



THE SUPREME COURT

[Record No. 2019/000137]

**Clarke C.J.
Dunne J.
O'Malley J.
Irvine J.
Baker J.**

BETWEEN

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND
THE ATTORNEY GENERAL**

APPELLANTS

**AND
X**

RESPONDENT

AND

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

NOTICE PARTY

Judgment of Ms. Justice Dunne delivered the 9th day of June 2020

Introduction

1. The appellants herein (hereinafter collectively referred to as "the Minister") were by a Determination of the 11th October, 2019 given leave to bring a leapfrog appeal to this Court from a decision of the High Court (Barrett J.) of the 3rd May, 2019. The applicant/respondent (hereinafter referred to as Mr. X) brought judicial review proceedings seeking an order of certiorari quashing the decision of the Minister to refuse an application for family reunification in respect of two children. That order was granted by the High Court on the basis that the Minister erred in his interpretation of the word "child" as it appears in s. 56(9) of the International Protection Act 2015 (hereinafter referred to as the Act of 2015).
2. As can be seen from the Determination of this Court granting leave, the issue at the heart of this appeal is therefore the extent or breadth of the definition of "child" for the purpose of family reunification and whether that definition could include a minor who is said to be the child of the applicant for family reunification but who is not a biological or adopted child of the applicant.
3. The United Nations High Commissioner for Refugees (hereinafter "the UNHCR") was given leave to appear before this Court as an *amicus curiae* pursuant to an application of the 29th November, 2019.

Background

4. I propose in this section of the judgment to set out some details of Mr. X's background and to refer to some litigation that Mr. X was involved in previously, arising out of the issues that are central to these proceedings.
5. Mr. X is a Cameroonian national. He arrived in this country on the 21st December, 2006 and applied for asylum. His application for asylum was unsuccessful and, ultimately, on

the 13th March, 2013 he applied for subsidiary protection. He was notified by the Minister on the 25th June, 2014 that his application for subsidiary protection was successful. On the 27th January, 2015, Mr. X applied for family reunification in respect of two children, a boy and a girl, pursuant to the European Union (Subsidiary Protection) Regulations 2013 (hereinafter referred to as the "2013 Regulations").

6. Mr. X has always claimed to be single and the two children concerned live with his sister in Douala. He explained that he remained in touch with them by telephone throughout his time in the asylum system and that he sent money to his sister for them when he was in a position to do so, notwithstanding his limited means. In the course of his subsidiary protection family questionnaire, Mr. X set out details of his relationship with the mother of the children, how they were "abandoned . . . to my mother" in 2006 and how his relationship with the mother of the children had come to an end.
7. The INIS wrote to Mr. X asking him if he would consent to providing DNA evidence for the purpose of verifying his relationship with the two children. Initially, Mr. X agreed to this proposition but in a letter of the 11th May, 2016, from his solicitors, Messrs. Daly Lynch Crowe & Morris, it was explained that Mr. X had reconsidered his decision to undergo DNA testing. He explained that he had been let down by the mother of the children. She had not waited for him in Cameroon as he had requested but had instead gone to live in the U.K. to pursue an education and to live with another man with whom she has two other children, leaving the other two children, the subject of these proceedings, in Cameroon. Mr. X instructed his solicitors that while he was still in Cameroon, he had already had some suspicions that the mother of the children might have been unfaithful to him and that he might not be the biological father of the two children. He said that he could not face the reality of discovering that he was not their biological father. Incidentally, in that letter the mother of the children is described as the wife of Mr. X, notwithstanding that he has always asserted that he is single. Nothing appears to turn on this discrepancy. It appears to be the case that he was not married to the mother of the children. Finally, it was indicated in the letter that Mr. X was in the process of attempting to obtain a court order in Cameroon confirming that he was the children's sole legal guardian. Mr. X's application for family reunification under the 2013 Regulations was refused by the Minister by letter dated the 22nd August, 2016. The reason given for the decision was stated to be as follows:

"As the applicant is not in a position to undergo DNA testing, the Minister in exercising her discretion has decided not to grant the application for family reunification."

8. The door was not completely closed to a further application by Mr. X. It was noted that if he was granted guardianship and this was recognised in Ireland, he could make a further application.
9. Approximately one month later, Mr. X sought a review of the decision and enclosed a copy of a judgment of the Western Appeal Court in Cameroon of the 9th June, 2016 appointing him as the sole legal guardian of the children.

10. The application for a review of the decision was refused by letter of the 2nd November, 2016 on the basis that there was no provision for such a review under the 2013 Regulations. It was made clear however that a fresh application could be submitted for family reunification. A new application was furnished on the 20th March, 2017 based on the Cameroon judgment granting Mr. X sole guardianship of the children.
11. It is now necessary to outline some of the difficulties that then arose by reason of certain legislative changes.
12. A letter of the 7th April, 2017 was sent by INIS refusing to process the application of the 20th March, 2017 on the basis that:

"In accordance with s. 56(8) of the International Protection Act 2015, an application for family reunification must be made within twelve months of being granted refugee declaration, a subsidiary protection declaration or from the date of your arrival in Ireland as a Programme Refugee. As twelve months has passed since you received your client's declaration, your client is no longer entitled to apply for family reunification and his application in respect of [his children] cannot be accepted. It may be open to your client to apply for a different immigration permission for his family members."
13. This resulted in a letter from Mr. X's solicitor enclosing a fresh application for family reunification pursuant to Regulation 25 of the 2013 Regulations. (The application of the 20th March, 2017 was made pursuant to the Act of 2015 although Mr. X's grounding affidavit suggests otherwise).
14. The application of the 19th April, 2017 was then refused on the basis that the Act of 2015 was now in force and superseded any previous Act. It was stated in the letter refusing the application: "S.I. 426 of 2013 is no longer in force".
15. Following this response, Mr. X commenced judicial review proceedings challenging the refusal to process his application. Following correspondence between the parties, in which it was pointed out that persons granted subsidiary protection prior to the commencement of the Act of 2015 were, according to the website of the INIS, deemed to have been granted the status of subsidiary protection on the date the Act commenced, namely the 31st December, 2016. Thereafter, the INIS informed Mr. X's solicitors that he was entitled to make an application for family reunification. Accordingly, the judicial review proceedings were compromised and the decision not to process the application as set out in the letter of the 7th April, 2017 was revoked.
16. This led to the final application for family reunification made by letter of the 12th October, 2017. Further correspondence ensued between Mr. X's solicitor and the INIS. The issue of Mr. X undergoing a DNA test was raised again. The reason for refusing to undergo DNA testing previously was reiterated in the letter of the 5th February, 2018 from his solicitors. Further it was pointed out that the application was based on the fact that Mr. X was named as the father on the children's birth certificates and that he was relying on the

fact that he was the sole legal guardian of the children by reason of the decision of the court in Cameroon. By letter of the 12th February, 2018, INIS again asked if Mr. X was willing to undergo DNA testing. It was pointed out that his previous application was refused because he did not undergo DNA testing.

17. Ultimately by letter of the 29th May, 2018, the application for family reunification was again refused. The decision concluded:

"Once again the applicant has refused to consent to DNA testing for the same reasons as previously stated.

Based on the above information the applicant has failed to fully establish the familial link between himself and the two minor children listed above."

18. Following some further correspondence between the parties these proceedings were commenced. Mr. X was granted leave to apply for judicial review of the Minister's decision on the 9th July, 2018. The matter came on for hearing in the High Court and on the 3rd May, 2019, an order of *certiorari* was granted quashing the Minister's decision communicated by letter of the 29th May, 2018 and remitting the matter to the Minister for fresh consideration.

The judgment of the High Court

19. It was noted in the judgment of the High Court that the parties had agreed that the application for family reunification made following the compromise of the judicial review proceedings referred to earlier was to be made pursuant to the provisions of s. 56 of the Act of 2015. Reference was made to the application of the 20th March, 2017. Strictly speaking, it appears from the letter of the 12th October, 2017, from the solicitors for Mr. X, that a third application was submitted with that letter and the application bore that date but nothing of significance turns on the fact that this was a third application and that it was made on the 12th October, 2017 despite the reference of the High Court to the application of the 20th March, 2017.
20. The trial judge observed that there was no parallel application under the 2013 Regulations. In any event, the trial judge observed at para 1 of his judgment that:

"...Nor does the court accept that Mr X had a vested right under the 2013 Regulations to seek family reunification; he had but a right to apply for same and did not do so...."

21. Three issues were identified for decision by the trial judge. The first issue was said, at para 1 of the judgment, to be as follows:

"Does the Applicant have *locus standi* to challenge the impugned decision. . .where by letter dated . . . 5th February, 2018, his solicitors said that his application was 'based upon the fact that he is the sole legal guardian' of the children, and where he was informed by [the Minister] . . . that s.56(9) of the Act of 2015 did not define

'child' of an applicant to include a 'ward', and where the Applicant has never taken a DNA test to [establish his natural parentage of the children]?"

22. The trial judge then proceeded to answer that question as follows:

"Section 56(1) of the 2015 Act provides that a reunification application may be made regarding '*a member of the family of the sponsor*'. Section 56(9) provides that the phrase '*member of the family*' includes '(d) *a child of the sponsor who, on the date of the application. . . is under the age of 18 years and is not married*'. The term 'child' is not defined. Assuming for a moment that the two children to whom Mr X's application refers are the biological children of another man, albeit that Mr X views them as his, can each of them properly be described as a '*child*' of Mr X for the purposes of s. 56(9) of the Act of 2015? The short answer is 'yes'. There is a wide diversity of familial structures and the relationship of father/child is not confined (presumably deliberately not confined) by the 2015 Act to a biological father. It is not unknown for a child to grow up addressing and thinking of a man who is not their biological father as 'Dad'; and it is not unknown for such non-biological fathers to be as devoted to such children as if they were their biological children. A 'cookie cutter' definition of children as embracing only biological children would doubtless be easier for the State to police, not least given the availability of DNA testing. But that is not what the Act of 2015 provides, perhaps because of an understanding that in a diverse society defining who is a child of someone is not always straightforward, as this application shows. (In passing, the court does not accept that because the 2013 Regulations, repealed by the 2015 Act, entitled the Minister to grant permission to a dependent to enter the State, it follows that the absence of such a provision in the 2015 Act points to an intention to exclude dependents. It could just as well be argued that the absence of reference to dependents in s.56(9) points to an understanding that the term '*child*' is wide enough, and intended, to embrace dependents. However, this line of argument/discussion is something of a 'red herring'. The issue is not whether the term '*child*' in s.56(9) embraces a dependent but whether it bears a wider meaning than a biological child. For the reasons stated, it does)."

23. As can be seen, the trial judge noted that the Act of 2015 and, in particular, s. 56 thereof contained no definition of the word "child" and the trial judge concluded that the word "child" bore a wider meaning than a biological child.
24. This view of the trial judge was confirmed in the manner in which he dealt with the third issue that he identified. For completeness I should set this out. The third issue was stated at para 3 of the judgment to be as follows:

"In circumstances where the Act of 2015 does not entitle guardians to apply for family reunification with their wards, was the first-named respondent obliged to grant the application for family reunification made by the Applicant in circumstances where the application was based upon the grant of guardianship to him by a . . . court [in Country X] . . . in respect of his two asserted children and

where he has refused to submit DNA evidence of his alleged fatherhood of those children?"

25. This was answered by the trial judge, also in para 3, as follows:

"As will by now be clear, the court does not accept the introductory premise ('*In circumstances . . . wards*'). The term '*child*' in s. 56(9) is not defined. For the reasons stated above it extends to non-biological children. The critical issue arising from s. 56(9)(d) is whether one is dealing with an unmarried minor who is the '*child*' (biological or non-biological) of the sponsor."

26. Thus, the trial judge emphasised that the word "child" meant someone who is the child (biological or non-biological) of the sponsor.

27. The trial judge concluded his judgment by referring to the Minister requiring that Mr. X should undergo a DNA test. The trial judge observed at para 4 in this context as follows:

"4. ...Inviting someone to undertake a DNA test is not the same as requiring one. Neither, the court observes, does failing to provide a DNA sample necessarily and in all instances amount to a failure by a sponsor to '*cooperate fully*', as required by s. 56(3) of the 2015 Act. Instances can arise where a man might for good reason prefer not to know that children whom he has treated as his children are not his biological children. In this regard the court recalls the observation of Clark J. in *NzN v. MJE* [2014] IEHC 31, para. 41, that the appellant's refusal there to undertake '*DNA testing was telling and her reasons unacceptable*'. Implicit in that observation is that acceptable reasons could be provided for such a refusal. If a sponsor is the natural parent of a child then one is clearly dealing with a child for the purposes of s. 56(9)(d) of the 2015 Act. Where the Minister erred was in proceeding on the basis that s. 56(9)(d) requires that a sponsor be the natural parent of a child (and he clearly so proceeds; see the last paragraph on p. 4 and the first two paragraphs on p. 5 of the Impugned Decision). For the reasons stated above this is not legally correct. As the Minister proceeded on a mistaken basis, the court will grant the order of *certiorari* sought and remit Mr X's application for fresh consideration."

28. Accordingly, as can be seen, the High Court made an order quashing the decision of the Minister on the basis that the Minister erred in proceeding on the basis that s. 56(9)(d) of the Act of 2015 requires that a sponsor be the natural parent of a child. The key question at the heart of this appeal is whether the conclusion of the trial judge as to the meaning of the word "child" as used in s. 56 of the Act of 2015 is correct.

Legislation

29. It would be helpful to set out the legislation at issue in these proceedings and in order to consider the extent of the changes introduced by the Act of 2015, it would also be helpful to consider its precursors. In the course of the judgment I will also refer to some other extracts from legislation which it is said may have a bearing on the interpretation of the

word "child" as used in the Act of 2015 for the purpose of considering whether that word could have the broad meaning attributed to it by the trial judge.

30. I have referred already to the 2013 Regulations. These Regulations were made for the purpose of giving further effect to Council Directive 2004/83/EC of the 29th April, 2004 and are the immediate precursor to the relevant provisions. Regulation 25 of the 2013 Regulations is as follows:

"25.(1) A qualified person (in this Regulation referred to as the 'sponsor') may apply to the Minister for permission to be granted to a member of his or her family to enter and reside in the State.

- (2) The Minister shall investigate an application under paragraph (1) to determine the relationship between the sponsor and the person who is the subject of the application and that person's domestic circumstances.
- (3) Subject to paragraph (5), if the Minister is satisfied that the person who is the subject of the application is a member of the family of the sponsor, the Minister shall grant permission in writing to the person to enter and reside in the State and the person shall be entitled to the rights and privileges specified in Regulation 22 in relation to a qualified person for such period as the sponsor is entitled to remain in the State.
- (4) Subject to paragraph (5), the Minister may grant permission to a dependent member of the family of a sponsor to enter and reside in the State and such member shall be entitled to the rights and privileges specified in Regulation 22 in relation to a qualified person for such period as the sponsor is entitled to remain in the State.

...

- (6) In this Regulation and Regulation 26 -

'dependent member of the family', in relation to a sponsor, means any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the sponsor who is wholly or mainly dependent on the sponsor or is suffering from a mental or physical incapacity to such extent that it is not reasonable to expect him or her to maintain himself or herself fully;

'member of the family', in relation to a sponsor, means -

- (a) where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date of the application under paragraph (1)),
- (b) where the sponsor is a civil partner, his or her civil partner,

- (c) where the sponsor is, on the date of the application under paragraph (1), under the age of 18 years and is not married, his or her parents, or
 - (d) a child of the sponsor who, on the date of the application under paragraph (1), is under the age of 18 years and is not married."
31. It is also relevant to note the provisions of the Refugee Act 1996 (hereinafter called the Act of 1996), s. 18 of which contained a provision to allow a member of the family of a person to whom a declaration of refugee status had been given to enter and reside in the State. Section 18(4)(a) and (b) provided as follows:
- "(a) The Minister may, at his or her discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State and such member shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State.
 - (b) In *paragraph (a)*, 'dependent member of the family', in relation to a refugee, means any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully."
32. The Act of 1996 and the 2013 Regulations were both repealed by the Act of 2015 subject to certain transitional provisions contained in Part XI of the Act.
33. I now propose to set out the relevant provisions of the Act of 2015 which can be found in s. 56:
- "(1) A qualified person (in this section referred to as the 'sponsor') may, subject to *subsection (8)*, make an application to the Minister for permission to be given to a member of the family of the sponsor to enter and reside in the State.
 - (2) The Minister shall investigate, or cause to be investigated, an application under *subsection (1)* to determine -
 - (a) the identity of the person who is the subject of the application,
 - (b) the relationship between the sponsor and the person who is the subject of the application, and
 - (c) the domestic circumstances of the person who is the subject of the application.
 - (3) It shall be the duty of the sponsor and the person who is the subject of the application to co-operate fully in the investigation under *subsection (2)*, including by providing all information in his or her possession, control or procurement relevant to the application.
 - (4) Subject to *subsection (7)*, if the Minister is satisfied that the person who is the subject of an application under this section is a member of the family of the

sponsor, the Minister shall give permission in writing to the person to enter and reside in the State and the person shall, while the permission is in force and the sponsor is entitled to remain in the State, be entitled to the rights and privileges specified in *section 53* in relation to a qualified person.

- (5) A permission given under *subsection (4)* shall cease to be in force if the person to whom it is given does not enter and reside in the State by a date specified by the Minister when giving the permission.
- (6) A permission given under *subsection (4)* to the spouse or civil partner of a sponsor shall cease to be in force where the marriage or the civil partnership concerned ceases to subsist.
- (7) The Minister may refuse to give permission to enter and reside in the State to a person referred to in *subsection (4)* or revoke any permission given to such a person -
 - (a) in the interest of national security or public policy ('ordre public'),
 - (b) where the person would be or is excluded from being a refugee in accordance with *section 10*,
 - (c) where the person would be or is excluded from being eligible for subsidiary protection in accordance with *section 12*,
 - (d) where the entitlement of the sponsor to remain in the State ceases, or
 - (e) where misrepresentation or omission of facts, whether or not including the use of false documents, by the person was decisive in the decision to give the person the permission.
- (8) An application under *subsection (1)* shall be made within 12 months of the giving under *section 47* of the refugee declaration or, as the case may be, subsidiary protection declaration to the sponsor concerned.
- (9) In this section and *section 57*, 'member of the family' means, in relation to the sponsor -
 - (a) where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date the sponsor made an application for international protection in the State),
 - (b) where the sponsor is a civil partner, his or her civil partner (provided that the civil partnership is subsisting on the date the sponsor made an application for international protection in the State),
 - (c) where the sponsor is, on the date of the application under *subsection (1)* under the age of 18 years and is not married, his or her parents and their children who, on the date of the application under *subsection (1)*, are under the age of 18 years and are not married, or
 - (d) a child of the sponsor who, on the date of the application under *subsection (1)*, is under the age of 18 years and is not married."

[My emphasis]

34. I pause to note at this stage that s. 56(9) in defining "member of the family" expressly uses the word "means" and not the word "includes" as one often sees in a definition section. In other words, the definition given to "member of the family" is limited to the categories expressly set out in s. 56(9) of the Act of 2015.
35. As mentioned previously the Act of 2015 contains certain transitional provisions in relation to applications made under repealed enactments and for the purpose of these proceedings I shall refer only to the provisions of s. 70(15) which provides as follows:

"Where, before the date on which this subsection comes into operation, a person has made an application under Regulation 25(1) or (4), or Regulation 26(1) or (4), of the Regulations of 2013 and, by that date, the Minister has not made a decision under the Regulation concerned in respect of the application -

- (a) the Regulations of 2013 shall continue to apply in respect of the application, and
- (b) where the Minister decides -
 - (i) under Regulation 25 of the Regulations of 2013, to grant a permission to the person who is the subject of the application to enter and reside in the State, the permission shall be deemed to be a permission given to the person under *section 56* and the provisions of this Act shall apply accordingly, and
 - (ii) under Regulation 26 of the Regulations of 2013, to grant a permission to the person who is the subject of the application to reside in the State, the permission shall be deemed to be a permission given to the person under *section 57* and the provisions of this Act shall apply accordingly."

36. As noted previously, the Act of 2015 came into force on the 31st December, 2016.

Submissions of the Minister and Mr. X and Discussion on s. 56 of the Act of 2015

37. The Minister, in his submissions has identified the following issues said to arise from the judgment of the High Court, namely:

- (1) Did the High Court misinterpret s. 56(9) of the Act of 2015 and in particular, did the High Court err in holding that the definition of "child" in s. 56(9) of the Act encompasses children other than biological (or adopted) children?

(I should note here that an adopted child has the same legal status as a biological child and thus "child" as used in s. 56(9)(d) encompasses both a biological child and an adopted child. Therefore, any reference to a biological child in the course of this judgment should be taken to include an adopted child unless the context otherwise requires.)

- (2) Did the High Court fail to have regard to the legislative context/history in which s. 56(9)(d) of the Act of 2015 was passed by the Oireachtas?
- (3) Did the High Court in so holding, grant relief on a basis not contended for by Mr. X at the substantive hearing and err in not inviting the submissions from the parties, particularly from the Minister, before disposing of the case upon the basis outlined above?

38. Mr. X has outlined the issues in the following way:

- (1) Whether the meaning of "child" is limited to the biological issue of an applicant for family reunification;
 - (2) Whether the meaning of "child" in s. 56 embraces persons legally recognised and recorded as the child of a sponsor in the country of origin, where unimpugned documentation to that effect has been provided;
 - (3) Was the Minister entitled to refuse an application under s. 56 in the event of a sponsor's failure to undergo a DNA test to establish biological parenthood?
 - (4) Can the respondent continue to benefit from the application of the European Union (Subsidiary Protection) Regulations 2013 insofar as family reunification is concerned?
39. In passing, I should say that having read the translation of the judgment of the Western Appeal Court, Cameroon, of the 9th June, 2016, it is clear that the decision of the Court in that case was based on the uncontested claims of Mr. X. There was no appearance by or on behalf of the mother of the children. It is not clear from the judgment what steps, if any, were taken to notify her of the proceedings.
40. Finally, it should be noted that the UNHCR contends that the word "child" as used in s. 56(9)(d) of the Act of 2015 should be given a broad interpretation. I will deal with their submissions later in the course of this judgment.
41. As can be seen from the above, the key issue in this case concerns the interpretation of s. 56(9)(d) of the Act of 2015. I have already set out the passage of the trial judge where he expressed the view that the two children concerned in these proceedings, even assuming that they were the biological children of another man, could properly each be described as a child of Mr. X. He came to this conclusion by reference to the wide diversity of familial structures and a view that the Act of 2015 did not confine the relationship of father/child to a biological child. The provisions of s. 56 of the Act have been set out above. As can be seen, it sets out the circumstances in which a qualified person described in the section as a "sponsor" may make an application for a member of his or her family to enter and reside in the State. It requires the Minister to investigate the application to determine the identity of the person sought to be given permission to enter and reside, the relationship between the sponsor and the person concerned and the domestic circumstances of the person concerned. There is a duty on the sponsor and the

person concerned to co-operate fully in the investigation. The Minister has an obligation to give permission if satisfied that the person concerned is a member of the family of the sponsor. Section 56(9) goes on to set out what is meant by "member of the family". It is a precise definition of who is understood to be a member of the family. It expressly states that the categories listed are those who qualify and the sub-section does not appear to contain a broad definition of those who may be included in the definition of "members of the family". The word "means" is used rather than "includes" as previously noted. It seems to me to be a limiting provision rather than an expansive provision. By way of explanation, it may be observed that the ordinary meaning of the phrase "member of the family" could encompass a much larger cohort than that provided for in s. 56(9). Ordinarily, one might consider the phrase "member of the family" to include grandparents, uncles and aunts and cousins. However, they are clearly not included in the cohort for the purpose of s. 56(9). Even the category of eligible siblings is restricted. If the sponsor is under the age of eighteen years and not married, "member of the family" means parents and siblings under the age of eighteen who are not married. Therefore, a sibling over the age of eighteen years or one who is not yet eighteen but is married does not come within the definition of "member of the family". It is also clear from s. 56(9) that "member of the family" does not mean a child of the sponsor who is over the age of eighteen or who is under the age of eighteen and is married. Therefore, it seems to me that taken as a whole, s. 56(9) confines those who might ordinarily be understood to come within the phrase "member of the family" to a limited cohort of those who would appear to come within the definition of "member of the family" as that phrase is normally used. How then should the phrase "child of the sponsor" be understood and what does "child" mean in the context of s. 56(9)(d)?

42. The Minister in his submissions referred to the canons of construction and urged the Court that the starting point in any consideration of the interpretation of words used in a statute is the plain and ordinary meaning of the words. The observations of McKechnie J. in the case of *C.M. v. Minister for Health* [2017] IESC 76 (hereinafter referred to as "C.M") at paras. 57 to 58 were relied on in support of this long-established principle:

"57. As might be obvious, if the objective intent of parliament is self-evident from the ordinary and natural meaning of the words or phrases used, then the task is at an end, and the court's function has been performed. Whilst it has long been said that the words themselves, in their plain meaning, best declare such wish, that and multiple other similar expressions must be properly understood. I would therefore add the following, as being part of and complementary to this primary approach to legislative construction. The Court may:

- (i) Look at any legislative history of relevance; indeed, in *D.B., Geoghegan J.* felt that the non-statutory scheme established in December 1995 was '... for all practical purposes a legislative antecedent and part of the [1997 Act's] legislative history' (p. 58).

- (ii) Consider the subject matter being dealt with, the provisions put in place for that purpose, and the harm, injury or damage – the legislative objective – which the same were intended to address. What Lord Blackburn said as far back as 1877 remains as apt today as when it was first stated:

‘The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand those words it is material to inquire what is the subject-matter with respect to which they are used, and the object in view.’

(*Direct United States Cable Company v. Anglo-American Telegraph Company* (1877) 2 App. Cas. 394). In 1953, Lord Goddard C.J. in *R v. Wimbledon Justices, ex parte Derwent* [1953] 1 Q.B. 380 stated that:

‘... the court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at ...’

- (iii) Have regard to both the proximate and general context in which the phrase or provision occurs, including any other such phrase or provision, or indeed the Act as a whole, which may illuminate the correct meaning of the disputed provision. In *In Re Macmanaway* [1951] A.C. 161, Lord Radcliffe said at p. 169 that:

‘The primary duty of a court of law is to find the natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light on the sense in which the makers of the Act use the words in dispute.’

- (iv) Have regard to the long title of and preamble to the Act (see, for example, *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] I.R. 317 and *Minister for Agriculture v Information Commissioner* [2000] 1 I.R. 309).

58. Accordingly, a consideration of both the narrower and broader context of any disputed provision, including the subject matter of the legislation itself, is an integral part of the literal approach, as is the legislative history, the subject matter of the Act and, to use an almost obsolete phrase, the ‘mischief’ which was sought to be remedied by its provisions. In identifying such matters, the same is not intended, quite evidently, as a prescriptive ruling on this approach.”

43. I did not understand counsel for Mr. X to take any issue with this approach to the interpretation of legislation. It would therefore be of assistance to consider the submission of the parties in the light of the helpful approach described by McKechnie J. in C.M. referred to above.

44. The Minister in his submissions referred to the use of the word “child” in other legislative provisions and how the word is interpreted in the case law to argue that the term “child”

when used in a statute should be understood to mean biological child unless the context plainly requires a wider interpretation. By way of example, reference was made to the case of *B.E. v. S.S.* [1998] 4 I.R. 527 in which consideration was given to the interpretation of s. 117(1) of the Succession Act 1965. That was a challenge by a son to his mother's will whereby it was contended that the mother had failed to make proper provision for him as provided for in the legislation. The High Court noted that the defendant's contention was that the real matter in dispute was whether there was a moral duty to the mother's daughter-in-law and grandchildren and whether such moral duty had been breached and concluded that such a breach was not susceptible of enforcement under s. 117 of the 1965 Act. On appeal to the Supreme Court at page 561, Keane J. (as he then was) said:

"But to extend in effect the extremely ample protection which the Oireachtas has thus afforded to children, even in the middle aged and elderly category, to grandchildren seems to me to bring within the scheme of the Act a category of claimants the protection of whom was not envisaged by the legislature. I am accordingly satisfied that the apparent needs of the plaintiff's children are not a factor which would justify the court in the present case in setting aside the findings of the learned High Court Judge."

45. Reference was also made to a decision of the High Court in the case of *Hyland v. Residential Tenancies Board* [2017] IEHC 557 in which the High Court held that the word "child" within the meaning of the Residential Tenancies Act 2004 did not include a stepchild. In that case an issue arose in circumstances where notice parties to the proceedings were appointed receivers over a number of properties owned by the appellant's step-father. The appellant became the tenant of one of those properties pursuant to an arrangement with the owner of the property. Ultimately a notice of termination was served by the receivers against the occupier of the property and an application for adjudication in respect of her overholding was made to the RTB. One of the issues was whether the occupier was a "child" of the landlord within the meaning of s. 3(2)(h) of the 2004 Act and accordingly, a contention that the provisions of the Act did not apply. The Tribunal concluded that the 2004 Act did apply because the appellant was not a "child" of the landlord within the meaning of s. 3(2)(h). An appeal on a point of law was brought to the High Court in which one of the issues was the question as to whether or not the appellant was a "child" of the landlord within the meaning of the 2004 Act so that it did not apply. Noonan J. in the course of his judgment observed at paragraph 17:

"Therefore no explicit definition of the word 'child' is to be found in the 2004 Act. Like any other piece of legislation, the 2004 Act must be interpreted in accordance with well settled canons of construction, the first and most basic of which is that words should be accorded their natural and ordinary meaning. The appellant has sought to argue that in the light of evolving concepts of family, the word 'child' is ambiguous and unclear as to its meaning and in the light of those same concepts, it ought to be regarded as including a stepchild. I cannot accept that proposition. The word 'child' in its natural and ordinary meaning can only refer to the biological

offspring of a natural person. Such a person's son or daughter is a 'child' of that person. Of course whether a person is the biological offspring of another is, with advances in medical science, perhaps a more complex question than it used to be. What is clear however is that a person who has no biological connection to another cannot be the latter's 'child'. A stepchild is thus not a 'child'."

46. Noonan J. in that judgment went on to refer to a further provision of the Act itself which to his mind clarified the position. At he said at paragraphs 18 and 19:

"18. If there were any doubt about this, and I believe there is none, it is removed by s. 39 of the Act itself. That section provides that a tenancy shall terminate on the death of the tenant save where certain conditions are satisfied. Those conditions include that stipulated in s. 39 (3) (a) (iii) that the dwelling was at the time of the death of the tenant occupied by:

'(iii) a child, stepchild or foster child of the tenant, or a person adopted by the tenant under the Adoption Acts 1952 to 1998, being in each case aged 18 years or more...'"

19. The subsection therefore clearly recognises that a child is something different from a stepchild or indeed a foster child or an adopted child..."
47. Noonan J. also referred to a different provision of the Act which gave a further definition of a member of the landlord's family which again made reference to a child, stepchild, foster child, grandchild, etc. He observed at para 19:

"Here again, a clear distinction is drawn between a child and a stepchild. Since the passing of the 2004 Act, separate reference to an adopted child is now no longer necessary by virtue of s. 18 of the Interpretation Act, 2005 which expressly provides that a reference to a child of a person in any enactment shall be construed as including a reference to an adopted child as defined."

48. Noonan J. therefore concluded that on a literal interpretation of the provisions of the Act the meaning of the expression "child" was clear and unambiguous and therefore did not apply to the appellant in that case who was a stepchild of the landlord as applied.
49. A similar consideration arose in the case of *A.C. v. Minister for Health* [2019] IEHC 431 which concerned a person who was making an application for compensation pursuant to the provisions of the Hepatitis C Compensation Tribunal Acts 1997 to 2006. The issue that arose in that case was whether the appellant, who was a stepchild of a person who died from hepatitis C was a "child" within the meaning of s. 5(3B)(b) of those Acts and, therefore eligible to qualify as a claimant for compensation. In that case, Barton J. noted at paragraph 58 of his judgment that:

"At common law a 'child' is the begotten offspring or issue of its natural parents. An individual who has no biological connection to another cannot be that person's child."

50. He concluded at paragraph 89 to 90 of his judgment in that case:

- "89. In circumstances where the legislature has identified a class of individuals by reference to a relationship with a deceased person upon whom to confer a right to bring a claim for loss of society and in that context has recognised by express distinction the difference in meaning between a 'child', 'grandchild' and 'step-child', a construction of the word 'child' to include a 'step-child' would, in my judgement, be so expansive as to render such interpretation *contra-regem*.
90. In common with the approach of the Westminster Parliament to the interpretation of the word 'child', where the legislative intention of the Oireachtas has been to extend or expand the common law meaning such intention has been consistently provided for by the enactment of an express provision to that effect. Had the Oireachtas intended to confer the right to make a claim for loss of society on a 'step-child' it would have been necessary to do so expressly, all the more so where the right to bring such a claim is a creature of statute; parliament chose to do otherwise. Considering the proximate and general context in which the provision occurs together with the preamble, title and object for which the 1997-2006 Acts were enacted, the legislative intention in this regard is, for the reasons given, beyond question and without doubt."
51. The Minister went on to refer to a number of Acts of the Oireachtas where the term "child" is given a broader definition than that of a biological child. Reference was made to the provision in the Interpretation Act 2005 contained in s. 18(d) of that Act which provides that an adopted child is to be understood to be a child of the person concerned. Reference was also made to the fact that in a number of family law statutes, a broad definition has been given to dependent children or members of the family and in that regard reference was made to s. 3 of the Family Law (Maintenance of Spouses and Children) Act 1976 and to similar definitions in the Family Law Act 1995 and the Family Law (Divorce) Act 1996. Reference was also made to the provisions of the Civil Liability Act 1961 which adopts a broad interpretation of the word "dependent" for the purposes of a fatal injury application including a provision that a person in *locum parentis* to another is to be considered the parent of that other. By contrast it was pointed out that no such extended definition of the term "child" is provided for in the 2015 Act and in particular in s. 56. Accordingly, it is argued that having regard to the legislative history of the Act it is clear that the absence of such an extended definition was a clear legislative choice.
52. The case law referred to above is of some assistance in making it clear that the natural and ordinary meaning of "child" relates to the offspring or issue of its parents but what is also clear is that the definition of child may be expanded having regard to the terms of the particular statute under consideration. That is why in considering the terms of s. 56(9)(d) it will be of some assistance to examine not just the use of the word in the context of the Act of 2015 but also the way in which the word has been used in the historical context of the legislation concerned.

53. It will be recalled that the immediate precursor to the provisions of s. 56(9) of the Act of 2015 was to be found in the 2013 Regulations. I have previously set out the terms of the 2013 Regulations and in particular the provisions contained in Regulation 25(6). It will be seen from the 2013 Regulations that the Minister was in a position to grant permission to a "dependent member of the family" of a sponsor to enter and reside in the State. The first point that stands out is that the phrase used in the 2013 Regulations is "dependent member of the family" by contrast to the phrase which is used in the Act of 2015, namely "member of the family". The second observation that can be made is that the definition contained in Regulation 25 of "dependent member of the family" is broader than that contained in s. 56(9)(d) of the Act of 2015. The 2013 Regulations expressly included "ward . . . of the sponsor who is wholly or mainly dependent on the sponsor". Given this difference, it is argued on behalf of the Minister that there was a clear legislative intent on the part of the Oireachtas in enacting s. 56 of the Act of 2015 to restrict the categories of persons in respect of whom a beneficiary of subsidiary protection could seek family reunification. Removed from the scope of s. 56(9) was the possibility of seeking reunification with dependent members of the family of the sponsor. It was further noted that the possibility of obtaining reunification with a "ward" of the beneficiary of subsidiary protection was excluded and consequently, it was argued that the history of s. 56 operated in favour of an interpretation of "child" in s. 56(9)(d) which excludes from the interpretation or meaning of "child" of a person who is a "ward".
54. There is no doubt that the Minister in his submissions placed considerable reliance on the legislative history or background to the provisions as to family reunification now found in s. 56 of the Act of 2015. By contrast, Mr. X in his submissions supports the approach taken by the High Court in discounting the focus on the historical background to the legislation and contends that the focus should be on the context of s. 56 within the Act of 2015 as a whole.
55. As will be recalled, the trial judge was of the view that the fact that the 2013 Regulations allowed the Minister to give permission to a dependent to enter and reside in the State (including a ward) and that the Act of 2015 contained no such reference was not relevant. He was of the view that the absence of such a reference was supportive of the view that the term "child" was wide enough "and intended, to embrace dependents." He dismissed the arguments of the Minister based on the legislative history as "...something of a 'red herring'..." at para 1 of his judgment. I have already referred to the decision in the case of *C.M. v. Minister for Health* and in particular, paragraph 58, as to the relevance of legislative history in assisting the interpretation of a term used in a statute and would be slow to dismiss the reliance by the Minister on the legislative history as being "something of a 'red herring'"
56. Reference was also made to the judgment of the High Court (Barton J.) in the case of *A.Q. v. Minister for Health* [2016] IEHC 429 which concerned the application of s. 4 of the Hepatitis C Compensation Tribunal Act 1997. In order to qualify for compensation, a claimant had to have a positive diagnosis of Hepatitis C. The Act of 1997 did not specify what was meant by a positive diagnosis. This definition was provided in the Hepatitis C

Compensation Tribunal (Amendment) Act 2006 which specified that a positive diagnosis was one based on a specified test, the enzyme-linked immunosorbent assay. The claimant before the High Court relied on a different test known as the ChLIA test and therefore the question that arose was whether she was precluded from seeking compensation. It was therefore necessary to consider the meaning of s. (1A)(a)(i) of the Act of 2006 and whether it was appropriate to deny compensation to the claimant by reference to the test which resulted in her positive diagnosis. Barton J., in considering the words of s. (1A) in their natural and ordinary meaning concluded at paragraphs 87 to 89 as follows:

- "87. By enacting the provision in question, the Oireachtas clearly and unequivocally intended to restrict the qualifying tests, thereby excluding tests, including 'ChLIA's', which would have qualified in respect of applications brought before that date. That such a result was the plain intention of the Oireachtas is abundantly clear from the wording of the provision and, in my judgment, consistent with the purpose of that Act which was, *inter alia*, to amend the Acts of 1997 and 2002.
 - 88. Had the Oireachtas intended to exclude the operation of the provisions of the 2006 Act to test results reported before the 20th June 2006 but which would not qualify under the provision in question, it would have had to have said so. Such a provision could have been enacted without difficulty. As it is, the relevant date for the purposes of the legislation is not the date of the tests but rather the date on which the application is made.
 - 89. In my judgment, it was exclusively within the powers and competence of the Oireachtas to regulate the entitlements and the rights of applicants seeking compensation under the Acts by enacting a threshold which has to be crossed in order to receive an award of compensation on foot of an application made after the 20th June 2006, even though the (e)ffect of the provision operates to exclude tests which would have qualified for the purposes of applications made before that date."
- 57. It is contended by the Minister, adopting a similar approach to that of Barton J., that the plain intention of the Oireachtas in enacting s. 56 was to limit the categories of persons with whom a beneficiary of subsidiary protection in the State could seek to reunite, by excluding "wards" from those categories amongst others. Had the Oireachtas intended to include "wards" in the definition of a "member of the family", it could have done so expressly. Accordingly, it is submitted that the only logical inference to draw from the fact that it did not do so is that s. 56 is not intended to encompass "wards" such as the children the subject of Mr. X's application.
 - 58. It was pointed out on behalf of the Minister that s. 56 provides that the child with whom a sponsor of international protection seeks reunification must be under eighteen and unmarried at the date of the application for family reunification. It was emphasised that the child must be "a child of the sponsor". It was argued that in using that phrase the legislature meant a biological child of the sponsor. It was urged on the Court that there was no provision in the legislation to enable a reference to a child of a person to be

construed as including a “ward” of a person. Finally, the Minister urged the Court to reject the view of the trial judge that the definition of “child of the sponsor” was not confined to biological children based on what he described as “an understanding that in a diverse society defining who was a child of someone is not always straightforward . . .”. The Minister concluded his submissions on this point by asserting that the approach of the trial judge failed to proceed from the correct starting point, namely that the plain and ordinary meaning of the term “child” is the biological child of his or her parents. There was also a criticism of the failure to have any or any sufficient regard to the legislative history of the provision. It was finally pointed out that any change in social *mores* did not change the plain and obvious meaning of the words of the statute and the decision of the Oireachtas not to provide for an extended meaning of the word “child”.

59. The core submission on behalf of Mr. X is that the word “child” as used in s. 56 has a wider meaning than biological child as contended for by the Minister. On that basis, Mr. X urges this Court to accept as correct the approach of the High Court in disregarding the argument of the Minister that s. 56 should be interpreted by having regard to its precursors, the Act of 1996 and the 2013 Regulations.
60. It is argued that in changing the wording used in the Act of 2015, it is equally possible that the Oireachtas intended the word “child” to have a wider meaning. Further it is argued that if it was intended to bring about a change which had the effect of restricting those who could be the subject of an application for family reunification, the wording in the legislation bringing about such a change had to be absolutely clear.
61. It was said that in interpreting s. 56 of the Act it was instructive to have regard to the wider context of the Act as a whole and in particular to have regard to the provisions of s. 58 of the Act of 2015 which provides at s. 58(2) as follows:

“In the application of sections 53 to 57 in relation to a person who has not attained the age of 18 years, the best interests of the child shall be a primary consideration.”
62. It was noted that this provision is not restricted in any biological sense and therefore is applicable to Mr. X’s two children. It was argued that treating the best interests of the child as a primary consideration can only be achieved by a process which reunites children who lived together as part of a family unit at the time of the events leading to the need for protection and who were wholly or mainly dependent on the sponsor at the time and who are entitled to continue to reside with the sponsor. Accordingly, given that the intent and purpose of family reunification is to protect the family unit that existed in the home state, it is submitted that for the purposes of s. 56 “child” includes a ward or a child in respect of whom the sponsor is in *locum parentis*. It is argued that the Act of 2015 is a social and remedial Act and thus to be read broadly in that respect.
63. Reference was made to a number of sources which it is said give rise to a wide definition of family and thus, by analogy, give support to the argument made by Mr. X that “child” as used in s. 56(9) should also be given a wider meaning. Thus, the Court was referred

to the decision in the case of *Re G (Children)* [2006] 1 WLR 2305 in which Baroness Hale at page 2316 observed at para 33 onwards:

- "33. There are at least three ways in which a person may be or become a natural parent of a child, each of which may be a very significant factor in the child's welfare, depending upon the circumstances of the particular case.

. . .

35. The third is social and psychological parenthood: the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting. The phrase 'psychological parent' gained most currency from the influential work of Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* (1973), who defined it thus:

'A psychological parent is one who, on a continuous, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfils the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster or common law parent'."

64. That authority has been quoted with approval in this jurisdiction in a number of cases, for example, *O.R. v. An tArd Chláraitheoir* [2014] 3 IR 533 (McKechnie J.).
65. Reference was also made to chapter five (entitled "Protection Considerations, and the Identification of Resettlement Needs) of the UNHCR Handbook which it was said advocates a wide interpretation of the term "dependent" in the context of family reunification at pages 178 to 179:

"Dependency infers that a relationship or a bond exists between family members, whether this is social emotional or economic. For operational purposes, with regard to the active involvement of UNHCR offices in individual cases, the concept of dependant should be understood to be someone who depends for his or her existence substantially and directly on any other person, in particular for economic reasons, but also taking social or emotional dependency and cultural norms into consideration.

The relationship or bond between the persons in question will normally be one which is strong, continuous and of reasonable duration. Dependency does not require complete dependence, such as that of a parent and minor child, but can be mutual or partial dependence, as in the case of spouses or elderly parents. Dependency may usually be assumed to exist when a person is under the age of 18 years, but continues if the individual (over the age of 18) in question remains within the family unit and retains economic, social and emotional bonds. Dependency should be recognized if a person is disabled and incapable of self-

support, either permanently or for a period expected to be of long duration. Other members of the household may also be dependants, such as grandparents, single/lone brothers, sisters, aunts, uncles, cousins, nieces, nephews, grandchildren; as well as individuals who are not biologically related but are cared for within the family unit."

66. It was therefore urged on behalf of Mr. X that a wider definition is supported by the rights of the family as protected by the Constitution, the European Convention on Human Rights and the EU Charter of Rights.
67. Reference was made to the Cameroonian court order and it was argued that absent any wider meaning of the word "child", Mr. X was entitled to have his children assessed on the basis that they must be considered as his children by virtue of the Cameroonian court order. It was argued that that was a recognition sufficient for the purpose of any definition of "child" in s. 56 of the subsisting parent/child relationship. It was pointed out that the interpretation contended for by the Minister could lead to unjust situations such as where a household in a country of origin comprised of both biological and non-biological children. The question was posed as to what should happen to a family in which there was a child by surrogacy and was that a child that would not come within the definition of "child" in s. 56(9)? A similar question was posed in relation to a same sex couple with children - would such a child be excluded from the definition of "child" within the meaning of s. 56(9) if the party seeking family reunification was not the biological parent of the child? Relying on such anomalies and having regard to the proposed interpretation relied on by the Minister, it was contended that it was hardly intended that the Act of 2015 should bring about such anomalies.
68. Reference was also made to Article 42A.1 of the Constitution which provides that:

"The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."
69. A number of cases in which the provisions of Article 42A.1 have been considered were referred to including *I.R.M. v. Minister for Justice* [2018] 1 I.R. 417 which recognised that the provisions of Article 42A applied "to all children regardless of the marital status of their parents". Reference was also made to what was described as a wider definition of family in cases such as *O'Leary and Ors v. Minister for Justice and Equality (No. 1)* [2011] IEHC 256, and *R.X. v. Minister for Justice* [2011] ILRM 444. The point was made that the rights under the Constitution are not confined to citizens, a point which has long been recognised by the courts.
70. Reference was also made to the European Convention on Human Rights to argue that in interpreting Irish law, the State must do so in a manner compatible with the State's obligation under Convention provisions. On that basis it was submitted that "child" in s. 56(9) should be interpreted in a manner which: (1) Recognises *de facto* bonds and/or (2) gives effect to a legal parent/child relationship which existed in the country of origin as

recognised by a competent court in that place. Reference was made to a number of decisions of the European Court on Human Rights in relation to the concept of the *de facto* family as recognised in Article 8 of the Convention. (See *X.Y. and Z. v. U.K.* [1997] 24 EHRR 143, *Paradiso and Campanelli v. Italy* (Application No. 25358/12; Grand Chamber 24 January 2017) and *Schneider v. Germany* [2012] 54 EHRR 12.) In essence the argument made on foot of those cases was to the effect that Article 8 of the Convention recognises a *de facto* family which is not confined to that based on biological relationships alone. In general terms I see no difficulty with that argument. The question is whether or not it enables a wider definition to be given to the meaning of the word "child" as used in s. 56(9) of the Act of 2015. Reference was also made to the EU Charter which at Article 24(2) reiterates as does Article 42A of the Irish Constitution that the protection of the child's best interests must be the "primary consideration" in decisions made by public authorities when making orders concerning a child.

71. Finally, reference was made to Article 5 of the United Nations Convention on the Rights of the Child (hereinafter "UNCRC") which provides:

"States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

72. This was relied on to contend that legal guardians and others *in loco parentis* have important parenting roles that are entitled to recognition by states. It was acknowledged that the UNCRC is not part of domestic law but nonetheless can be informative and of assistance in terms of public policy.
73. Counsel on behalf of Mr. X then considered the cases relied on by the Minister in support of his contentions such as *B.E. v. S.S.*, *Hyland v. Residential Tenancies Board* and *A.C. v. Minister for Health and Children* and disagreed with the Minister's reliance on those cases. It was pointed out, for example, that in the case of *Hyland*, no authority was cited for the proposition stated at paragraph 17 of the judgment in that case that:

"...The word 'child' in its natural and ordinary meaning can only refer to the biological offspring of a natural person..."

74. The point was made that in a number of those cases the child concerned was not a minor child. Further, the point was made that in a number of those cases such as in *Hyland*, the legislation in question expressly referred to "step-child" and "foster child" and that they were cases therefore where the Oireachtas could be said to have addressed the question clearly.
75. Thus, the contention on behalf of Mr. X is that the Minister's reliance on these cases is misplaced. Finally, reference was made to the provision of s. 46(3) of the Status of

Children Act 1987 by virtue of which the person named as the father on a birth certificate is presumed to be the father of the child. This was contrasted with the position in the case of the term "direct descendant" as used in the Citizens' Directive. Reference was made to the decision in the case of *S.M. v. Entry Clearance Officer Case C129/18* (26 March 2019) (hereinafter "S.M.") in which the CJEU noted at paragraph 45 as follows:

"45. As a preliminary point, it is apparent from the evidence in the file submitted to the Court that, as the Advocate General noted in points 36 to 38 of his Opinion, under Algerian law kafala is where an adult undertakes to assume responsibility for the care, education and protection of a child, in the same way a parent would for their child, and to assume legal guardianship of that child. Unlike adoption, which is prohibited by Algerian law, the placing of a child under kafala does not mean that the child becomes the guardian's heir. In addition, kafala comes to an end when the child attains the age of majority and may be revoked at the request of the biological parents or the guardian."

76. It was said that this is materially different to the facts in the present case where Mr. X was registered as the children's father. The CJEU in that case also observed at paragraph 54:

"Therefore it must be considered that the concept of a 'parent-child relationship' as referred to in paragraph 52 above must be construed broadly, so that it covers any parent-child relationship, whether biological or legal..."

77. In the particular case, the Court concluded at paragraph 56:

"Given that the placing of a child under the Algerian kafala system does not create a parent-child relationship between the child and its guardian, a child, such as SM, who is placed in the legal guardianship of citizens of the Union under that system cannot be regarded as a 'direct descendant' of a citizen of the Union for the purposes of Article 2(2)(c) of Directive 2004/38."

78. The point made on behalf of Mr. X in relation to that case is that he is someone who has the benefit of a judgment of the court in Cameroon appointing him as the guardian of the children concerned and therefore he does have a legal relationship with the children.

Other Issues

79. The Minister went on to consider the role of EU law and whether Mr. X derived any benefit from the Qualification Directive, (Council Directive 2004/83/EC of 29 April 2004). It was noted that the trial judge rejected the reliance by Mr. X on the Directive and his view in this regard is supported by the Minister. The Minister notes that Mr. X, while accepting that he has no entitlement to family reunification under the Qualification Directive, argues that he has an entitlement under what are said to be the more favourable provisions of Irish law which it is asserted by Mr. X are permitted by Article 3 of the Qualification Directive. The Minister places reliance on the decision in *S.M. v. Entry Clearance Officer* referred to above and notes that the CJEU has declined to interpret the concept of "direct

descendant" in Article 2(2)(c) of Directive 2004/38/EC (the Citizens' Directive) as including wards, that is children placed in the permanent legal guardianship of one or more Union citizens. The main point made by the Minister having referred to that case was that it should have been applied by analogy to the facts of this case given that, it is argued, the phrase "child of the sponsor", as contained in s. 56(9)(d) of the Act of 2015 does not include a child with whom the sponsor has a guardianship relationship. Reliance is placed on paragraph 56 of the judgment of the CJEU in *S.M.* referred to above, a case which was concerned with the Citizens' Directive. The Minister accepts that the 2013 Regulations provided more favourable standards than those required by the Qualification Directive which noted in Article 3 that:

"Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive."

80. Having said that, the Minister points out that the 2013 Regulations have been repealed and the present application was made under the Act of 2015 and therefore no reliance can now be placed on the 2013 Regulations. The Minister pointed out that by virtue of the provisions of s. 69 of the Act of 2015 certain transitional arrangements came into effect and they provide at s. 69(4) as follows:

"(4) A subsidiary protection declaration given under Regulation 20 of the Regulation of 2013, or deemed under Regulation 31(1) of those Regulations to have been granted, to a person, that is in force immediately before the date on which this subsection comes into operation shall be deemed to be a subsidiary protection declaration given to the person under this Act and the provisions of this Act shall apply accordingly."

81. In the course of his submissions, the Minister made reference to the provisions of Article 2 of the Qualification Directive in which a definition of family members appears which is as follows:

"(h) 'family members' means, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection status who are present in the same Member State in relation to the application for international protection:

. . .

- the minor children of the couple referred to in the first indent or of the refugee or subsidiary protection status, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;"

82. The point is made by the Minister in reference to this provision and in relation to the definition of "family members" of a citizen of the Union set out in the Citizens' Directive,

to which reference has already been made, namely that family members include his "direct descendants" and it is for that reason that reliance was placed by the Minister in the course of his submissions on the *S.M.* case referred to above. Although the trial judge rejected the reliance by Mr. X on the provisions of the Qualification Directive on the basis that it referred to family members "present in the same Member State in relation to the application for international protection", the Minister was critical of the failure of the trial judge not to draw an analogy from the decision of the CJEU in *S.M.* as it is argued that "child of the sponsor" as used in s. 56(9)(d) of the 2015 Act does not include a child with whom the sponsor has a guardianship relationship just as a child placed under the Algerian kafala system does not create a parent/child relationship between the child and its guardian under the Citizens' Directive and such a child cannot be regarded as a "direct descendant" of a Union citizen for the purposes of that Directive. However, as mentioned previously, Mr. X seeks to distinguish that decision on the basis that unlike the case of *S.M.*, Mr. X has the benefit that he was registered as the father of the children concerned.

83. I now propose to consider the arguments in relation to the request from the Minister that Mr. X undergo DNA testing. A number of points are made on behalf of Mr. X in this context. First of all, reference was made to the children's birth certificates which name him as their father and the observation following the investigation and consideration of the documents supplied by Mr. X that "(t)his office has not found any obvious signs of alteration of the documents listed above". Reference was made to the UNHCR Note on DNA testing to establish Family Relationships in which it is observed as follows at para 5 onwards:

"5. DNA testing potentially has serious implications for the right to privacy in two main ways. First, given that DNA carries the most intimate of information about a person, which goes to the very heart of the person's hereditary make-up and identity, extracting DNA samples to gather data could lead to a violation of the right to privacy if not carefully circumscribed.

....

6. While international human rights law guarantees everyone's rights to privacy, honor and reputation from arbitrary or unlawful interference and attacks, the protection is not absolute. 'Authorized interferences' may however, as explained by the Human Rights Committee, be undertaken only in accordance with legislative and other measures which would specify in detail the precise circumstances in which interferences may be permitted and circumscribe the types of interferences. Furthermore, any interference must be 'a proportionate means to achieve a legitimate aim, which should be in the interest of society, be reasonable, and must comply with the provisions, aims and objectives of the ICCPR'."

84. It was also noted that the UNHCR note on DNA testing urges that DNA testing to verify family relationships should only be resorted to where serious doubts remain after all other types of proof have been examined and DNA testing is considered to be the only reliable recourse to prove or disprove fraud.

85. Reference was made to the Minister's "Guidelines on DNA Sampling for the Purposes of Family Reunification" in the non-EEA Visa context where it is said at para 3 of Appendix A to the 2016 Policy Document on Non-EEA Family Reunification:

"If DNA evidence is not supplied, a decision will be based on other evidence of parentage supplied."

The Guidelines further state at para 4:

"No negative inference will be drawn merely from the fact that the applicant does not wish to undergo DNA testing."

86. There are no similar guidelines in relation to family reunification in the context of a person who is the beneficiary of subsidiary protection. Mr. X relies on the views of the trial judge where he stated at para 4:

"...Inviting someone to undertake a DNA test is not the same as requiring one. Neither, the court observes, does failing to provide a DNA sample necessarily and in all instances amount to a failure by a sponsor to 'cooperate fully', as required by s.56(3) of the 2015 Act..."

87. The point was made on behalf of Mr. X that the DNA test was voluntary and that a failure to undergo such a test could not be a failure to co-operate fully with the investigation such that the application should be refused.

88. The Minister in his submissions pointed out the obligation under s. 56 of the Act of 2015 to investigate an application to establish the relationship between the sponsor and the subject of the application. It was submitted that in an appropriate case the Minister is entitled to request DNA evidence. This was a case in which Mr. X had earlier indicated a willingness to undergo DNA testing but subsequently changed his mind. It was noted that he was obliged to co-operate fully with the investigative process pursuant to s. 56(3) of the Act of 2015. It was pointed out that DNA testing would have been relevant and helpful in the investigative process and in determining "the relationship between the sponsor and the person who is subject to the application" as set out in s. 56(2)(b). The Minister submits that the request that Mr. X consent to the submission of DNA evidence was reasonable particularly where he himself had raised serious doubts over the issue of his paternity. Insofar as it had been suggested on his behalf in the course of submissions that it is only where "serious doubts" exist as to paternity that recourse should be had to DNA evidence, the Minister submits that this was such a case.

89. In the course of the submissions reference was made to a number of authorities in which the use of DNA testing was considered. They include the case of *Petkov v. Bulgaria*, Application No. 2641/06 15 July 2014 and the case of *Canonne v. France*, Application No. 22037/13, 2nd June 2015, decisions of the European Court of Human Rights. Reference was also made to a number of decisions of the courts in this jurisdiction including *G.N. v. K.K.* [1998] IEHC 15, *Nz.N. v. Minister for Justice* [2014] IEHC 31 and *Z.M.H. v. Minister*

for Justice [2012] IEHC 221. In *Z.M.H. v. Minister for Justice*, Cooke J. observed at paragraph 18:

"18. Both because of the statutory requirements of s.18 of the Act of 1996 and of the consequences for the State's international obligations in issuing authorisations for international travel, the Minister is both entitled and obliged to satisfy himself that authorisations for family reunification and the travel visas that necessarily issue as a result are validly issued to persons who have the genuine family relationship claimed with the refugee and that their identities as the individuals concerned have been authentically established. In other words, the Minister is entitled to demand reasonably verifiable proof that the applicant is the mother of the two sons nominated in the application and that the person she claims to be her husband is the natural father of those two boys. As the Minister has made clear, those paternal relationships may ultimately have to be verified by recourse to DNA evidence..."

90. At paragraph 20 he went on to say in relation to a requirement that passports be produced:

"20. . . . the Court does not consider that it is unreasonable or irrational for the respondent to insist upon the presentation of such a passport when an applicant acknowledges that it can be obtained. That is on the basis that it is but one of a number of steps required to be taken in order to establish some verifiable basis for the identities claimed and the family relationships asserted. . . . The degree of weight to be attributed to it ultimately will obviously depend on the cumulative effect of other proofs and information offered and particularly on any eventual DNA results but the mere fact that passports are requested or suggested as part of the material the Minister wishes to consider does not mean that the request is irrational or unreasonable especially when the applicant has previously given the Minister to understand that they were being applied for."

91. Relying on that decision together with the earlier decision referred to of *N.Z.M.*, it is argued by the Minister that he is entitled to request that DNA testing would take place where doubt as to paternity exists. It is accepted that he cannot require such a test but he is entitled to take into account the unwillingness to avail of a procedure which would put the question of parentage beyond doubt.

92. The final point made by Mr. X is that he is still entitled to benefit from the 2013 Regulations in relation to family reunification notwithstanding that those Regulations are no longer in force and that the Act of 2015 now governs the question of family reunification. The point is made that under the 2013 Regulations an application for family reunification could be made in respect of a ward. If the Minister's interpretation of s. 56(9)(d) is correct, that is no longer possible but notwithstanding that, it is said that Mr. X is entitled to rely on his pre-existing entitlement to family reunification pursuant to the 2013 Regulations. As was noted by Mr. X in the course of his submissions, it is said that at the time that he obtained the declaration that he was entitled to subsidiary protection, he was entitled to apply to have the children brought to the State qua wards. The

Minister's view is that he has lost that, notwithstanding that he asserted this right prior to the repeal of the 2013 Regulations. He contends that he has a continuing entitlement to have his application determined under the more favourable provisions of Regulation 25. He argues that while the Minister may be able to revoke what was the more favourable treatment for applicants under Regulation 25 in respect of future applicants, the Minister cannot do so retrospectively or in respect of persons granted subsidiary protection under the 2013 Regulations. Reliance is placed on the provisions of s. 27(1) of the Interpretation Act 2005 to the effect that where an enactment is repealed the repeal does not, *inter alia*, -

"...affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment."

93. Reference was made to some of the case law in which the provisions of s. 27(1) has been considered such as *Minister for Justice, Equality and Law Reform v. Tobin (No. 2)* [2012] IESC 37 (hereinafter "Tobin (No. 2)"). A passage from the judgment of O'Donnell J. in that case was quoted where it was stated at paragraph 67 as follows:

"67. It is important to remind ourselves that we are dealing with a right at common law, and no issue of any constitutionally protected right arises. In that sense, a right can be said to be the entitlement of a person to do something which is not itself specifically prohibited, and which a court will enforce as a matter of entitlement and not merely as a matter of discretion. To some extent therefore it can be said much legislation interferes with existing rights in that sense, and indeed is intended to do so. In identifying what can be said to be 'vested' rights which trigger the presumption in s.27 there is I think much useful guidance to be gained in Bennion, *Statutory Interpretation* (4th Ed. Butterworths, 2002) which states that '*the right must have become in some way vested by the date of a repeal, i.e. it must not have been a mere right to take advantage of the enactment now repealed*'. A similar point was made in the 9th edition of *Craies on Legislation* (Sweet & Maxwell 2008) at para. 14.4.12:-,

'The notion of a right accrued in s.16(1)(c) requires a little exposition. In particular the saving does not apply to a mere right to take advantage of a repealed enactment (clearly since that would deprive the notion of a repeal of much of its obvious significance). Something must have been done or occurred to cause of a particular right to accrue under a repealed enactment'.

94. Reference was also made to the decision in *Chief Adjudication Officer v. Maguire* [1999] 1 WLR 1778 and to a decision of the CJEU in Case C – 429/15 *Danqua v. Minister for Justice and Equality* (hereinafter "Danqua"). It is contended that a repeal of the 2013 Regulations simpliciter is a breach of EU law insofar as the respondent had a vested right in EU law to apply for family reunification under the Regulations and insofar as those rules are more favourable, the right was taken from him without any notice.

95. The Minister in his submissions acknowledges the fact that Mr. X had a right to apply for family reunification under the 2013 Regulations but takes issue with the suggestion that there was a vested right to such reunification. Reference was made to a decision of the High Court in the case of *Djamba v. Minister for Justice* [2017] IEHC 280 in which leave was refused to challenge a decision of the Minister to the effect that the first named applicant was no longer entitled to apply for family reunification in respect of the second to fifth named applicants in those proceedings. The applicant had been granted subsidiary protection in February 2015 at a time when there was no time limit within which he could apply for family reunification. The effect of the coming into force of the Act of 2015 was that a twelve-month time limit for making such an application was introduced. Reliance was placed upon s. 27(1)(c) of the Interpretation Act 2005 to assert that the applicant was not subject to that limit. This argument was rejected by O'Regan J. who said at paragraph 13:

"13. No application was in being on the part of the Applicants at the date of coming into force of the 2015 Act. The right asserted therefore is a mere right to take advantage of an enactment now repealed. Such claimed right is not a vested right therefore the presumption in s.27 is not triggered (see para. 9 above). It is evident from foregoing that the argument of the applicants is not sustainable and therefore the application for leave is refused."

96. A similar approach was taken in the case of *V.B. v. The Minister for Justice and Equality* [2019] IEHC 55. That was a case in which the applicant was seeking family reunification in respect of her mother under the Refugee Act 1996 but was refused because the 1996 Act had been repealed and replaced by the 2015 Act and under the 2015 Act her mother fell outside the definition of a "member of the family" as provided for in the Act of 2015. Keane J. in that case relied expressly on the passage from O'Donnell J.'s judgment in *Tobin (No. 2)* referred to above to the effect that if the right to apply was accepted as a vested right, it would deprive the repeal of the relevant provisions of any meaningful effect. For these reasons the Minister contends that it is not open to Mr. X to rely on the provisions of s. 27(1)(c) of the 2005 Act.

97. One further point is made on behalf of Mr. X relying on EU law. Given that the status of subsidiary protection is to be found in EU law it is argued that the principle of effectiveness is applicable. It was in that context that reference was made to the case of *Danqua* referred to above. At paragraph 39 of the judgment in that case the CJEU held that:

"39. So far as that principle is concerned, as recalled in paragraph 29 above, a national procedural rule, such as that at issue in the main proceedings, must not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order. Accordingly, such a rule must ensure, in the present case, that persons applying for subsidiary protection are actually in a position to avail themselves of the rights conferred on them by Directive 2004/83."

98. Accordingly, it was argued by Mr. X that he is entitled to the continued operation of the more favourable provisions then in force at the time when he obtained his declaration of subsidiary protection. Such a declaration is precisely that, namely a declaration that someone is entitled to subsidiary protection – it is not the grant of a right. As such it is argued, that when he obtained the declaration he became entitled to the then associated rights applicable to the declaration of subsidiary protection. Further complaint is made by virtue of the fact that the position in which Mr. X found himself was exacerbated by the delay in recognising his status which is said to have been caused by the Minister. Thus, it is contended that a repeal of the 2013 Regulations breaches EU law insofar as he had a vested right in EU law to apply for family reunification under the rules. It was therefore argued that insofar as Irish law might operate so that the right to apply under Regulation 25 is not vested or a continuing right, the law must be disapplied to facilitate the continued benefit of EU law to which Mr. X is entitled.
99. The Minister in his submissions rejects the allegation as to delay and says that there was no delay demonstrated by Mr. X, unreasonable or otherwise, in determining his status. The suggestion is that even if there had been delay that it is well established that it would not have conferred any substantive rights on him, such as the right to have his new application of the 20th March, 2017 considered under the 2013 Regulations. Reference was made to the decision in *Iatan and Ors v. Commissioner of An Garda Síochána and Ors* [2007] 4 IR 47. The essential point made on behalf of the Minister is that whilst it is possible to provide for a greater level of protection, that was not required by EU law and in particular the reliance by Mr. X on the provisions of Article 23(5) of the Qualification Directive is rejected. It is pointed out that the choice made here in the 2013 Regulations in relation to who should be entitled to seek family reunification was greater than that required by way of the minimum standard set in the Qualification Directive. As it is, the Oireachtas has, while limiting the categories of those entitled to seek family reunification, still provided for a larger cohort of people permitted to apply for family reunification than required under the Qualification Directive. It is pointed out that the Qualification Directive limits an application for family reunification to those who are present in the same Member State in relation to the application for international protection and thus it is contended that in this case, EU law does not apply given that this is not a case involving someone who was present in the Member State. To that extent, the Minister accepts the approach of the trial judge on this issue and says that what is before the Court is an issue of domestic law and is not the application of EU law.

Submissions on behalf of the UNHCR

100. Mr. Lynn on behalf of the *amicus curiae* urged the Court to take a broad interpretation to the question of family life. It was submitted that such an approach helps to ensure the protection, emotional wellbeing and economic support of beneficiaries of international protection and that reuniting separated family members ensures sustainable and durable solutions and enhances the integration of beneficiaries of international protection in their host societies. The UN Human Rights Committee (in General Comment 16, adopted on 8 April 1988) has observed at para 5 that family life should be given a "...broad interpretation to include all those comprising the families understood in the society of the

State party concerned...". Reference was made to the decision of the European Court of Human Rights in the case of *Tanda-Muzinga v. France*, Application No. 2260/10, 10th July, 2014 (hereinafter "Tanda-Muzinga") in which it was stated at paragraph 75 as follows:

"75. The Court reiterates that the family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life (see the UNHCR's remit...). It further reiterates that it has held that obtaining such international protection constitutes evidence of the vulnerability of the parties concerned (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, (para) 155, ECHR 2012). In this connection, it notes that there exists a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens, as evidenced by the remit and the activities of the UNHCR and the standards set out in Directive 2003/86 EC of the European Union In this context, the Court considers that it was essential for the national authorities to take account of the applicant's vulnerability and his particularly difficult personal history, to pay close attention to his arguments of relevance to the outcome of the dispute, to inform him of the reasons preventing family reunification, and, lastly, to take a rapid decision on the visa applications."

101. It is contended on behalf of the UNHCR that the right to family unity is a particularly strong right. It was also submitted that the case referred to above was authority for the proposition that refugee families had enhanced rights. It was noted that so far as EU law is concerned, Ireland has not opted in to the Family Reunification Directive. That, of course, is Directive 2003/86/EC referred to in paragraph 75 of *Tanda-Muzinga* referred to above. Reference was also made to the decision in the case of *S.M. v. Entry Clearance Officer*, to which I referred previously and emphasis was placed on the aspect of dependency as referred to in that decision.
102. Reference was also made to the importance of considering the best interests of the child and in that context reference was made to the UN Committee on the Rights of the Child which has said (in General comment No. 14 of 2013, CRC/C/GC/14 at para 59) that the term family "must be interpreted in a broad sense to include biological, adoptive or foster parents, or, where applicable the members of the extended family or community as provided for by local custom". Reference was also made in that context to a decision of the Court of Human Rights in the case of *Nazarenko v. Russia*, Application No. 39438/13, 16th July, 2015 in which a failure to examine the best interests of the child in the case of a termination of paternity on account of not being the biological father was found to be a violation of Article 8 of the European Convention on Human Rights (the "ECHR"). In that case the Court considered that Article 8 of the ECHR obliged contracting states to examine on a case by case basis whether it is in the child's best interests to maintain contact with a person, whether biologically related or not, who has taken care of him or her for a relatively long time. Accordingly, it was submitted on behalf of the UNHCR that s. 56(9) of the Act of 2015 should be interpreted in such a way as to be sufficiently broad

and flexible to take account of the many and various cultural dimensions and societal norms across the world concerning the relationships of love and affection between children and the people who care for them. It was submitted that if interpreted in this way, s. 56(9) would be capable of being applied in a manner consistent with Ireland's obligations under international and European human rights law with respect to the rights of beneficiaries of international protection to family unity and family reunification. Further, the UNHCR noted the provisions of s. 58(2) of the Act of 2015 to the effect that in the application of ss. 53 to 57 in relation to a person who has not attained the age of 18 years, the best interests of the child shall be a primary consideration. Accordingly, the UNHCR submitted that the word "child" in s. 56(9) should be construed so as to be capable of embracing non-biological children who form a genuine family unit with the qualified person, even where they have not been legally adopted.

103. Finally, the UNHCR made submissions in relation to the issue of DNA testing. Reference was made to its note of June 2008, on DNA testing to establish family relationships in the refugee context. It was noted that DNA testing potentially has serious implications for the right to privacy. Nevertheless, the UNHCR acknowledges that states have a legitimate interest in ensuring that there is proper and accurate identification of persons claiming family relationships with beneficiaries of international protection. Therefore, it is the position of the UNHCR that where DNA testing is required, in order to be lawful it must be shown to be necessary, so that any interference in the right to privacy is proportionate to the legitimate purpose the testing pursues. For DNA testing to be necessary and proportionate, other means of verification of family links must first have been shown to be insufficient. It was the view of the UNHCR that DNA testing should only be resorted to where serious doubts remain after all other types of proof have been examined or where there are strong indications of fraudulent intent and DNA testing is considered as the only reliable recourse to prove or disprove fraud.

Decision

104. The question at the heart of this appeal concerns the breadth of the definition of the word "child" in the context of family reunification as provided for in the Act of 2015. As can be seen from the submissions on behalf of Mr. X and of the UNHCR, family reunification is an important aspect of ensuring that a person granted refugee status or international protection is able to start a new life in the country to which they have come with the support of their family. The importance of this is recognised in various international instruments and, indeed, in our domestic law. Apart from international obligations arising from our membership of the United Nations, there are a number of relevant EU Directives as we have seen which touch on these issues, not to mention the provisions of the European Convention on Human Rights and in particular Article 8 thereof which may also be of relevance in given cases. There can be no doubt therefore that family reunification is an important part of our legal system in relation to asylum and international protection.
105. This case concerns the provisions of the Act of 2015 and the section dealing with family reunification, namely s. 56. As we have seen it provides in the first instance that a qualified person may make an application to the Minister for permission to be given to a

member of the family of the sponsor to enter and reside in the State. Thereafter the Minister is obliged to investigate the application to determine certain issues including the relationship between the sponsor and the person who is the subject of the application and the domestic circumstances of that person. A person seeking family reunification is obliged to co-operate fully in the investigation and if the Minister is satisfied that the person concerned is a member of the family of the sponsor, the Minister is obliged to give permission to that person to enter and reside in the State. In certain circumstances, the Minister can refuse to give permission to the person concerned to enter and reside in the State but for the purposes of this discussion it is not necessary to consider those provisions. The first point to note is that the person to whom permission is to be given in an appropriate case is "a member of the family of the sponsor". Section 56(9) goes on to define what is meant by the phrase "member of the family". Although I have previously set out the terms of s. 56(9)(d), given its centrality to the issues in this case it bears further repetition. It states as follows:

"In this section and *section 57*, 'member of the family' means, in relation to the sponsor -

...

(d) a child of the sponsor who, on the date of the application under *subsection (1)*, is under the age of 18 years and is not married."

106. A number of observations can be made straight away. First of all, in the context of "child" it will immediately be apparent that not every child, as that word is ordinarily understood, can be the subject of an application for family reunification. A child over the age of eighteen does not come within the definition of a member of the family. Likewise, a child under the age of eighteen but one who is married is also excluded from the possibility of being the subject of an application for family reunification. The third point to note is that to be the subject of the application, the child must be "a child of the sponsor". The critical question to be decided in this case is what does that phrase mean? The trial judge stated that there was no definition of the word "child" in the Act of 2015. He therefore took the view that given that there is "a wide diversity of family structures and the relationship of father/child is not confined (presumably deliberately not confined) by the 2015 Act to a biological father", he was of the view that to confine the definition of child as one including only biological children was not what was provided for in the Act of 2015. In order to consider whether the interpretation of the Act of 2015 by the trial judge is correct it is necessary to consider what the legislative intent of the Oireachtas was in passing the Act of 2015 in these terms. I referred earlier in the course of this judgment to the observations of McKechnie J. in the case of *C.M. v. Minister for Health* [2017] IESC 76. These provide a useful summary of the approach to be taken in ascertaining the intention of the legislature in passing a particular piece of legislation. The first step to be taken is to consider the ordinary and natural meaning of the words or phrases used but it may be helpful in considering the construction of a particular statute to have regard to the legislative history in that area. It occurs to me that in this case, the legislative history is particularly illuminating. I have referred previously to the provisions of s. 18(4)(a) and

(b) of the Act of 1996 which provided a definition of "dependent member of the family" which included any "...grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee...". The same language was used in Regulation 25 of the 2013 Regulations. It is relevant to note that in the Act of 2015 there is no longer included in the definition of member of the family, grandparents or wards or guardians. On the face of it, the provisions of the Act of 2015 are clearly more restrictive than its legislative predecessors.

107. Having considered the provisions of s.56(9)(d), it seems to me the legislature can only have intended the words "child of the sponsor" to mean a biological child. I am satisfied that this is the natural and ordinary meaning of the words "child of the sponsor". As we have seen, by virtue of the provisions of the Interpretation Act 2005, an adopted child falls into the same category. Can it be inferred as believed by the trial judge that given the wide diversity of family structures that the legislature in this case intended a broad definition of child to be given to that word as used in s. 56(9)(d)? The answer to that question in my view is clear. "Child of the sponsor" can only mean a biological or adopted child. If there was any doubt about that, it seems to me that the legislative history is illustrative. The fact that the legislature has seen fit to restrict the categories of those who can be regarded as members of the family is clear from the legislation, for example, by removing grandparents from the list of those considered to be members of the family. To interpret the phrase "child of the sponsor" as having a broader meaning than the biological child would be at odds with the clear intent of the legislature in restricting the categories of those entitled to be considered for family reunification. I find it very hard to understand how the phrase "child of the sponsor" can be read as including a relationship of father/child where that relationship is not a biological/adoptive relationship. I accept that that there is now a wide diversity of family structures as noted by the trial judge but I cannot agree with his conclusion that the relationship of father/child is not confined to a biological father in the context of this legislation. Bearing in mind the plain and ordinary meaning of the words "child of the sponsor" and the legislative history of the Act of 2015, I find it impossible to reach a conclusion that the legislature in making such a change from the provisions of the 1996 Act and the 2013 Regulations, intended by narrowing down the categories for whom family reunification could be sought, could at the same time be said to have intended to expand the category to whom the word "child" applied. Given that the Oireachtas had, in the Act of 1996 and in the 2013 Regulations expressly provided a broader definition of "member of the family", one would have expected that if the Oireachtas had intended to give a broader meaning to the word "child" in the Act of 2015, it would have said so clearly. It has not provided for a broader definition. Accordingly, I am satisfied that the use of the phrase "child of the sponsor" in the Act of 2015 is limited to the biological/adopted child of the sponsor. I accept that this may give rise to certain anomalies and one of the areas mentioned in the course of submissions was the situation in relation to surrogate children or indeed the children of a partner or spouse of the sponsor who were not the biological children of the sponsor. That there may be anomalous situations is undoubtedly the case but unfortunate though that may be, the fact that there may be anomalous situations created by the legislation does not in my view affect the interpretation of the statute. It is for these reasons that I am satisfied

that there is only one possible interpretation open having regard to the clear words of the statute.

108. Finally, I should say that while reference was made in the course of submissions to the definition of "child" in other statutory provisions, it is necessary to have regard when interpreting the word "child" to the use of the word in the statute at issue. The word "child" is capable of meaning different things in different contexts. The term as used and defined in other statutes can only be of limited assistance. The only other observation to make is that I fail to see how having regard to the "best interests" of the child can give rise to a broader interpretation of the word "child" when the natural and meaning of the word in the context of this legislation is clear.
109. Given that I am satisfied that the provisions of s. 56(9)(d) refer to the biological child of the sponsor, how then is it to be established that the person or persons in respect of whom an application for family reunification is made is in fact the biological child of the sponsor? It will be recalled that under the provisions of s. 56, the Minister is under a duty to investigate the relationship between the sponsor and the person or persons who are the subject of an application for family reunification. In addition, the sponsor is obliged to co-operate fully in the investigation. It will be noted that in this case Mr. X provided birth certificates for the two children concerned in which he is named as the father. In the letter from the Minister in which the request for DNA evidence was first sought, it was noted:

"In relation to your application it is not possible to verify the relationships of the subjects of the application to yourself on the basis of the documents submitted with your application. As a result, further evidence is now necessary in order to verify the relationship between you and the subjects of your application."
110. There is nothing to suggest that the Minister was not entitled to deal with this matter in this way. As will be recalled Mr. X initially indicated that he would provide such evidence but thereafter in correspondence he changed his mind about providing DNA evidence. That initial application was refused by letter of the 22nd August, 2016 and as has previously been set out the reason given was stated to be the fact that Mr. X was not in a position to undergo DNA testing. When the present application was made pursuant to the provisions of the Act of 2015 the issue of DNA testing once again arose. Mr. X again declined, reiterating the reason for his previous refusal. In the course of correspondence, it was pointed out to Mr. X that his previous application had been refused because Mr. X did not undergo DNA testing. The decision refusing the application made pursuant to the Act of 2015 expressly referred to the fact that Mr. X had refused to consent to DNA testing and on the information available, he had "failed to fully establish the familial link between himself and the two minor children listed above".
111. Given the factual background set out above, was it appropriate to have sought DNA testing and to have made the decision to refuse family reunification based on the refusal to provide such testing? Mr. X has contended that there was no lawful or administrative basis for the Minister to seek DNA testing in circumstances where birth certificates had

been submitted for the children naming him as the father and he had been granted guardianship in respect of the children by a court order in Cameroon. Nevertheless, even assuming that those documents are genuine, and there is no reason to suggest otherwise, they do not conclusively prove that Mr. X is the father of the children. Indeed, had the Act of 2015 not altered the position in relation to the categories of those who could seek family reunification, no doubt, the Cameroon Court order would have been of benefit to Mr. X in an application under the 2013 Regulations.

112. I think it has to be said that it is clear from a number of authorities that the Minister is entitled to seek DNA testing to resolve issues in relation to family relationships. In this regard the cases of *Nz.N. v. Minister for Justice* and *Z.M.H. v. Minister for Justice* provide support for this view. Clearly, the Minister was not in a position to order that Mr. X undergo such testing and was merely entitled to request that DNA evidence be provided. It is interesting to note the approach of the UNHCR in relation to the issue of DNA testing. The UNHCR recognises that DNA testing has serious implications for the right to privacy and expressed the view that for such testing to be necessary and proportionate, other means of verification should first be considered. It is only when those are considered to be insufficient that DNA testing should be considered. The view was expressed that DNA testing should only be resorted to where serious doubts remain after all other types of proof have been examined. The difficulty in this case is that serious doubts had been raised by Mr X himself as to Mr. X's paternity of the two children concerned. Those doubts (that he might not be the father of the children which were, he felt, supported by the fact that their mother had left the children to start a new life in England) having been raised by Mr. X himself in the letter of the 11th May 2016 from his solicitors to the INIS, (see para. 7 above as to the contents of the letter) it is difficult to see what other course could have been taken by the Minister other than to seek DNA testing to establish the relationship between Mr. X and the two children concerned, and the request by the Minister was reasonable and appropriate. Therefore, I cannot see any basis on which it could be suggested that the reliance on Mr. X's refusal to undergo DNA testing was an impermissible interference with the privacy rights of Mr. X. In those circumstances, the decision of the Minister to decline family reunification on that basis is to my mind one that cannot be challenged.
113. There are a number of observations to be made in this regard. In the course of submissions, reference was made to the fact that the Minister has provided guidelines on DNA sampling for the purposes of family reunification in the "non-EEA visa context". In those guidelines it is said at para 4:

"No negative inference will be drawn merely from the fact that the applicant does not wish to undergo DNA testing."

114. It is perhaps unfortunate that no such guidelines are available in relation to the use of DNA sampling for the purposes of family reunification in this context. Having said that the circumstances of this case were such that having regard to the serious doubts that

arose in relation to paternity, the only way to resolve those doubts was by seeking DNA evidence of the paternity of Mr. X in relation to the two children.

115. The only other observation to be made in relation to DNA testing is that it is not something that should be sought or requested as a matter of routine. It is something that should only arise in the limited circumstances where serious doubt has been raised as to the issue of paternity. There is no doubt that DNA testing has implications for the right to privacy and that as such, care should be taken before seeking that an individual undergo DNA testing to establish paternity. It would be inappropriate if the Minister were to do so as a matter of course and therefore I would be of the view that resorting to DNA testing should be limited to cases of "serious doubt".
116. In the circumstances, I can see no basis for challenging the decision of the Minister based on the refusal of DNA testing by Mr. X.
117. The final argument raised on behalf of Mr. X concerns his reliance on the 2013 Regulations and his assertion that under EU law the rights he would have had by virtue of the 2013 Regulations to family reunification in respect of the children concerned remain notwithstanding the repeal of the 2013 Regulations by the Act of 2015. The 2013 Regulations were as stated therein made for the purpose of "giving further effect" to the Qualification Directive. The Qualification Directive prescribes the minimum standards for those who need international protection and the extent of the protection granted. It is important to note that the Qualification Directive sets out the "minimum standards". As stated in the Recitals to the Qualification Directive at paragraph 8:

"(8) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection."

118. It is the case that in enacting the 2013 Regulations the Minister went further than required by the Qualification Directive in terms of the requirements for maintaining family unity. First of all, the 2013 Regulations do not contain the significant restriction contained in the Directive in the definition of family members to those who "are present in the same Member State in relation to the application for international protection". The definition of family member contained in the Qualification Directive goes on to state that:

"(h) 'Family members' means...

- the minor children of the couple referred to in the first indent or of the beneficiary of refugee or subsidiary protection status, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law..."

119. The other relevant aspect of the definition of “family member” was that it included the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship but did not extend to other family members. As will be recalled, the 2013 Regulations went further than that and included within the definition of family members people such as grandparents and in certain circumstances siblings. It was argued on behalf of Mr. X that he is still entitled to benefit from the application of the 2013 Regulations insofar as family reunification is concerned. Essentially, the argument is made that the 2013 Regulations were made in accordance with the provisions of s. 3 of the European Communities Act 1972. The Regulations, having been made for the purpose of giving further effect to the Qualification Directive, could only have been made by the Minister if he was implementing the Regulations and did not go beyond including in the Regulations those which were in terms of s. 3(2) “incidental, supplementary and consequential provisions” necessary for the purposes of the Regulations. Essentially, the argument is that insofar as the Minister contends that the 2013 Regulations went beyond what was required by the Qualification Directive, the 2013 Regulations would have been *ultra vires* the power of the Minister having regard to the provisions of s. 3 of the European Communities Act 1972. Therefore, it is argued that the Qualification Directive must be the basis for the broader entitlement to family reunification that was provided for in Regulation 25.

120. It seems to me that the provisions of the Qualification Directive as to the definition of “family member” are quite clear. It is also clear from the provisions of the 2013 Regulations that the State went further than was provided for by way of minimum standards in the Qualification Directive. Although there is a suggestion that the Minister was acting *ultra vires* in transposing the Qualification Directive by means of a Statutory Instrument, Mr. X has not sought to challenge the validity of the Regulations on that basis, as was pointed out on behalf of the Minister, while at the same time, the Minister did not concede that the Regulations may have been *ultra vires*. Whatever the status of the 2013 Regulations, the position is that those Regulations have been repealed and therefore I cannot see any basis upon which it could be suggested that Mr. X can derive any benefit from them. Insofar as it was suggested that Mr. X had vested rights under the 2013 Regulations to seek family reunification I cannot disagree with the observation of the trial judge in this regard. As he pithily stated in para 1:

“...Nor does the court accept that Mr. X had a vested right under the 2013 Regulations to seek family reunification; he had but a right to apply for same and did not do so...”

121. As the trial judge also noted this application was made not on the basis of any vested right under the 2013 Regulations, but by agreement between the parties it was made pursuant to the provisions of s. 56(9) of the Act of 2015 and therefore I cannot see any basis whatsoever upon which Mr. X can rely on the 2013 Regulations.

Conclusions

122. The key issue at the heart of this case concerns the definition of “child” as that phrase is used in s. 56(9)(d) of the Act of 2015. The word “child” in that context can only be a

reference to a biological/adoptive child of the sponsor. That is the literal and ordinary meaning of the word. That that is so is reinforced by an examination of the historical background to the legislation concerned from which it is manifestly clear that rather than introducing a broader meaning of the word "child" in the section, the overall effect of the section was restrictive in terms of those to whom family reunification could apply.

123. This was a case in which a serious doubt arose as to the paternity of the two children in respect of whom Mr. X sought family reunification. That serious doubt was created by Mr. X himself in correspondence with the INIS. In those circumstances it was appropriate to seek DNA testing to establish the relationship between Mr. X and the children concerned. In circumstances where he refused to undergo such testing, the Minister was entitled to draw an inference from that fact and to refuse the application. Finally, Mr. X has no entitlement to rely on the 2013 Regulations by way of vested right or otherwise in relation to his application.
124. In the circumstances I would allow the appeal of the Minister and would set aside the order of *certiorari* made herein.