Op-Ed: “Giving with One Hand and Taking with the Other: The Court Provides (Some) Guidance on Who Counts as a ‘Member of a Union Citizen’s Household’ under the Citizenship Directive (Case C-22/21 ,*Minister for Justice and Equality*)” by Stephanie Reynolds

In recent [Case C-22/21](https://curia.europa.eu/juris/document/document.jsf?text=&docid=265547&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=9076714), *Minister for Justice and Equality (third country national cousin of a Union citizen)* the Court of Justice was asked to provide guidance as to the definition of a ‘member of a [Union citizen’s] household’ under Article 3(2)(a) [Directive 2004/38](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0038) (the Citizenship Directive). The term forms part of a wider category of ‘other family member’ under that provision. While not enjoying the automatic residence rights in a host State that ‘family members’ are granted under Article 2, ‘other family members’ gain procedural entitlements; namely that host Member States must ‘facilitate’ entry in accordance with national law. This is in recognition of the need to maintain the ‘[unity of the family in the broader sense’](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0038).

The question as to who counts as a ‘member of [a Union citizen’s] household’ is an interesting one since the term is potentially far-reaching, raising the possibility that, in line with its Article 3 obligations, the host Member State would have to undertake an ‘extensive examination of the personal circumstances’ of any family member who had, at some point, lived under the Union citizen’s roof and would have to ‘justify any denial of [her/his] entry or residence’.

Ultimately, however, while *Minister for Justice and Equality* usefully answered some questions about the scope of this term, the judgment also inadvertently raises new ones. The consequent ongoing lack of clarity as regards how to define a member of a Union citizen’s household, and the reality of how this will be assessed on the ground, means continuing restrictions to free movement seem likely at the national administrative-level.

By way of background, AA had applied for a resident permit in Ireland as the member of SRS’s household. SRS was a UK national who had already moved to Ireland and AA had lived with SRS in the UK. Over the course of domestic litigation, various reasons were found as to why AA was not a member of SRS’s household. These included the fact that, although SRS had lived together for a number of years, SRS had only became a Union citizen relatively recently, with the result that AA had lived with a *Union citizen* for fewer than two years. In addition, it had not been established that SRS was the head of the household in his Member State of origin, seemingly with a knock-on effect as to whether SRS had a household of which AA could form part. With the relevance of such criteria percolating in the background, the Supreme Court (Ireland) sought clarification from the Court of Justice as to whether, first, the term had a definition of universal application across the EU and, if so, what that definition was; and, second, if not, what criteria national judges might nevertheless use to ascertain whether someone was a member of a Union citizen’s household for the purposes of free movement.

*The potential for a generous definition of ‘member of the household of an EU citizen’*

In holding that ‘member of the [Union citizen’s] household’ was to be defined at EU-level, the Court of Justice created an opportunity for a generous approach to Article 3. Indeed, its emphasis on the need for a ‘uniform application’ to ensure that the term’s definition cohered with the ‘context and objectives’ in which it operated is reminiscent of the Court’s seminal approach to the concept of ‘worker’ in [*Hoekstra*](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61963CJ0075). As is well-known, this enabled a progressively broader definition in light of its free movement foundations until the market, and later Union, citizen emerged as an almost [inevitable consequence](https://www.cambridge.org/core/books/fissures-in-eu-citizenship/C54B8348787502BC45F895BA9A0719C1#:~:text='Fissures%20in%20EU%20Citizenship%20connects,'&text='A%20theoretically%20illuminating%20study%20of,unusual%20as%20it%20is%20welcome.). In-keeping with this, the Court also held that the ‘start date’ of cohabitation could not be dictated by when an individual had been granted Union citizenship. This makes sense. Though a Union citizen is needed to ‘trigger’ Article 3, the focus of that provision is on membership of a household, the formation of which clearly does not start at the point of naturalisation. Additionally, there was no requirement that the member of a Union citizen’s household be determined by reference to whether the Union citizen himself/herself was the ‘head of that household’. As the Advocate General rightly pointed out in his [Opinion](https://curia.europa.eu/juris/document/document.jsf?text=&docid=255448&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3286033), this would be overly restrictive of free movement given that the Directive itself makes no reference – across any language version – to such a requirement.

Instead, for the Court, the crux of the matter was what constituted a ‘household’. Noting that several language versions used terms that connoted mere cohabitation, the Court nonetheless drew on the context of Article 3 in order to favour those versions that adopted phrasing that signified something more meaningful. Thus, membership of a ‘household’ arose from ‘close and stable personal ties, forged within the same household, in the context of a shared domestic life going beyond a mere temporary cohabitation entered into for reasons of pure convenience’. As the Court explained, such ‘close and stable ties’ were present if at least one of the individuals concerned ‘would be affected’ by the denial of entry of the family member into the host State. Whilst, therefore, this would seem to narrow the scope of Article 3 Directive 2004/38, this is understandable given that the *purpose* of the Citizenship Directive is to facilitate the free movement of the Union citizen. So far so logical.

Yet in contrast to its Advocate General, the Court then separated the term from this context, holding that ties could not be required to such an extent that the Union citizen would ‘refrain’ from exercising his freedom of movement if the other family member could not join him in the host State. For the Court, this would conflate ‘other family members’ with the ‘family members’ enjoying automatic rights under Article 2(2). However, arguably the purpose of both Articles 2 and 3 is the same: to facilitate free movement. Article 2 presumes that restrictions on the entry of certain family members would unquestionably impede the free movement rights of Union citizens; while Article 3 acknowledges that in certain family contexts a Union citizen might be deterred from exercising those rights if *other* family members were denied entry. Indeed, one might question the legitimacy of EU law placing obligations on host Member States to facilitate the entry of family members at all if the denial of entry would not restrict free movement rights.

On the other hand, the Advocate General’s apparent argument that such an approach cannot be adopted because it might result in ‘a situation that is ultimately more favourable to [other family members] as compared with those…covered by Article 2(2) of the directive’ overlooks the different outcomes of falling into each respective category. After all, family members under Article 2(2) enjoy automatic rights, while other family members may only have their entry and residence ‘facilitated’ under *national* law. In this sense, the Court’s approach recognises, in-line with Recital 6 of the Directive, that ‘maintain[ing] the broader unity of the family’ might *facilitate* free movement, rather than merely avoid restrictions upon it. Meanwhile, this breadth is counter-balanced by the fact that entry and residence rights for other family members are procedural and not automatic.

*Narrowing the definition in practice and paving the way for a restrictive approach*

In any case, the potential generosity of this approach might not play out on the ground, not least because at stage 1 – establishing that an individual is a member of the Union citizen’s household – the line between the applicants being ‘affected’ by denial of entry but not necessarily deterred in exercising their free movement rights is a usefully fuzzy one for national authorities. This is exacerbated by the link the Court draws between ‘close and stable ties’ and ‘emotional dependence’. The Court noted that the ‘other family members’ listed in Article 3 included financial dependants and those dependent on the Union citizen as a result of serious health issues. From this, the Court concluded that the final category of ‘other family member’ i.e. a member of a Union citizen’s household must also require a situation of dependence, this time of an emotional nature, ‘based…on the existence of close and stable personal ties’. This is arguably narrower than a textual reading of Article 3 since it is possible to read its categories as being *sequential* in nature. While dependence is explicitly relevant to the other categories, no such express obligation of dependence is attached to membership of a Union citizen’s household within the wording of the provision. In determining the existence of ‘emotional dependence’, national authorities must consider the degree of kinship and the closeness of the family relationship, the duration of cohabitation, and the reciprocity and strength of ties between the individuals concerned. As we have seen, such ties are apparently present when the denial of entry of the other family member from the host State would leave either party ‘affected’ but not necessarily to such an extent that the Union citizen would refrain from exercising free movement rights. In this sense, the Court gives with one hand and takes with the other; somewhat separating Article 3 from free movement but as part of the introduction of the arguably additional requirement of emotional dependence.

Crucially, in doing so it increases the evidential burden faced by the applicant, leading to a narrower approach overall. While Article 3 requires national authorities to undertake an extensive examination of personal circumstances when considering whether to allow the entry and residence of an ‘other family member’ under national law, *Minister for Justice and Equality* transplants this obligation on to the ‘other family member’ themselves at an earlier stage in the process; namely the determination of whether an individual is an ‘other family member’ at all. The applicant must provide ‘proof of close and stable ties with [the Union] citizen, demonstrating a situation of genuine dependence’. This arguably allows Member States to convert the requirement of an ‘extensive examination’ from an obligation operating to the advantage of the Union citizen to an opportunity to impose onerous evidential requirements on the applicant, particularly given the rather nebulous nature of ‘emotional dependence’. Host Member States can potentially operate on the presumption that an individual is not a ‘member of the Union citizen’s household’ until the applicant proves otherwise. After all, it is [well-documented](https://www.bloomsbury.com/uk/unity-in-adversity-9781849467193/) that, even where Court jurisprudence suggests a generous approach – for instance to the definition of ‘worker’ – certain Member States routinely implement such rulings at the administrative level in such a way as to require copious information – [beyond formal proof](https://jura.ku.dk/english/fide2014/pdf/FINAL-Topic-2-on-Union-Citizenship.pdf) - as evidence that an individual qualifies as falling within any given category. Indeed, one example emerging from [research](https://jura.ku.dk/english/fide2014/pdf/FINAL-Topic-2-on-Union-Citizenship.pdf) in 2014 into Article 3 concerned an Iraqi national who had failed to demonstrate he was in a ‘durable relationship’ with the Union citizen – another option under Article 3 – despite the fact that it was ‘not disputed’ that the couple had known each other for six years, had lived together for one year, and had a child together with a second child on the way.

Moreover, at stage 2 – deciding on residence rights – the matter reverts to national law. As per [*Rahman*](https://curia.europa.eu/juris/document/document.jsf?text=&docid=126362&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=9043870), though host States must undertake an extensive examination of the personal circumstances of the applicant, they are ‘not required to grant every application for entry or residence’ submitted by ‘other family members’.

In sum then, while the Court initially offered a generous approach to Article 3 Directive 2004/38, its focus on ‘emotional dependence’ as a decisive criterion within the definition of ‘other family member’ and, crucially, the onus it placed on the applicant to provide proof of so woolly a term is likely to lead to restrictions to the rights of other family members on the ground. This remains true despite the Court’s somewhat confused decision to require that the individuals concerned be ‘affected’ by the separation but not necessarily to the extent where free movement rights are impeded.

Stephanie Reynolds is a Senior Lecturer at the School of Law and Social Justice, University of Liverpool