THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 412

[Record No.: 2023 / 159JR]

BETWEEN:

ISRAR AHMED

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

AND

[Record No.: 2023 / 545 JR]

BETWEEN:

NAZNEEN ARSHAD

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT OF Ms. Justice Siobhán Phelan, delivered on the 4th day of July, 2024.

INTRODUCTION

1. These two cases arise from the refusal of applications for certificates of naturalisation under s. 15 of the Irish Naturalisation and Citizenship Act, 1956 (as amended) (hereinafter "the 1956 Act") on the basis that the Applicants did not have the necessary five years reckonable residence. The net legal issue which arises is whether physical presence in the State of a person whose application for residence as a family member of an EU citizen has been accepted for consideration under the European Communities (Free Movement of Persons) Regulations 2015

(hereinafter "the 2015 Regulations") is reckonable residence for the purpose of a subsequent application for a certificate of naturalisation under s. 15 of the 1956 Act. The cases were heard together, and the same legal team appeared in both.

FACTUAL BACKGROUND

2. While there is no dispute on the facts and the issue of law which arises in each of the cases is the same, there are some factual differences. Common to both cases, neither Applicant sought permission to enter or remain in the State under s. 4 of the Immigration Act, 2004 (hereinafter "the 2004 Act"). Both Applicants entered the State to join EU citizen siblings working in the State and applied for residency based on their family relationship using Form EU1 which is entitled "*Application for a Residence Card for Non-EEA National Family Members*". Neither Applicant was requested to make a separate application under Regulation 5 of the 2015 Regulations for permission to be treated as a permitted family member.

3. There is no evidence that either Applicant was ever advised to seek permission under s. 4 of the 2004 Act while the application was processed. Nor is it suggested on behalf of the Minister that there is a practice or convention whereby applicants for residence cards as Non-EEA National Family Members are advised to seek permission to be in the State. Nothing turns on the fact that the Minister elected to treat the date of registration rather than the date of approval of a grant of residency as the start date for reckonable residency as the resulting difference was not material to the decision. The broad factual circumstances of each Applicant are summarised as follows:

Application of Nazneen Arshad

4. This Applicant is a national of Pakistan who claims to have lawfully resided in the State since 2015. She entered the State in September, 2015 as a family member of her brother who is a British citizen residing in the State on a permanent basis. She applied for a residence card using Form EU1. On the application form, she ticked the pre-populated box that her application was based on a sibling relationship.

5. The Form EU1 is signed by the Applicant and her brother on the 23rd of November, 2015, albeit date stamped received on the 21st of December, 2015 and under Section 5 "*Declarations*" records the Applicant's declaration as follows:

> *"I hereby apply for a residence card for myself".*

6. She was subsequently advised that her application had been accepted for consideration on the 21st of December, 2015. The first record of a communication in relation to the acceptance of her application for consideration appears to be a letter dated 25th of March, 2016 which stated:

> *"I am directed by the Minister for Justice and Equality to refer to your application for a Residence Card under the European Communities (Free Movement of Persons) Regulations 2015 ("the Regulations") which was accepted for consideration by this office on 21/12/2015."*

7. The letter continued to request a range of documents to substantiate the application including documentation evidencing that the Applicant was a dependent of the EU citizen in the country from which they had come, evidence that she had been a member of the EU citizen's household in that country, evidence of the current activities of the EU citizen in the State and evidence of residence of the Applicant and the EU citizen in the State.

8. There is no other record in evidence of the decision to accept the application for consideration. The only consideration of the Applicant as a family member by the Minister before the decision to grant residence made on the 7th of February, 2017 exhibited in evidence is a consideration document dated the 7th of February, 2017 which reflects the basis for the decision to grant the residence application. In this document, the evidence of the Applicant's relationship with her brother was assessed in the light of evidence submitted of:

(i) relationship (brother and sister);
(ii) dependence on the Union citizen in the country from which they had come; and
(iii) membership of the same household in the country from which they had come.

9. There was also clear evidence available to the Minister that the Union citizen was exercising EU rights through active employment in the State.

10. Following on from this consideration which resulted in a decision to grant residence on foot of the application for residence dated the 21st of December, 2015, on the 7th of February, 2017 the Minister also wrote to the Applicant to advise that her application for a residence card under the 2015 Regulations and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State (hereinafter "the Directive") had been approved under Regulation 7 of the 2015 Regulations on the basis that she was a permitted family member of a Union citizen who is residing in the State in exercise of rights under the Directive. She was duly advised of required next steps to obtain a residence card as a family member of a Union citizen (Stamp 4 EU Fam). It appears that she was formally registered on the 1st of March, 2017 having paid the required registration fee.

11. The Applicant obtained employment from April, 2017 and thereafter was in receipt of maternity benefit from December, 2020 to June, 2021.

12. The Applicant applied for a certificate of naturalisation on or about the 6th of May, 2021.

13. While her application for a certificate of naturalisation was pending, the Applicant also applied for permanent residence on the 18th of May, 2021 using a Form EU3. The decision to approve this application was communicated by letter dated the 9th of March, 2022 having regard to the provisions of the European Union (Withdrawal Agreement)(Citizen's Rights) Regulations, 2020 and the 2015 Regulations. She was advised on how to obtain a permanent residence document as a family member of a UK national (Stamp 4C). Accordingly, the Applicant has been granted permission to reside in the State valid until March, 2032.

14. By letter dated the 9th of March, 2023, the Applicant was advised that her application under s. 15 of the 1956 Act for a certificate of naturalisation had been refused. The refusal letter stated:

"Section 15 of the Irish Nationality and Citizenship Act, 1956, as amended, provides that the Minister may grant a certificate of naturalization if, among other things, that the applicant has been resident in the State for a period of one year immediately prior to the date of application and 4 years in the 8 year period before that. For the purpose of calculating this residency, no period may be taken into account where a non-national-

1. *Was required to have the permission of the Minister to remain in the State but did not have that permission, or*
2. *Had permission to remain for the purpose of study (whether or not such study necessitated the employment of the non-national during the whole or part of the period of study), or*
3. *Had permission to remain for the purpose of seeking to be recognized as a refugee (within the meaning of the Refugee Act, 1996) where such application was either unsuccessful or withdrawn.*

The documentation submitted with your client's application has disclosed that when such periods have been considered your client did not have five years reckonable residence as at the date of their application, therefore, your client's application for naturalization has been deemed ineligible.

It is open to your client to lodge a new application if and when they are in a position to meet the statutory requirements applicable at that time."

15. It transpired that the Minister had calculated the Applicant's residency as beginning on the 1st of March, 2017 when she registered with the Garda National Immigration Bureau and obtained the Stamp 4 EU Fam (this is the date shown on a residency reckoner disclosed as part of the Minister's file) whereas the Applicant had lodged her application for a certificate of naturalisation on the basis that she was resident at the latest from the 21st of December, 2015 when her application for residence was accepted for consideration under Regulation 7 of the 2015 Regulations.

Application of Israr Ahmed

16. The Applicant is a national of Pakistan who claims to have lawfully resided in the State since 2015. He claims to have entered the State in or around March, 2015 and to have submitted his application for residence to the Minister using a Form EU1 on the 31st of July, 2015 on the claimed basis that he was a permitted family member of his EU citizen brother who was exercising his EU Treaty rights in the State. He ticked the pre-populated box on the Form EU1 identifying his family relationship as that of a sibling.

17. A notice acknowledging the receipt of his application indicating that it had been accepted for consideration was issued on the 13th of November, 2015. In this letter certain additional information was also sought. No documentary evidence reflecting consideration of his eligibility as a permitted family member has been exhibited.

18. The application for residence was granted on the 24th of March, 2016. By letter of the same date the Applicant was advised that his application for a residence card under the 2015 Regulations and Directive which had been submitted on From EU1 and is recorded in subsequent correspondence as accepted for consideration on the 31st of July, 2015 had been examined. He was informed that the Minister had decided to approve the application for a Residence card under Regulation 7 of the 2015 Regulations on the basis that he was a qualifying family member of a Union citizen who is residing in the State in exercise of rights under the Directive. He was duly advised of the required next steps to obtain a residence card as a family member of a Union citizen (Stamp 4 EU Fam). He was then issued with a Stamp 4 EU Fam valid until the 23rd of March, 2021.

19. Although the letter notifying the grant of residence on the 24th of March, 2016 referred to residence being granted on the basis of being a "*qualifying*" family member, it appears to be accepted that this should have referred to "*permitted.*"

20. The Applicant subsequently applied for a certificate of naturalisation in or around the 26th of November, 2020 on the basis of having acquired 60 months of reckonable residence.

21. By decision dated the 24th of November, 2022 this application was refused pursuant to s. 15(1)(d) of the 1956 Act. The Minister's basis for refusing the application was stated as follows:

"the documentation submitted with our client's application has disclosed that when such periods have been considered your client did not have five years reckonable residence at the date of their application, therefore your client's application for naturalization has been deemed ineligible. A document showing how this has been calculated is attached for your consideration."

22. It appears from the document referred to as attached to the decision letter that the Minister considered the Applicant's residence to commence following the issue of his Stamp 4 EU Fam on the 24th of March, 2016 rather than the date of acceptance of his application for residence for consideration. However, another residency calculation was disclosed in FOI, apparently prepared on the 21st of March, 2021 recording a start date of the 31st of July, 2015 (the date the application was recorded as received) and showing residence in excess of five years (totaling 1946 days).

23. The Applicant subsequently applied for permanent residence on the 6th of April, 2021 and this was refused by decision dated 5th of July, 2022. He was granted temporary permission while the decision to refuse permanent permission was under review.

The Applications and the Forms Used

24. It bears repetition that in neither case is there a record of a preliminary application under Regulation 5 of the 2015 Regulations for a decision that the Applicant be treated as a permitted family member for the purpose of the 2015 Regulations. Neither Applicant was requested to make a separate application. Despite this, applications for residence as a family member under Regulation 7 of the 2015 Regulations were accepted for consideration in both cases.

25. According to the Applicant's solicitor (second affidavit of Imtiaz Khan sworn on the 7th of March, 2024), in his experience the application for a residence card as a qualifying or permitted family member is a unitary process under the 2015 Regulations and that process involves the application for a residence card and a decision on that application. This has not been disputed on behalf of the Minister and reflects what occurred in practice in these two cases. This notwithstanding the Minister relies on a two-stage process involving Regulations 5 and 7 in her Statement of Opposition. Furthermore, the Applicant's solicitor has exhibited

Forms EUTR1 and EUTR1A identified as for use in an application for a residence card for a qualifying family member of an EEA national and an application to be treated as a permitted family member of an EEA national respectively.

26. On their face Forms EUTR1 and EUTR1A date to 2023 (according to a notation across the bottom of each page). The Applicant's solicitor has deposed that he does not know if these forms reflect similar forms available in 2015, pointing out that this would be within the knowledge of the Minister. This averment has not been responded to on behalf of the Minister. If a version of the Form EUTR1A existed in 2015, it was not used in either case.

27. The Explanatory Leaflet to both the EUTR1 and the EUTR1A forms now in use envisages that the non-EEA national making application will be living in the State at the date of application, suggesting a possible misalignment between the official application forms.

PROCEEDINGS

28. In moving an application for relief by way of judicial review, the Applicants relied on the declaratory nature of EU Treaty Rights. It was contended that the Minister had erred in law as treating the date upon which residency as a permitted family member was granted on the 7th of February, 2017 as the date from which reckonable residency was calculated, thereby excluding the earlier period during which the applicants resided in the State while the application was under consideration.

29. It was the Applicants' contention that the grant of residency was the mere recognition of an existing right and that therefore lawful residency should be deemed to accrue from the date of the application.

30. It was further contended that inadequate reasons had been given for the decision to refuse a certificate of naturalisation. This complaint has not been pursued before me in light of the fact that it is clear from the documents disclosed, when read together with the refusal letters, that the reason for refusal is that the Minister does not consider residency pending a determination of an application for residency on the basis that the applicant is a "*permitted*" family member to constitute reckonable residency.

31. In the Opposition papers filed the Minister disputes any error of law relying on s. 16A of the 1956 Act. It is contended that in order for the period of residence in the State on the part of the Applicants to be reckonable, the Minister would have been obliged to conduct an extensive examination of the Applicants' personal circumstances to decide whether the Applicant should be treated for the purposes of the 2015 Regulations as a permitted family member. It is contended that if the Applicant had an entitlement to remain in the State pending the outcome of the residence card application, this is not permission within the meaning of the Immigration Act, 2004 [hereinafter "the 2004 Act"] or a permission given by or on behalf of the Minister to be present in the State.

32. It is no part of the Minister's case that the Applicants were unlawfully present in the State having failed to seek permission under s. 4 of the 2004 Act nor that they ought to have sought such permission while their applications for residence were under considered and being processed.

LEGAL FRAMEWORK

33. The presenting issue arises in an area of intersection between EU and domestic law concerning the way the Directive has been transposed into Irish law by the 2015 Regulations, the proper interpretation of the 2015 Regulations in that context and how the EU inspired free movement code interacts with domestic immigration and citizenship laws. It is necessary therefore to consider the legal framework more generally.

34. In helpful submissions of counsel, my attention has been carefully drawn to relevant provisions of both the Directive and the 2015 Regulations.

Directive 2004/38/EC

35. The Directive prescribes minimum rights for family members deriving from the rights of an EU citizen who exercises free movement rights in the State in accordance with EU law. There is no impediment, however, to the State providing for the more advantageous treatment of non-nationals applying for residency in the State (Article 37 of the Directive).

36. Although the Directive does not use the terms "*qualifying*" and "*permitted*" family members (the terms in domestic legislation), it is clear that the Directive envisages two categories of family member under Article 3 of the Directive, namely, qualifying family members being family members captured by the definition in Article 2 of the Directive, and others which come within Article 3(2) of the Directive.

37. Under Articles 2 and 3(2), qualifying members include spouses and civil partners of a Union citizen and the Union citizen's immediate dependant descendants and ascendants.

38. On the other hand, another family member as provided for under Article 3(2), is a family member who, in the country from which they have come, are dependants or members of the household of the Union citizen or have serious health grounds strictly requiring the personal care of the family member by the Union citizen (Article 3(2)(a)) or a partner with whom the Union citizen had a durable relationship (Article 3(2)(b)). Under Article 3(2) of the Directive, the State is obliged to facilitate entry and residence for such persons and shall undertake an extensive examination of their personal circumstances and justify any denial of entry or residence to these people.

39. The difference between a qualifying family member and other family members is reflected in the language of Recital 6 to the Directive as follows:

> *"In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen."*

40. Accordingly, by reason of their status as qualifying family members, persons who can establish their relationship with the EU citizen are entitled to residence (subject only to limited

exceptions) where the EU citizen is residing in the State in exercise of free movement rights. On the other hand, while Member States are obliged to facilitate entry and residence for other family members as defined in Article 3(2) and shall undertake an extensive examination of the personal circumstances pertaining in deciding whether to grant a right of residence, the Member State is not obliged as a matter of EU law to grant residence. Where residence is refused, however, the Member State must justify any denial of entry or residence to this category of family member.

41. Article 5 of the Directive provides a right of entry for family members. Article 6 goes on to provide for a right for residence for up to three months without any conditions or formalities for both the Union citizen and accompanying family members.

42. Article 7(2) extends the right of residence to family members for longer than three months provided the Union citizen's residence is in accordance with Article 7(1) (conditions include that the Union citizen is in employment or has sufficient resources to maintain themselves and their family members without recourse to social assistance during residence and sickness insurance cover in the State etc.).

43. Article 8 permits a Member State to require registration with relevant authorities where residence exceeds three months and allows Member States to require that in the case of family members falling within Article 3(2)(a) a document certifying that they were dependants or members of the household of the Union citizen in the country from which they are coming or proof of the existence of serious health grounds which strictly require the person care of the family member by the Union citizen (under Article 8(2)(e)).

44. Article 10 provides for the issue of residence cards and states that:

> *"the right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence car shall be issued immediately."*

45. Article 10(2)(e) provides for evidence which the Member State must require before issuing a residence card which in the case of persons making application under Article 3(2)(a), as in these cases, shall include a document issued by the relevant authority in the country of origin or the country from which they are arriving certifying that they are dependents or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen.

46. The net difference between the two categories of family members identified under the Directive is that in the case of a qualifying member, the grant of residency is almost automatic (subject only to limited exceptions) upon establishing the family connection whereas in the case of other family members, the obligation on member states is to facilitate the making of the application, to consider the application and to justify the refusal of the application, if it is being refused.

The 2015 Regulations

47. This position under the Directive is to a significant extent reflected in the structure of the 2015 Regulations. The terms "*qualifying*" and "*permitted*" family members are defined in Regulation 2(1) of the 2015 Regulations to distinguish between the two class of family members (reflecting Articles 3(1) and 3(2) of the Directive) as follows:

> *"qualifying family member" means, in relation to a particular Union citizen, a person who is, under Regulation 3(5), a qualifying family member of the Union citizen;*
>
> *"permitted family member" means, in relation to a particular Union citizen, a person who is, under Regulation 3(6), a permitted family member of the Union citizen;*

48. In line with Articles 2(2) and 3(1) of the Directive, Regulation 3(5) provides as regards "*qualifying family member*":

> *"(5) For the purpose of these Regulations, a person is a qualifying family member of a particular Union citizen where—*

(a) subparagraphs (a) and (b) of paragraph (1) apply, respectively, to the Union citizen and the person, and

(b) the person is—

(i) the Union citizens spouse or civil partner,

(ii) a direct descendant of the Union citizen, or of the Union citizens spouse or civil partner, and is—

(I) under the age of 21, or

(II) a dependent of the Union citizen, or of his or her spouse or civil partner, or

(iv) a dependent direct relative in the ascending line of the Union citizen, or of his or her spouse or civil partner."

49. Regulation 4(2) provides for permission to enter the State for a qualifying family member in terms which provide that, save in the prescribed circumstances and subject to securing an entry visa, if necessary, a qualifying member has an entitlement to enter the State to make an application under the 2015 Regulations. This is in line with Article 5 of the Directive.

50. Consistent with Article 3(2) of the Directive, Regulation 3(6) provides as regards *"permitted family member":*

"(6) For the purposes of these Regulations, a person is a permitted family member of a particular Union citizen where—

(a) subparagraphs (a) and (b) of paragraph (1) apply, respectively, to the Union citizen and the person, and

(b) the Minister has, in accordance with Regulation 5, decided that the person should be treated as a permitted family member of the Union citizen for the purposes of these Regulations, which decision has not been revoked pursuant to Regulation 27."

51. In turn, Regulation 5 is headed "*Permission for permitted family member to enter State"* and provides for an application by a "*permitted family member*" in line with Article 3(2) of the

Directive. It envisages a detailed examination of the application for the purpose of deciding whether a person should be treated as a *"permitted family member"* as also envisaged by Article 3(2) of the Directive and Articles 8(2)(e) and 10(2)(e) of the Directive. Given its central importance to the issues in this case it is set out in full as follows:

"5. (1) This paragraph applies to a person who—

(a) irrespective of his or her nationality, is a member of the family (other than a qualifying family member) of a Union citizen to whom paragraph (2) applies and who in the country from which the person has come—

(i) is a dependant of the Union citizen,

(ii) is a member of the household of the Union citizen, or

(iii) on the basis of serious health grounds strictly requires the personal care of the Union citizen,

or

(b) is the partner with whom a Union citizen has a durable relationship, duly attested.

(2) Where a Union citizen has entered or is residing in the State in accordance with these Regulations or is proposing to do so, a person to whom paragraph (1) applies may apply to the Minister for a decision that he or she be treated as a permitted family member for the purposes of these Regulations and shall, for the purposes of such an application, produce to the Minister—

(a)(i) where the applicant is a national of a Member State, a valid passport or national identity card, or

(ii) where the applicant is not a national of a Member State, a valid passport,

(b) evidence that he or she is a member of the family of the Union citizen,

and

(c) one of the following:

(i) documentary evidence from the relevant authority in the country of origin or country from which he or she has come, that he or she is a dependant, or a member of the household, of the Union citizen;

(ii) proof of the existence of serious health grounds which strictly require the personal care of the applicant by the Union citizen;

(iii) documentary evidence of the existence of a durable relationship with the Union citizen.

(3) Upon receipt of the evidence referred to in paragraph (2), and on being satisfied that the applicant is a person to whom paragraph (1) applies, the Minister shall cause to be carried out an extensive examination of the personal circumstances of the applicant in order to decide whether the applicant should be treated for the purposes of these Regulations as a permitted family member of the Union citizen concerned.

(4) For the purposes of his or her decision under paragraph (3), the Minister may require the applicant to produce such additional evidence as the Minister may reasonably require

(5) The Minister, in deciding under paragraph (3) whether an applicant should be treated as a permitted family member for the purposes of these Regulations, shall have regard to the following:

(a) where the applicant is a dependant of the Union citizen concerned, the extent and nature of the dependency and, in the case of financial dependency, the extent and duration of the financial support provided by the Union citizen to the applicant prior to the applicant's coming to the State, having regard, amongst other relevant matters, to living costs in the country from which the applicant has come, whether the financial dependency can be satisfied by remittances to the applicant in the country from which the applicant has come and other financial resources available to him or her;

(b) where the applicant is a member of the household of the Union citizen concerned, the duration of the period during which he or she has been living within the household of the Union citizen;

(c) where, on the basis of serious health grounds, the applicant strictly requires the personal care of him or her by the Union citizen concerned, the nature of the serious health grounds and the duration of the period in which they have existed;

(d) where the applicant is in a durable relationship with the Union citizen concerned, the nature and duration of the relationship;

(e) whether the relationship described in subparagraph (a), (b), (c) or (d), as the case may be, was brought about with the objective of obtaining permission to remain in the State or a Member State;

(f) the capacity of the Union citizen concerned to continue to support the applicant in the State in the event that the applicant is to be treated as a permitted family member under these Regulations.

(6) The Minister, following an examination under paragraph (3), shall—

(a) where he or she decides that an applicant should be treated as a permitted family member for the purposes of these Regulations, notify the applicant in writing of the decision, or

(b) where he or she decides that an applicant should not be treated as a permitted family member for the purposes of these Regulations, notify the applicant in writing of the decision and of the reasons for it.

(7) Without prejudice to any rights or entitlements which he or she may have, on an individual basis, under these Regulations, a permitted family member shall not be refused permission to enter the State unless he or she—

(a) is suffering from a disease specified in Schedule 1, or

(b) represents a danger for public policy or public security by reason of the fact that his or her personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

(8)(a) A permitted family member who is not a member of a class of non-nationals specified in an order made under section 17 of the Immigration Act 2004 as not requiring an Irish visa shall be in possession of a valid Irish visa as a condition of being granted permission to enter the State.

(b) The Minister shall grant permitted family members every facility to obtain an Irish visa and, on the basis of an accelerated process, consider an application for an Irish visa from a person 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.

(9) An immigration officer shall not, at the point of entry, place a stamp in the passport of a person referred to in paragraph (8)(a) who presents to the officer a valid residence card.

(10) Where a permitted family member who is not a national of a Member State does not have a valid national identity card or passport or, where required, the necessary Irish visa, the immigration officer shall, before refusing permission to enter the State to that person, give him or her every reasonable opportunity to do all or any of the following:

(a) obtain the necessary documents;

(b) present the necessary documents to the immigration officer within a reasonable period of time;

(c) corroborate or prove by other means that he or she is entitled to enter the State in accordance with these Regulations."

52. Regulation 6 provides for residence in the State for up to 3 months for a Union citizen and family member (and longer where certain conditions are met) in line with Article 6 of the Directive.

53. Regulation 7 provides for an application for residence on the part of both a qualifying and permitted family member (in line with Articles 8 and 10 of the Directive). As in the case of Regulation 5 above, where the interpretation and application of Regulation 7 is fundamental to a decision on the issues in this case, the terms of Regulation are set out in full as follows:

"7. (1) A family member who is not a national of a Member State—

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

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

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

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

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

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

and

(b) in the case of a permitted family member—

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

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

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

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

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

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

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

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

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

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

54. From the foregoing, it is apparent that both the Directive and the 2015 Regulations provide for applications for residency by family members of an EU citizens exercising free movement rights in the State. As seen above, both the Directive and the 2015 Regulations distinguish between qualified family members and permitted family members (Articles 3(1) & (2) and Regulations 4 and 5).

55. Broadly speaking under both the Directive and the 2015 Regulations (Article 3(1) and Regulation 4), qualifying members are spouses and civil partners of a Union citizen and the Union citizen's immediate dependant descendants and ascendants. On the other hand, a permitted family member (Article 3(2) and Regulation 5), is a family member who, in the country from which they have come, is a dependant or a member of the household of the Union citizen or a partner with whom the Union citizen had a durable relationship.

56. Under Article 3(2) of the Directive (as transposed by Regulation 5(7) of the 2015 Regulations), the State is obliged to facilitate entry and residence for such persons and shall undertake an extensive examination of the personal circumstances and justify any denial of entry or residence to these people but under Regulation 7(6), an applicant for a residence card, be they qualifying or permitted family member, may remain in the State pending a decision on the application and under Regulation 7.

57. Regulation 7 provides for a right to a decision on an application for residence on the part of a family member within six months but in the case of the permitted family member, this runs from the date the Minister decided to treat the Applicant as a permitted family member pursuant to examination of an application under Regulation 5. In the case of a permitted family member, Regulation 7(2) envisages the making of an application within a specified time of the "*relevant date*". The "*relevant date*" is ascertainable by reference to a decision to treat the applicant as a permitted family member.

Irish Naturalisation and Citizenship Act, 1956 (as Amended)

58. While the grant of a certificate of naturalisation is a discretionary power which vests in the Minister, it is common case that a condition precedent to the grant of an application for a certificate of naturalisation by the Minister is that an applicant must be able to establish five years lawful residence in accordance with s. 15(1)(c) of the 1956 Act.

59. Section 16A of the 1956 Act provides that a period of residence in the State shall not be reckoned when calculating a period of residence for the purposes of granting a certificate of naturalisation if it is in contravention of s. 5(1) of the 2004 Act. Section 16A states:

"16A.—(1) A period of residence in the State shall not be reckoned when calculating a period of residence for the purposes of granting a certificate of naturalisation if—

(a) it is in contravention of section 5(1) of the Act of 2004,

(b) it is in accordance with a permission given to a person under section 4 of the Act of 2004 for the purpose of enabling him or her to engage in a course of education or study in the State, or

(c) it consists of a period during which a person (other than a person who was, during that period, a national of a Member State, an EEA state or the Swiss Confederation) referred to in subsection (1) of section 16 of the International Protection Act 2015 is entitled to remain in the State in accordance only with the said subsection.

(2) This section does not apply to a person to whom the provisions of the Aliens Act, 1935, do not apply by virtue of an order made under section 10 of that Act.

(3) This section does not apply in the calculation of a period of residence in the State for the purposes of an application for a certificate of naturalisation made before the commencement of section 6 of the Irish Nationality and Citizenship Act, 2001.

(4) Where a person referred to in section 2 (1) or 2(1A) of the Immigration Act 2004 is resident in the State, such residence shall not be reckonable as a period of residence in the State for the purposes of granting a certificate of naturalisation."

60. It is clear from s. 16A(1)(a) that if the period from the application for the residence card to the decision thereon is in contravention of s. 5(1) of the 2004 Act, then in accordance with s. 16A, that period is not reckonable.

Immigration Act, 2004 (as amended)

61. Three provisions of the 2004 Act require mention. Section 2 of the 2004 Act provides for a "*carve out*" from the application of that Act as follows:

"2.—(1) This Act shall not apply to any of the following persons, that is to say:

(a) a person entitled in the State to privileges and immunities under section 5 of the Diplomatic Relations and Immunities Act 1967;

(b) a person entitled in the State to privileges and immunities under section 6 of that Act;

(c) a person entitled in the State to privileges and immunities under any other Act of the Oireachtas or any instrument made thereunder.

(1A) Without prejudice to the generality of subsection (1), this Act shall not apply to the following persons:

(a) a member of the mission as defined in Article 1 of the Vienna Convention on Diplomatic Relations done at Vienna on the 18th day of April, 1961, as set out in the First Schedule to the Diplomatic Relations and Immunities Act 1967, and a person who is a member of the family and forms part of the household of such a member,

(b) a private servant as defined in Article 1 of the Vienna Convention on Diplomatic Relations done at Vienna on the 18th day of April, 1961, as set out in the First Schedule to the Diplomatic Relations and Immunities Act 1967, and a person who is a member of the family and forms part of the household of a private servant,

(c) a member of the consular post where that post is headed by a career consular officer, as defined in Article 1 of the Vienna Convention on Consular Relations done at Vienna on the 24th day of April, 1963, as set out in the Second Schedule to the Diplomatic Relations and Immunities Act 1967, and a person who is a member of the family and forms part of the household of such a member,

(d) a member of the private staff as defined in Article 1 of the Vienna Convention on Consular Relations done at Vienna on the 24th day of April, 1963, as set out in the Second Schedule to the Diplomatic Relations and Immunities Act 1967, and a person who is a member of the family and forms part of the household of such a member,

(e) a preclearance officer as defined in section 1 of the Aviation (Preclearance) Act 2009 and a dependant of a preclearance officer, and

(f) an official of an international organisation, community or body assigned to official duty in the State and a person who is a member of the family and forms part of the household of such an official,

where that person has been duly notified to, and that notification has not been objected to by, the Minister for Foreign Affairs and Trade.

(2) Nothing in this Act shall derogate from—

(a) any of the obligations of the State under the treaties governing the European Communities within the meaning of the European Communities Acts 1972 to 2003,

(b) any act adopted by an institution of those Communities,

(c) section 9(1) of the Refugee Act 1996,

(d) the European Communities (Aliens) Regulations 1977 (S.I. No. 393 of 1977)

(e) the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 (S.I. No. 57 of 1997), or

(f) the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015).”

62. There is a difference in language between s. 2(1) and s. 2(2) insofar as s.2(1) provides that “*the Act shall not apply*” whereas in s. 2(2) it is stated “*nothing in this Act shall derogate from*”. This difference begs questions as to proper interpretation of s. 2(2) insofar as the use of different language suggests a distinct meaning. This is a question returned to below.

63. Section 4(1) of the 2004 Act provides for the grant of permission to enter and be in the State in the following terms:

“4.—(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as “a permission”).”

64. Section 5 provides for presence in the State as follows:

> *"5.—(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given to him or her after such passing, by or on behalf of the Minister.*
>
> *(2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State."*

DISCUSSION

65. I have also been referred by counsel in submissions to a number of decisions, to which I now turn, where issues touching on the question I must decide were considered. Some consideration needs to be given to how different strands of jurisprudence fall to be read consistently with each other and properly applied in these cases.

66. The first in time of the cases cited before me of relevance is *Druzinins v. Minister for Justice Equality and Law Reform* [2010] IEHC 84. In *Druzinins*, Cooke J. found that the requirement that the Minister immediately cause to be issued a notice acknowledging receipt of an application for residence under the 2006 Regulations is designed to legitimise the presence of the family member in the State pending the making of a decision on the application.

67. Shortly afterwards, in *Desci v. Minister for Justice, Equality and Law Reform* [2010] IEHC 342, Cooke J. further decided in the context of an application for a residence permission on behalf of the spouse (and therefore a qualifying family member) of an EU national working in the State in exercise of free movement rights that the said spouse had an entitlement conferred on her pursuant to Article 23 of the Directive and Regulation 18(1)(b) of the then transposing Regulations (European Communities (Free Movement of Persons)(No. 2) Regulations 2006 and 2008) to work at least following the acknowledgement of receipt of the application for residence. The entitlement to take up employment derived from the Directive (Article 23) as implemented by Regulation 18 of the 2006-2008 Regulations and not the issue of any employment permit or documentary permission. Cooke J. found in this context, in reliance on C-363/89 *Roux v. Belgium* [1991] ECR 1-273, that the issue of a residence card

merely evidences a right of residence which already vested in the family member (as reflected in the language of Article 10 of the Directive).

68. In *Mohamud v. Minister for Justice, Equality and Law Reform* [2011] IEHC 54, it was held that the acknowledgement of receipt of the original application issued under the Regulations remains valid evidence of the exercise of the right and that where the initial refusal decision is quashed, the entitlement of a family member of an EU citizen to remain continues until the definitive decision is taken.

69. The question of lawful residence was considered in *Sulaimon v. Minister for Justice, Equality and Law Reform* [2012] IESC 63 where the Supreme Court found, in two separate judgments (Hardiman J. and O'Donnell J.) that lawful residence for the purpose of s. 6B(4) of the 1956 Act in the context of an application for a certificate of Irish nationality on the part of a child born in Ireland to a non-national who had resided in the State for well in excess of the qualifying period was residence which is not in breach of s. 5(1) of the 2004 Act. Permission to remain had been granted in a letter from the Minister to the child's non-national father in July, 2005 but it was the Minister's contention, roundly rejected by both the High Court (Ryan J.) and the Supreme Court, that permission could only be given by an immigration officer putting a stamp on the applicant's passport. The Court was satisfied that the Immigration Act, 2004 envisaged more than one type of permission and clearly contemplated permission granted by the Minister or on his behalf.

70. In *Rodis v. Minister for Justice, Equality and Law Reform* [2016] IEHC 360 the Court (Humphreys J.) found it clear that, because the immigration law requirements of the 2004 Act did not apply to persons working in the State on a diplomatic mission (by operation of s. 2(1) of the Immigration Act, 2004) such persons were not present in the State in contravention of the 2004 Act and therefore their time spent in the State was not precluded from reckonability under s. 16A(1) of the Immigration Act, 2004.

71. In a detailed decision in *C.A. v. Governor of Cloverhill Prison* [2017] IECA 46, on appeal from the High Court decision of Keane J., the Court of Appeal (Hogan J.) considered an appeal against a refusal to release from custody on an Article 40.4.2 enquiry the family member of an EU national who was detained for the purpose of deportation pursuant to the provisions of the Immigration Act, 1999. Although an unsuccessful asylum seeker who was

married with his own family, the applicant applied to the Minister for Justice pursuant to Regulation 5(2) of the 2015 Regulations for a decision to be treated as a permitted family member of his sister-in-law who was a UK national and with whom he claimed to be in a durable relationship of more than two years' standing.

72. In the High Court, Keane J. had found that nothing in the 2015 Regulations conferred a permission to reside in the State on a person who had applied, under Regulation 5(2) of the 2015 Regulations for a decision that he should be treated as a permitted family member of a Union citizen pending the making of that decision.

73. The Court of Appeal conducted an exhaustive review of the 2015 Regulations and concluded that a person claiming an entitlement to be treated as a permitted family member does not achieve that status absent a positive decision to this effect on the part of the Minister. Referring to Article 7(6) of the 2015 Regulations, Hogan J. observed that while Article 7(6) provides that an applicant for a residence card may remain in the State pending a decision, persons claiming status as a permitted family member only become such when (and if) the Minister has made a positive decision to this effect in their favour.

74. In his judgment for the Court of Appeal, Hogan J. found it telling that no similar provision for an entitlement on the part of a person who had simply applied for the status of permitted family member to remain pending a determination of that application under Regulation 5 had been made and he observed that there was no requirement for same under Article 7 of the Directive. He considered that the caselaw of the CJEU (specifically citing C-83/11 *Secretary of State for the Home Department v. Rahman*) contra-indicates the existence of any general EU derived right to remain in the State pending the determination of the application to be treated as a permitted family member.

75. While a decision in *C.A.* was pending from the Court of Appeal, *Rafique v. Governor of the Dóchas Centre* [2017] IEHC 80 came before the High Court. Binchy J. followed the decision of Keane J. in the High Court in *C.A.* (the decision of the Court of Appeal in *C.A.* only being handed down ten days later) in upholding the conclusion that the 2015 Regulations do not confer any permission to reside in the State on a person who has simply applied to be treated as a permitted family member "*pending the making of that decision*" (paras. 21-23). It is noteworthy that in his judgment Binchy J. refers to the fact that the applicant had applied under

Regulation 5(2) of the 2015 Regulations for a decision that she should be treated as a permitted family member of a citizen of the EU.

76. Ultimately, the Regulation 7(6) question came before the Supreme Court in the case of *S.S. (Pakistan) v. Governor of Mountjoy Prison* [2019] 3 I.R. 595; [2019] IESC 37 on appeal from the decision of the Court of Appeal to uphold the High Court's refusal (Humphreys J.) to release an applicant from detention pending deportation on an Article 40.4.2. enquiry. The decision in the High Court and Court of Appeal had been made on an application of the decision of the Court of Appeal in *C.A.*.

77. The applicant in *S.S.*, a failed asylum seeker who was the subject of a deportation order, had made an application for residency on the basis that he was the adult dependent child of his father who in turn was married to an EU citizen residing in the State. It was considered by both the High Court and the Court of Appeal in turn that as he had not established dependency, he had not established a right to apply for a residence card as a family member.

78. The Court of Appeal (Kennedy J.) ([2018] IECA 384) found that establishing that a person is a family member is sufficient to entitle them to apply to benefit under Article 10(1) of the Directive or Regulation 7(6) of the 2015 Regulations but that to make an application under Regulation 7(1), the person must be a family member as statutorily defined. She observed (para. 39) that in the case of permitted family members the entitlement to temporary residence does not arise as a matter of law but is dependent on the exercise of a ministerial discretion, to be exercised in accordance with Regulation 5 of the 2016 Regulations, to permit it.

79. The Court found (at para. 47) that Regulation 7(6) of the Regulations provides expressly for the right to remain in the State of family members (as defined in Regulation 2 of the 2015 Regulations) pending a decision on their application for a residence card. Moreover, where an application is merely seeking, but has not yet been granted, the status of a permitted family member, there is no such entitlement because such a person is not yet "*a family member*". She considered to be "*indicative*" of this fact that to gain the benefit of Regulation 7(6), one must be, an actual "*family member*". She added (at para. 49) that to interpret Regulation 7(6) as applying to every person who merely applies for a residence card pursuant to Regulation 7(1) would not reflect the intention of the legislator.

80. The Court of Appeal was satisfied from a consideration of the entirety of the 2015 Regulations and the legislative scheme that it was not the intention of the Minister to provide a temporary right of residence to any person who simply submits a form seeking a residence card on the basis of dependency without first establishing on a *prima facie* basis that he/she is an actual qualifying family member. The Minister's submission that the appellant must first establish to the satisfaction of the Minister that there exists a relationship of dependency sufficient to make him a qualifying family member before Regulation 7(6) of the Regulations is engaged was accepted (para. 53).

81. On appeal to the Supreme Court, there was a single judgment of the Court (Charleton J., [2019] 3 I.R. 595; [2019] IESC 37) allowing the appeal. The Court found that there was no requirement in the Directive or the Regulations that, in order for the right to remain in the State pursuant to Regulation 7(6) to arise, a person applying for a resident card under Regulation 7(1) had to first establish a *prima facie* case of entitlement by virtue of being a qualifying family member of a European Union citizen, as defined, followed by proof of dependency and relationship; such a two-part test could not be read into the national legislation. It was stated by Charleton J. that nothing indicated that the Minister ever had in mind that applications of this kind, namely qualifying members, should be run in two stages: a first stage establishing a *prima facie* basis for the application and then a second stage analysing the application based on it having some preliminary validity to it. Even if the legislation supported such an analysis, Charleton J. observed that this was not what had happened in fact in any event.

82. While the Directive does not require the conferral of a right to remain while an application is being processed, the Supreme Court found, in essence, that the Directive conferred "*a floor of rights*" and there was no impediment to Member States conferring additional rights as expressly recognised by Article 37 of the Directive. As national law was permitted to confer more rights than those contained in the Directive and the 2015 regulations conferred the additional right to remain in the State pending the resolution of an application for a residence card under Regulation 7(1), the Supreme Court found that *S.S.* was entitled to remain pending a determination of the application under Regulation 7(1).

83. The next case in time presenting as potentially bearing on the issues arising here identified by counsel on behalf of the parties was the decision of the High Court in *P.F. v.*

Minister for Justice and Equality [2019] IEHC 369. *P.F.* concerned a refusal on the part of the Minister to treat an entitlement to remain pending the determination of a protection application under the European Union (Subsidiary Protection) Regulations 2013 as a "*permission*" within the meaning of s. 4 of the 2004 Act. Having considered the decision in *Sulaimon*, Keane J. found that there is a general power vested in the Minister to grant a non-national permission to remain in the State, whether under s. 5 of the Act of 2004 or derived directly from the executive power of the State, quite apart from the specific powers contained in s. 4 of that Act. He also observed, however, that under the European Union (Subsidiary Protection) Regulations 2013 the applicant had an entitlement, rather than a permission, to remain in the State pending the resolution of his subsidiary protection application.

84. There is some apparent tension between the decision in *P.F.* and the decision in *Kant v. Minister for Justice and Equality* [2019] IEHC 583 which was decided shortly afterwards. In *Kant* it was found by Humphreys J. (in the case of spouses as qualifying family members) that an application for residence based on EU Treaty Rights is not made under s. 4 of the 2004 Act but under the 2015 Regulations. Accordingly, any permission granted is a permission under the 2015 Regulations, not the 2004 Act. The submission made that this led to an inconsistency with s. 5 of the 2004 Act was rejected noting that a permission for the purposes of s. 5 did not require to be given under the 2004 Act. Humphreys J. observed, in any event, that rights under EU law would displace the requirement for a permission under the 2004 Act anyway.

85. Finally, in terms of the EU law position, in C-22/21 *SRS v. Minister for Justice and Equality*, it was clearly established in the context of an Irish referral that as a matter of EU law, unlike qualifying family members, permitted family members (para. 25):

> "*do not have a right of entry and residence in the host Member State of that citizen, but rather the possibility of being granted such a right*".

86. While these cases are helpful in placing the question which arises in these proceedings within a broader legal context and serve to properly direct me in law in relation to the specific question which arises, none of the cases cited are on all fours. Some caution is required, for example, in applying *Druzinins v. Minister for Justice Equality and Law Reform* [2010] IEHC 84 because it was a decision involving a previous regulatory regime involving different

provisions and the issue of a Stamp 4 visa pending a determination of an application in a case involving a qualifying family member.

87. Similarly, although undoubtedly a relevant and important authority, the decision in *Desci* needs to be read in the light of the fact that Cooke J. did not there distinguish between permitted family members and qualifying family members and, as spouses, the applicants in the two cases under consideration by him were, in fact, qualifying family members. Nonetheless, it is also true that Regulation 7(6) of the 2015 Regulations does not distinguish between permitted and qualifying family members.

88. While the judgment in *Sulamion* is particularly compelling, there is a risk of overstating its relevance to the issue arising in these proceedings because the Supreme Court focused on what is meant by "*permission*" in s. 5 of the 2004 Act and was not concerned with and did not consider those prescribed situations where permission is not required under s. 2 of the 2004 Act or the interaction of 2004 Act with regulation in the EU rights area, factors clearly arising in this case but was not present in *Sulamion*.

89. Furthermore, although *C.A.* was at least impliedly overturned in relation to a qualifying family member by the Supreme Court in *S.S.*, that decision remains obviously correct as a matter of law and fact insofar as it states that where an application seeking the status of a permitted family member is made under Regulation 5 for the purpose of establishing a right to apply for residence under Regulation 7, no provision is made in Regulation 5 for a right to remain in the State pending a decision on that application.

90. Moreover, *S.S.* is not an authority which can be automatically applied in this case. It differs in a material way from the situation in this case because it concerned an application by a person asserting rights as a qualified family member and, unlike the situation with a permitted family member, the 2015 Regulations do not envisage a verification or preliminary stage before accepting an application for consideration under Regulation 7.

91. Neither *C.A.* (or indeed *Rafique*) nor *S.S.* therefore addresses a situation where, as here, the application which has been accepted for consideration is an application under Regulation 7 of the 2015 Regulations from a person claiming a right of residence as a permitted family member. This is potentially material when regard is had to the fact that there is a difference in

the 2015 Regulations between the treatment of qualifying family members and permitted family members in that the 2015 Regulations make provision for a two-stage process through Regulations 5 and 7 in the case of a permitted family member.

92. Thus, it cannot be said, as it was in *S.S.*, that there is nothing to indicate that the Minister ever had in mind a two-stage process when the terms of Regulations 5 and 7, are to the contrary insofar as permitted family members are concerned. In these cases, however, there is also the additional factor that the Regulation 5 process was not clearly or expressly invoked and neither Applicant was required to make a separate application under Regulation 5 before the Form EU1 was accepted. This begs the question as to whether Regulation 7(6) avails a person seeking residency as a permitted family member where a separate application under Regulation 5 was not first made, and a decision communicated thereon in accordance with Regulation 5(6) before the further application for residence is presented for processing.

93. The decision in *Rodis* is illuminating because it appears to have provoked the insertion of s. 16A(4) of the 1956 Act which undid the effect of the decision in the High Court in that case by expressly providing that residence as a diplomat was excluded from reckonable residence for the purpose of a s. 15 application. This express statutory exclusion was necessary because s. 2(1) of the 2004 Act disapplied s. 5 such that the diplomat's residence in the State was not in contravention of s. 5 meaning that, without the statutory amendment introduced at s. 16A(4) of the 1956 Act, residence was reckonable on a s. 15 application. However, the carve out from s. 5 of the 2004 Act provided for in s. 2(1) which was under consideration in *Rodis* is different to that in s. 2(2) with the result that its reasoning cannot be simply adopted in construing s. 2(2) of the 2004 Act.

94. Although s. 2(1) clearly operates to disapply the 2004 Act to persons entitled to be in the State pursuant to the Diplomatic Relations and Immunities Act, 1967, this still leaves the question as to whether s. 2(2) has a similar effect, through the different formulation of words which appear there, namely, "*nothing in this Act shall derogate from.*" It remains an open question as to whether s. 2(2) of the 2004 Act similarly disapplies s. 5 for residence visa applicants benefitting from an entitlement to remain in the State pursuant to the 2015 Regulations.

95. The following principles appear to me, however, to be established on the case-law:

i. EU law treats qualifying family members and permitted family members differently by granting rights of residence to qualifying members (subject to limited exceptions) but merely a right to apply for residence as a permitted family member;

ii. Whereas a qualifying family member has a right of residence as a matter of EU law, subject to conditions permitted under the Directive as transposed, the putative permitted family member has no automatic entitlement as a matter of EU law to be granted a residence permission or to remain in the State pending a decision on their application but has an entitlement to have an application properly considered and to be facilitated in entering and residing in the State for this purpose and for any refusal to be justified;

iii. As permitted by EU law, the 2015 Regulations go further than the Directive requires by providing in Regulation 7(6) that a family member (be they a qualifying family member or a permitted family member) may remain in the State pending a decision on their application under Regulation 7(1);

iv. Acknowledgement of receipt of the application issued under Regulation 7 is valid evidence of the exercise of the right and the entitlement of a family member of an EU citizen to remain;

v. A permission under s. 4 of the 2004 Act is not the same as an entitlement to reside deriving from the requirements of EU law or under statutory provision.

DECISION

96. Having carefully considered each of the authorities referred to by counsel and the statutory framework, it seems to me that whether the Minister was wrong in law to exclude the period from December, 2015 when the Regulation 7 application was accepted for consideration from reckoning turns on two questions as follows:

- Firstly, does Regulation 7(6) of the 2015 Regulations avail an applicant who seeks residence as a permitted family member without first having made a separate and distinct application under Regulation 5 to be accepted as a "*permitted family*

member" before proceeding to make a further application for residence under Regulation 7; and

- If so, where a person has an entitlement to remain under Regulation 7(6) pending a determination of their residency application, is their presence in the State in contravention of s. 5(1) of the 2004 Act?

Does Regulation 7(6) of the 2015 Regulations avail an applicant who seeks residence as a permitted family member without having made separate application under Regulation 5 to be accepted as a "permitted family member"?

97. Despite the fact that as a matter of EU law neither Applicant was entitled as a matter of right to be granted entry and residence for the purpose of pursuing an application for residence on family member grounds under Regulation 7 (see C-22/21 *SRS v. Minister for Justice* and *Equality and S.S. v.* [2019] 3 I.R. 595), both obtained entry to the State and, without making a separate and distinct application under Regulation 5 to be treated as a permitted family member, proceeded to make an application for residence under Regulation 7.

98. While the Supreme Court found in *S.S.* that the 2015 Regulations did not envisage a two-stage process and provided for a right of residence for so long as an application under Regulation 7 was under consideration, the premise for this finding is true only of qualifying family members. The 2015 Regulations clearly does make provision for a two-stage process in the case of permitted family members, although it is less clear how this was reflected in practice at the time of the applications made in 2015 and there is some ambiguity as to the procedure followed.

99. Where a Regulation 5 procedure is pursued, there is no entitlement to reside in the State pending its determination either under the 2015 Regulations or as a matter of EU law (*S.S.* and *C.A.*). This is quite distinct from the position under Regulation 7(6) where an application for residence is under consideration. Insofar as Regulation 5 provides for consideration of an application to be treated as a permitted family member for the purpose of making an application for residence as a family member, it is consistent with the requirements of the Directive which envisage a process involving an examination of the person's circumstances and allows for the possibility that refusal may be justified.

100. While provision is made in terms of Regulation 5 for the first stage of a two-stage process, the second stage being the Regulation 7 process, it is unclear on the evidence how this distinct stage of the process was treated in the Minister's procedures at the time the applications the subject of these proceedings were made. In neither of the two cases before me is there clear evidence of a separate Regulation 5 procedure being engaged in to determine whether the Applicants were to be allowed to make an application for residency as permitted family members. Certainly, they did not use a separate application form and obtain a first stage decision before then proceeding to lodge an application under Regulation 7. In neither case was any suggestion made on the Minister's part that a separate, preliminary or first stage application under Regulation 5 was required using a predecessor form to the EUTR1A (if one existed) prior to making her decision to grant residence on the Regulation 7 application. Indeed, the undisputed evidence before me is that there was a practice of not requiring applicants under Regulation 7 as permitted family members to go through a separate and distinct Regulation 5 process, albeit that the Regulations provide for a two-stage process and separate application forms exist on the Minister's website, as least since 2023.

101. The absence of a separate form invoking the Regulation 5 procedure starting with an application and concluding with a communicated decision before proceeding to the next stage of the process by making a further application, does not mean that the Minister did not, in fact, engage in a two-stage process by first deciding whether to treat the Applicants as permitted family members before then proceeding to decide on the residence application. The Minister's powers are not trammeled by forms. A two-stage process may be followed by the Minister using a single form and in a continuing process, albeit Regulation 5(6) mandates communication of a decision on the application to be treated as a permitted family member.

102. Although the 2015 Regulations provide for a two-stage process in respect of a person who seeks to be accepted as a permitted family member and have a residence application processed on this basis, there is no impediment to the Minister making the decision on each stage on foot of a single application form and within one continuing process involving two separate stages with the decision on whether to accept the application being a consideration of whether an applicant should be treated as a permitted family member and the decision on the residence application following where it is accepted to treat an application as a permitted family member. In these cases, a single application was made using Form EU1, which is a form which

permits an application for residence *simpliciter*. Both applicants were advised that their applications were "*accepted for consideration*," however, under Regulation 7(2), an application on behalf of a permitted family member is made with reference to a "*relevant date*" being the date when the Minister decided to treat the applicant as a permitted family member. Having acknowledged receipt of and acceptance of the applications for consideration, only one further decision was communicated in each of the two cases before me – namely the decision to grant residence.

103. Where under the scheme of the 2015 Regulations it is envisaged that a permitted family member is a person with the benefit of a determination in accordance with Regulation 5 that the person be treated as a permitted family member (Regulation 3(6)), an application for residence on behalf of a permitted family member will only be accepted under Regulation 7 with reference to the date it was decided to treat an applicant as a permitted family member. It follows that acceptance of the application for consideration only occurs where a decision to treat the applicant as a permitted family member has been made. In accepting the application for consideration under Regulation 7, the Minister is required under the statutory scheme to have made a positive decision that the applicant was entitled to be treated as a permitted family member.

104. Accordingly, in acknowledging acceptance of the application for consideration in the case of each of the Applicants it must be taken to be the case that the Minister had decided to accept the applications for consideration by reference to an ascertained date, that is date she decided to allow the application to be processed on the basis that the Applicants were to be treated as "*permitted family members*". While certainly in doubtful compliance with the requirements of Regulation 5(6) to notify a decision to treat an applicant as a permitted family member, notification of acceptance of the application for consideration as occurred in different ways in these cases, can only be understood as evidencing the entitlement of each of the Applicants, as family members of an EU citizen said to be exercising free movement rights in the State, to remain in the State pending a determination of the application under Regulation 7(6).

105. As the applications in the two cases before me were processed on foot of a single application form and the decision to grant residence has never been impugned, it seems to me that in accepting the residence application for consideration in both cases, the Minister must be

understood to do so on the basis that she was satisfied to treat the applications as having been made by permitted family members because this is a condition precedent to accepting an application under Regulation 7 of the 2015 Regulations. Where an applicant is not required to seek acceptance as a permitted family member in a distinct process using a separate application form under Regulation 5 but instead the decision is made by the Minister in considering whether to accept the application for processing under Regulation 7 and the application is then accepted for processing under Regulation 7(1), it must follow that Regulation 7(6) applies as a matter of domestic law to applicants with pending applications. Accordingly, having accepted the application on the basis that the Applicants are permitted family members, the Regulation 7(6) permission to remain is triggered.

106. I conclude that by reason of the acceptance of their applications, each of the Applicants in the present proceedings were facilitated in making an application as a permitted family member with assessment of their entitlement to residence being determined on foot of a single application form, the Minister having first determined that they were eligible to be treated as permitted family members. While the Minister was not obliged as a matter of EU law to proceed on this basis, in accepting an application for consideration under Regulation 7(1) from a person relying on the status of permitted family member, that person's continued presence in the State pending the determination of the application was provided for by the Minister pursuant to Regulation 7(6) of the Regulations.

Where a person has an entitlement to remain under Regulation 7(6) pending a determination of their residency application, is their presence in the State in contravention of s. 5(1) of the 2004 Act?

107. The question of how leave to be in the State granted under Regulation 7(6) of the 2015 Regulations can be reconciled with a prohibition on being in the State other than in accordance with the terms of a permission granted by the Minister as provided for in s. 5(1) requires careful consideration of s. 2 of the 2004 Act together with Regulation 7(6). This reconciliation falls to take place in circumstances where the primary determinant of reckonability under s.16A of the 1956 Act is whether the Applicant's "*presence in the State is in contravention of s.5(1)*" during the period of the pending application between December, 2015 and the decision in February, 2017 and first registration with the GNIB in March, 2017.

108. Section 2 of the 2004 Act operates to disapply that Act in certain circumstances. In s. 2(1) of the 2004 Act a straightforward disapplication of the 2004 Act is provided for using the words "*shall not apply to any of the following persons*". The language of s. 2(2) is not so straightforward and requires consideration of the substance of identified measures by providing that "*nothing in the Act shall derogate*". Rather than a simple automatic disapplication of the 2004 Act as under s. 2(1), for there to be a derogation, it is necessary for there to be a conflict or incompatibility with the provisions which are identified in s. 2(2) of the 2004 Act and this requires a consideration of the substance of those provisions.

109. As the right to remain in the State provided for in Regulation 7(6) in the case of permitted family members arises as a matter of domestic rather than EU law, s. 2(2)(a) of the 2004 Act relating to obligations on the State under the EC Treaties and the European Communities Acts 1972 to 2003 and (b) which relates to any act adopted by an institution of those Communities, are not relevant for present purposes. An issue arises, however, in relation to (f) which provides that nothing in the 2004 Act shall derogate from the 2015 Regulations.

110. It appears from the language of s. 5(1) that it precludes the very presence of a person in the State without permission, whereas Regulation 7(6) of the 2015 Regulations plainly envisages a person remaining in the State pending a determination of their application for residence. It seems to me that these provisions contradict each other unless the entitlement to remain under Regulation 7(6) is characterised as a permission by or on behalf of the Minister. If it is not a permission, then by operation of s. 5 of the 2004 Act, rights conferred under the 2015 Regulations would be cut across as the presence of a person in the State on foot of the 2015 Regulations is precluded in a manner which would derogate from the 2015 Regulations unless disapplied. In my view s. 2(2) of the 2004 Act would be triggered in such circumstances to provide a special carve out from the requirement to seek separate permission to be in the State from the Minister.

111. The question of whether acceptance of an application under Regulation 7(1) results in a permission by operation of Regulation 7(6) is not without complexity given some tension between the different strands of case-law. To some extent it may therefore be a moot question as to whether Regulation 7(6) provides a permission which is recognised under s. 5(1) or instead an entitlement which triggers a carve out or exemption provided for by s. 2(2)(f) of the

2004 Act because, if I am correct in relation to the application of s. 2(2)(f), the outcome is the same.

112. Weighing in favour of a finding that Regulation 7(6) of the 2015 Regulations operate as a form of statutory permission which should be recognised as a permission for the purposes of s. 5(1) of the 2004 Act is the fact that it is established that the two regimes operate in parallel. It was found in *Kant* that a permission for the purpose of s. 5 is not necessarily a permission under that 2004 Act and can also be a permission under the 2015 Regulations. I am satisfied that there is no separate requirement to obtain permission under the 2004 Act where authority to be present in the State has been granted under the 2015 Regulations. It also relevant that the 2015 Regulations are adopted by one and the same Minister by or on whose behalf permissions are granted under the 2004 Act. Accordingly, the same Minister vested with authority to issue permissions under the 2004 Act also made the 2015 Regulations providing for a statutory right to remain.

113. On the other hand, the argument that there is a distinction between an entitlement to stay in the State and a permission forcibly made in submissions is, at least to some extent, supported by the decision in *P.F. v. Minister for Justice and Equality*. The decision in that case is, however, difficult to reconcile with *Kant*. For the purpose of reconciling these two authorities it seems to me that *P.F. v. Minister for Justice and Equality* must be understood in the context in which it was given.

114. The distinction between entitlement to stay and a permission under s. 4 of the 2004 Act was important in *P.F. v. Minister for Justice and Equality* because the issue the Court was required to address was whether a power to extend or vary a permission prescribed under s. 4(7) of the 2004 Act fell to be exercised in respect of an entitlement to remain under a separate statutory regime. Accordingly, for this purpose, it was necessary to identify the ambit of the s. 4(7) power to vary referrable to the exercise of a power to grant permission under the 2004 Act rather than any other statutory regime. It is nonetheless clear that the Court found that a legislative entitlement to remain (in that case pursuant to the 2013 Protection Regulations) is not equitable to a permission to be in the State, given to an applicant by or on behalf of the Minister.

115. When one considers the language of Regulation 7(6), it seems to me that it cannot be construed as other than making it lawful for an applicant to remain in the State. It is true that this is not in accordance with a permission under the 2004 Act which envisages a prescribed degree of formality. It is also true that the only evidence of the entitlement to remain in the State in these cases is the acceptance of the application for consideration (unlike *Sulamion* where a separate permission had issued) but such an acknowledgement has been found to be an incident of the legitimacy of presence in the State (as in *Druzinins v. Minister for Justice Equality and Law Reform* [2010] IEHC 84).

116. In view of these factors, it seems to me the exercise of the Minister in regulating in the terms of Regulation 7(6) is a form of statutory permission. Characterising Regulation 7(6) right as an entitlement rather than as a permission is almost semantic in the circumstances. It does not bear on the substance of the matter, namely, the existence of a right to be present in the State or the lawfulness of that presence. While using different language may be of assistance in differentiating between the formality of a "*permission*" which leads to registration and the issue of a formal stamp and a statutory entitlement for which no formality has been prescribed, the effect of both is similar insofar as lawful authority to be present in the State has been conferred.

117. I appreciate that there is a sense in which the use of different language and a differentiation between the grant of an actual permission and the operation of a statutory entitlement may be important, including potentially where the State seeks to determine what type of residence is reckonable for citizenship purposes as argued on behalf of the Minister in these proceedings. In this regard the Minister's argument that there is no derogation from the 2015 Regulations where the issue is whether residence is reckonable for the purposes of a citizenship application and where the Legislature has determined that an actual individual permission from the Minister is required is well made, but for the fact that this is not what s. 16A requires and because of difficulties which arise if the argument is followed to a logical conclusion.

118. Looking at the second difficulty first, if this argument is followed to its logical conclusion, it would mean that even permanent residence pursuant to the 2015 Regulations would not be reckonable for the purpose of an application under s. 15 of the 1956 Act. The Minister in these proceedings has not contended that residence after the grant of residence

under the 2015 Regulations is not reckonable, albeit an attempt is made to tie reckonability to registration with the GNIB and the issue of Stamp 4 EU Fam in this way conferring the status of a permission on residency post registration as distinct from pre-residency.

119. Even if for the sake of argument it were proper to treat only residence post registration as reckonable without distinction between persons entitled to residence as a matter of right pursuant to EU law and those who are merely entitled to seek residency in accordance with domestic law (noting that Regulation 7(6) does not distinguish between qualified and permitted family members), notwithstanding Article 10 of the Directive and decisions such as *Desci* and C-363/89 *Roux v. Belgium* [1991] ECR 1-273, it is still necessary to engage with the actual wording of s. 16A.

120. Section 16A expressly treats presence in the State which is not in contravention of s. 5(1) of the 2004 as reckonable. The test therefore is presence in the State which is "*in contravention*" of s. 5(1) – not whether one has a permission within the meaning of s. 5(1). When the Minister argues that s. 16A of the 1956 Act excludes from the calculation of reckonable residence periods spent in the State without a permission which has been given by the Minister, it bears emphasis that the actual wording of s. 16A makes no direct reference to a requirement for residence with permission but relies instead on residence in the State in contravention of s. 5(1). For the Minister's argument to succeed, therefore, it would be necessary for me to find that presence in the State in reliance on Regulation 7(6) of the 2015 Regulations is "*in contravention*" of s. 5 of the 2004 Act notwithstanding the terms of s. 2(2)(f) of the 2004 Act.

121. The Minister contends that while Regulation 7(6) may preclude arrest or deportation pending the outcome of the application for residence as a permitted family member, this does not entail the proposition that an applicant is during this time resident in accordance with the terms of a permission given to him by or on behalf of the Minister. It seems to me, however, that if s. 5(1) of the 2004 Act is interpreted as applying to an applicant for Regulation 7 residence pending a decision, then it cannot be read as meaning otherwise than that the applicant for Regulation 7 residence may not be in the State. The language of s. 5(1) provides for an unambiguous prohibition on presence simpliciter where it applies but an applicant under the 2015 has no other permission than the leave granted by operation of Regulation 7(6) which

would mean that were s. 5(1) and Regulation 7(6) not construed as a permission, then presence in the State of the applicant would be unlawful.

122. I am referred on behalf of the Minister to Stanley in Immigration and Citizenship Law (2017) at paras. 5.45 to 5.46 where he notes that the Directive does not confer a right of residence on permitted family members and posits that an EU citizen who does not meet the conditions of the Directive presumably is subject to ss. 4 and 5 of the 2004 Act in the same way as non-nationals. The Minister's reliance on this extract to suggest that there is no good reason for considering s. 5(1) of the 2004 Act is disapplied to permitted family members in reliance on this statement of principle ignores the meaning and effect of Regulation 7(6) of the 2015 Regulations as a domestic measure not mandated but permitted under EU law and on foot of which additional entitlements are conferred to applicants within the Regulation 7 application process pending a decision on their applications. Whereas the thesis posited in the extract relied upon is sound insofar as it goes the interaction of Regulation 7(6) of the 2015 Regulations and s. 5(1) of the 2004 Act is not addressed.

123. It is my view that by operation of Regulations 7(6) of the 2015 Regulations presence in the State is not in contravention of s. 5(1) of the 2004 Act. Indeed, if it were really the Minister's understanding of the law that they were, one would expect to see applicants seeking residence routinely advised of a requirement to also seek separate permission under s. 4 of the 2004 Act. There is no evidence that they are. However, if I am wrong, were presence in the State to be treated as in contravention of s. 5(1), the unavoidable conclusion is that this would be in conflict with Regulation 7(6) of the 2015 Regulations which clearly provides for a right to remain pending the determination of the Regulation 7 residence application (which by law should be determined within 6 months) without any requirement to seek further permission. The Legislature has provided, pursuant to s. 2(2) of the 2004 Act, that in the event of such a conflict, rights vested pursuant to the 2015 Regulations should prevail over a requirement to hold a permission within the meaning of the 2004 Act. The clear legislative intent is to ensure that rights conferred in the 2015 Regulations should supersede to the extent, if any, that they conflict with s. 5(1) of the 2004 Act.

124. When s. 2 and 5 of the 2004 Act are construed together with Regulation 7(6) of the 2015 Regulations, I am bound to conclude that a person exercising an entitlement under Regulation 7(6) to remain in the State is lawfully in the State and is not in contravention of s.

5(1) of the 2004 Act by reason of not holding a separate permission from the Minister. Where residence is not in contravention of s. 5(1) of the 2004 Act and is not otherwise excluded from reckoning pursuant to s. 16A of the 1956 Act, it follows that it is reckonable for the purpose of an application under s. 15 of the 1956 Act.

CONCLUSION

125. For the reasons given above, it seems to me that the Minister erred in law in excluding residence in the State pursuant to Regulation 7(6) prior to the grant of residence permission from reckonable residence for the purpose of applications under s. 15 of the 1956 Act. In the circumstances, I will make orders of *Certiorari* quashing the refusal of a certificate of naturalisation in both cases as follows:

126. In proceedings bearing Record No. 2023/545 JR, I will make an Order of *Certiorari* quashing the decision of the Minister dated the 9th of March, 2023 refusing an application for a certificate of naturalization on the part of *Nasneed Arshad.*

127. In proceedings bearing Record No. 2023/159 JR, I will make an Order of *Certiorari* quashing the decision of the Minister dated the 24th of November, 2022 refusing an application for a certificate of naturalisation on the part of *Israr Ahmed.*

128. To the extent that it may be necessary, I will hear the parties in respect of the form of the order and any consequential matters where these cannot be agreed.