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**Case C-22/21 *Minister for Justice and Equality* - Facilitating entry and residency for distant family members based on emotional dependence**

*By Max van Iersel*

## Introduction

On 15 September 2022, the Court of Justice issued an important judgment on the matter of the residence rights of '*any other family member who is a member of a household of a Union citizen*' as defined in Article 3(2)(a) of [Directive 2004/38/EC](#). In its judgment, the Court of Justice held that a family member is part of a Union citizen's household if a dependence relation is established, based on close and personal ties, forged within the same household. The Court essentially defines the concept of 'emotional dependence'. A seemingly new concept of dependency that is based on strong emotional ties between two individuals. The degree of dependence, thus, goes beyond cohabitation for pure convenience.

Unlike the family members falling within the definition of Article 2(2) of the Directive, the beneficiaries of Article 3(2)(a) are not entitled to an automatic right to entry and

residency within a host Member State. 'Family members' as in Article 3(2)(a) of Directive 2004/38, are facilitated entry and residency into a host Member State only after an extensive examination of their personal circumstances. Directive 2004/38, thus, makes a clear distinction between core family members, for example, children and spouses, and more distant 'other' family members.

In its decision, the Court of Justice reaffirms and expands on its previous judgments, [SM](#) and [Rahman](#), on the scope of Article 3(2)(a). While the requirements relating to the nature and duration of dependence remain at the discretion of the Member States, as previously stated in *Rahman*, the definition of 'other family members' is a matter of EU law and, thus, requires a uniform interpretation. By allowing other family members of the Union citizen to enter and reside in the EU based on emotional dependence, the Court brings Article 3(2)(a) further in line with the case law of the European Court of Human Rights (ECtHR) on the protection of family life based on a high degree of emotional dependence between family members other than the parent-child relationship.

### **Facts of the case**

The [Minister for Justice and Equality](#) case concerns two Pakistani nationals, SRS and AA, who are first cousins of one another. SRS acquired British citizenship in 2013, after living in the country since 1997 with his family. After receiving a four-year student visa in the UK, his first cousin AA moved in with SRS and his family in 2010. SRS and AA both relocated to Ireland at the beginning of 2015. AA relocated to Ireland without having a visa to legally reside in either the United Kingdom or Ireland, as his student visa expired in December 2014.

AA filed an application for a residence permit in Ireland asserting both emotional and financial dependence on his family member SRS, with whom he shared a household to claim emotional dependence. The Irish authorities rejected the application, deeming it insufficient, merely, to live together at the same address. Instead, they required

evidence to show that the Union national was 'the head of the household'. Additionally, the assessment of the stability of the links between the Union national and the third-country national (TCN) can only take into account the period after Union citizenship has been conferred. The Irish authorities, hence, claimed that AA did not fulfil the conditions for a residence permit.

Arguing that the Irish authorities interpreted Article 3(2)(a) of Directive 2004/38 too restrictive, SRS and AA appealed the rejection. Both the Court of First Instance and the Court of Appeal dismissed the case, arguing that family members who live with a Union citizen must be – due to an emotional connection – an integral part of the family unit, and cannot live together merely for convenience.

Having limited the appeal to the interpretation of '*other family member who is a member of the household of the Union citizen*', the Supreme Court referred the matter to the Court of Justice pointing out variations between Directive 2004/38's language versions. The Supreme Court of Ireland referred the following questions:

1. Does the concept 'member of a household of an EU citizen' (Article 3(2)(a) of Directive 2004/38) require uniform application in the EU, and if so, what is its definition?
2. If not, what are the criteria to assess if a person is a member of the household of an EU citizen?

In its referral, the Supreme Court proposed a number of factors, namely the length of time spent living with a Union citizen and the reason for cohabitation, in order to develop a uniform interpretation. Similarly, the likelihood of a Union citizen being deterred from exercising his freedom of movement must be considered the moment his family member is unable to accompany him.

## **Judgment**

In its judgment, the Court of Justice defined the concept of '*any other family members who are members of the household of Union citizen having the primary right of residence*' as a person who has a relationship of dependence with a Union citizen, based on close and stable personal ties, established within the same household, which goes beyond a mere cohabitation for reasons of pure convenience. Although Article 3(2) references national legislation of the Member States, the Court of Justice – and the Commission its observations – stated that this reference does not extend to the definition of 'other family member'. The concept, thus, requires an independent and uniform interpretation within the European Union to ensure uniform application.

First, the Court claimed that, when read in light of recital 6, the various language versions, supported by the objective of the Directive, require that the connections between the other family member and the Union citizen sharing the same household go beyond pure convenience (paras. 23-24). The basis for such dependence relies on close and stable personal ties between the other family member and the Union citizen. The other two situations mentioned by Article 3(2)(a), after all, also involve either a physical or financial dependence on the Union citizen (para. 23). Although certain language versions may only suggest cohabitation, previous case law states a uniform interpretation cannot be based solely on one language version and must take the Directive's overall objective into account (paras. 20-21). The Court, further, clarified that the text of the provision does not call for the criterion implied by the Irish authorities, that the Union citizen must be the head of the family (para. 22).

Second, the Court reaffirmed its previous judgments – *Rahman* and *SM* – by holding that Article 3(2) merely facilitates entry and residence in a Member State but does not confer an automatic right (para. 25). The Court here nonetheless repeated the importance of Article 3(2), namely in the maintenance of the family's unity in a broader sense and in granting applicants certain procedural guarantees: a decision can only be made after an extensive examination of all the specifics of the applicant's situation, and a refusal must always be justified by reasons (paras. 24-25).

The Court concluded by highlighting various elements that need to be taken into account in an application based on this provision. Applicants are required to provide sufficient evidence relating to the genuine existence of their dependence relationship within their household to establish that their relationship is not solely for the purpose of gaining entry and residency in the host Member State (para. 26). Contrary to the proposal of the Irish Supreme Court, the Court of Justice found that the strength of the relationship between the Union citizen and the other family member is sufficient if at least one of them is affected if they cannot accompany one another in the host Member State (para. 27-28). The higher degree of requiring the Union citizen to be prevented from exercising his freedom of movement would equal family members in Article 3(2) with those in Article 2. The Court further ruled that additional considerations include the degree of kinship and the length of shared domestic life. The latter, contrary to the interpretation by the Irish authorities, may start before the acquisition of Union citizenship to properly assess the stability of the relationship between the family members (para. 29).

### **Comment**

The Court's decision in *Minister for Justice and Equality* is a step in the right direction toward protecting the family life of Union citizens, by recognizing that a household may also include family members who do not fall within the narrow scope of Article 2 of Directive 2004/38. In addition to financial and physical dependence, the Court holds that emotional dependence between other family members and the Union citizen is equally a ground to facilitate entry and residence in the host Member State.

The Court seems to interpret Article 3(2)(a) of Directive 2004/38, even if only implicitly, also in line with the ECtHR's case law on Article 8 of the European Convention on Human Rights (ECHR). The role of the [Charter of Fundamental Rights in the European Union \(Charter\)](#) – and its reflex effect with the ECHR through Article 52(3) of the Charter – for Article 3(2)(a) applications was already emphasized in *SM* (see para. 71). Particularly on the concept of emotional dependence and the establishment of 'family

life', the ECtHR has held that Article 8 ECHR protects the emotional dependence of other family members under certain circumstances ([Butt v. Norway](#), para. 76).

Arguably, in *Minister for Justice and Equality*, the Court confirms that Article 3(2) of Directive 2004/38 is a rest category for all situations involving 'family life' that necessitates entry and residence in the host Member State not covered by Article 2. The Court, seemingly, confirms this idea by reaffirming – as previously held in *Rahman* para. 32 – the necessity to maintain the family unit in a broader sense (also referenced in recital 6 of Directive 2004/38) for persons falling outside of the scope of Article 2.

While the Member States can still set conditions on the entry and residence in their national legislation, the Court in the present case offers a set of factors that need to be considered to assess the degree of emotional dependence. However, certain comments and reservations should be made on these criteria.

As mentioned, the Court states that applicants are required to provide evidence as to their close and stable ties wherein they demonstrate a genuine level of emotional dependence between the Union citizen and the other family member (para. 26). Proving financial and physical dependence is much more straightforward than establishing emotional dependence. The Court, seemingly, in its judgment recognizes the difficulty of establishing such emotional dependence ties. It, therefore, provided four factors to assess the existence of emotional dependence.

The first factor is the degree of kinship between the family member and the Union citizen. While the European Commission's [Communication on the transposition of Directive 2004/38](#) states that there are no restrictions on the degree of kinship specified in the text of the Directive (page 6), the ECtHR has ruled in [Slivenko v. Latvia](#) that establishing a sufficient degree of dependence for more distant kin requires stronger emotional links than with closer family members (para. 97). It remains to be seen how the Member States will assess this factor in cases with (very) distant family members that show a strong emotional dependence on the Union citizen. The contrast

between the European Commission's Communication and the ECtHR ruling on distant family members might lead a national court to refer another preliminary question to the Court of Justice on the weight ratio of kinship compared to the other factors in the assessment of emotional dependence. Will it be in line with the ECtHR, or, will the EU protect distant family members with a genuine emotional dependence on a Union citizen by requiring an equal level of emotional dependence as more close family members for facilitation of entry and residency under Article 3(2)(a) of Directive 2004/38?

In line with the degree of kinship, the Court of Justice in *Minister for Justice and Equality* notes that the closeness of the family relationship and the strength of their ties play a role in the assessment of emotional dependence (factor two and three). Although applicants can provide proof by any means necessary, as confirmed in its decision in *Jia*, it is difficult to imagine how applicants can provide proof of their closeness in practice. [Belgium](#), for example, in the case of Article 3(2)(b) of Directive 2004/38 (partners in a durable relationship), requires proof of travel arrangements taken together and/or photos of the applicants together over a certain period in order to prove the emotional bond between the persons in a durable relationship. It seems likely that (at least some) Member States will take a similar approach to assess emotional dependence between two family members.

The last factor, the length of shared domestic life, seems to be the most objective and most suitable for demonstrating emotional reliance. A lengthy, stable period of a shared household may presuppose the closeness and strength of family bonds. Applicants may be able to provide legally binding documentation, such as, for example, a rental contract with both names on it or an extract from the municipal registry to substantiate their application.

Ultimately, it is up to the competent national authorities to examine extensively all provided documentation proving the emotional dependence. It will be interesting to see how Member States will assess emotional dependence and to what extent the

degree of kinship will matter. It is clear that any requirements that go beyond the terms of Article 3(2)(a), such as mandating that the Union citizen serves as the head of the household, is contrary to EU law. The question remains, however, if even a very distant relative with whom a Union citizen has a close emotional bond, may obtain a right to entry and residence in a host Member State under Article 3(2)(a)?