



THE COURT OF APPEAL
CIVIL

Appeal Number: 2023/190

Ní Raifeartaigh J.

Neutral Citation Number [2024] IECA 44

Allen J.

Meenan J.

BETWEEN

**F.S.H., F.S., APPLICANT No. 3 (A MINOR), APPLICANT No. 4 (A MINOR),
APPLICANT No. 5 (A MINOR), AND APPLICANT No. 5 (A MINOR) AND
APPLICANT No. 6 (A MINOR)**

APPLICANTS/RESPONDENTS

AND

THE MINISTER FOR JUSTICE

RESPONDENT/APELLANT

JUDGMENT of Mr. Justice Allen delivered on the 26th day of February, 2024

Introduction

1. This is an appeal by the Minister for Justice (*“the Minister”*) against the judgment of the High Court (Barr J.) delivered on 14th June, 2023 ([2023] IEHC 316) and consequent order made on 5th July, 2023 quashing the decision of the Minister made on 14th April, 2022 refusing an appeal against the refusal of the applications of the third, fourth, fifth and sixth applicants for long stay – so-called “*D*” – visas to join the first and second applicants in the State, and remitting the applications for reconsideration by a different decision maker on behalf of the Minister.

2. The third, fourth, fifth and sixth applicants are non-EEA nationals. The Minister, by the Irish National Immigration Service, has published a Policy Document on Non-EEA Family Reunification (“*the Policy Document*”). The declared purpose of that document was to set out a comprehensive statement of Irish national immigration policy in the area of family reunification and to provide comprehensive and transparent guidelines to assist applicants and decision makers in that area. While emphasising that the purpose of the Policy Document was not to circumscribe the Ministerial discretion, the declared object was to identify the overall policies and parameters for the exercise of the discretion, with some margin of appreciation for professional decision makers exercising their professional judgment on the Minister’s behalf.

3. In a number of respects the applications did not meet the requirements set out in the Policy Document but the applicants contended that they presented an exceptional set of circumstances in which the appropriate and proportionate decision should be positive.

4. It needs to be said at the outset that the initial visa applications and the appeal against the refusal of those applications were complicated by the fact that the applicants asserted that they met the qualifying criteria laid down by the guidelines when they plainly did not.

5. By these proceedings, the applicants sought – and in the High Court, were granted – orders of *certiorari* quashing the refusal of their applications. I will come to the detail but the thrust of the challenge in the High Court was that the applicants’ circumstances, from a humanitarian point of view, were so exceptional that the visas ought to have been granted – or, if it is not the same thing, ought not to have been refused; and the thrust of the Minister’s appeal was that the effect of the judgment of the High Court was that she was more or less bound to grant them.

6. On the appeal to this court it was submitted on behalf of the applicants that the Minister had misunderstood the High Court judgment. It was acknowledged that the question as to

whether the applications disclosed exceptional humanitarian circumstances such as warranted a departure from the ordinary criteria was a matter for the Minister. But it was said that the substance of the High Court judgment was not that the Minister had failed to recognise the applicants' circumstances as sufficiently exceptional to warrant a departure from the criteria set out in the Policy Document, rather that the Minister had rigidly applied the criteria set out in the Policy Document and had not considered whether the applicants' circumstances were exceptional humanitarian circumstances such as would justify a departure from the general scheme of the guidelines.

The Policy Document on Non-EEA Family Reunification

7. In December, 2016 the Minister, by the Irish Naturalisation and Immigration Service (“*INIS*”), issued a Policy Document on Non-EEA Family Reunification. The declared purpose of that document was to set out a comprehensive statement of Irish immigration policy in the area of family reunification. It recognised that more comprehensive and transparent guidelines were necessary to assist applicants and decision makers and set out that the policies would apply to all decision making in the immigration system in family reunification cases in a harmonised way. The guidelines expressly did not create or acknowledge any new rights of family reunification and spelled out that Ministerial discretion applies to most of the decision making in the area of family reunification and that that would continue to be the case. The guidelines expressly excluded cases in which rights of family reunification are essentially automatic once certain conditions are met, specifically, claims to residence as the family member of an E.U. national exercising rights of free movement, and cases in which the sponsor is the beneficiary of international protection.

8. The guidelines are summarised in the executive summary and they include, in so far as material for present purposes, that:-

“Family reunification must be seen in a wider context of public policy. Immigration control is the right and responsibility of the elected Government of the day and it may set down immigration policy in the public interest. The State must strike a fair balance between the sometimes competing interests of the individual and the community as a whole. ...

In addition to ensuring that there is no threat to public security, public policy or public health, family reunification should not be an undue burden on the public purse.

Economic considerations are thus a very necessary part of family reunification policy. While it is not proposed that family reunification determinations should become purely financial assessments the State cannot be regarded as having an obligation to subsidise the family concerned and the sponsor must be seen to fulfil their responsibility to provide for his/her family members if they are to be permitted to come to Ireland.

It is intended however that family reunification with an Irish citizen or certain categories of non-EEA persons lawfully resident will be facilitated as far as possible where people meet the criteria set out in this policy although of course each case must be considered on its merits. ...

The onus of proof as to the genuineness of the family relationship rests squarely with the applicant and the sponsor whether that person is an Irish national or a non-EEA national.

In facilitating family reunification due regard must also be had to the decisions which the family itself has made. If the family has elected to separate for many years it does not follow that the Irish State is obliged to facilitate its reconstitution in Ireland.”

9. The Policy Document, in Part 1, under the heading “*General Orientation*”, repeats that the scope of the document is limited to family reunification determinations that are made on the basis of Ministerial discretion in the exercise of Irish immigration policy and that the purpose of the document is not to circumscribe Ministerial discretion but to locate it in the overall framework of Government immigration policy. Paragraph 1.7 provides that:-

“1.7 It is also important to remember that family reunification must be seen in a wider context of public policy where there are often competing social and particularly economic interests. Thus the fact that it may be to the benefit of a family with non-EEA family members to reside together in Ireland does not necessarily mean that the correct public policy response is to facilitate this request. In considering applications from family members INIS must, of course, establish at the outset that there is a genuine family relationship in existence. In relation to considering the interests of the community as a whole INIS must ensure, as far as possible, that there is no threat to public policy, public security or public health, that there is no abuse of family reunification arrangements and that there is not an undue burden placed on the taxpayer by family members seeking to reside in the State. This is in addition, in individual cases, to remaining vigilant against trafficking or smuggling, ensuring that consent of the parties is freely given and that, in the case of children, there is full parental consent to their coming to Ireland. See Appendix B.”

10. Appendix B sets out that in cases where one parent seeks to remove a child from the lawful custody of the other it must be clearly established that both parents consent to the movement of their child. It contemplates that the consent of the other parent will not be required in the case of death, mental incapacity, where the identity of the father is not known, or where sole custody has been granted to one parent without visitation rights to the other;

and provides that in such cases verified official documentation must be provided to support dispensing with the requirement for consent.

11. Paragraph 1.12 of the Policy Document provides:-

“1.12 While this document sets down guidelines for the processing of cases, it is intended that decision makers will retain the discretion to grant family reunification in cases that on the face of it do not appear to meet the requirements of the policy. This is to allow the system to deal with those rare cases that present an exceptional set of circumstances, normally humanitarian, that would suggest that an appropriate and proportionate decision would be positive.”

12. Part 8 of the Policy Document elaborates on the assessment of the economic impact of the application. It recognises that while on the one hand immigration can bring significant economic advantages, on the other hand there can be substantial costs in terms of education, housing, healthcare and welfare arising from family migration. While emphasising that family reunification assessments should not become purely financial assessments:-

“8.3 ... Nevertheless, the State cannot be regarded as having an obligation to subsidise the family concerned and the sponsor must be seen to fulfil their responsibility to provide for his/her family members if they are to be permitted to come to Ireland. ...

8.4 It is a question of finding the correct balance between rights and responsibilities. All other things being equal however, a non-EEA resident of Ireland in active well paid employment will have a considerably greater opportunity of being joined by family members than a person who is subsisting on State supports. Indeed a person who is unable to support himself/herself cannot expect the State to assume the necessary financial obligations on his/her behalf.”

13. Part 12 of the Policy Document sets out that family reunification decisions are made on the basis of a connection between the person seeking residence in Ireland and a person who has a status within the State – either as a citizen or a non-EEA resident – who is referred to as the sponsor. For present purposes it is sufficient to say that the sponsor may be an Irish Citizen residing or intending to reside in Ireland or a lawfully resident foreign national with an immigration Stamp 4 who – as required by para.16.4 – has been resident in the State for twelve months.

14. Part 13 of the Policy Document sets out that an application for family reunification is a function of two people, namely the sponsor and the family member and is based on their association. It provides for three categories of family, namely (a) immediate family, encompassing spouses, “*de facto partners*”, and children under the age of eighteen years; (b) parents, and (c) “*other family*”.

15. Part 14 of the Policy Document sets out the guidelines for dependency which – other than in the case of a minor child living with his or her parent – means that the family member must be (i) supported financially by the sponsor on a continuous basis and (ii) that there is evidence of social dependency between the two parties. The degree of dependency must be such as to render independent living at a subsistence level by the family member in his or her home country impossible if that financial and social support were not maintained. A minor child living with his or her parents is automatically assumed to be their dependant.

16. Thus, the scheme of the Policy Document is that an eligible sponsor may apply for family reunification with a family member who can be shown to have been socially and financially dependent on the sponsor and who the sponsor can support financially. The stronger the applicant’s case is, the greater is the prospect that the visa will be granted. In the case of applications which do not meet the criteria, the Minister has a residual discretion – in

rare cases that present an exceptional set of circumstances, normally humanitarian – to grant the visa.

17. In considering an application, the first step is to ascertain whether the applicant can satisfy the prescribed criteria. If he or she can, the application will be assessed by reference to those criteria and will ordinarily be granted. In a case where the criteria are not met, the Minister may go on to consider whether the applicant has established exceptional circumstances which warrant a departure from the guidelines. In every case the onus is on the applicant to establish the facts relied on in support of the application.

18. There is no challenge to the entitlement of the Minister to have issued the Policy Document; or to have prescribed qualifying criteria; or to the criteria prescribed. Specifically, there is no challenge to the entitlement of the Minister to differentiate between applications in respect of children, on the one hand, and nieces and nephews, on the other; or to require that ordinarily – other than in the case of minor children living with their parents – the sponsor should demonstrate financial and social dependency and sufficient financial resources to support the subject of the application if the visa were to be granted.

19. As I will come to – and as is repeatedly spelled out in the Policy Document – it is common case that the criteria set out in the Policy Document are not to be rigidly applied but are guidelines which may be departed from in exceptional circumstances. It is common case, also, that it is the Minister who is the arbiter of whether exceptional circumstances exist and of whether the circumstances are such as to warrant a departure from the ordinarily applicable criteria.

Factual background

20. As I will come to, the impugned decisions were challenged principally on the ground that they were unreasonable and irrational. To understand the decisions and the challenge to them, it is useful to examine and analyse the visa applications and the appeals in some detail.

- 21.** The first applicant (*“the mother”*) is a Somali citizen who was born in 1997 and has been lawfully resident in the State since October, 2021. She is the mother of the third, fourth, fifth and sixth applicants (*“the children”*) who were born between 2012 and 2016 and are living in Somalia.
- 22.** The second applicant (*“the aunt”*) is the sister of the first applicant and the aunt of the children. She was born in Somalia in 1979 and came to Ireland in 2004. On her arrival, the second applicant applied for asylum and was declared a refugee in 2005. In 2012 she became a naturalised Irish citizen. In the meantime, the aunt, having separated from her husband, made a family reunification application in respect of their daughter, who was born in 2000. That application was granted in 2009 and the aunt’s daughter came to Ireland to live with her mother.
- 23.** The man described as the aunt’s current partner is a U.K. citizen of Somali origin. He lives and works in the U.K. The aunt and her partner have seven children who were born between 2008 and 2015, all of whom are Irish citizens.
- 24.** The aunt’s and the mother’s father was killed in 2005.
- 25.** The aunt and the mother had three sisters and three brothers, five of whom were killed in a bomb attack on the family home in Somalia in 2009. Another died in 2013, leaving only the aunt – who by then had two children – the mother – who by then had two children – and their mother (*“the grandmother”*). At the time of the bomb attack on the family home the aunt had been living in Ireland for about four or five years. Following the bomb attack, the mother had no contact with the aunt for about six years. It was not expressly stated that the mother also lost contact with the grandmother during those years but as there was contact between the aunt and the grandmother, and the aunt was endeavouring to establish the whereabouts of the mother, it is, I think, to be inferred that there was no contact between the mother and the grandmother.

- 26.** In December, 2010 the aunt applied for refugee family reunification in respect of the grandmother. This was granted in 2014 and the grandmother came to Ireland on 25th July, 2014. She lives in Dublin with the aunt and the aunt's children.
- 27.** The mother was born in Somalia in 1997. After the bomb attack on the family home – when she was about twelve years of age – she moved around Somalia for some time. There was no explanation as to how the mother came to be separated from her mother or how it came about that there was – apparently – no contact between the mother and the grandmother in the following years.
- 28.** The mother was married in Mogadishu in April, 2011 and has four children, the minor applicants, who were born between 2012 and 2016. In or about May, 2011 the mother and her husband moved to Addis Ababa. Later – at an unspecified time – she moved back to Somalia – for an unspecified period of time – before returning to Addis Ababa in April, 2015. Puzzlingly, the three oldest children's birth certificates show that they were born in Mogadishu in 2012, 2013 and 2014 and only the youngest in Addis Ababa, in 2016. Puzzlingly, the youngest child's birth certificate, dated 24th December, 2020 – showing that she was born in Addis Ababa – was issued by the Municipality of Mogadishu and gives an address for her at Yaaqshiid, which is in Mogadishu.
- 29.** The mother's evidence to the High Court was that on an unspecified date in 2014 her husband and their son were taken hostage by the Al Shabab militia but the family was reunited in around February, 2016, when the mother became pregnant with her fourth child. The mother's case in the High Court was that in March, 2016 she had to flee from where she was staying – she did not say where that was – at which time – in circumstances which are unexplained – she lost contact with her husband, whom she has not seen since.
- 30.** On the mother's account of events, she was living in Ethiopia from April, 2015 until October, 2021. Part of the case made by the mother on the visa appeal application was that

she had fled Somalia during a war, but she did not say when. If – as was her case – she had returned to Ethiopia in and around April, 2015 and lived there until October, 2021, she could not have fled from Somalia in March, 2016.

31. On the aunt's account of events, she – the aunt – tried several times to find the mother through the Red Cross tracing service but was unsuccessful. However, in July, 2015 the aunt was told by an old friend that the mother was living in Addis Ababa and the old friend was able to provide her with a contact number. Sometime thereafter, the aunt made contact with the mother and – whatever may have happened in the interim – maintained that contact.

32. In 2016 the aunt applied for family reunification in respect of the mother under s. 18(4) of the Refugee Act, 1996. That was initially refused in 2017 but following judicial review proceedings initiated in 2018, was eventually granted in February, 2021.

33. Along the way, the aunt's solicitors wrote to the Family Reunification Unit of the Department of Justice on 23rd December, 2020 to say that the mother had four children who were living with the mother and the mother's mother-in-law in Ethiopia and that the mother wished to apply for visas for the children to accompany her to Ireland. It was said that the mother did not wish to leave her children in Ethiopia. The Family Reunification Unit replied on 18th January, 2021 stating that only holders of an international protection declaration were entitled to apply [to that unit] for family reunification and that such applications were the only type of application processed by that unit.

34. On 6th April, 2021 the aunt, by her solicitors, applied to the Minister for a long stay visa for the mother to travel to Ireland to join the aunt, indicating that the mother – by the same firm of solicitors – would be applying for visas for her four children to travel with her. It was said that:-

“We wish to bring to your attention that [the mother] has four dependent minor children who intend to travel with [the mother] to the State on the granting of this visa application.

We highlight that it would not be possible for [the mother] to travel to the State without her minor children. We are instructed the children live with [the mother] and her mother-in-law who would be unable to care for the children when [the mother] moves to Ireland.

Our office will therefore proceed to apply for visa applications for [each of the children] as soon as visa processing services have resumed.”

35. I pause here to say that the letter was rather confused. The mother – as a dependent sister of the aunt, who was a refugee – had permission to travel to the State to reside with the aunt. The children did not. The prospect that the children might travel with the mother was not dependent on the granting of the mother’s visa application. The children were then aged between four and nine years. As the solicitors’ letter implicitly recognised, the prospect that the children could come to Ireland was dependent on the success of the separate visa applications which were to be made on their behalf.

36. The mother’s visa was granted in June, 2021 and was valid from 11th June, 2021 to 10th December, 2021.

The children’s visa applications

37. On 19th July, 2021 online visa applications were made in respect of each of the children to the Irish embassy in Addis Ababa which, were followed up with a letter of 28th July, 2021 to the Immigration Service in Dublin from the solicitors who, they said, acted for both the mother and the aunt. The solicitors enclosed summary forms – signed by the mother – and a bundle of what was said to be supporting documentation. The solicitors highlighted

that the mother's visa would expire on 10th December, 2021 and asked that the application be dealt with as soon as at all possible.

38. I pause here to say that while the forms were signed by the mother, the application in each case was for "*Join Family (Irish nat.)(other)*". Under the provisions of the Policy Document the visa applicants needed a sponsor. The mother was clearly ineligible to act as a sponsor, so that the sponsor could only have been the aunt.

39. Under the heading "*Factual circumstances relevant to the application*", it was said that the children were the dependent children of the mother and the nieces and nephews of the aunt. The aunt, it was said, was a recognised refugee who had become a naturalised Irish citizen. The aunt, it was said, had submitted an application for family reunification of the mother, which had been granted, and the mother had been issued with a travel visa. It was, it was said, the desire of the mother and the aunt that the children would be in a position to travel with their mother "*so that [the mother and the children] can join their sister and aunt in Ireland.*"

40. The solicitors highlighted that it was not possible for the mother to travel to the State without her minor children and that the family unit could not be split up. It was said that the children could not be left alone in Ethiopia without her and that the situation was very precarious and dangerous for them in Addis Ababa, with no permission to reside in Ethiopia. They highlighted that the aunt had always been forthright and open in her intention to apply for her nephews and nieces to join her in the State, with their mother. It was said that the children were living with the mother alone and that there was no other family member resident in Ethiopia who could care for the children and that the mother had lost contact with the children's father "*at the end of 2015/beginning of 2016 in Somalia.*" It was, it was said, the intention of the family that the mother and her family would reside with the aunt. It will be recalled that in their letter of 23rd December, 2020 in connection with the aunt's family

reunification application the solicitors had said that the children were living with their mother and her mother-in-law. There was no reference in their letter of 28th July, 2021 to the children's paternal grandmother.

41. Under the heading "*Exceptional humanitarian considerations*" it was submitted that the most reasonable and proportionate decision was to grant long stay D visas to the children for the purpose of travelling to Ireland with their mother. It was acknowledged that the application was one which "*does not clearly fall within the categories*" of the Policy Document but the solicitors referenced para. 1.12 of the Policy Document (which I have set out at para. 11 above) submitting that the applications were among:-

"... those rare cases that present an exceptional set of circumstances, normally humanitarian, that would suggest that an appropriate and proportionate decision would be positive."

42. The application was said to involve "*acute humanitarian considerations*" which were said to be (the solicitors' letter was narrative and the list is mine):-

- (1) That the aunt was a declared refugee which meant that the application should be assessed and determined in a manner which took account of the special position of refugees and the benefits of having family members to support them in their homes;
- (2) That the applicants were minors who were dependent on their mother in Ethiopia;
- (3) That there was no one else who could support and care for the children;
- (4) That there were "*constant risks to the day to day life*" of the children, who would be unable to survive in the absence of their mother;
- (5) That a refusal of the application would have the direct, consequential effect of preventing the mother from travelling to Ireland;

- (6) That a refusal of the children's applications would go against the grant of the aunt's family reunification application;
- (7) That a refusal of the applications would prevent the mother from fulfilling her moral obligations and responsibilities to her family;
- (8) That the aunt had been resident in the State for sixteen years and nine months and was fully integrated into the State;
- (9) That it was in the public interest that those granted refugee status be assisted to fully integrate through "*full and meaningful family reunification.*"

43. I pause here to underline that the visa applications invoked the discretionary power of the Minister to permit the family reunification of non-EEA citizens with an Irish citizen and not the aunt's statutory rights as a refugee to family reunification.

44. Among the documents submitted by the solicitors in support of the applications was a "*letter of invitation*" signed by the aunt which suggested that it was not possible for the mother to travel to the State without the children, that the children would live with the aunt, and asserted that:-

"My family will not have to rely on public services and will not be a cost to public funds."

45. Also included was a "*letter of application*" signed by the mother by which she confirmed that it was not possible for her to travel without her children, and asserted that she would not become a burden on the Irish State. The mother listed ten family members in Ireland; her sister, her mother, and eight nephews and nieces.

46. I need to pause here to say that the suggestion that the children would not become a burden on the State was plainly untrue. The aunt's bank statements showed that her only source of income was the Department of Social Protection. The premise of the aunt's family reunification application was that the mother was dependent on the aunt. The aunt, the

grandmother and the aunt's eight children were dependant on the State. There was no prospect and there cannot have been any expectation that either the aunt or the mother or anyone else would be in a position to financially support the children. There were already ten people living in the aunt's house. As I will come to, the High Court judge found that the applicants "*were not realistically making the case that they could financially support*" the children. But if there was no reality to the case they were making, it was nevertheless the case which they made, and, as will be seen, persisted in. On the hearing of the appeal to this court, counsel for the applicants accepted that there was never any prospect that they would not be dependent on the State and suggested that the assertions otherwise were "*optimistic.*" I find it very difficult to accept that. To my mind, the wholly unfounded assertion that the children would not be a financial burden on public funds may go a long way to explaining why the Minister was sceptical about other details in the supporting documentation which by themselves, perhaps, would not have excited comment.

47. Also included with the visa applications were copies of the mother's and the children's passports – which had been issued in Mogadishu by the Somali Government on 22nd December, 2020 and 27th December, 2020 – and copies of certificates of identity confirmation and birth certificates for the children which had been issued by the Municipality of Mogadishu on 24th December, 2020. The Mayor of Mogadishu certified that the address of each of the children was Yaaqshiid – which, as I have said, is a district of Mogadishu.

48. On 24th September, 2021 the visa applications were refused on the grounds that the finances shown were deemed to be insufficient; that insufficient supporting documentation had been submitted; that the children's birth certificates had been issued long after their birth; that the granting of the visas "*may*" result in a cost to public funds and/or resources; and that no clear link to the sponsor in Ireland had been shown. Specifically, it was said that there was no automatic right for non-EEA nationals who are extended family members of Irish

citizens to migrate to Ireland. The applicants had not demonstrated that they were socially or financially dependent on the sponsor and had failed to demonstrate any special circumstances which would warrant an exception. By the letter of the law the applicant was the sponsor – the aunt – rather than the children but nothing turns on this.

49. Under the heading “*Insufficient documentation submitted in support of the application*” it was said that:-

“Evidence of consent from the applicant’s father has not been submitted with this application. No visa for a minor can be issued without proper evidence of joint consent or sole custody. If a child under the age of 18 is travelling with one parent/legal guardian, the consent of the other parent/legal guardian is required. This signed consent must be accompanied by a copy of the consenting parent/legal guardian’s passport or national identity card which clearly shows their signature. Where one parent has sole custody, a Court Order bestowing sole custody of the child on the parent concerned must be submitted.”

50. On 16th October, 2021 – notwithstanding her previous insistence that it would be impossible for her to do so – the mother travelled to Ireland, alone. A week earlier she had brought the children to her sister-in-law’s house in Mogadishu and left them there.

The appeal against the refusal of the visa applications

51. By letter dated 23rd November, 2021 the mother and the aunt, by their solicitors, appealed against the refusal of the visa applications. The children were identified as the dependent minor children of the mother, who was resident in the State, and the nieces and nephews of the aunt. The mother, it was said, had travelled to Ireland on 16th October, 2021. The children, it was said, were temporarily resident in Mogadishu. The mother, it was said, had decided to travel by bus to Mogadishu with her children before she travelled to Ireland. The mother had no family member or friends in Ethiopia who could care for the children.

The mother, it was said, was the children's only caregiver and guardian and the children were totally dependent on their mother. The children were said to be temporarily staying with the mother's sister-in-law. The mother's sister-in-law, it was said, had agreed to mind the children for a short period while the mother pursued the visa appeal. The mother, it was said, was "*incredibly scared*" for her children because her sister-in-law – who was a widow – had no support and had five children herself. The letter did not suggest why the mother was scared for her children, but I take it that that was intended to be conveyed was that she was – for whatever unstated reason – extremely scared, rather than that it was impossible to believe why she was scared. It was said that:-

"[The mother] instructs that her sister-in law-buys tomatoes and vegetables for the children to eat and cannot afford anything further.

[The mother] instructs that she is in the process of organising to send money to her children, however given that they are in Somalia and services are of very poor quality, she is still figuring out the best way to provide financial support to them. ...

[The mother] instructs that this living arrangement was her only and last resort for her children who were not granted permission to travel with her."

52. The mother and the aunt, it was said, were in contact with the children through the WhatsApp account of the son of the mother's sister-in-law.

53. As to sufficient finances, it was said that the aunt was completing a course as a carer and was shortly to commence employment and that the mother intended to complete a course in English and then become a carer so that she could financially support her children. It was submitted that the "*particular humanitarian circumstances that this case presents are exceptional and genuine and are exactly the situation which allows the decision maker to deviate from the normal financial requirements and grant the application.*"

54. The solicitors pointed to the previously established dependency of the mother on the aunt. They submitted that the application involved acute humanitarian considerations which gave rise to special circumstances, pointing again (and again the letter was narrative and the list is mine) to:-

- (1) The aunt's refugee status and the benefit of refugees having their family member in the State to support them in their homes;
- (2) The fact that the mother could not reasonably be expected to reside in the State without her children;
- (3) The fact that five of the mother's and aunt's siblings had died in the bomb attack in 2009, and another had died in 2013;
- (4) That the mother and the aunt were the only surviving children of the grandmother, who was resident in Ireland;
- (5) That the mother and her children had been emotionally and socially dependent on the aunt and the grandmother for years;
- (6) That the mother had ten family members in Ireland;
- (7) That the children were living in Somalia, an unstable country without any long-term support;
- (8) That the mother was the children's biological mother and only caregiver and was resident in Ireland;
- (9) That the mother's family life was in Ireland and she wanted nothing more than to have her minor children join her and her family as soon as possible;
- (10) That the aunt had not met the children because she lost contact with the mother as a result of the war and the bomb attack in 2009;
- (11) That the aunt, as the mother of minor children herself, had been unable to travel to Ethiopia to visit the children;

(12) That the aunt had been supporting the mother financially and with regular phone calls and video calls and had a great relationship with the children and would like them to join her and the mother in Ireland so that they could grow up in a safe environment.

55. It was submitted that the finding of the INIS that an exceptional set of circumstances did not exist was at complete odds with the reality of the case involving four minor children; and that this was an unlawful and in fact cruel finding.

56. As to the absence of the father's consent, it was said that:-

“[The mother] instructs that she has no way of locating the applicants' father.

[The mother] instructs that she had no court documentation to this effect, nor does she have any documents relating to the custody of her children. [The mother] wishes to highlight that she fled Somalia during a war and was residing in Ethiopia with her children as an undocumented persons [sic].

[The mother] instructs that it is not common practice to obtain documents from the Court to this effect given the prevalence of missing persons in Somalia and the state of the war-torn country. [The mother] wishes to highlight again that there is no stable Government in Somalia which means that there are no official and proper systems for the issuance of such documents.”

57. Without getting ahead of myself, there was no evidence – or even assertion – of any attempt by the mother to locate the father. The aunt had previously been said to have tried several times to find the mother using the Red Cross tracing service. The mother did not say that she had considered using this service or any other service that might have been available to her. Nor was it said that the mother had ever considered applying for a court order or had taken advice as to the possibility of doing so. All that had been said of the father in the solicitors' letter of 28th July, 2021 was that the mother had “*lost contact*” with him “*at the*

end of 2015/beginning of 2016 in Somalia” and that the mother did not know his whereabouts and was unsure if he was alive. In the letter of 23rd November, 2021 it was said that – at an unspecified time and place – the husband had been taken hostage after they were attacked by the Al-Shabaab militia and that *“approximately four years ago”* the mother had *“received mixed reports from different people telling her that he was dead, that he was captured, and that people saw him, but he was injured at the time.”*

58. On this very vague account of events, the mother’s husband could not have been the father of the youngest child, who was born at the end of December, 2016. According to the statement grounding the application for judicial review, the father was taken hostage *“in or around”* 2014 and reunited with the mother *“in or around February 2016”* until *“in or around March, 2016”* when *“[the mother] again lost contact with her husband and has not heard from him since.”* If the father had been taken hostage a second time, I would have expected the mother to have said so, as opposed to simply saying that she had lost contact. Approximately four years prior to the solicitors’ letter of November, 2021 would have been November, 2018. There was no indication as to what, if any, attempt was made between March, 2016 and 2018 to establish the whereabouts of the husband. There was no attempt to identify the *“different people”* who had conveyed the *“mixed reports”* or, indeed, whether these reports had been sought or volunteered. There was no indication as to what, if any, attempt had been made to follow up on any of them.

59. Nor was there any evidence – or even assertion – of any consideration of what documentation might be obtained to address the question of the absence of the father’s consent. The height of what was said about the possibility that a court order might be obtained was that it was not the common practice to obtain court orders. As to the availability of official documentation, there was no suggestion that there had been any difficulty in obtaining the children’s passports and birth certificates.

60. Included with the letter of appeal were receipts dated 1st October, 2021 and 2nd November, 2021 for the purchase by the aunt of two electronic money transfers of US\$200 to the mother’s sister-in-law in Mogadishu; a statement of account in respect the payment of rent by the aunt to the local authority; and some further bank statements for the aunt showing regular payments from the Department of Social Protection.

61. The solicitors’ letter of appeal of 23rd November, 2021 was followed up by a letter of 21st December, 2021 enclosing further documentation, including a full copy of the aunt’s passport – which showed that she had travelled to the United Arab Emirates on 22nd October, 2020 and had travelled from there to Kenya on 1st November, 2020, where she had stayed until 10th November, 2020 – and a screenshot of a WhatsApp message showing a photograph of four children. A further letter of 7th February, 2022 enclosed a birth certificate for the mother issued by the Mayor of Mogadishu on 25th November, 2021 and showing her address as Yaaqshiid, and some pay slips for the aunt which showed modest earnings as a care worker.

The impugned decisions

62. On 14th April, 2022 the Visa Appeals Unit of the Department of Justice issued four individual decisions on the applicants’ appeals and a composite “*consideration*” running to 36 pages. Each of the decisions stated that the appeal had been examined in accordance with the Policy Document, as well as under Article 8 of the ECHR and Article 41 of the Constitution and that all documentation and submissions made had been considered.

63. Strictly speaking, by the terms of the Policy Document, the applicant in the case of minor children was – or ought to have been – the sponsor. The decision referred to the children as the applicants and the mother and the aunt as the sponsors, but nothing turns on that.

64. The decision in each case was to refuse the appeal on the grounds that finances shown were deemed to be insufficient; that there was no automatic right for non-EEA nationals who are extended family members of Irish citizens to migrate on a long-term basis to Ireland; that the documentation submitted was insufficient; that the quality of the documentation submitted was unacceptable in a number of respects; that there was no evidence of the consent of the applicants' father or court order bestowing sole custody of the children; and that the granting of the visas "*could*" result in costs to the State.

65. The appeals officer determined that the applicants had not demonstrated that they had ever been financially or socially dependent on the aunt; and that the mother was ineligible as a sponsor because – as required by section 16.4 of the Policy Document – she had not been resident in the State for twelve months. Immediately after the finding that the applicants had not demonstrated that they were or ever had been socially or financially dependent on the aunt, it was stated that:-

“Applicant has failed to demonstrate any special circumstances that would warrant an exception. The visa officer has additionally considered the applicant under section 1.12 of the Policy Document and has not found that the application as submitted demonstrated through documentary evidence an exceptional set of circumstances that would suggest that the appropriate and proportionate decision on the visa application should be positive.”

66. The consideration was long and – as the High Court judge observed – in some respects repetitious. The correspondence and supporting documentation was examined in great detail.

67. In section 1, under the heading "*Background*", the appeals officer examined the information and supporting documentation in relation to each of the aunt and the mother as proposed sponsors and each of the children. It identified the other family members living in

Ireland and examined and analysed the documents which had been submitted to evidence the relationship and evidence of contact between each of the aunt and the mother and the children. It examined in detail the evidence submitted in support of the assertion that the aunt would be in a position to support the children and listed the other information and documents which had been considered.

68. In section 2, under the heading “*Assessment under the Policy Document on Non-EEA Family Reunification*”, the appeals officer addressed the eligibility of the mother and aunt to act as sponsors under the Policy Document. It identified that the relationship between mother and the children was that the children were “*nuclear family ... children under the age of 18*” and that the relationship between the aunt and the children was “*other family*”. It concluded that the aunt’s income was such that the granting of the visas “*may result in a reliance on public funds/resources*” and that the stated “*close familial relationship*” that had been described had not been sufficiently or effectively demonstrated. It concluded that the mother was not eligible as a sponsor as she had not been resident in Ireland for twelve months and immediately went on to say that even if the mother had been eligible, it had not been demonstrated that she had sufficient financial resources to act as a sponsor.

69. The consideration addressed at some length the question of the father’s consent. The policy was, it was said, that in order to ensure that family reunification cannot be used as a means of facilitating child abduction, it must be clearly established that both parents consent to the movement of the child. The consideration recorded that the visa appeals officer had been told by the solicitors that the father had been taken hostage by Al Shebab militia “*in late 2015/ early 2016 and that his circumstances are currently unknown*” but there was no evidence in support of that such as, for example, but not limited to, a missing person’s report or a death certificate. Additionally, it was said, the mother could have obtained a court order granting her sole legal guardianship of the children. The appeals officer noted the mother’s

contention that this was not common practice in Somalia but said that it was crucial that the Minister should be satisfied that the granting of a visa was not used as a means of child abduction.

70. The appeals officer observed that on the information provided, the paternal link between the youngest child and the father “*must be called into question.*” If, as had been submitted, the mother lost contact with the father “*at the end of 2015/beginning of 2016*”, it did not seem possible that he could have fathered the youngest child, who was born at the end of December, 2016. The appeals officer also identified an inconsistency between the initial assertion that the mother had lost contact with the father late 2015/early 2016 in Somalia and the statement on the appeal letter that the family had returned to Ethiopia in April, 2015. The appeals officer concluded that these conflicting accounts cast doubt on the accuracy of the information provided by the mother and challenged the possibility of the father fathering the youngest child and so the veracity of the birth certificate provided in respect of the youngest child.

71. On about the twenty fourth page of the consideration, under the sub-heading “*Reconstituting the Family Unit*”, the appeals officer set out the text of para. 6.1 of the Policy Document which provides that:-

“In some cases, for economic and other reasons, a family may remain separate for a long time, in some instances for many years. One member may go abroad to work and to continue to support the family in their home country via remittances. Ireland’s fairly short history as a country of immigration destination has also evidenced significant levels of migration where one individual comes to Ireland, leaving family behind, and seeks to secure leave to remain, in some cases following a lengthy legal process. It is legitimate in such cases, without undermining the validity of the residence of the migrant who may have ultimately become naturalised

or impugning their actions, to take account of the fact that the family has elected to separate. Moreover, the longer the elective separation, the weaker must be the claim to reconstitution of the family in Ireland. It is not intended to be prescriptive in respect of this issue but rather to highlight it as a highly relevant consideration in any case processing.”

72. The appeals officer found that the fact that the family was living apart was the result of a deliberate decision taken by the mother to move to Ireland rather than to remain with her children in Ethiopia was a highly relevant consideration. She found that insufficient information had been provided to show the extent to which family life was sustained by the mother since the mother “*freely elected*” to move to Ireland while the children remained in Somalia. The appeals officer took into account that the mother was aware when she moved that the children’s visa applications had been refused and said that it would be reasonable to assume that there was no guarantee that the appeals would be successful.

73. The consideration then turned to “*Any special circumstances*”. It noted that the relationship with the aunt was stated to have been entirely long distance in nature and that the aunt and the children had never met. This relationship, it was said, was capable of being sustained in the same manner as it had been developed.

74. There was, it was said, no evidence to indicate that the relationship between the mother and the children warranted an exception. The mother was named as the mother on the birth certificates but had been living apart from them since she entered the State on 16th October, 2021. There was, she said, no evidence that they had ever resided as a family unit and no examples had been provided of ongoing communication, whether by telephonic or electronic means, to demonstrate that the mother was continuing to provide social support.

75. The appeals officer recalled that the mother, by her solicitors, has asserted that she was incredibly scared for the children in Somalia because her sister-in-law had no support

and had five children herself; that she was worried for her daughters because her sister-in-law had teenage boys living in the house; that this living arrangement was her last and only resort for her children who were not granted permission to travel with her; and had submitted that a finding that an exceptional set of circumstances did not exist would be at complete odds with the reality of the case and was an unlawful and cruel finding. The appeals officer found that no evidence had been submitted as to the children's location or the financial situation of the sister-in-law, who was identified as the current caregiver. She took into account that the children were the children of the aunt's sister and that she had been told that there was no other family member who could take care of the children in Somalia or Ethiopia on a long term basis.

76. The appeals officer addressed the applicants' solicitors' submission that the cases involved acute humanitarian considerations which gave rise to special circumstances and had submitted that the appeals should be considered in a manner which took into account the aunt's refugee status and the benefits of refugees having family member in the State to support them in their homes. She observed that the visa system was not intended to be a protection system. While acknowledging the civil and political unrest in Somalia and the associated difficulties faced by many of its citizens, she said that she could not accept unsubstantiated evidence in individual cases. She found that there was insufficient evidence to suggest that the children's circumstances were more severe than other Somali citizens to the extent that their circumstances were exceptional. She found that no evidence had been provided to show that the children had been the victim of any crime or personal attack as a result of any unrest or that they suffered from any medical complaint.

77. The appeals officer concluded that the applicants had not demonstrated exceptional/humanitarian circumstances which would warrant the granting of a visa.

Legal principles

78. Before examining the applicants' challenge to the decisions, it is useful to summarise the legal principles applicable first, to the decisions themselves, and then to the application by way of judicial review to quash them.

79. As to the applicants' claim for family reunification, it is common case that this was not a matter of right but of discretion. In *A. v. Minister for Justice* [2021] 3 I.R. 140, [2020] IESC 70 the Supreme Court was immediately concerned with the entitlement of the Oireachtas to impose conditions on family reunification applications by persons who had been granted refugee status or subsidiary protection. In the principal judgment, Dunne J., said, at para. 126:-

“[The importance of family reunification] applies not just to spouses but, of course, must also apply to the case of children seeking reunification with their parents or parents seeking reunification with their children. It is not necessary to refer once again to the various guidelines and other international instruments dealing with this subject. The State has made provision for family reunification by means of the provisions contained in the [International Protection Act 2015]. It should also be recalled, as explained previously, that the 2015 Act is not the sole means by which family reunification can take place. As is clear, it is also possible to pursue family reunification through the [Policy Document on Non-EEA Family Reunification] referred to previously. The extent of family reunification is not unlimited and the State is entitled to have regard to the requirements of immigration control in making such provision. It may be considered to be somewhat harsh in the case of children that they are subject to the same time limit as adults given that they are not themselves able to bring an application for family reunification without the intervention of others but it is perhaps worth bearing in mind that in this case, Ms. I

was in the care of the Child and Family Agency and these proceedings were commenced by her through her allocated social worker who acted as her next friend in the proceedings, just as her application for refugee status was brought on her behalf. There is nothing to suggest that she was in any way inhibited by her status as a child from initiating an application or indeed in bringing proceedings. Ultimately, however, the fact that the legislation may be viewed as harsh when viewed through the prism of its application to minors, it is at the end of the day a matter of policy for the legislature and is not an issue for the courts.”

80. In *A. v. Minister for Justice* the policy had been laid down by the Oireachtas. In this case, the policy is a matter for the Minister. In neither case is the policy a matter for the courts.

81. As to the Policy Document on Non-EEA Family Reunification, it was common case that the Minister was entitled to set a scheme or policy with respect to the exercise of her executive discretion. Reference was made to *Middelkamp v. Minister for Justice* [2023] 1 I.L.R.M. 277, [2023] IESC 2 – where, at para. 44, Hogan J. observed that “*The functioning of the entire immigration system rests on the operation of clear and predictable rules.*” – and to *S.H. v. Minister for Justice* [2022] IEHC 392 and *A.Z. v. Minister for Justice* [2021] IEHC 770. As there was no challenge to the entitlement of the Minister to choose the criteria, there was no challenge to the criteria chosen.

82. It was common case that the Minister was not only entitled to have adopted the Policy Document but that it was desirable for the promotion of the principle of equality before the law and greater certainty and consistency in administrative decisions. *Li and Wang v. MJE* [2015] IEHC 638 and *S.H. v. Minister for Justice*.

83. It was common case, also, that as a matter of legal principle as well as by the express terms of the Policy Document the policy adopted by the Minister was not to be applied in a

rigid and inflexible manner but could be departed from in exceptional circumstances. *Mishra v. Minister for Justice* [1996] 1 I.R. 189 and *Ezenwaka v. Minister for Justice* [2011] IEHC 328. And it was common case that, in principle, the onus was on the applicants to establish the facts which they contended amounted to the existence of exceptional circumstances and that the question as to whether such circumstances put forward did amount to sufficient exceptional circumstances was a matter for the Minister.

84. As to the principles applicable in judicial review, these are well established and were not in contest. The Minister pointed to the summary of “*Guiding principles*” in the judgment of Heslin J. in *L.T.E. v. Minister for Justice* [2022] IEHC 504:-

“71. Judicial review is not concerned with the merits or outcome of a particular decision, but with the decision-making process. Thus, judicial review is not a vehicle by which to agitate an appeal on the merits (see the State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642; Meadows v. Minister for Justice Equality and Law Reform [2010] IESC 3).

72. There is a presumption that material has been considered by the decision-maker if the decision says so (see G.K. v. Minister for Justice Equality and Law Reform [2002] 2 IR 418; [2002] 1 ILRM 401; Talla v. Minister for Justice & Equality [2020] IECA 135; and MH (Pakistan) v the international protection appeals tribunal and others [2020] IEHC 364).

73. The weight to be given to the evidence is quintessentially a matter for the decision-maker (see KAS v. the Minister for Justice [2021] IEHC 100; and M.E. v Refugee Appeals Tribunal [2008] IEHC 192).

74. There is a presumption of validity for administrative decisions (see Campus Oil v Minister for Industry and Energy No. 2 [1983] I.R. 88).

75. *To substantiate a challenge to a decision as irrational, unreasonable or disproportionate, it is not sufficient merely to disagree with the evaluation made; nor is it enough to assert that the Minister ought to have given greater weight to some factors or less weight to others. (see ISOF v Minister for Justice [2010] IEHC 386).*

76. *The duty to balance, proportionately, the opposing rights and interests of the family, on the one hand, and the interests of the State, on the other, lies with the Minister (see Cooke J in ISOF v Minister for Justice [2010] IEHC 386, para. 12).*

77. *The onus of establishing the unlawfulness of a decision remains at all times on the applicant (see Meadows)."*

The application to the High Court

85. By notice of motion issued on 12th July, 2022 – pursuant to leave obtained on the previous day – the applicants applied for orders of *certiorari* quashing the appeal decisions of 14th April, 2022 on thirteen grounds. The notice of motion also claimed declarations that the refusal of the visa applications breached the applicants’ rights under Articles 40.3, 41 and 42A of the Constitution, Article 8 of the European Convention on Human Rights and s. 3(1) of the European Convention on Human Rights Act, 2003 but these reliefs were not pursued at the hearing before the High Court.

86. I observed at the outset of this judgment that there was disagreement as to the meaning and effect of the High Court judgment. That disagreement can be traced back to the grounds upon which the relief was sought.

87. The first ground was that:-

“The [Minister’s] finding that the [mother] is ‘ineligible’ to sponsor her minor children’s visa applications on the basis of having resided in the State for less than 12 months is unreasonable, irrational and contrary to the terms of the

[Minister's]own Policy Document on Non-EEA Family Reunification, which provides at paragraph 1.12 that any requirement of the said Policy Document may be waived in exceptional circumstances. The [Minister] thus failed to give consideration to whether the 12 month minimum residence requirement referred to in paragraph 16.4 of the Policy Document should be waived in respect of the [mother], resulting in the [aunt] being deemed the sole sponsor, which in turn resulted in the applications unreasonably and irrationally being deemed to be sponsored by a non-nuclear family member."

88. This was confusing and contradictory. The mother plainly did not meet the eligibility requirement specified in para. 6.4 of the Policy Document. The logical consequence of any argument that the Minister's finding that the mother was ineligible was unreasonable and irrational, or that the Minister acted unreasonably and irrationally in dealing with the appeal solely as the aunt's application, could only be that the Minister acted unreasonably and irrationally in failing to find that the applications had shown such exceptional circumstances as warranted a departure from the residence criterion. On the other hand, the logical consequence of any argument that the Minister had simply failed to consider whether the minimum residence requirement should be waived, would be that appeals should be remitted with a direction that the Minister should do so. However, the premise of any argument that the Minister had dealt with the applications otherwise than in accordance with the Policy Document – including considering whether exceptional circumstances had been shown – would have been simply that she failed to deal with the applications in accordance with the policy and with law, and not that they had been dealt with unreasonably and irrationally. It is true that the applicants did not ask for an order of *mandamus* or a declaration that the visas should have been granted but, on one view at least, that appeared to be the substance of their case.

89. The second ground was that:-

“The [Minister] acted unreasonably and irrationally in failing to have due regard to the unusual and exceptional factual and legal background to the visa applications. In applying the requirements of the [Minister’s] Policy Document on Non-EEA Family Reunification in an inflexible manner, the [Minister] (a) failed to give due weight to the accepted facts in the [aunt’s] application for international protection, including in relation to the death and persecution of family members; (b) failed to acknowledge that it had been flagged in the course of the [aunt’s] application for family reunification in respect of the [mother] that family reunification applications were to be submitted in respect of the [mother’s] children given that she was their sole carer; and (c) failed to give due weight to the significant practical difficulties for the [mother] in obtaining documentation in relation to her missing husband, in circumstances where the [Minister] had no reason to doubt that the [mother’s] husband was missing.”

90. It seems to me that the fundamental premise of this ground was that the applicants had in fact established an exceptional factual and legal background to the visa applications which the Minister had failed to take into account, rather than that the Minister had failed to consider whether those matters put forward as amounting to exceptional circumstances constituted exceptional circumstances.

91. The proposition that the Minister failed to take account of the practical difficulties for the mother in obtaining documentation in relation to her missing husband presupposed that the mother had established – or that it was unreasonable and irrational for the Minister to have concluded that she had not established – (a) that her husband was missing and (b) that she would face significant practical difficulties in obtaining documentation. As I have said, it was no part of the applicants’ case that there was any legal shortcoming in the Policy

Document: specifically, in the requirement that a single applicant parent should provide evidence of the consent of the other, or, by verified official documentation, evidence of the death or incapacity of the other parent or a court order granting sole custody to the applicant parent. Moreover, even if such were established, it seems to me that in principle “*a significant practical difficulty*” necessarily falls short of an insuperable difficulty. I find it impossible to reconcile the proposition that the Minister acted unreasonably and irrationally in failing to accept without question an assertion that the husband was missing with the principle that the onus of proof lies squarely on the applicants. Essentially, the proposition was that the Minister was bound to accept and to act upon a bald assertion that a man in Somalia was missing, unless the Minister had reason to doubt that. In my view, the proposition need only be stated to be seen to be untenable.

92. From the outset of the visa applications, and consistently since, the mother and the aunt have canvassed the aunt’s refugee status but they have failed to establish any legal link between the aunt’s status and the children’s visa applications. The aunt, as a refugee, had a right – which she exercised – to apply for family reunification for the mother – her sister – and her mother – the grandmother – as members of her immediate family. There was no such right as far as her nieces and nephews were concerned. On one view, at least, the applicants’ case was that the limits on the family reunification rights of refugees constituted such exceptional humanitarian circumstances as called for an extension of those rights.

93. It is evident from the appeals officer’s consideration that the Minister did address the submission that the aunt’s status as a refugee was a significant factor but took into account that the visa system was not intended to be a protection system. There was no challenge to the conclusion – or at least to the Minister’s entitlement to have concluded – that the aunt had not made out any financial or social dependency of the children. If it was open to the Minister to have concluded that the fact that the children had no right to come to Ireland to

live with an aunt who they had never met and on whom they were neither socially nor financially dependent or the fact that the mother could not avail of her visa unless she could bring the children with her, constituted exceptional humanitarian circumstances, I fail utterly to understand how it could be contended that the contrary conclusion flew in the face of fundamental reason and common sense.

94. To the extent that the applicants sought to make the case that the Minister had failed to afford sufficient weight to the matters to which it was said she had not afforded due weight, it seems to me that the High Court was plainly being invited (a) to say that these were factors to which the Minister was bound to afford weight, which she had not, and (b) – if the appeal decisions were to be quashed on that basis and the appeals remitted – to say what weight which should be afforded to those factors on any reconsideration. This, it seems to me, is impossible to reconcile with the applicants’ acceptance that the weight to be given to the evidence is quintessentially a matter for the decision maker. Moreover, the proposition that the Minister failed to give “*due weight*” to those matters to which it was contended that she did not give “*due weight*” involves an acceptance that she did give those matters some weight.

95. The third ground was that:-

“The [Minister] acted unreasonably and irrationally in finding at para. 25 of the appeal refusal decision that the [mother’s] decision to travel to Ireland following the refusal of her children’s visa applications at first instance on 24th September, 2021 was a factor which should weigh against her children’s visa appeals being granted. The [Minister’s] finding that the [mother] had ‘freely elected to move to Ireland’ while her children remained in Somalia is a gross mischaracterisation of the reality of the situation, whereby the [Minister] had notified the [mother] that she

was obliged to move to Ireland by the 10th December, 2021 if she wished to avail of the family reunification visa which had been granted to her.”

96. Again without wishing to get ahead of myself, it seems to me that this is an entirely partisan portrayal of what happened. The mother’s visa was never going to enable the children to travel to Ireland and the mother and her solicitors were well aware of that. If the aunt, in the course of her family reunification application, and the mother in her visa application on 5th April, 2021, made it clear that the mother wished the children to come with her, they both also unambiguously stated that the mother could not travel without them and that the separate applications would be made on behalf of the children – which they were. In deciding to avail of her visa, the mother did something which she had consistently said she could not do.

97. By the way, there is no explanation for the fact that the children’s visa applications were not made until 28th July, 2021. If, inferentially, the mother was awaiting the outcome of the aunt’s application for her – the mother’s – visa in the hope that it would bolster the children’s application, there was no legal basis for this.

98. I do not think that it is quite correct either to say that the mother – to use a neutral term – decided to move to Ireland while her children remained in Somalia. The objective fact of the matter is that the mother moved the children from Adidas Ababa to Mogadishu to enable her to travel to Ireland; and that she did so after the children’s visa applications had been refused at first instance. If, before she moved, the mother gave any consideration to – or took any advice as to the possibility of – applying for a renewal of her visa or a new visa, there was no evidence of that. The height of the mother’s case was that if she was to avail of the visa which had been granted to her, she would have to do so within the term of that visa. If she did not avail of the visa, the visa would have expired. She did not make the case that if

she had not travelled when she did, she – or more correctly, the aunt – would have permanently lost the right of family reunification.

99. The application for the mother’s visa was made on 6th April, 2021. The mother was plainly aware long before then – and the application expressly acknowledged – that if the children were to be able to come to Ireland, they would need their own visas. But the children’s visa applications were not made until nearly three months later on 28th July, 2021. The children’s visa applications were dealt with promptly and the decisions were made on 24th September, 2021. There was no evidence that the mother gave any consideration to the possibility that the children’s appeals might be decided within the remaining three months before her visa expired. In the event, the children’s appeals were not filed until the day before the two month time limit would have expired and the solicitors’ letter of 23rd November, 2021 indicated – in bold type – that they were in the process of gathering further supporting documents and asked that no decision be made until those documents were submitted. The solicitors’ letter of 21st December, 2021 similarly presaged further documents and information, which were provided under cover of their letter of 7th February, 2022. The appeal decisions were made within two months thereafter.

100. The fourth ground was that:-

“In refusing the visa appeals on the basis that the relationship between the [aunt] (whom the [Minister] deemed to be the sole sponsor) and her nephews and nieces ‘... is capable of being sustained in the same manner in which it was developed whether by way of telephone or electronic communication, without the grant of a visa to the [children]’, the [Minister] has acted unreasonably and irrationally ... and has failed to give sufficient weight to the fact that the [mother] is living with the [aunt] in Ireland and had applied to co-sponsor the visa applications.”

101. This, again, is confused. The fact of the matter is that the Minister decided that the children were not socially or economically dependent on the aunt and there is no challenge to the entitlement of the Minister to have so decided. The aunt acknowledged that she had never met the children. Her explanation for this – that as the mother of small children herself, she would have been unable to travel to Somalia – sat very uneasily with the fact that her passport showed that in October and November, 2020 she had travelled to the U.A.E. and Kenya. In any event – and leaving to one side the fact that it was not vouched – the height of the aunt’s case was that such relationship as she had with the children was on the basis of telephone calls and electronic messages. I cannot see how the Minister might have conceivably acted unreasonably or irrationally in coming to the conclusion that the relationship was capable of being sustained on the same basis.

102. The proposition that the mother was “*living*” with the aunt – inasmuch as it tended to suggest that she was permanently resident with the aunt – was not obviously consistent with the statement in the letter of appeal that the children were “*temporarily staying with ... the sister-in-law.*” As to the weight attributed by the Minister fact that the mother was living (or temporarily staying) in Ireland with the aunt, it is perfectly clear that the considerable weight was afforded to this fact – but as a factor in diluting rather than bolstering the claim for reconstitution.

103. The fifth ground was that:-

“The [Minister] in the appeal refusal decision has failed to afford any weight, or any sufficient weight, to the fact that the [aunt] is a declared refugee in the State and the right of a refugee to family reunification and the increased benefit to society provided by refugee family reunification when compared with family reunification of non-refugees. The [Minister] has failed to place any reliance on the [aunt’s] refugee status in the appeal refusal decision. The [Minister] does not engage in any

way with the significance of the [aunt's] refugee status in the context of her family rights and particular circumstances, and the increased benefit to society provided by refugee family reunification when compared with family reunification of non-refugees.”

104. There is substantial overlap between the second and the fifth grounds. The decision clearly stated that the appeals had been assessed in accordance with the Policy Document on Non-EEA Family Reunification, which was the basis on which the applications had been made. The Policy Document clearly excludes from that process cases where the sponsor is a beneficiary of international protection whose application falls within the scope of ss. 56 or 57 of the International Protection Act, 2015. The aunt had previously exhausted her rights as a refugee to family reunification with her daughter, her mother – the grandmother – and her sister – the mother. Those rights did not extend to the children. While the aunt undoubtedly sought to persuade the Minister to take her refugee status into account, her status or eligibility as sponsor was as an Irish citizen seeking reunification with non-nuclear “*other family*”, who, if the applications were granted, she was manifestly unable to support.

105. The sixth and seventh grounds were that the Minister had acted unreasonably and irrationally in relying on the low finances of the mother and the aunt in finding that no exceptional circumstances arose and in requiring that the children should show that their circumstances were more severe than those of other Somali children and that the appropriate comparators were not Somali citizens but visa applicants generally. It seems to me that it is these grounds which are at the heart of the appeal and I will return to them.

106. The eighth and ninth grounds – that the Minister acted in breach of The Constitution, the ECHR and the European Convention on Human Rights Act, 2003 were not pursued.

107. I will come in due course to the remaining grounds.

The High Court judgment

108. The judicial review application was heard by the High Court (Barr J.) on 2nd and 3rd May, 2022 and he delivered a written judgment on 14th June, 2023 ([2023] IEHC 316). For the reasons he gave, the High Court judge concluded that the decisions of the visa appeals officer were irrational and unfair and should be set aside.

109. In circumstances in which there is a dispute as to what the judge decided, it will be necessary to examine closely what he said. Before doing so, I should set out the basis on which this court should conduct that examination.

Standard of review

110. In the written submissions filed on behalf of the Minister, it is pointed out that the High Court did not hear oral evidence but made findings based on the pleadings, affidavits and exhibits. In those circumstances, it is submitted that this court is in as good a position as the High Court judge to assess the evidence and come to its own conclusions and thereby to decide whether the judge fell into error. Reference was made to the judgment of the Supreme Court in *O'Donnell v. Bank of Ireland* [2015] IESC 14 where Laffoy J. said, at para. 36:-

“[I]n Hay v. O’Grady [1992] 1 I.R. 210 McCarthy J. stated at pp. 216 and 217 that the Court hears ‘the arguments based upon the findings of fact, including arguments that the findings are unsupported by evidence, itself a question of law’. There was no oral evidence on the hearing in the High Court and to a large extent the subsequent observations of McCarthy J. as to the role of this Court on an appeal, in reality, are of no relevance, except, perhaps, that, by analogy to the statement that, in the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge, in determining issues that arise on affidavit evidence alone, an appellate tribunal is similarly in as good a position as the trial judge.”

111. The Minister identified this appeal as falling within the third of the three categories of findings identified by Murray J. (Haughton and Barniville JJ. concurring) in *A.K. v. U.S.*

[2022] IECA 65 where:-

“... the appellate court affords limited deference to the decision of the trial court by beginning its analysis from the firm assumption that the trial judge was correct in the findings or inferences he or she has drawn, and interfering with those conclusions only where it is satisfied that the judge has clearly erred in the findings made or inferences drawn in a material respect.”

112. Reference was also made to the judgments in *Ryanair v. Billigfluege.de GmbH* [2015] IESC 11 and *Minogue v. Clare County Council* [2021] IECA 98.

113. Acknowledging that she bore the burden to prove that the High Court judge erred materially in the findings or inferences, the Minister submitted that taking a “*somewhat deferential*” approach, this court was free to correct errors of fact or mistaken inferences of fact made by the High Court judge, where it is established that the judge was incorrect in the findings of fact underpinning his decision.

114. While counsel for the applicants did not contest the Minister’s submission as to the appropriate standard of review, I am unconvinced that it is quite correct.

115. *A.K v. U.S.* was an appeal in an international child abduction case in which – as Murray J. explained – the decision of the court of first instance may, depending on the case, be based on the resolution of issues of fact, findings of primary fact and/or inferences drawn from findings of fact. At para. 46, he said that:-

“Different standards of appellate review fall to be applied to these different categories of findings. For this reason, the description of the issue of where a child is habitually resident for the purposes of the Convention as one of fact can confuse, as it risks the elision of the different standards of review that must be applied to

distinct components of the trial court's answer to that question in a given case.”

[Emphasis added.]

116. From this – and elsewhere in the judgment of Murray J. – it is clear that the standard of review does not depend on the nature of the case, or the procedure, or, by itself, whether or not oral evidence was heard, but rather on the nature and basis of the precise finding in issue. Murray J. identified, at one end of the spectrum, cases in which the appellate court simply forms its own view as to the matter in issue, untrammelled by any finding that has been reached by the trial court. That, he said, is the standard applicable to findings of pure law. At the other extreme lie findings with which the appellate court will interfere only in very limited circumstances. This, he said, was the approach to be adopted when the High Court makes findings of primary fact based on his or her appraisal of conflicting oral evidence and/or where inferences are drawn that depend on such findings. Murray J. stressed that it was not sufficient to trigger that standard of review to merely observe that oral evidence was given.

117. The third – intermediate – category of finding was where the appellate court is asked to address alleged errors in (a) findings based on affidavit or documentary evidence alone, or (b) what Humphreys J. has described in *Minogue v. Clare County Council* as “*secondary findings of fact that are not dependent on oral evidence such as inferences from admitted facts or those proven by way of oral testimony.*” In reviewing such findings, the appellate court is “*somewhat deferential.*” It is settled – as the Minister accepted – that the burden of proving that the trial judge assessed the facts wrongly lies on the party claiming that he did.

118. In this case, the review by this court is complicated by the fact that the judgment of the High Court was a judgment on an application by way of judicial review, in which the High Court was essentially asked to decide whether the Minister was entitled to have come to the conclusions which she did, and in which the appeals officer’s decision was based on

documents and the absence of documents. It is further complicated by the fact that in the time between the initial decision and the filing of the appeal, the applicants' circumstances had changed. Thus, while the initial decision refusing the visa applications identified the shortcomings in the application and the availability of an appeal meant that the applicants had an opportunity to address those shortcomings, the applicants did not have the opportunity to address whatever shortcomings there might have been – or thought to have been – in the appeal. That said, it is clear from the Policy Document that the onus of proof was on the applicants to make a sufficiently clear and cogent case for the granting of the visas. Similarly, it was clear from the initial decision that the applicants were required to sufficiently vouch the case which they made by supporting documentation and it is clear from the correspondence that they understood the requirement for supporting documentation.

119. The substance of the applicants' judicial review application was that the Minister's decision was unreasonable and irrational. As McCarthy J. pointed out in *Hay v. O'Grady* [1992] 1 I.R. 210, the applicants' arguments that the Minister's findings were unsupported by evidence is a question of law, on which this court is required to form its own view. If and to the extent that the judge may have found that the appeals officer took into account irrelevant considerations or failed to take into account relevant considerations, this, too, is a question of law on which this court is at large. The role of the High Court on an application by way of judicial review is strictly circumscribed. If an administrative decision is based on facts found by the drawing of inferences, it may not be set aside on the ground that the judge would have drawn other inferences but only on the basis that the inferences were such that no reasonable decision maker could have drawn. Thus, the conclusion of the High Court on as the entitlement of an administrative decision maker to have drawn inferences is a question of law, on which this court is ultimately at large. The onus is on the Minister to demonstrate the error contended for.

120. The starting point will be to resolve the dispute as to what the judge decided.

The appeal

121. By notice of appeal filed on 2nd August, 2023 the Minister appealed against the judgment and order of the High Court on sixteen grounds. Broadly speaking, the Minister complains that the judge erred in law and/or fact in making the findings which he did – or at least the findings which the Minister contends he made – and in his conclusion that the decisions were irrational and unfair. The judge’s findings, it is said, were not supported by the evidence which was before the High Court or the evidence which was put before the Minister but were based on bare assertions and submissions which were unsupported by evidence. The judge, it is said, failed to take account of the discrepancies between the account of events presented to the court and the account of events presented to the Minister, or the discrepancies within the account of events presented to the Minister, or the absence of supporting documentation.

122. The judge, it is said, erred in law and/or fact in finding that the Minister acted irrationally in refusing the visas on the basis that there was no evidence of the consent of the father and in failing to have proper regard to the fact that the applicants had not produced a court order in relation to custody.

123. The judge, it is said, erred in law and/or in fact in finding that the Minister had applied the wrong test in finding that the children were no worse off than other children in Somalia and had failed to have proper regard to whether their circumstances were exceptional from a humanitarian point of view. Specifically, it is said that the judge erred in accepting the applicants’ submissions – which, it is said were unsupported by evidence – that the mother was a young mother who had travelled to Ethiopia to find safety; that she had limited financial means; that the children had little to eat and were not attending school; that the children were living with the sister-in-law in dangerous conditions; that the family of origin

had been destroyed in a bomb attack when she was twelve years old; and that these constituted exceptional circumstances.

124. The judge, it is said, erred in law and/or in fact in finding that the criteria for eligibility and the financial requirements of the Policy Document should have been waived by the Minister, given the exceptional humanitarian circumstances in the case.

125. The respondents' notice contested the grounds of appeal *seriatim*.

126. It is said that the Minister had not – in the notice of appeal – identified any discrepancy or provided any example of information provided to the court which had not been provided to the Minister. It was denied that there was any discrepancy or, if there was, that any discrepancies were material to the outcome.

127. It was said that the lawfulness of the Minister's findings must be considered in the round, including evidence previously accepted by the Minister in the aunt's family reunification application – which the applicants characterised as a related application.

128. The applicants pointed to various of the judge's criticisms of the findings by the appeals officer, to which I will return.

129. It was said that the Minister's finding that the children must show that their circumstances were exceptional compared to other Somali children, rather than exceptional compared to other visa applicants generally, was clearly an error of law.

130. The applicants contended that there was evidence before the High Court of exceptional humanitarian circumstances and that the judge had not found that the requirements of the Policy Document should have been waived but rather than there had been "*insufficient engagement with the exceptional humanitarian circumstances arising.*" It was said that there had been a clear failure on the part of the Minister to engage with the exceptional humanitarian circumstances, and the High Court judge's findings in relation to same was correct.

Analysis of the High Court judgment

The substance of the judgment

131. The High Court judge identified the essence of the applicants' case as being that the Minister had applied the Policy Document in an inflexible and irrational way by failing to have any or any adequate regard to the exceptional circumstances of a humanitarian nature of the case which would, if it had been submitted, have justified a departure from the strict requirements of the policy in favour of the grant of visas to the children. "*In essence*", he said, "*they rely in this regard on the existence of exceptional humanitarian circumstances in the case.*"

132. This accords entirely with my understanding of the statement of grounds. The applicants' case was that they had in fact established exceptional humanitarian circumstances and they invited the High Court to find that they had, and to quash the Minister's decision on the grounds that she had failed to recognise their circumstances as exceptional humanitarian circumstances which at least warranted a departure from the policy. It would necessarily follow, it seems to me, that if the decisions were set aside and the appeals remitted, they would have to be reconsidered by the Minister on the basis that the applicants had made out exceptional humanitarian circumstances such as would at least warrant, if not require, a departure from the policy.

133. The submissions made on behalf of the applicants in the High Court are summarised at paras. 18 to 30 of the judgment and the submissions on behalf of the Minister at paras. 31 to 39. I will come to the detail of the arguments but the core issue was whether the Minister had applied the Policy Document in an inflexible and irrational way.

134. It was submitted firstly, that the Minister was wrong to have excluded the mother as a sponsor on the ground that she did not meet the requirement set out at para. 16.4 of the Policy Document that a sponsor should have been lawfully resident in the State for twelve months.

It was submitted that the Minister should always be free to exercise her discretion in whatever way she thought was most appropriate in the circumstances and that the Policy Document could not be applied inflexibly. It was submitted that the decision maker should have been prepared to depart from what were described as the strict requirements of the policy if she was satisfied that there were exceptional circumstances which warranted so doing. It was submitted that the decision maker had not had regard to the fact that the basis of the applications was due to the existence of exceptional circumstances of a humanitarian character and that these would have justified a departure from the strict adherence to the eligibility criteria.

135. It was accepted by the Minister in the High Court, as it was on the appeal, that the policy was flexible and could not be operated in such a way as to remove the discretion of the Minister. Once the flexibility of the policy was acknowledged, it followed that the Minister accepted that the decision-maker should have been prepared to depart from the eligibility criteria if she was satisfied that there were exceptional circumstances which warranted a departure. The Minister's case – in the High Court and on the appeal – was that the decision maker was prepared to depart from the eligibility criteria if she was satisfied that there were exceptional humanitarian considerations which warranted a departure; but that the applicants had failed to establish that there were such considerations.

136. The issue, then, was whether or not the Minister had taken into account the fact that the basis of the applications was the existence of exceptional circumstances which would have justified a departure from the criteria.

137. Thus the premise of the applicants' argument was that the circumstances put up by them as being exceptional circumstances were in fact exceptional circumstances which warranted a departure from the policy. This, it seems to me, invited the judge to determine

(a) that the applicants' circumstances were exceptional and (b) that they were such as at least might – but in truth the argument was that they did – warrant a departure from the policy.

138. The applicants submitted that a rigid adherence to the provisions of the policy was contrary to the relevant authorities on the exercise of discretionary powers and that such an approach was contrary to the provisions of the Policy Document itself, not least paragraph 1.12. That was common case. The Minister's case was that the applicants had not – or at least that she was entitled to have concluded that they had not – made out the existence of exceptional circumstances such as warranted a departure from the policy.

139. At para. 40 of his judgment, the High Court judge identified the overall tone and conclusions of the decision as summarised in the following paragraphs:-

“In the case of the second sponsor [the mother], she is the biological mother of the applicants. This office is informed that she was the primary caretaker of the applicants before entering the State. However, as outlined elsewhere in this consideration, there has been insufficient evidence submitted to corroborate this. This visa appeals officer notes that the children's application was refused at first instance on the 24th September 2021, with the refusal letter issued on 30th September 2021, and the second sponsor entered the State on the 16th October 2021. The appeal was launched on 30th November 2021. The second sponsor departed Somalia without her children, with the knowledge that their application had been refused for a variety of reasons. While she was completely within her rights to appeal the decision on behalf of the applicants, there is no guarantee that the appeal would be successful. As she relinquished her role as the primary caregiver, with the knowledge that the Family Reunification appeal may be refused, her claims to reconstitution have been diluted. Therefore, while it may be in the best interest of the children to reside with their mother, it was a decision undertaken by the mother to

cease residing with the children. As a result, weighed against the rights of the State, her claim has been significantly weakened.

Details regarding the financial situation of the first sponsor [the aunt] and the second sponsor [the mother] have been set out earlier in the consideration, and in the event of a visa being granted to the minor applicants, there is a reasonable founded risk that they may become a burden on public funds and public resources. The granting of a visa to the minor applicants would result in an immediate obligation by the State to provide education to the minor applicants. This office has not been informed that the second sponsor is receiving an income independent of the first sponsor. It is estimated that the annual cost of school education is approximately €8,000 per child. As there are four minor children, it is immediately clear that there will be an immediate and significant cost to the State should the within applicants be allowed to reside here.”

140. The High Court judge found that on reading the decision as a whole, the appeals officer adopted a harsh and, in some respects, unfair approach to the applications.

141. He found, first, that the Minister had applied a strict eligibility test to the mother acting as a sponsor on the ground that she was not been resident in the State for longer than one year. This, he said, ignored the fact that the policy can be departed from in exceptional circumstances.

142. It is the fact that the Minister found as a fact – as it was the fact – that the mother did not meet the residence criterion. However, that was not the only basis on which she was ineligible to act as a sponsor. In the passage identified by the judge as setting out the overall tone and conclusions of the decision – which is taken from the appeals officer’s consideration in section 4 of her consideration of the “*Best Interest of the Child/Children*” – the focus was on the fact that the mother had – as the visa appeals officer had put it – relinquished her role

as the primary caregiver and that there was what was characterised as a reasonably founded risk that the children would become a burden on public funds and public resources.

143. The decision shows that the visa appeals officer, having found that the mother did not currently meet the eligibility requirement, immediately went on to say that even if she had been eligible, there was “*insufficient financial information ... provided to indicate that this person has the financial resources to act as a sponsor for the within applicants.*” The fact is that neither the mother nor the aunt could satisfy any of the criteria in the Policy Document and the only real issue was whether the children’s applications disclosed such sufficient exceptional humanitarian circumstances as warranted a departure from the entire policy. This had already been addressed in section 2 of the consideration – under the heading “*Assessment under the Policy Document on Non-EEA Family Reunification* – in which the appeals officer examined first the eligibility of each of the mother and the aunt to act as sponsor, then the evidence as to the means of each of the mother and the aunt, then the issues as to the absence of the father’s consent, then the significance of the fact that the fact that the mother and children were living apart was the result of a deliberate decision taken by the mother and finally, under a separate sub-heading of “*Any special circumstances*” – having first set out the text of para. 1.12 of the Policy Document – whether the applicants had demonstrated any exceptional humanitarian circumstances in the case which would warrant the granting of the visas.

144. The High Court judge held, secondly, that the finding that there was insufficient documentary evidence of any family life between the mother and the children before she left Somalia in October, 2021 was extraordinary. That, the judge found, was not an issue which had been raised in the first instance decision and had not been put to her.

145. The decision under review went through the visa applications and the documentation submitted in support of them with a fine tooth comb. In turn, in the judicial review

application, counsel for the applicants put the appeals officers' consideration under a forensic microscope, focussing on a small number of observations. The decision identified a number of discrepancies including, for example, the discrepancy between the assertions that the children would not become a financial burden on the State and the aunt's bank statements; the fact that the aunt had said that she had been unable to travel to Somalia but had been in the U.A.E. and Kenya; and that the aunt's account of having established a relationship with the children by telephone and video calls was supported only by two screenshots on WhatsApp.

146. The appeals officer did say that there was insufficient evidence to show that the mother and the children existed as a family unit before the mother entered the State and did say that it was unclear that the mother and children had "*existed as a family unit prior to entering the State*". I would not disagree with the judge that this was a very peculiar observation, *a fortiori* when it had not been in issue at first instance and had not been put to the mother. However, I would not equate the observation that there was insufficient evidence that the mother and children had lived together as a family with a finding that they had not. I will come back to the fact that, and the circumstances in which, the mother came to Ireland in October, 2021 but the premise of the finding that she then relinquished her role as the primary caregiver can only be that she was, until that time, the primary caregiver. Elsewhere in the decision, the appeals officer observed that the mother had been living apart from the children since she entered the State on 16th October, 2021 – which implicitly, at least, accepted that they had been living together until then. Therefore, whatever about any shortcomings in the supporting documentation, the decision-maker must have accepted that the mother and the children were a family unit before the mother came to Ireland.

The absence of the father's consent

147. The judge held thirdly, that the finding that there was no evidence of consent on the part of the father nor any court order granting sole custody of the children to the mother – while factually correct – ignored the fact that Somalia is a country with deep political and social unrest, a fact which had been accepted by the decision maker. The judge found that it was unlikely that the mother was taking the children against the wishes of the father when they were in the care of his sister. “*Thus*”, he said, “*this finding has to be seen as being irrational in the particular circumstances of this case.*”

148. I cannot agree.

149. It was uncontested that the Minister is entitled, in principle, to require evidence of the consent of the father – unless unknown – or evidence of his death or incapacity, or a court order. In my view, the accepted fact that Somalia is a country with deep political and social unrest did not go directly to the absence of the father’s consent.

150. In her appeal letter of 23rd November, 2021 the mother, by her solicitors, asserted that the father was “*missing and presumed dead.*” However, the information given in support of this was that approximately four years previously the mother had received mixed reports from different people telling her – variously – that he was dead, that he was (or had been?) captured, and that people had seen him but he was injured. The “*people*” were not identified; the reports were entirely vague; the reports were said to have been received approximately four years previously but there was no indication as to when or where the husband was reported to have died, or to have been captured, or to have been seen, or to have been injured. There was no indication whether the reports were received as a result of enquiries or were made in the course of casual conversation. There was no indication that any of the reports had been followed up on. More fundamentally, it seems to me that absent any attempt to investigate or assess the mixed reports there was no basis on which it could have been presumed that he was dead. The mother baldly instructed the solicitors that she had no way

of locating the father. It seems to me that even on the vague information given, the mother may very well have had leads which she failed to follow up.

151. The mother instructed her solicitors that it was not common practice to obtain documents from the court but does not say that she had attempted to do so, or that there were practical difficulties in doing so, or what those difficulties might have been, still less that it was impossible. The assertion that there were no official and proper systems for the issue of documents was inconsistent with the fact that the mother had procured passports and birth certificates for herself and the children.

152. The mother's case on the visa appeals was that the children were living with her sister-in-law and her sister-in-law's five children at an unspecified address in Mogadishu but there was no corroboration of that. While it was said that the sister-in-law had agreed to mind the children on a temporary basis pending the determination of their visa appeals, there was no corroboration of that. It seems to me that there is a significant difference between the children being taken to Ireland against the father's wishes and being taken without his consent. On the mother's case, the father could have had no knowledge of the proposed move. If the mother had lost contact with the father, it seems to me that the sister-in-law in Somalia – with whom the mother was clearly in contact – must also have lost contact with the father. There was simply no explanation as to how the mother and the sister-in-law had lost contact with the father or of what, if any, attempts were later made by either to make contact with him or to establish his whereabouts, or whether he was dead or alive. If the sister-in-law was aware of the mother's intentions and had no objection, I do not see how that can logically have substituted for the consent of the father.

153. In addressing the issue of the absence of the father's consent, the appeals officer also identified a question of the identity of the father of the youngest child. The twelfth ground on which the applicants sought to quash the decision was that the Minster acted in breach of fair

procedures and the principle of *audi alteram partem* in casting doubt on the paternity of the youngest child without putting “*the perceived inconsistencies in the timeline*” to the mother for comment. While it is true that the Minister did not before making her decision point out the inconsistency – and it was not a perceived inconsistency but an obvious one – to the mother, the appeal was not a contest *inter partes* but a visa application on which the applicants bore the onus of proof. There was no *alteram partem*. Moreover, it was the obvious inconsistency in the evidence provided by the mother herself which had cast doubt on the paternity of the youngest child. Pointedly, the appeals officer identified the paternity issue as an issue, without deciding it one way or the other.

154. In any event, any issue as to the paternity of the youngest child did not go the question of the father’s consent or the entitlement of the mother to take the children to Ireland without his consent.

155. With respect to the High Court judge, it seems to me that the Minister was clearly entitled to have taken the view that the absence of the father’s consent had not been sufficiently explained or vouched.

Comparison with Somali children generally

156. The High Court judge next found that the decision maker applied the wrong test in holding that the children were no worse off than other children in Somalia. He quoted a paragraph from section 4 of the consideration where, under the heading “*Best Interest of the Child/Children*” it was said that:-

“The Visa Appeals Officer accepts that the children’s circumstances in Somalia may be unenviable, yet it is much the same as the circumstances of other Somali citizens. The desire to have the children reside with their mother in the State is understandable. However, the applicants have failed to demonstrate that their

circumstances are more severe to that of other Somali citizens to the extent that their situation is more exceptional.”

157. The judge found that in applying that test, the decision maker fell into error. He found that in order for the children to be successful in their visa applications, it was not necessary for them to prove that they were in a worse position than other children in Somalia but – quoting from the Policy Document – only that they constituted “*an exceptional set of circumstances, normally humanitarian, that would suggest that the appropriate and proportionate decision should be positive.*” “*This*”, he said, “*means that they only have to prove that their circumstances are exceptional from a humanitarian point of view. It does not mean that they have to prove that their circumstances within the particular country in question, are exceptional by the standards of that country.*”

158. The ground of appeal against this finding is woolly. It is suggested at ground No. 13 that the trial judge erred in law and/or in fact in finding that the Minister had applied the wrong test in finding that the children were no worse off than other children in Somalia and had failed to have proper regard to whether their circumstances were exceptional from a humanitarian point of view. What is less than clear to me from this is whether the complaint is that the judge erred in fact in finding that the Minister applied the test which the judge found that she had applied, or erred in law in finding that the test which in fact had been applied was the wrong test, or both. The point was not clarified or developed in the Minister’s written submissions. As they had in their respondents’ notice, the applicants in their written submissions contended that the Minister had unlawfully required the children to show that their circumstances were exceptional compared to Somali citizens rather than visa applicants generally, for which there was no basis on law or in the Policy Document. The issue was touched upon in oral argument but, again, not really developed. Counsel for the applicants went further than he had in the written submissions, arguing that the reference

point for exceptionality was not visa applicants generally but Irish standards. Counsel for the Minister argued that the judge was not entitled to have found that there were exceptional circumstances but did not contend that the fact that the children's circumstances were no different to those of other Somali children was determinative.

159. The passage from the appeals officer's consideration which was quoted by the judge was in section 4 of the decision in which she was dealing with the "*Best Interest of the Child/Children.*" It came after, and repeated, the conclusion previously expressed in section 2 in which the appeals officer dealt with "*Assessment under the Policy Document on Non-EEA Family Reunification.*" In that section, the appeals officer analysed in exquisite detail over fifteen pages the forlorn case which the mother and the aunt had sought to make that they were eligible as sponsors and would be in a position to financially support the children if the visas were granted.

160. The consideration then turned, under a separate sub-heading, to the question of "*Any special circumstances.*" The appeals officer first set out the text of para. 1.12 of the Policy Document and then looked at the case made as to the social dependency of the children on the aunt, the absence of evidence of contact between the children and the mother since the mother came to Ireland, the case made as to the children's circumstances in Somalia, the absence of evidence as to those circumstances, the financial circumstances and prospects of the aunt and the mother, and the refugee status of the aunt. With no disrespect, the language used is not always precise. For example where the officer expresses her conclusions she says "*it is contended*" and "*it is submitted*", and she uses the words "*unsubstantiated evidence*" when she plainly means a mere assertion, but taken as a whole, the findings are tolerably clear.

161. The appeals officer – quoting from the solicitors’ letter of 23rd November, 2022 – addressed the applicants’ submission that the cases presented exceptional circumstances and found that they did not. She concluded that:-

“However it is contended [recte. concluded] that the visa system is not intended to be a protection system. While the Department is cognizant of the civil and political unrest in Somalia and sympathetic to the associated difficulties faced by many of its citizens, it cannot accept unsubstantiated evidence [recte. general assertions] in individual cases. There is insufficient evidence to suggest that the four applicants’ circumstances are more severe to that of other Somalian citizens to the extent that their situation is more exceptional. No evidence of medical or police reports have been provided to show that the applicants in this case have been victims of any crime or personal attack as a result of any unrest or that they suffer from any medical complaint. The applicants have not demonstrated any exceptional/humanitarian circumstances in this case which would warrant the granting of a visa.”

162. The appeals officer found that it had not been demonstrated that the children’s circumstances were any different to those of other Somali children. There is no challenge to that finding. Indeed it was never contended that the children’s circumstances were in fact any different to those of Somali children generally.

163. The premise of the applicants’ argument on this issue – and the finding of the High Court judge accepting that argument – is that the Minister concluded that because the children’s circumstances were no different to those of other Somali children, ergo they could not be exceptional circumstances. Taking the consideration as a whole, I am persuaded that this is not correct. There is force in the applicants’ submission that there is nothing in the Policy Document which required or entitled the Minister to assess the children’s

circumstances merely or exclusively by reference to other Somali children. By the same token, there is nothing in the Policy Document which suggests that the assessment is to be carried out by reference to the circumstances of visa applicants generally, or Non-EEA visa applicants generally, or by reference to Irish standards of living. It seems to me that an assessment of humanitarian circumstances must be by reference to humanitarian considerations and not the social circumstances of any cohort. That said, if the circumstances of an individual applicant are no different to those of any of his or her fellow citizens, it is difficult to see how they could be exceptional, much less, in a population of 18 million, rare.

164. Taking the consideration as a whole, I am not persuaded that the Minister required the children to demonstrate that their circumstances were exceptional compared to other Somali citizens rather than compared to other visa applicants generally. The observation that there was no evidence that the children's circumstances were any different to other Somali children was correct in fact and was not unreasonable in the context of the case put forward. The observation was just that, an observation. The Minister did not suppose the existence of, or apply, any test or precondition for a consideration of whether the applicants could show, or had shown, exceptional humanitarian circumstances such as might warrant a departure from the ordinarily applicable rules.

Application of the policy criteria

165. At para. 43 of his judgment, the High Court judge found – as the applicants had submitted – that the Minister's finding that the mother was not eligible to sponsor the children ignored the fact that the policy was to be departed from in exceptional circumstances. At para. 51 he found – as the applicants had submitted – that the Minister's finding that the children were likely to become a financial burden on the State ignored the fact that the children were making the case that due to exceptional circumstances the financial requirements should be waived. If, at first blush, a departure from, or a waiver, of the usual

requirements, on the one hand, and the granting of a visa notwithstanding that the requirements are not met, on the other, amount to much the same thing, it seems to me that there is a difference.

166. An applicant who can satisfy the criteria set out in the Policy Document is entitled to have his or her application considered by reference to the guidelines. The starting point then is to establish whether the sponsor is eligible, can demonstrate dependency, and can satisfy the requirements of dependency and financial circumstances. In such a case, the decision maker can proceed to deal with the substance of the application. That is not to say that a qualified applicant cannot also put forward humanitarian circumstances, or exceptional humanitarian circumstances, or that any such circumstances put forward are not to be considered in the exercise of the discretion. But it is not necessary that the applicant should put forward any such circumstances. By contrast, an applicant who cannot satisfy the eligibility criteria must put before the Minister such material as will justify a departure from the policy.

167. That being the scheme of the Policy Document, it is perfectly reasonable that in the case of an applicant who asserts that he or she meets the requirements of the scheme and alternatively can demonstrate exceptional humanitarian circumstances such as warrant a departure from the criteria, the Minister should first determine whether the applicant has demonstrated that he or she meets the criteria before turning to the alternative basis advanced. Such an assessment is not fairly or correctly to be characterised as a rigid application of the criteria.

168. It seems to me that the mother's eligibility and financial circumstances were matters of objective fact. If – as was the fact – she was ineligible to act as a sponsor, any exceptional humanitarian circumstances were not going to change that. I cannot see how the Minister could properly be criticised for ignoring something which was immaterial to the question that

needed to be decided. Similarly, if – as is now accepted – the mother and the aunt did not have (or at least had not demonstrated) the financial resources necessary to support the children if the visas were granted, any exceptional humanitarian circumstances were not going to change that either. As long as the mother and the aunt were insisting that they met the qualifying criteria, the Minister was obliged to decide whether they did or not and to explain the basis of her decision one way or the other. In my firm view the Minister was perfectly entitled to address sequentially the alternative bases on which the applications had been made and was not to be criticised for having done so.

Discrepancies in documentation

169. The tenth ground on which the judicial review was sought was that there was a lack of proportionality between the emphasis put on relatively minor variation in the spelling of the applicants' names and the consequences of the refusals, that being the separation of the mother from her four minor children, and that the decisions were therefore invalid. The judge, at para. 50, found that the minor discrepancies in spelling in the various official documents, such as the mother's passport, were not the responsibility of the mother and that the explanation – that the discrepancies were attributable to the translation from the Osmanya script to the Latin alphabet – was reasonable. The eighth ground of appeal was that the judge erred in law and/or in fact in failing to give proper consideration to all of the discrepancies in the documentation presented.

170. The appeals officer's consideration of the discrepancies in the documentation was, perhaps, not as clear as it might have been. The appeals officer closely examined the official documentation and identified a number of discrepancies. She accepted that the explanation for what were minor variations in the spelling of her name on the children's birth certificates was reasonable. She found, however, that the same logic could not be applied to

discrepancies in the identity documents, such as discrepancies as to the place of birth, which, she said, called into question *“the accuracy of the documentation submitted.”*

171. As the applicants had in their statement of grounds, so the judge in his judgment focussed on the variations in the spelling of the mother’s name. In the view of the judge, the fact that the decision maker had accepted that the documents were authentic meant that the errors were not of any probative value and that the decision maker acted irrationally and unfairly in finding that these affected the applications.

172. I am satisfied that there is substance to the Minister’s criticism that the judge failed to give proper consideration to all of the discrepancies. The discrepancies in the information given by the official documents could not be explained by translation. If the official documents were authentic, it did not follow that they were reliable. The discrepancies in the official documentation were taken into account along with many other identified – and acknowledged – discrepancies in the information. In my view, it was not irrational or unreasonable for the Minister to have done so.

The key issue in the case

173. As I observed at the outset of this judgment, there is disagreement between the parties as to the basis on which the Minister’s decision was quashed. It is common case that the Minister was entitled to have decided whether the children’s circumstances were – or, more correctly, whether they had been established to be – such as warranted a departure from the policy. The Minister’s case was and is that not only were the children’s circumstances not established to be exceptional humanitarian circumstances but that they had not been established at all as a matter of fact.

174. What the High Court judge said was that:-

“52. This brings the court to the key issue in this case. The court is satisfied that there was no evidence that the decision maker engaged in a real way with the

exceptional circumstances in this case. Those exceptional circumstances stretch back to 2009, when the [mother's] family of origin was largely destroyed by a bomb attack, when she was 12 years old. The occurrence of that atrocity was accepted by the Minister in the application for refugee status that was brought by the [aunt] when she arrived in Ireland.

53. The decision maker did not appear to have regard to the following factual circumstances, which appear to the court to be most relevant: the [mother] married on 10th April, 2011, when she was aged 13 years and 8 months. She had her first child when she was 14 years. Her second child was born when she was 15 years; her third child was born when she was 17 years and her fourth child was born when she was 19 years. Thus, the [mother] had had three children, while she was still a child herself. The significance of those circumstances are not referred to in the appeal decision.

54. When the [mother] was a very young woman, she had to travel to Ethiopia with her young children in order to find safety. She was still only 24 years of age, at the time of the appeal hearing in April 2022. At that time her children were being cared for on a temporary and emergency basis by her sister-in-law, who had five children of her own. There was evidence that she had very limited financial means. The children had very little to eat and were not attending school.

55. It is against that background, that the finding that the [mother] elected to sunder her family ties, by coming to Ireland in October 2021, ignores the fact that she had to take up her visa within a certain window of time and that her chances of getting her children to Ireland, were greatly enhanced by her being lawfully present in this country. It is against that background that the findings that she 'relinquished her role as the primary caregiver' and that she 'elected to move to the State', are

particularly harsh and do not appear to this Court, to take account of the very significant personal dilemma that faced her at that time. The fact that she may have made a decision to leave her children and come to Ireland, in what she perceived to be the best long-term interests of her family, seems to have been ignored by the decision maker. For those reasons, the court holds the findings to be irrational, in the particular circumstances of the case.

56. In summary, the court holds that to have applied the eligibility criteria and the financial requirements of the policy in refusing the visa applications on behalf of the [children], while effectively ignoring the past circumstances of the [mother] and her children, together with their present circumstances in Somalia, and in not considering whether these constituted exceptional circumstances, which warranted a departure from the strict requirements of the policy, rendered the decision irrational and unfair. On this basis it has to be set aside.”

175. The Minister understands this as meaning that there were exceptional circumstances, with which the Minister did not engage. The applicants contend that it merely means that the decision maker failed to consider whether the identified facts or circumstances did or did not amount to exceptional circumstances such as would warrant a departure from the ordinary requirements. In my firm view, the Minister is correct.

176. It needs to be said first of all that there was no evidence that the children had very little to eat and that the High Court judge was in error in saying so. The height of what had been said in the solicitors’ letter of 23rd November, 2021 was that the sister-in-law bought tomatoes and vegetables for the children to eat and could not afford anything further. It was said in the same letter that the sister-in-law was a widow and was caring for nine children without any support. This, of course, was inconsistent with the suggestion that the sister-in-law or the children or both were financially dependent on the aunt but in any event the case

was not made that the children were hungry or were not being well cared for by the sister-in-law. There was no evidence at all as to the sister-in-law's means.

177. Secondly, while it was asserted in the letter of appeal of 23rd November, 2021 that the children were not in school, that was all that was said. It was not said why the children were not in school. It was not said what schools were available; or what attempts had been made to enrol the children in school; or what their prospects were of going to school, or when. It was not said whether their Somali cousins were in school. It was not said whether the children had been in school in Ethiopia before they were taken to Somalia.

178. Thirdly, it was by no means clear that the mother had to travel to Ethiopia with her children to find safety. The mother's case was that following the bombing of the family home in 2009 she moved around Somalia for "*a number of years*" – it can only have been two years – running from the Al Shabab militia. She was married in Mogadishu in April, 2011 and went – with her husband – to Addis Ababa in May, 2011. She did not say that she was forced to flee and at that time she had no children. The case made on the visa applications was that at some unspecified later time the mother moved back to Somalia before returning to Addis Ababa in April, 2015 where she remained until she came to Ireland. If it was from somewhere in Somalia that her husband and son were kidnapped in 2014, the mother did not say so and this was not said to have been what prompted the move back to Addis Ababa in April, 2015. On her own case, the mother was living in Addis Ababa when – whenever it was – she was reunited with her husband and her son.

179. The case made by the mother in her statement of grounds was different. It was that "*they*" – which I take to include the father – "*again had to flee from where they were staying in or around March, 2016*". However, there was no reference to this in either the letter of 28th July, 2021 in support of the initial application – which said only that the mother had "*lost contact with the father at the end of 2015/ beginning of 2016 in Somalia*" – or in the

visa appeal letter of 23rd November, 2021 – which stated only that the mother returned to Addis Ababa in and around April, 2015 where she resided until her arrival in Ireland on 16th October, 2021. On the information provided, if the mother had to flee anywhere in March, 2016, it can only have been from one address in Addis Ababa to another.

180. I cannot construe the judge’s finding at para. 52 that there was no evidence that the decision maker “*engaged in any real way with the exceptional circumstances in this case*” otherwise than as a finding that there were, in fact, exceptional circumstances, or the finding that “[*t*]*hose exceptional circumstances stretch back ...*” otherwise than as presaging an exposition of exceptional circumstances to which the decision-maker should have had but did not have regard.

181. The first of those circumstances was the bomb attack in 2009 when the mother was twelve years old. By the time of the appeal decision, that atrocity was twelve or thirteen years in the past and it took place five years after the aunt had fled and four years before the first of the children was born. It seems to me that the judge’s observation that the occurrence of that atrocity was accepted by the Minister in the application for refugee status that was brought by the aunt when she arrived in Ireland is clearly a mistake. The aunt arrived in Ireland in 2004 and was declared a refugee in 2005. While I would not go so far as to say that the bomb attack was not something to which the Minister might have had regard in considering the visa appeals, I cannot accept that her failure to do so, or her failure to expressly discount it, as irrational.

182. At para. 53, the judge identified the age at which the mother married and the age at which she had her children as among the most relevant factual circumstances. These were matters which were apparent from an examination of the application and supporting documentation but were not relied on by the applicants as constituting or contributing to exceptional humanitarian circumstances relevant to the children’s visa applications. If those

circumstances were not relied on by the mother as constituting or contributing to exceptional circumstances, it is unsurprising that they were not addressed in the decision.

183. I have addressed the findings at para. 54 of the High Court judgment that the mother had to travel to Ethiopia with her children in order to find safety and that the children had very little to eat. If the decision maker was not persuaded that the fact that the children were not going to school was an exceptional humanitarian circumstance, that could not be condemned that as an irrational view.

184. At para. 55 the judge characterised the decision-maker's finding that the mother had "*relinquished her role as the children's primary caregiver*" as a finding that she "*elected to sunder her family ties.*" I am not sure that either phrase precisely describes what the mother did. On the initial visa application, the mother's position was that she could not – and, at least inferentially, would not – move without her children. On the visa appeal, her position was that her sister-in-law had agreed to care for the children on a temporary and emergency basis pending the determination of the appeal against the refusal of the visas. If the mother assumed that the appeal would be successful, it seems to me that she had no basis for any such assumption. On the mother's case, then, the circumstances of the children were temporary, and the Minister noted this.

185. At the time of the initial application the children were living with their mother in Addis Ababa. The exceptional humanitarian considerations canvassed in the solicitors' letter of 28th July, 2021 were the aunt's status and the desirability of the reunification of the mother with the aunt. It was baldly asserted that there were "*constant risks to the day to day life of ... the children who would be totally unable to survive in the absence of their mother*" but there was no suggestion, never mind evidence, of what those alleged risks might have been and no suggestion that the children would not continue to have the care of their mother. The fact was that at that time the mother and children had been living in Addis Ababa for upwards

of six years. The first instance finding was that the application did not meet the requirements of the policy and disclosed no special circumstances that would warrant an exception. It was submitted in the letter of appeal that this was a cruel and unlawful finding but by then there had been a significant change in the children's circumstances and the appeal did not address the children's circumstances in Ethiopia.

186. On the case made by the mother, the children's circumstances will change again on the determination of the visa appeal. If the visas are granted, they will come to Ireland to join their mother. If they are not, the mother will be reunited with them in Somalia, at least in the first instance.

187. Subject to what I have already said about the timing and progress of the children's visa appeals, it is the fact that the mother had to take up her visa within a certain window of time but there was no evidence that the mother's visa could not have been renewed. On the hearing of the appeal to this court, in response to a question from the court, it was said that the mother's visa could have been reviewed if any application had met the criteria, but counsel were unable to say what those criteria were, or would have been. In my firm view, if the mother – or the aunt – wished to make the case that if the mother had waited for the result of the children's visa appeals she would have lost the opportunity to come to Ireland forever, the onus was on her, or them, to establish that. It is clear enough that the mother thought that her chances of getting the children to Ireland would be greatly enhanced by her being lawfully present here but, respectfully, I see no basis for the judge's finding that this belief was correct. Under the Policy Document she would not have been eligible to act as sponsor until she was lawfully resident in the State for upwards of twelve months and there was no prospect that she would by then be able to meet the financial requirements.

188. The High Court judge found that the fact that the mother made a decision to leave her children and come to Ireland in what she perceived to be the best interests of her family

seemed to have been ignored by the decision maker. I cannot agree. Far from ignoring the mother's decision, it is clear from the passages of the decision quoted by the judge that the decision-maker attached considerable significance to it, but viewed it as diluting the mother's claim to reconstitution. The Policy Document clearly provides that in considering family reunification decisions, due regard must be had to the decisions which the family itself has made, and that if the family has decided to separate, it does not follow that the Irish State is obliged to facilitate its reconstitution in Ireland. While the Policy Document refers in particular to an election to separate for many years, the fact of the family decision is no less a consideration than the period of separation. There is no challenge to the entitlement of the Minister to have had due regard to the mother's decision in 2021; or before that to the grandmother's decision to move to Ireland in 2014, or the aunt's decision to send for her eldest daughter in 2010.

189. The applicants in their written submissions identified thirteen factual matters which were found by the decision-maker to have been insufficiently corroborated. By contrast, it was submitted, the essential humanitarian features on which the High Court based its decision had not been doubted by the decision-maker and must therefore be deemed to have been accepted by the decision-maker. These – it was said – were that the mother was a young mother who had travelled to Ethiopia to find safety, that she had limited financial means, that the children had very little to eat and were not attending school and were living with the sister-in-law in very dangerous conditions; and that the family of origin was destroyed in a bomb attack when the mother was twelve years old.

190. As will have been seen, however, the mother did not rely on her young age as amounting to or contributing to exceptional circumstances; did not make the case that she had been obliged to travel to Ethiopia to find safety or was not safe in Ethiopia; and did not make the case that the children had very little to eat. Nor did she make the case that the children

were living with the sister-in-law in very dangerous conditions. The height of what was said was that Somalia is a war torn country with no stable government: and this was said in the context of the absence of evidence of the father's consent, rather than the circumstances of the children.

191. In addressing what he identified as the key issue in the case, the judge did not address the question of the absence of the father's consent.

192. There is some ambiguity in the judge's summary, at paragraph 56. On the one hand, the conclusion was that the past circumstances of the mother and her children and the present circumstances of the children in Somalia had been ignored. That, to my mind, accurately summarises the substance of the preceding paragraphs: which was that the case did present exceptional circumstances, which were not, but which ought to have been, considered. On the other hand, the conclusion that the decision-maker had not considered whether the matters identified constitute exceptional circumstances which warranted a departure from the strict – I prefer to say ordinary – requirements of the policy would appear to leave to the Minister the decision whether they were or were not such circumstances.

193. It seems to me that the only ambiguity in the judgment is in paragraph 56. The substance of the judgment is that the Minister failed to recognise the circumstances identified in paras. 52 to 55 as exceptional circumstances. As a matter of law, the questions first, as to whether the circumstances relied on by the applicants had been made out, and secondly – if they were made out – constituted exceptional humanitarian circumstances, were matters to be determined by the Minister.

194. For the reasons given, I am persuaded that the High Court judge not so much fell, as was led, into error in engaging with and coming to conclusions as to the merits of the visa applications. The applicants' argument as to what the judge decided is difficult – almost to the point of being impossible – to reconcile with the statement of grounds. It was quite

correctly acknowledged by counsel for the applicants that if the substance and effect of the judgment was what the Minister contended it was, it could not stand. I accept the Minister's submission as to the substance and effect of the High Court judgment. Accordingly, the appeal must be allowed.

Summary

195. This was a case in which – it is now accepted but should have been recognised from the start – the prospects of success of the children's visa applications were always going to be dependent on the applicants being able to demonstrate the existence of such rare and exceptional circumstances, normally of a humanitarian nature, as warranted a departure from the policy.

196. However, the application was made on the basis that the children were socially and financially dependent on the aunt and/or that exceptional humanitarian circumstances existed such as warranted a positive decision; and the appeal was advanced on the basis that the mother and the aunt might be considered to be sponsors and that they would be in a position to support the children if the visas were granted and/or that exceptional humanitarian circumstances existed such as warranted a positive decision. This inevitably meant that the assertions as to the eligibility of the mother and the financial circumstances of the mother and the aunt were contradicted by what was offered as "*supporting documentation*". The case made as to the social dependency of the children on the aunt and the documentation offered in support of that case needed to be separately examined.

197. The Minister did not rigidly or inflexibly apply to the mother the residence or financial requirements of the Policy Document.

198. It was not unreasonable or irrational that the Minister should have first examined the case made as to the claimed ability to satisfy the generally applicable criteria, before turning to those factors relied on as amounting to extraordinary humanitarian circumstances.

199. The question of whether the appeals disclosed that exceptional humanitarian circumstances existed such as warranted a positive decision did not go to the question as to whether the mother could satisfy the residence and financial criteria.

200. The lengthy consideration on which the visa appeal decisions were based demonstrably considered whether the matters relied on as amounting to exceptional humanitarian circumstances were made out by a clear and cogent narrative and sufficiently vouched and concluded that they had not been made out. That was a matter for the judgment of the Minister.

201. The consideration shows that the Minister considered whether the factors and circumstances relied on by the applicants as amounting to exceptional circumstances were exceptional circumstances and concluded that they were not.

202. The Minister's acceptance that there is civil and political unrest in Somalia or that the children's circumstances there may be unenviable is not inconsistent with her conclusion that the existence of exceptional humanitarian circumstances had not been established. The Minister's recognition of the general civil and political conditions in Somalia was not a solid foundation for the submission in the High Court or on the appeal that the children were living in dangerous conditions.

203. The Minister clearly accorded considerable weight to the fact that the children's circumstances were attributable to a succession of family choices or decisions. There was no challenge to the Minister's entitlement in principle and under the Policy Document to have had due regard to those matters.

204. The Minister was plainly correct in the view which she expressed that the Policy Document on Non-EEA Family Reunification was not concerned with applications for family reunification by the beneficiaries of international protection.

205. In her consideration as to whether the children’s circumstances were so exceptional as to warrant the granting of the visas, the Minister made an observation comparing their circumstances with those of children in Somalia generally. She did not, however, adopt or apply that comparison as the test of exceptional circumstances. If, as the applicants correctly argued, the existence of exceptional humanitarian circumstances is not to be established or discounted by a reference to social and economic circumstances in the country of origin, neither, as the applicants argued, are they to be established or discounted by reference to the prevailing circumstances in Ireland, or – if it is possible to do so – prevailing circumstances in Non-EEA countries generally.

206. While the mother’s case was that she had had no choice but to come to Ireland when she did, that was not made out. Specifically, there was no evidence that the mother ever considered whether the children’s visa appeals could be expedited or whether her own visa could be renewed. Even if there had been, the mother never made the case that she was forced to flee to Ireland. It was a matter of choice.

207. The substance of the legal grounds of the judicial review application and the substance of the High Court judgment was not that the Minister had failed to consider whether the appeals disclosed exceptional humanitarian circumstances, but that she had unreasonably and irrationally concluded that they did not.

208. For the reasons given, the High Court judge erred in accepting as having been proved a series of assertions which the visa appeals officer had found had not been established or vouched and in drawing inferences which were not warranted from what had been said. The judge further erred in assessing the relevance of the circumstances relied on by the applicants as amounting to, or contributing to, exceptional humanitarian circumstances and in thereby substituting his own view for that of the Minister.

209. There was no challenge to the requirement of the Policy Document that visa applications by one parent in respect of minor children must generally be accompanied by evidence of the consent of the other or a court order giving sole custody of the child to the applicant parent. There was no evidence of the father's consent to the visa application and no clear and cogent explanation as to why that was not forthcoming. While I do not rule out the possibility that this is a requirement that might be dispensed with in exceptional circumstances, the exceptional circumstances of the applicant parent or the children do not necessarily or directly go to the question of the consent of the other parent. In these cases, the Minister was entitled to take the view that the assertion that the father was missing and presumed dead was not supported by a cogent narrative or supporting documentation. Similarly, the Minister was entitled to have taken the view that the mother had failed to account for the absence of a court order giving her sole custody. It is clear from the consideration that the Minister was not satisfied what had become of the father. On the case presented, the mother simply did not know what had become of him.

210. The applicants' submission that the Minister had not put up child abduction as a realistic possibility would seek to reverse the onus of proof. As the Minister could have had no means of knowing the whereabouts of a man in Somalia, identified only by name, neither could the Minister – otherwise than by reference to the evidence submitted in support of the appeals – have had any means of knowing whether child abduction was or was not a realistic possibility. Counsel for the applicants accepted that the Minister – in her consideration of the appeals as well as in the Policy Document – was entitled to be concerned about the possibility of child abduction. It was submitted that the Minister had not said why the father's consent would not be dispensed with. But the fact is the mother had failed to establish why it should. There was a bare assertion that the father was missing and no evidence of any attempt to establish his whereabouts, or whether he was alive or dead. By

the plain terms of the Policy Document the onus was on the mother to prove the consent of the father or to provide at least a *prima facie* explanation as to why it was not available or necessary. In my firm view, the Minister was abundantly justified in her conclusion that the mother had not engaged with the requirement for consent.

211. The question mark over the father's paternity of the youngest child was not raised by the Minister but arose from the mother's account of when she had been last separated from him. That account had been given on the visa appeal, in response to the first instance finding that there was no evidence of the father's consent, or death, or incapacity, or court order. There is no onus on the Minister to ensure that the case presented by an applicant is consistent or, before making a decision, to point out obvious inconsistencies in the appellants' own case.

212. I am persuaded that the consideration underpinning the Minister's decisions on the visa appeals shows that the Minister took all relevant factors into account and came to a reasonable and rational decision.

213. I would allow the appeal and set aside the judgment and order of the High Court.

214. The Minister having been entirely successful in her appeal, it seems to me, provisionally, that there should be an order for costs against the applicants in both courts. If the applicants wish to contend for any other costs order, the panel will reconvene for a short hearing.

215. As this judgment is being delivered electronically, Ní Raifeartaigh and Meenan JJ. have authorised me to say that they agree with it.