, the second named applicant is required by the respondent to make her application from outside the State. This was done and the requisite information was provided by 24th July, 2015, including details of the first named applicant's passport and a statement from him of his intention to exercise EU Treaty rights, as provided for in the respondent's guidelines. On the face of it (and the court is not making any determination as to the substantive content of the information or any issue that might arise from the information supplied), by the time the information was received by INIS in August, 2015 the respondent had the necessary data for her perusal, and for the purpose (if necessary) of initiating contact with the Pakistani and UK authorities in the context of making such checks as might be deemed necessary from a perusal of the information supplied, based on the principle of proportionality, as provided for in the Directive.

121. Given the limited documentation which is required for 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 required to be considered or indeed any particular complexity, such as might arise in residence card applications. Furthermore, this is not a situation where the respondent has contacted the applicants with regard to any aspect of the information provided and the applicants were dilatory in their response.

122. Thus, it is a factor of some significance that it is not the second named applicant's application *per se* which presents difficulties for the respondent, since no concerns can be said to arise, at this stage at least, from any data provided by the applicants or on account of any delay by the UK or Pakistani authorities in dealing with such queries as might be directed to them by the respondent,

given that the application has not been processed. I note that at para. 50 of his affidavit, Mr. McDonagh avers that it is the respondent's intention to subject the second named applicant's application to checks from both the Pakistani 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." In the present case however, the applicants have not yet even reached this juncture.

123. The situation is this case is that the visa application is 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, the apprehension of fraud or abuse of rights to which the respondent alludes cannot be deemed personal to the applicants, at this stage at least, since their application remains unprocessed. In any event, the first named applicant has stated that his marriage is genuine and takes umbrage at the suggestion that it might be otherwise. He also avers that he has no reason to believe that IAS is involved in the type of abuse apprehended by the respondent.

124. 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* [2015] QB 651, 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)

125. 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)

126. I appreciate that the circumstances in the present case 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 application. Nevertheless, I find the ECJ's interpretation of the Directive instructive in circumstances where the contents of Mr. McDonagh's affidavit 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 Directive 2004/38/EC could be said to arise. However, in circumstances where no examination of the second named applicant's application 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 application, I find that the proposition advocated by the respondent cannot be said to accord with either the letter or spirit of Directive 2004/38/EC, as interpreted by the ECJ in *McCarthy*, 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 the applicant's personal conduct.

127. Furthermore, in light of the ECJ's approach in *McCarthy*, I cannot accept the respondent's argument that interpreting Art. 5 (2) to require the processing of visa applications absent completion of the pending Garda operations and the implementation of consequential checks 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.

128. Other than the correspondence which was sent to the applicants' solicitor on 13th November, 2015, the applicants have been given no indication as to when a decision on the visa application can be expected. No such indication was intimated during the course of the hearing of the within proceedings. It is noteworthy that the email of 13th November, 2015 refers to an expected decision "where all the required supporting documentation has been received and no queries remain outstanding" "within twenty weeks". Thus, the respondent envisages the twenty weeks timeframe as commencing after such checks (as, according to Mr. McDonagh's affidavit, will be undertaken in respect of the second named applicant's application) have been completed. By July, 2016, the process of examination of the application had not commenced. Counsel for the applicants advised the court of this during the hearing of unrelated cases pertaining to delays in the issuing of visas for non national family members of EU citizens before this court. Counsel for the respondent did not demur in this regard or advise of any revised time span with respect to the second named applicant's application.

129. The applicants contend that the respondent is prioritising other types of visa applications over those of non national family members of EU citizens. I am not satisfied that this is necessarily the case. I accept 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 EU Treaty rights applications are now overtaking EU treaty rights applications. I am however of the view, from the contents of Mr. McDonagh's affidavit, that the respondent is placing priority on ascertaining why there has been such a rapid increase in applications by non national family members of, particularly UK citizens, and from particular countries.

130. As stated, I accept that the respondent has evinced concerns about actual and potential abuse of the State's immigration system. This concern arises following advice from the Gardaí that criminal networks in the State and the UK are facilitating marriages of convenience and other unlawful activity, perhaps involving vulnerable persons. The respondent has also been advised that many visa applications are being handled and serviced by for-profit immigration service companies; some of which may be knowingly or unknowingly facilitating applications in respect of which false employment records and fictitious residences are being established in this State solely for the purpose of generating an application for EU Treaty rights for non national family members of EU citizens in

another EU state, in particular the UK. It is common case that the second named applicant has received assistance from an agency, IAS. They wrote to the respondent on her behalf in October, 2015. The first named applicant avers that he has no reason to believe that IAS is involved in any abuse of the Irish or British immigration system. Mr. McDonagh clearly acknowledges that IAS has not been the subject of specific investigation "and no conclusions have been reached regarding the nature of its activities." He points however to the content of that entity's website, as set out above, in the context of the respondent's contention that short periods of residence of three months and a day in a Member State are insufficient to ground a Union citizen's acquisition of derivative rights in respect of his or her family member, for the purpose of establishing a right of residence for the family member in the Union citizen's home State. I have alluded earlier in this judgment to the jurisprudence of the ECJ as to what is required in the context of derivative rights of 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 second named applicant to establish to the British authorities that she has a derived right of residence in the UK based on the first named applicant having become established in this State pursuant to Art. 7 (1) based on "*an effective and genuine activity*". The present state of affairs is far removed in time and substance from any such putative assessment since the applicants have yet to arrive in this State, let alone assert EU Treaty rights on behalf of the second named applicant before the British authorities.

131. 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 the Gardaí (which is not particular to the applicants) is that the ensuing delay in processing the second named applicant's application is not unreasonable in such circumstances and that they should stay in the queue until the fruits of the Garda and other investigations are more fully known. The result of such investigations may lead to revised or enhanced checking procedures in the respondent's department.

132. While the respondent contends that 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, Mr. McDonagh's affidavit is 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 affidavit is not in question. The court also accepts that the applicants cannot expect to jump the queue over other similarly situated visa applicants. However, the prospect of the applicants jumping the queue is not the salient issue in this case. As effectively conceded by the respondent, the applicants are facing an open-ended timeframe in terms of when a decision 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*.

133. The essential question is whether it is reasonable to allow receipt of the decision on the second named applicant's visa application 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*.

134. Fundamentally, what is at issue in this case is, as Cooke J. puts it in *Saleem v. Min for Justice* [2011] IEHC 49, "*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)

135. *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. 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."

136. 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.

137. Reading Art. 5 (1) and (2), my view 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 of the import of Art. 5(2) as compelling persuasive authority as to how Art. 5 (2) must be read.

138. In *Saleem v. Minister for Justice*, Cooke J. opined:

> *"Where 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. As Geoghegan J. put it in Point Exhibition Co. Ltd v. Revenue Commissioners, [1993] 2 I.R. 551 '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.'".*

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."*

139. 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 case, the visa application cannot, in any real sense, be said to be currently under consideration. The best that can be said is that it is somewhere in the system without any projected timeframe for a decision. This is in circumstances where the application was received in July, 2015.

140. In circumstances where no time span for even the commencement of the examination of the application has been forthcoming from the respondent since the last time frame was advised on 13th November, 2015, and where as of July, 2016, no indication has been forthcoming as to when a decision might be expected, I am satisfied that 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*.

141. 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."*

142. Moreover, 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*" (*Commission v. France* (Case C-144/97) [1998] ECR 1-613). If the delay in the present case 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 application, 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 alluded to in Mr. McDonagh's affidavit, is not sufficient to outweigh the provisions of the Free Movement Directive, especially given the open-ended timeframe currently contemplated by the respondent for the processing of the second named applicant's visa application.

Are there other factors which preclude the grant of an order of mandamus?
143. 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. In view of my finding that the applicants are entitled to treat the delay as to be tantamount to a refusal, I consider that this particular argument has been rendered moot.

144. 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 page 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. The court has set out its 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 v. Minister for Justice*. 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.

145. It is also contended that an order of *mandamus* would severely dilute the necessary appropriate assessment of the second named applicant's visa application 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 application within a given timeframe. The court is not trespassing on whatever checks the respondent considers necessary to carry out, in line with the requirements of the Directive, in order to reach a decision on the application. Nor is the court directing that the visa be granted, which is entirely a matter for the respondent. 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 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.

Is the applicants' conduct of the within proceedings a bar to mandamus?
146. In the course of the hearing, counsel for the respondent alluded to a number of factors particular to the applicants which, he argues, militate against a grant of *mandamus* in this case, irrespective of whatever other findings the court may make. These factors include what is alleged to be the hearsay nature of the evidence before the court, inconsistencies in the applicants' evidence and the studied avoidance by the applicants to provide details of their plans upon arrival in this State.

147. It is contended that issues arise in relation to the grounding affidavit sworn by the applicants' solicitor on 11th November, 2015 and her second supplemental affidavit sworn on 16th February, 2016. The respondent asserts that while it is not doubted that the applicants exist and hold passports, that the first named applicant is a UK citizen, that the second named applicant is a Pakistani national and that a marriage has taken place (in the sense purely that there is a marriage certificate), there remains a question over who exactly has provided the information which is in the affidavit sworn by the applicants' solicitor on 11th November, 2015, some of which is incorrect as acknowledged in the second supplemental affidavit.

148. The respondent also asserts that the applicants' solicitor has not properly explained in the second supplemental affidavit why she had earlier averred that the second named applicant had received assistance from IAS in completing her online application for a visa, in circumstances where the online application itself states that she received no assistance. Nor, according to the respondent, has it been explained who advised the applicants' solicitor that IAS drafted letters for the second named applicant but did not assist her in completing the online application. Similarly, the respondent asserts that the fact the applicants' solicitor has had to correct information previously sworn by her concerning the date of the marriage and the first named applicant's present whereabouts is indicative of the quality of the instructions being given. The respondent also submits that the applicants' solicitor's reference to seeking the "full file" from IAS appears to contradict her assertion that they were not involved in the online application. It is claimed that it is not clear from the second supplemental affidavit what files were in fact furnished by IAS. Counsel also refers to the applicants' solicitor being instructed "on behalf" of the applicants that their marriage is genuine. It is further asserted that while the first named applicant has sworn an affidavit on 3rd March, 2016, it does not answer the contradictions inherent in his solicitor's second supplemental affidavit nor does the first named applicant's affidavit say what it is IAS did for the applicants. Additionally, he has not given the reasons for the refusal by the UK authorities of a visa to the second named applicant. The respondent points to the second named applicant's failure to provide evidence of the assistance received by her with regard to her online application in 2015. Furthermore, the respondent emphasises the absence of any details regarding the first named applicant's employment plans in the State. The respondent says that upshot of all of these factors is confusion as to who is giving instructions, which, counsel submits, is an important consideration in the context of a *mandamus* application and where the onus of proof is on the applicants.

149. While there are undoubtedly errors in the affidavit sworn on 11th November, 2015, as acknowledged by the applicants' solicitor, I am satisfied they have by and large been dealt with by her second supplemental affidavit and by the affidavit sworn by the first named applicant on 3rd March, 2016. Insofar as there may be some question mark remaining as to the extent of the IAS involvement in the visa application (in the absence of any affidavit sworn by the second named applicant), that, to my mind, is not a sufficiently persuasive factor for the court's consideration as to whether *mandamus* should be granted, particularly in circumstances where the respondent acknowledges that IAS "has not been the subject of specific investigation, and no conclusions have been reached regarding the nature of its activities". I am also of the view that the applicants' failure to provide details of their activities in the State upon arrival cannot be a bar to relief, given the provisions of Art. 5 (1) and Art. 6 of the Directive, as indeed acknowledged by the respondent at para. 2.6 of her guidelines.

150. The respondent also argues that in light of their stated objective to use the Directive to ultimately gain entry into the UK for the second named applicant, the applicants are persons who should be deemed unsuitable for an order of *mandamus*. The court has already addressed this argument earlier in this judgment. What is in issue in the present case is the second named applicant's attempt to exercise her derivative right under the Directive to enter the State on foot of a short stay visa in the company of the first named applicant. For the reasons set out earlier, the court should not either pre-empt or prejudge matters which, more appropriately, may fall to be considered by the respondent and or the UK authorities at a future date.

151. In all the circumstances, there will be an order directing the respondent to take a decision on the second named applicant's visa application within six weeks of the perfection of the order.

Is there an entitlement to damages?

152. The applicants seek damages on the grounds set out in their statement of grounds. The respondent argues that the applicants have not made out a case for damages and that it is for the applicants to show the nexus between any breach and the causal damage and that it is for them to advise the court what the damage is. Part of that is advising what it is they plan to do in Ireland, in respect of which the applicants have not been forthcoming. Furthermore, insofar as the applicants have intimated that the court should leave over the issue of damages for another day, the respondent objects to such an approach given that the applicants have opened and closed their case.

153. Overall, the applicants have made a bare claim for damages without advancing any evidence of harm or loss. Accordingly, in such circumstances, I agree with the respondent that in this case there is no basis for the applicants' contention that any issue of damages should be left for another day. I see no basis for an award of damages. Moreover, their circumstances cannot be said to equate with those in *Raducan* which gave arise to such an award.