THE HIGH COURT

[2023] IEHC 616

[Record No. 2022/945 JR]

BETWEEN:-

QUYNH NHAT LE

AND

CUONG QWOC LE

APPLICANTS

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr Justice Barr delivered *extempore* on 8th November 2023.

Introduction.

1. The first applicant is the adult daughter of the second applicant. The first applicant is a citizen of Vietnam. The second applicant is a citizen of the UK. For the purposes of these proceedings, it has been accepted that the second applicant was at all material times a citizen of the European Union.

2. In these proceedings, the applicants seek an order setting aside a review decision made by the respondent on 13th July 2022, in which she refused the application that had been brought by the first applicant for a residence card on the basis that she was a dependent qualifying family member of the second applicant, who had exercised his right to free movement within the EU, by relocating from the UK to Ireland in June 2016.

3. It is alleged that in reaching the decision to reject the application for a residence card, the Minister applied the wrong test at law, when she determined that there was insufficient evidence of the first applicant being financially dependent upon the second applicant, subsequent to her arrival in the State in 2019. It was submitted that the correct test to apply, was whether the child of the EU citizen had been financially dependent on the EU citizen in the period prior to him or her accompanying the EU citizen into the State, or joining the EU citizen there. It was submitted that as that test had not been applied in the review decision, it should be struck down by this court.

4. On behalf of the respondent, it was submitted that when one read the review decision of 13th July 2022 in its entirety, it was clear that the Minister had applied the correct test at law, notwithstanding

that she had made reference to the lack of evidence of dependency in the period after the first applicant had joined the second applicant in the State in 2019. It was submitted that those findings in the decision, did not render the remainder of the findings made concerning the lack of evidence of dependency, flawed or ineffective. It was submitted that in these circumstances, the review decision was sound in law.

Background.

5. The first applicant was born on 13th September 1998. The second applicant, her father, was born on 25th May 1969. The second applicant left Vietnam in 2009, when he travelled to the UK to obtain work. During the following four years, he worked in the UK and sent money back to his family in Vietnam. The second applicant became a UK citizen.

6. In 2013, the first applicant and her mother, the wife of the second applicant, travelled to the UK, to reside there with the second applicant. The first applicant was 15 years of age at that time.

7. In June 2016, the second applicant travelled to Ireland to obtain work. On 6th October 2019, the first applicant and her mother joined the second applicant in Ireland. In December 2019, the second applicant applied for a residence card to remain in the State, based on the fact that she had been dependent on the second applicant and was therefore a dependent qualifying family member, within the meaning of Directive 2004/38/EC of the European Parliament and of the Council of 29th April 2004 of the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (hereinafter "the directive") and pursuant to the European Communities (Free Movement of Persons) Regulations 2015 (SI 548/2015).

8. By letter dated 12th December 2019, the respondent wrote to the first applicant informing her that she had to provide evidence of relationship with the EU citizen. The letter stipulated that evidence of dependence on the EU citizen since arrival in the State, must be specifically in the applicant's name showing payments by the EU citizen. The letter also requested evidence of residence of the applicant and the EU citizen in the State, to include a letter from the landlord confirming that the applicant was also residing at the same address and utility bills for the applicant.

9. The first applicant's former solicitor responded to that letter by letter dated 21st January 2020. Unfortunately, there was an error in the title of the letter, which purported to show that the letter related to the application that had been made by the first applicant's mother. It also gave her personal identification number for the application process. This was significant, because it had the consequence, that that correspondence was placed onto the mother's file, rather than onto the file belonging to the

first applicant.

10. In the letter dated 21st January 2020, the first applicant's former solicitor had provided a letter from the landlord regarding her residence at an address in Dublin. It also provided a utility bill from Virgin Media dated 7th January 2020 for that address. In addition, a number of other documents showing payments made by the EU citizen for the benefit of the first applicant at various times between 2008 and 2013, were submitted.

11. On 27th February 2020, the respondent gave her first instance decision in relation to the application that had been lodged on behalf of the first applicant. It is important to note that that decision was made without sight of the documentation that had been furnished by the first applicant's former solicitor with his letter dated 21st January 2020, as that letter would have been placed onto the mother's file, rather than on the file belonging to the first applicant. The relevant parts of the Minister's decision were in the following terms:

> "*Subsequently, on 12 December 2019, correspondence issued to you requesting evidence of relationship with the EU citizen, showing evidence of dependence on the EU citizen since arrival in the State and evidence of residence, including a letter from landlord confirming that you are also residing at the same address, along with utility bills in your name.*
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> *No response was forthcoming and on the basis of the information and documents supplied, the Minister is not satisfied that you are a qualifying family member as set out in regulation 3 (5) of the regulations, as you have failed to provide evidence of dependence and residence on your EU citizen father Cuong Qwoc Le.*
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> *Having considered all the information and documentation available, the Minister is satisfied that you have submitted insufficient evidence that you are the dependent daughter of the EU citizen and as such it is in order to refuse the application at hand.*"

12. On 11th March 2020, the first applicant sought a review of the first instance refusal of her application. Prior to the making of the review decision, the applicant's former solicitor noted that his letter of 21st January 2020 had been incorrectly sent as relating to the mother's application. He therefore re-sent the documentation that was contained in that letter, along with some further documentation showing the dependence of the first applicant on the second applicant since her arrival in Ireland in 2019.

13. The respondent issued her decision on the review on 13th July 2022. The relevant portions of

that decision are in the following terms:

> "*It has been submitted that you are the adult dependent daughter of your British national father, Cuong Qwoc Le. In this regard, this office notes the presentation of AIB bank statements bearing the name of the British national dated 3 April 2019 – 3 October 2019. On examination of the statements, these demonstrate no evidence of the provision of funds to you by the British national in Ireland. Furthermore, on examination of your application for a review of the Minister's decision of 27th of February 2020, no further evidence has been presented to demonstrate that you have been in receipt of funds from the British national since your arrival in the State.*
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> *The Minister has given consideration as to whether dependency may have been established prior to your entry to the State. In this regard, this office notes your presentation on review of receipts and dockets in respect of international funds transfers from the United Kingdom to Vietnam. These include receipts from companies including Western Union, Moneygram, Incombank and Vietcombank. It is apparent upon examination of these dockets that these are dated during the years 2008 to 2013. While acknowledging that you have presented a substantial number of documents which indicate that you may have been in receipt of financial assistance from the British national between 2008 and 2013, there is nothing to indicate that any such assistance continued after 2013. You submit that you arrived into Ireland on 6 October 2019. In this regard, it is apparent that you have not demonstrated any verifiable evidence that you are in receipt of any financial support for approximately six years prior to your entry to Ireland. Taking this into consideration with the absence of verifiable evidence of dependency since your arrival in the State, the Minister is not satisfied that evidence has been presented to demonstrate that you have established financial dependency on your British national father.*
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> *The onus is on you, the applicant, to satisfy the Minister by cogent evidence which could be tested that the level of maternal [sic] support that you receive from the Union citizen, its duration, and its impact upon your personal financial circumstances, combined together to meet the material definition to dependency in Ireland. You are required to establish that you rely for some of the essential material needs of life on the British national and that you are not able to support yourself without help from the British national. You have failed to do so and, as such, the Minister is not satisfied that you are dependent upon the British national in Ireland."*

Submissions on behalf of the Applicants.

14. On behalf of the applicants, Mr Keogh BL submitted that there were two grounds on which the review decision ought to be struck down. His primary ground was to the effect that the decision maker had adopted the wrong test for dependency at the time of the initial refusal on 27th February 2020. In that decision, it was clear that the decision maker had refused the application on the basis that the applicant had not provided any evidence of her continuing dependency on the second applicant after her arrival in the State.

15. It was submitted that the decision of the Court of Appeal in *Holland v. Minister for Justice & Equality* [2023] IECA 74, which was delivered on 31st March 2023, made it clear that the period that had to be looked at when assessing whether there was any dependency between the non-EU citizen and the EU citizen, was the period prior to the time when the non-EU citizen either accompanied the EU citizen into the State, or joined him or her in the State: see paras 88 and 89 of the judgment.

16. It was submitted that because the first instance decision had made reference to the fact that the Minister had not received a reply to her letter dated 12th December 2019, which had sought information in relation to the continuing dependency of the first applicant on the second applicant after her arrival in the State, that meant that for the purposes of the review decision, the first applicant had addressed that issue by resubmitting the documents that her former solicitor had sent by letter dated 21st January 2020 and had not addressed the critical period, being the period immediately prior to her departure from the UK in 2019.

17. It was submitted that the review decision was also tainted by this error in relation to the time for assessment of dependency. That decision referred in a number of places to the lack of evidence of dependency of the first applicant on the second applicant after her arrival in the State. It was submitted that although there were some references to a lack of evidence of dependency in the period prior to her departure from the UK, those references were not sufficient to mask the fact that the decision maker at the review stage had again adopted an incorrect test at law.

18. The second ground on which it was submitted that the decision was bad at law, was on the ground of irrationality. It was submitted that having regard to the fact that the first applicant had originally entered the UK with her mother in 2013, when she was 15 years of age, it was irrational for the decision-maker to have expected her to have been able to produce documentary evidence showing her dependence on the second applicant in the period prior to his departure from the UK in 2016, or

thereafter, prior to her departure from the UK in 2019.

19. It was submitted that it was irrational for the decision-maker to expect evidence of dependency to be produced by an applicant who was an infant at the relevant time, particularly in light of the fact that she was still an infant for the purposes of the directive prior to her attaining the age of 21 years, which occurred on 13th September 2019. It was submitted that had the applicant made her application prior to that time, then given that it was accepted that she was a qualifying family member, because she was a daughter of the second applicant, dependency would have been presumed and she would have obtained the right to receive a residence card. It was submitted that it was irrational for the decision-maker to ignore the fact that she was only 15 years of age when she first entered the UK in 2013 and because her application for a residence card had been made shortly after she had attained the age of 21 years, to have expected her to have been in a position to produce documentary evidence of dependence at the time when she resided with the second applicant in the UK.

Submissions on behalf of the Respondent.

20. On behalf of the respondent, Ms McGillicuddy BL accepted that the test for dependency for a qualifying family member who had to establish dependency, and for a permitted family member, was the same at law. She further accepted the definition of dependency that had been set down by Baker J. (then sitting as a judge of the Court of Appeal) in *VK & Others v. Minister for Justice and Equality* [2019] IECA 232, where it had been held that the requirement that the dependence be "real", meant that the dependence must be something of substance, it had to be support that was more than just fleeting or trifling, and such support must be proven, concrete, and factually established.

21. It was submitted that in the present case, the first applicant had provided no evidence to the decision-maker prior to the time of the review decision, establishing her dependence on the second applicant in the period 2013 to 2019, which was the critical period for the purpose of her application. It was submitted that in these circumstances the decision-maker had acted both rationally and reasonably in refusing to issue a residence card to the first applicant on grounds of dependency, because no evidence of such dependency during the critical period had been produced by the first applicant.

22. It was submitted that the first instance refusal decision was not relevant to the within proceedings, because no application had been made to have it quashed. Furthermore, it was submitted that that decision had effectively dropped out of the picture, once a review of that decision had been sought. The only decision that was challenged in the present proceedings was the review decision of

13th July 2022.

23. It was submitted that insofar as there was reference in the review decision to the lack of evidence of any dependency in the period after the first applicant had arrived in the State, that was not fatal to the decision, as the decision made it clear that the decision-maker had had regard to the lack of evidence of dependency in the six years prior to the departure of the first applicant from the UK in 2019. It was submitted that, as it was accepted that no evidence of dependency had been produced in respect of the critical period prior to the arrival of the first applicant into the State, and as the decision-maker had explicitly referred to the absence of evidence of dependency for that period, the decision was legally sound.

24. Insofar as the first applicant had alleged that there was irrationality in the review decision, due to the fact that the decision-maker had not had regard to the position that would have pertained, had the first applicant's application been made during the currency of her infancy for the purposes of the directive; that was irrelevant because the first applicant had not made her application until after she had attained the age of 21 years. That meant that she was a qualifying family member who had to establish dependency on the EU citizen in the country whence she had come, in order to obtain a right to receive a residence card.

25. It was submitted that the directive and the regulations made it clear that if the children of an EU citizen, who wished to join the EU citizen in the State, made their application after they had attained 21 years, they had to establish dependency during the relevant period. It was submitted that the decision-maker had had regard to the relevant period when reaching her decision. It was submitted that on this basis, the decision could not be struck down for irrationality for failing to consider a set of circumstances that did not arise in the present case.

Conclusions.

26. Before summarising the facts in this case, the court has to rule on a preliminary objection which was raised on behalf of the respondent, to the effect that the applicants' application herein should be struck out as being out of time. The decision which is the subject matter of challenge in these proceedings was delivered on 13th July 2022. While leave in this case was not granted until 16th January 2023, the application had been opened before the court on 4th November 2022, for the purposes of stopping time running against the applicants.

27. As time stopped running against the applicants on 4th November 2022 and the time period within

which to bring the proceedings, allowing four days for service of the impugned decision, expired on 17th October 2022. On that basis, the extension of time required by the applicants, was one of 18 days, or 22 days, if one discounted any period for service of the impugned decision. The law in relation to when a court should grant an extension of time within which to bring judicial review proceedings, was examined in the judgment of this court in *G.K. v IPAT* [2022] IEHC 204 and the principles were recently set out by Phelan J. in *I.T. v Minister for Justice* [2023] IEHC 40, at paras 52 – 61.

28. In determining this issue, the court has had regard to the averments of the first applicant's solicitor, Mr Khan in his affidavit sworn on 3rd November 2022. The court accepts that the reasons set out at paragraph 7 thereof, constitute good and sufficient reason why the court should grant the relatively short extension of time that is required in this case. The reasons why an extension of time is warranted, are the following: the delay was marginal; it was not caused by the applicants, as they had sought legal advice within three months of becoming aware of the impugned decision; an extension of time will not result in any prejudice to the respondent; whereas a refusal to extend time would have a significant detrimental effect on the applicants. Accordingly, the court will grant an extension of time within which to bring the application herein.

29. The essential facts in this case are not in dispute. The first applicant is the daughter of the second applicant. The second applicant is a citizen of the UK, and for the purposes of these proceedings, he is regarded as being at all material times, an EU citizen.

30. It appears to be accepted that the second applicant left his wife and child in Vietnam in 2009, for the purposes of travelling to the UK, to obtain work. In the following four years, there is evidence which suggests that he sent money back to Vietnam for the maintenance of his wife and child.

31. In 2013, the first applicant and her mother travelled to the UK to live with the second applicant. The first applicant was 15 years of age at that time. The second applicant left the UK in 2016 and travelled to Ireland, where he obtained employment. In 2019, the first applicant and her mother came to Ireland to resume residing with the second applicant. They have lived together as a family in the State since 2019.

32. The first applicant attained the age of 21 years on 13th September 2019. Accordingly, when she lodged her application for a residence card based on the fact that her father, an EU citizen, had travelled to Ireland for the purpose of working and residing here, she did so as an adult child of the EU citizen. This meant that in order to secure a residence card, she had to establish that she was dependent on the

second applicant.

33. The decision of the Court of Appeal in the *Holland* case, makes it clear that the critical period where the dependency of the non-EU citizen on the EU citizen must be established, is for the period immediately prior to the time when the non-EU citizen either accompanies the EU citizen into the State, or joins him or her in the State. Delivering the judgment of the Court of Appeal, Binchy J stated as follows at para. 88:

> "*However, the corollary of the entitlement of descendants who are under the age of 21 years to accompany or join the Union citizen is that descendants over 21 years of age who are not dependants of the Union citizen have no such entitlement. On this basis alone, it seems to me that it follows, both as a matter of logic and upon a combined reading of Article 2(2)(c), Article 3(1) and Article 10(2)(d) of the Directive, that the assessment of dependency must be undertaken at the time that the descendant accompanies or joins the Union citizen, and not after he/she arrives in the host State*."

34. Thus, for the purposes of the application that was lodged by the first applicant, the critical period in which she had to establish a dependency on her father, was the period immediately prior to her departure from the UK in 2019. Unfortunately, it appears that the Minister was not aware of the relevant period which had to be looked at for the purpose of establishing dependency, at the time when the first applicant lodged her application in December 2019. This is due to the fact that in a letter dated 12th December 2019, the Minister expressly asked the applicant to produce "...*evidence of dependence on the EU citizen since arrival in the State – this must be specifically in the applicant's name showing payments by the EU citizen*." It is clear from that letter, that the Minister was focusing on the position of the first applicant vis-à-vis the second applicant after her arrival in the State. This is further shown by the fact that in that letter, the Minister also requested the first applicant to produce evidence of her residence with the EU citizen in the State.

35. Due to an unfortunate error in the offices of the solicitor acting for the first applicant at the time, the response on behalf of the first applicant to that letter, which was sent by letter dated 21st January 2020, was sent under the wrong name; in that it was stated to be a letter concerning the application that was then pending by the first applicant's mother; in addition, it put the personal ID number that had been assigned to the applicant's mother at the top of the letter. This had the result, that the letter was placed on the wrong file. It was not put before the first instance decision-maker when considering

the first applicant's application.

36. The decision at first instance, which has been quoted earlier in the judgment, which was delivered on 27th February 2020, makes it clear that in the letter dated 12th December 2019, the first applicant had been requested to produce evidence of her dependence on the EU citizen since arrival in the State. It was noted that that correspondence had not been replied to. This was due to the fact that the reply that had been sent in, had been placed onto the incorrect file, due to the incorrect name having been put at the top of that letter. It is clear from the terms of this decision, that the first instance decision-maker refused the application on behalf of the first applicant, due to the fact that she had not provided evidence of her dependence on the second applicant since her arrival in the State. That was the wrong test at law.

37. When the solicitors acting for the first applicant received the first instance decision and realised the error that had been made in relation to their letter of 21st January 2020, they resent the documentation that had been sent with that letter and in addition, they furnished further documentation concerning the first applicant's residence with the second applicant since her arrival in the State. They also sought a review of the first instance decision.

38. While it has been argued that the first instance decision is not relevant to the present proceedings, due to the fact that no application has been made to set aside that decision and due to the fact that the first instance decision has been overtaken by the review decision of 13th July 2022; I do not accept that the first instance decision is of no relevance. It was a relevant decision, because it set out clearly that the first applicant's application for a residence card was being refused because she had not provided evidence of her dependency on the second applicant after her arrival in the State in 2019. This had the effect of requiring the first applicant and her advisers to address what was perceived as a lack of evidence in that regard. Thus, they were addressing a different period of time, that was not in fact relevant to her application.

39. One has to consider the difference between an appeal and a review of a decision within the immigration process. An appeal at law is generally based on the evidence that was tendered at the first instance hearing. It may be a rehearing of the matter, as in an appeal from the Circuit Court to the High Court, but it is run on the same evidence that was tendered in the lower court. It is only in special circumstances and with the leave of the court, that additional evidence can be adduced on the hearing of an appeal.

40. The situation is quite different with the review of a decision within the immigration process. When one seeks a review of a first instance decision, the person seeking the review is given the chance to specifically address by means of documentary evidence or other evidence, any deficiencies or omissions that have been identified in the first instance decision. Thus, they are given an opportunity in layman's language, "to mend their hand".

41. If the first instance decision in this case had been based on the correct test, being whether there was sufficient evidence of dependency in the period immediately prior to the arrival of the first applicant into the State in 2019, the first applicant and her advisers would have had the opportunity to address the deficiencies in evidence that were of concern to the Minister in relation to that period. However, given the content of the Minister's letter of 12th December 2019 and the content of the decision at first instance delivered on 27th February 2020, it was made known to the first applicant that the Minister was concerned about the lack of evidence concerning her dependency on the second applicant after her arrival in the State. The first applicant was not aware that the Minister had any concerns regarding the period 2013 to 2019. For that reason, there was no necessity for the first applicant to address the issue of dependency during that period in her submissions made prior to the making of the review decision. Thus, on grounds of fairness of procedures, I would have to set aside the review decision.

42. I am further satisfied that it is appropriate to set aside the review decision due to the fact that in that decision it is clear that the Minister to a large extent based her decision to refuse the application, on the basis that there was a lack of evidence showing any dependency of the first applicant on the second applicant after her arrival in the State. That is clear from the terms of the decision itself. It is equally clear from the *Holland* decision, that that was the wrong test.

43. I cannot accept the submission put forward by counsel on behalf of the respondent, that the decision is not vitiated by the fact that the wrong test was partially applied, due to the fact that there are references to a lack of evidence of any dependency in the period 2013 to 2019. I am satisfied that the level of reference to the absence of evidence in relation to the first applicant's dependence on the second applicant since her arrival in the State in 2019, is such, that one cannot say that these references were merely superfluous to the core decision and therefore could be excised from it, while leaving the core decision extant.

44. As I am satisfied that as the wrong test was applied by the Minister in both the first instance decision and to a large extent in the review decision, this court will have to accede to the application

made on behalf of the first applicant to set aside the review decision of the Minister dated 13th July 2022.

45. The court can deal very briefly with the second ground of challenge put forward by the first applicant, being a submission that the review decision was irrational, insofar as it had sought evidence of dependency in the period 2013 to 2019, at a time when the first applicant was a minor for the purposes of the directive; where such evidence of dependency would not have been required, had her application for a residence card been made during the continuance of her infancy. I am satisfied that the submission made by counsel on behalf of the respondent in this regard is correct. The court cannot set aside a decision as being irrational, due to the fact that the decision maker did not take into account a set of circumstances that did not arise on the facts of the case before her.

46. Having regard to the findings and conclusions of the court as set out herein, the court will grant the applicants the relief sought at paragraph 1 of their notice of motion dated 19th January 2023; being an order of certiorari quashing the decision of the respondent made on 13th July 2022, refusing to grant a residence card to the first named applicant. The court will remit the matter back to the respondent for a fresh review decision to be taken by another deciding officer.

47. The court will hear the parties on the terms of the final order and on costs and on any other matters that may arise.