



THE EU CITIZENS' DIRECTIVE – RECENT IRISH CASE-LAW

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Today's session



- Permitted family members / Partners – Art 3(2)
- Dependency – Art 2
- Marriages of convenience / Abuse of rights and fraud – Art 35
- [***Zambrano*** rights / Equal treatment]

Permitted Family Members / Partners

- ***Pervaiz v MJE*** [2020] IESC 27
 - TCN Permitted family member of EU citizen in “durable relationship”
 - Residence application refused: Failure to demonstrate durable relationship; Review upholds decision
 - Barrett J: Certiorari granted
 - General language in Regs and lack of legislative/non-legislative guidance meant no adequate transposition
 - Internal review mechanism vs Art 47 Charter
- **Art 3(2) Directive**
 - 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:*
 - (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.”*
- **Reg 5(1)(b) 2015 Regulations:** permitted family members includes “*the partner with whom a Union citizen has a durable relationship, duly attested*”

Permitted Family Members / Partners

- Baker J:
- **Standing:** Confirms that EU citizen has standing to assert family member's derived rights (***Safdar v MJE*** [2019] IECA 329)
 - Applying C-89/17 **Banger**: § 40 *“the requirement of effectiveness means that a remedy must be available to the person asserting breach of his or her rights to bring an application for entry and residence, and any other conclusion would be contrary to the object of the Citizens Directive. A narrow approach to the question of standing to challenge a decision does not meet that test.”*
- Argument that situation of qualifying and permitted family members differs as concerns standing rejected

Permitted Family Members / Partners

- Concept of “durable relationship duly attested” (cf *Safdar* CA; *AR v MJE* [2019] IECA 328)
- Approval of Humphreys J in *A. R. v. Minister for Justice and Equality* [2018] IEHC 785, § 21:
 - it is “normally a legitimate transposition of a directive to simply adopt the language of the directive concerned without seeking to define terms that are undefined in the directive itself”, and “the obligation to transpose does not require that every element of the directive must be given statutory language in full in every circumstance”; Keane J in *Safdar* HC
- § 62: “The discretionary decision-making process, and a decision on the characterisation of an applicant and whether he or she meets the definition, will always engage the analysis by the decision maker of the facts and a testing of those facts against the legislative requirements. **General language may more readily permit the exercise of this discretionary decision-making process in that it does not limit the approach to the facts by specifying detailed qualifying requirements**”; “the identifying features of those persons who come within the category of permitted family member in article 3(2) of the Directive are difficult to set out in exhaustive terms, and **a list may not be useful. The category is sufficiently broadly defined to admit a range of persons who could qualify, and permit the true exercise of discretion in the light of the individual facts**”

Permitted Family Members / Partners

- What does “durable” mean?
- § 76-77:

*“Durability connotes a relationship which carries indicia of permanence and commitment such that the couple live a life where each of them is connected to the other by a number of identifiable threads, **such as their social life and social network, their financial interconnectedness or interdependence, their living arrangements, and the extent to which they are recognised and acknowledged by their family circle and their friends as a couple.***

*While all of the elements of a durable partnership might not be easy to list, it is probably true to say that most persons would be aware when their friends, acquaintances, or family members are in a durable partnership. For that reason, it seems to me that the language of the 2015 Regulations can readily be understood in its plain terms as connoting **a committed personal interconnectedness which is recognised and recognisable between the couple and by the members of their circle or broader acquaintances, whether social or business, and which is anticipated as being likely to continue for the foreseeable future.***

- Duration of relationship an important but not essential factor
- Durable does not mean permanent
- Cohabitation generally a “useful yardstick” (Form EU1A) – at a minimum they must intend cohabiting
- Normally sexual relationship although evidential difficulties recognised
- No lack of clarity in application form

Permitted Family Members / Partners

- Meaning of “Facilitate”:
- **Rahman** CJEU applied: “extensive examination of personal circumstances”
- § 115: “**What is required...is something more than mere assertion.** To say that the evidence must be “duly attested” requires that it be “evidenced”, and may, in a suitable case, be evidenced by oral evidence or narrative. Were an applicant required to notarise or establish definitely by documentary evidence that he and the Union citizen are in a committed relationship, the test would be impossibly high. **What is required is evidence by which the relationship is proved or substantiated, and a proper reading of the Citizens Directive means that the criteria, whatever they are and however they are stated, must not impose too high a standard and make it impossible for a person to meet that standard.**”
- Minister must “assess the documentary evidence furnished by the applicant and examine all the individual and personal circumstances of the particular case without applying a blanket or general approach”
- Decision-making was justified in having regard to the fact that insufficient evidence was provided of alleged 2 year cohabitation: a “degree of scepticism” was justified from failure to disclose prior deportation order – vs Barrett J

Permitted Family Members / Partners



- Effective remedy: **AAA v MJE** [2017] IESC 80; **Okujaye v MJE** [2018] IESC 56 applied; JR as an effective remedy; vs Barrett J
- Cf **FM v MJE** [2020] IECA 184 Faherty J (jurisprudence “*very clear*”)
- Judgment overturned but open to As to make fresh application

Test of Dependency

- ***Rachid v MJE*** [2020] IEHC 333 (Humphreys J)
 - Dependency: Directive “seeks to have given rise to a cottage industry whereby once one family member manages to acquire EU citizenship, he or she can send any amount of money, modest or otherwise, to one or more relatives, remote or otherwise, and then launch a legal right to enter the Union territory on the basis of dependency”
 - Intention of CJEU/EU legislature is that “*real dependency*” be at issue; “*actual dependants*”
 - Minister’s decision refusing residence card upheld
- JR not an appeal on the facts
- Decision must be read as a whole: “*Not appropriate for the court to be invited to sift through every minute detail of the materials to see whether it can be represented that the Minister tripped up in some modest way*”
- Case C-423/12 ***Reyes*** considered (“*regular payment of sums of money for a significant period*” demonstrating financial dependence); ***VK v MJE*** [2019] IECA 232 applied
 - Claim of irrationality is a “*high bar*” and must be shown that decision is “*not open to the decision-maker*”
 - Evidence of payments to brother not enough; not enough to say that sum transferred would be large in Pakistani terms; Minister is “*not required to write a legal essay*”
 - Decision was taken on a “*sufficiently solid factual basis*”

Marriages of Convenience

- ***MKFS (Pakistan) v MJE***, McKechnie J, 24 July 2020
 - Residence card had been refused under 2015 Regulations on MOC grounds
 - Challenge to deportation order
- Humphreys J [2018] IEHC 103: marriage of convenience is a nullity at law for all purposes and no rights could arise therefrom – leave to appeal refused
 - Civil Registration Act 2004 – defined MOC as ground for impediment to marriage; Registrar must refer the matter for decision
- “[w]here it is determined that the applicants’ relationship is based on fraud, no ‘rights’ can arise from such a relationship; and an absolutely necessary consequence is that no obligation arises under the Constitution, the ECHR or EU law to consider any such ‘rights’” (para. 16)
- In the alternative: MOC is a nullity at law (***Izmailovic v Commissioner of An Garda Siochana*** [2011] IEHC 32, Hogan J, not followed)



Marriages of Convenience

- McKechnie J
- Minister can rely on MOC decision taken under 2015 Regs in considering deportation; A hadn't pointed to any material change in the interim
 - Can be relied upon in applying any law "concerning the entry and residence of foreign nationals in the State" (Reg 28)
- MOC is not void *ab initio*
- Concept of marriage has changed considerably in Ireland
- **HAH v SAA** [2017] IESC 40 applied (O'Malley J): "*the defining characteristic of marriage as envisaged by the Constitution in this era is that it entails to voluntary entry into mutual personal and legal commitments on the basis of an equal partnership between two persons*" with capacity, in accordance with the requirements laid down by law



Marriages of Convenience

- § 73: *“...a great number of people marry for love, but it would be a naïve view of the world to assume that this holds true for everyone. Some marry for money, or security, or status, or fame. Others marry to secure some tax or inheritance advantage. Certainly there are some others...who marry to secure an immigration advantage for one or other of them...some people are still married off to secure some advantage for others: to gain power, to form alliances...”*
- Decision of MOC is not a declaration in rem giving rise to nullity: Reg 28 simply empowers Minister to *“disregard the marriage as a factor bearing”* on his determination under those Regs
- Consequences of finding strictly tied to *“residency matters and the overall immigration process”* / *“immigration issues”*
- 2014 Act = prospective marriages only



Marriages of Convenience

- Wider issue whether MOC is nullity for all purposes parked: § 97 – for a case where party to a marriage seeks annulment on that ground
- Family and private life rights must nevertheless be taken into account (even if the conclusion may be that they carry little weight where MOC found) in Art 8 ECHR assessment at the deportation stage
- On the facts: Minister had failed to engage in proper Art 8 analysis
- Threshold for refusal of discretionary relief not reached (***PNS v MJE*** [2020] IESC 11)



Marriages of Convenience



- ***Mascarenhas v MJE*** [2020] IEHC 69 (Barrett J)
- Challenge to deportation decision on ground of MOC rejected; as EUTR residence had been unlawful, residence had been unlawful



Abuse of Rights / Fraud

- ***Aziz v MJE*** [2020] IEHC 61 (Barrett J) –
 - Minister entitled to refuse residence card; Burden of proof rests on As to establish the requisite family relationship on the basis of the documents before him (applying ***Khan; Badshah***)
 - Minister entitled to find that no genuine exercise of free movement rights via enquiries of landlord
- ***Ahsan v MJE*** [2020] IEHC 179
 - Finding of abuse of rights leading to refusal of residence card upheld (Barrett J); free movement of persons not designed to facilitate the by-passing of national immigration rules enabling a TCN to enter the EU by means of “*falsehood and fabrication*”

Zambrano rights

- **EO v MJE** [2020] IECA 246 (Power J)
 - Refusal of TCN visa application of partner; **Zambrano** principle applied and interpreted (cf Case C-256/11 **Dereci** “denial of the genuine enjoyment of the substance of the rights...refers to situations in which the Union citizen has, in fact, to leave...the territory of the Union as a whole”; **Bakare v MJE** [2016] IECA 292 (Hogan J))
 - § 92 “The critical question that falls to be considered is whether the refusal decision of the Minister gives rise to or creates a situation which would force the minor appellants to leave the territory of the EU”
 - Not enough to rely on averred intention of mother to leave the State; on the facts, partner had lived in various MS and family “meets on regular occasions and...are in regular contact by telephone and video calling”; this can continue
 - Choice to leave Ireland would not be “compulsion”; Charter does not apply, because Zambrano does not apply: purely national law; Requirement to assess the circumstances (CJEU **Tjebbes**) satisfied
 - Fact that the other partner can remain in the EU (as an EU citizen) a factor legitimately taken into account (CJEU **Chavez**; **KA** applied); Minister had fulfilled obligation to identify the child’s primary carer; Not dependent on the partner here
 - Minister could validly have regard to the legitimate public security interest of the State due to partner’s criminal convictions in Nigeria (CJEU **KA** applied)



Equal treatment / Social advantages

- Other developments
- ***Kozinceva*** [2020] IECA 7 (Haughton J) – Proof of specific residence cannot be required in the case of a homeless person, in order to claim a social benefit
- ***Voican*** [2020] IEHC 258 (Simons J) – Direct dependant family members entitled to claim social assistance