APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL
CIVIL

Court of Appeal Record Number : 2023/290
High Court Record Number: 2022/346JR
Neutral Citation: [2024] IECA 206

Whelan J.
Power J.
Butler J.

BETWEEN/

NKOSINOSIZO SIBANDA

APPLICANT/ APPELLANT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND,

AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Butler dated the 30th day July 2024

Introduction

1. It is a feature of the circumstances in which a person may be forced to flee their country of origin in fear of persecution that they will often have to do so suddenly leaving behind members of their immediate family. It is therefore unsurprising that the law should facilitate people who have been recognised as refugees in seeking the reunification of their families in the State in which they have been granted protection. This judgment looks at the

extent to which it is permissible for Irish law to place limits on those who can be regarded as members of a refugee's family and thus who are entitled under statute to be granted permission to enter the State for the purposes of residing here with the refugee.

2. The appellant is a recognised refugee who fled Zimbabwe leaving her three children behind her. On being granted a declaration recognising her status as a refugee, she made an application under section 56(1) of the International Protection Act 2015 for her children to be given permission to enter the State and to reside here with her. The first respondent (the Minister) declined to process the application in respect of her eldest child ("the/her daughter") on the basis that that child was not a minor on the date the application was made – which is a statutory requirement under section 56(9)(d) of the 2015 Act. The appellant regards this as fundamentally unfair as her daughter was a minor on the date on which she made her application for asylum some two years earlier and effectively "aged out" during the time it took the Minister to determine her claim for asylum.

3. The appellant contends that section 56(9)(d) of the 2015 Act is unconstitutional, in breach of European law and of her rights under the European Convention on Human Rights (ECHR) for reasons which will be expanded upon more fully below. The core argument she makes is based on equality grounds. She contends that the decision of the Minister to grant her asylum is declaratory in nature and recognised her existing status as a refugee rather than conferring that status upon her. Consequently, she contends that the relevant date for determining whether her children are minors and thus eligible family members for the purposes of family reunification should be the date upon which she applied for asylum. She argues that she is being treated unequally compared to the parents of similarly aged children who made applications for asylum at the same time but whose applications were determined more quickly by the Minister. Needless to say, these arguments are disputed by the respondents.

4. The respondents also contend that the appellant's application for judicial review was premature. The appellant has not availed of the opportunity open to her to make an application to the Minister for a long-stay (join family) visa on behalf of her daughter. Such applications are made pursuant to a 2016 Policy Document on Non–EEA Family Reunification. The appellant argues that the scheme reflected in that Policy Document is not an effective remedy or a reasonable alternative remedy which she must invoke before being entitled to bring proceedings.

5. The facts on which the appellant's case is based are undisputed and I need only advert to them very briefly. I will then look at the High Court judgment from which this appeal is taken (Barr J. [2023] IEHC 501) and, in circumstances where the High Court judge regarded himself as bound by a recent judgment of another High Court judge which delt with the issues arising in this case, I will also look at that judgment (*SH and AJ v. Minister for Justice*, Ferriter J. [2022] IEHC 392). Having looked at the broad parameters of the core equality arguments raised by the appellant I will then address that argument as it applies to each of the headings under which she makes her case, i.e. EU law, the Irish Constitution, and the ECHR. I will address the arguments made by the parties under the respective headings to which they are relevant. There is obviously a considerable overlap between these three headings and, where appropriate, I will attempt to give an overview of the relevant principles before delving into the detail.

Factual background:

6. Because the facts are largely undisputed it is unnecessary to set them out in any detail. The appellant is a national of Zimbabwe and until late 2019 lived there with her three children. The father of her eldest child is deceased and the relationship with the father of her two younger children had ended at some unspecified point prior to the events which led her

to flee her country. The circumstances giving rise to the appellant's claim for asylum are not relevant to the issues in these proceedings. It is sufficient to note that they arose over a number of months in 2019 and were undoubtably very traumatic for her. She made arrangements to leave her country of origin in considerable haste having been subjected to imprisonment and torture. It is not entirely clear from the papers who took responsibility for the children nor where they have been living since her departure. However, this is not immediately relevant as the appellant's claim is based on an entitlement to be treated equally under the relevant statutory provisions and not on the particular circumstances of her children and, in particular, of her daughter.

7. The appellant arrived in Ireland in November 2019 and made an application for international protection on the date of her arrival. She submitted a completed questionnaire, necessary for the processing of her application, some two months later at the end of January 2020. In January 2022 she received a letter from the International Protection Office advising her that her claim had been successful and on the 2nd of February 2022 the Minister granted her a formal declaration recognising her as a refugee. As a refugee the appellant became eligible to make an application for family reunification under section 56 of the 2015 Act and she submitted that application on the 4th of March 2022. By letter dated 7th March 2022 the Minister declined to process the application in respect of her eldest child on the basis that she was not a minor on the date the application was made. Although no details have been provided in the papers, I presume that the application in respect of the two younger children was processed in normal course.

8. It is evident from this brief chronology that it took the Minister over two years to process the appellant's application for international protection. The appellant has not made a complaint of delay in these proceedings. This is possibly because in *SH and AJ* Ferriter J. found, on very similar timelines, that there had been no culpable delay on the part of the

Minister in circumstances where during this time for a period totalling about one year the processing of international protection applications had been severely disrupted due to the public health measures put in place as a result of the Covid-19 pandemic. In any event the case made on behalf of the appellant is based on an entitlement to have her children's ages assessed for family reunification purposes as of the date of her asylum claim and not the date of the application for family reunification. The length of time taken to process her application is legally irrelevant in that context.

9. There is one other feature of the case which may have led the appellant's legal advisors to the view that a complaint of delay should not be pursued. For reasons which are not explained the appellant gave an incorrect date of birth for her daughter in her completed questionnaire. The respondents have not made an issue of this and it had no adverse impact on the appellant's credibility for the purposes of determining her application for asylum. The mistake was not a mere typographical error as the same incorrect date was given on each occasion that she was required to give details of her family, i.e., three times in all. Similarly, she gave the same incorrect date of birth at a preliminary interview with the IPO under section 13(2) of the 2015 Act held in December 2019. The relevance of the error is that if her daughter had been born on the date originally supplied, October 2005, she would still have been under eighteen years of age on the date the appellant received the declaration recognising her refugee status in February 2022. Because her daughter was born two years earlier, in October 2003, she had in fact turned eighteen in October 2021 some three months before the appellant received her declaration. However, due to the incorrect information supplied by the appellant, neither the IPO nor the Minister could have been aware that the appellant might lose the statutory right to family reunification under section 56(1) if the application were not processed more speedily.

Legal proceedings:

10. The appellant was granted leave to apply for judicial review on 16th of May 2022. The relief sought in her statement of grounds seeks to quash the decision of 7th of March 2022 declining to process the application for family reunification in respect of her daughter. Declaratory relief is also sought including a declaration to the effect that section 56(9) of the 2015 Act is incompatible with EU law, the Irish Constitution, and the European Convention on Human Rights Act 2003. The legal ground upon which this relief is sought is set out in a single discursive paragraph the key portion of which starts from the premise that recognition of refugee status is a declaratory act and continues as follows:-

> *"... any third country national or stateless person who fulfils the material conditions laid down by Chapter III of [the Qualification Directive] has a subjective right to be recognised as having refugee status, and that is so even before the formal decision is adopted in that regard. It therefore follows, to make the right to family reunification under section 56 of the International Protection Act, 2015 depend upon the moment at which the Minister formally adopts the decision recognising the refugee status of the person concerned and, therefore, on how quickly or slowly the application for international protection is processed by the relevant authorities, would call into question the effectiveness of that provision, which is to promote family reunification and to grant in that regard as specific protection to refugees, in particular on unaccompanied minors, but also the principles of equal treatment and legal certainty.*"

The language used in the latter part of this extract is lifted almost *verbatim* from a judgment of the CJEU in Case C-550/16 *A&S v. Staatssecretaris van Veiligheid en Justitie* ("*A&S*"). That judgment dealt specifically with the interpretation of the Family Reunification Directive (Council Directive 2003/86/EC), a directive to which Ireland has not opted-in (see

further below). One of the major issues on this appeal is the extent to which the jurisprudence of the CJEU in this area applies, whether by analogy or because international protection is an area within the EU sphere of competence, when Ireland has opted out of the directive in question.

11. The statement of grounds makes express reference to Article 40.1 of the Constitution. The notice of appeal purports to expand this to include Article 40.3.1 and Article 41, neither of which was originally pleaded. It also refers to Articles 18 and 20 of the Charter of Fundamental Rights of the EU ("the Charter") although this is qualified "*in so far as the right to asylum is provided for by Council Directive 2004/83/EC*". A similar qualification is included in respect of the plea under Article 8 of the ECHR "*in so far as it can be invoked by persons excluded from the scope of the Qualification Directive but falling within the scope of national law*", it is contended that section 56(9) is a wholly disproportionate interference with the appellant's right to a family life.

12. In the statement of opposition, the respondents expressly plead that the application is premature in that the appellant has not exhausted other means to seek the admission of her daughter to the State – i.e., an application under the Policy Document. Thereafter, the factual basis of the appellant's case is admitted but the legal grounds pleaded by the appellant are denied both generally and expressly relying on the resolution of the same issues in favour of the respondents by Ferriter J. in *SH and AJ*. It is contended that the decision of the 7th of March 2022 is valid as the daughter was eighteen years of age at the time of the application for family reunification and thus, did not meet the requirements of section 56(9)(d).

High Court Judgment:

13. This appeal is somewhat unusual in that in the High Court counsel for the appellant acknowledged that the issues in the case had recently been determined by the High Court in

SH and AJ and, having regard to the principles in *Hughes v. Worldport Communications Inc* [2005] IEHC 189 ("*Worldport"*), the trial judge was likely bound by the earlier decision. Counsel did not content that the case fell within any of the exceptions to the general principles outlined in *Worldport* but flagged that, assuming *SH and AJ* were to be followed, it was intended to appeal to this court. For the record, no appeal was brought from the decision in *SH and AJ*.

14. That concession was appropriately made. Indeed, in a case which is of relevance to the substantive issues in these proceedings, Dunne J. recently observed in *A, S and S, and I v. Minister for Justice* [2021] 3 IR 140 ("*ASSI*") at para 63:-

> "*Apart from the obvious uncertainty posed by a situation where judges were free to come to a view on a particular issue without regard to the view expressed previously by a colleague, as Clarke J. noted, the lack of certainty could give rise to increased litigation as parties and practitioners struggled to ascertain the legal status of a particular legal principle or the correct interpretation of a piece of legislation. It is for that reason that a judge of the same jurisdiction should have regard to a decision of a colleague on the same issue and should as a general rule follow that decision unless there is a clear basis for departing from that decision*."

15. As a result of this, having set out the background and the submissions made by each side, Barr J.'s judgment does not engage substantively with the arguments save to note that they were all canvased in *SH and AJ* and to adopt the reasoning and conclusions of Ferriter J. in that case. In one respect Barr J. goes further than *SH and AJ*. Had it been necessary to do so, he would have refused the appellant relief on the grounds that the existence of an alternative remedy of which she had not sought to avail rendered her application premature.

Judgment of Ferriter J. in *SH and AJ*:

16. This was a joint judgment delivered in respect of two separate cases which raised similar issues, which are in turn similar to the issues raised in this appeal. In *SH* the applicant's son aged out whilst SH's successful application for international protection was under consideration by the authorities in this jurisdiction. In principle the case is factually identical to this one. In *AJ* the facts are slightly different in that the child in question turned eighteen very shortly after a declaration was granted to the parent, but the applicant did not manage to submit an application for family reunification within the brief window in which it would have been possible to do so whilst the child was still a minor. Some of the issues raised by the applicants in those cases and determined against them by Ferriter J. are not relevant to or have not been raised in this case. Thus, large portions of the judgment are not relevant for present purposes including, *inter alia*, those dealing with delay in the decision making process; whether the Policy Document should be struck down for being systemically deficient; whether in *AJ's* case there had been sufficient compliance with Article 22 of the Qualification Directive in the provision to him of information about the rights relating to refugee status and, specifically, the family reunification process in a language which he understood and a claim for *Francovich* damages for the alleged breach of Article 22.

17. The central finding made by Ferriter J. was that neither section 56(9)(d) nor the manner in which it operated in those cases was unconstitutional or in breach of EU law or of the ECHR. In reaching this conclusion he rejected the applicants' central contention that they had a self-standing right to family reunification from the point at which they had submitted their applications for international protection. Although the declaratory nature of a decision recognising someone as a refugee was accepted by Ferriter J., he did not accept that Article 18 of the Charter created a right to family reunification for a recognised refugee much less a right dating from the date of the asylum application. Such a right was created

legislatively by the Family Reunification Directive to which Ireland had not opted in and, therefore, the case law on that directive could not be applied to section 56.

18. As regards equality, which was the basis on which section 56 was alleged to be unconstitutional and in breach of the ECHR, Ferriter J. relied heavily on the decision of the Supreme Court in *ASSI* rejecting claims that section 56(9)(a) and section 56(8) of the 2015 Act were unconstitutional based on similar allegations of inequality of treatment. In particular, he relied on the finding that the State enjoyed a margin of appreciation in deciding on how it chooses to introduce family reunification rights outside of those stipulated in the Qualification Directive. Ferriter J. identified a number of instances where the law differentiates in the conferral of benefits between people who had received a grant of international protection and those who had merely applied for international protection but whose applications had not yet been determined. He noted that the case law, including *BK v. Minister for Justice* [2011] IEHC 526 and *Michael and Emma v. Minister for Social Protection* [2019] IESC 82 supported the validity of such distinction. The fact that a grant of refugee status is declaratory in nature did not mean that the benefits to which a refugee is entitled would automatically be applied retrospectively.

19. In considering the applicants' equality argument Ferriter J. held that in circumstances where there was no self-standing right to family reunification, the appropriate comparator for equality purposes was a person who made an application for family reunification on the same date as the applicants, not a person who had made an application for international protection on the same date. To hold otherwise would, in Ferriter J's. view, involve the court in impermissibly rewriting section 59(9)(d) by replacing the reference to the date of application for family reunification with a reference to the date of application for international protection.

20. Looking at the applicants' proportionality argument, Ferriter J. regarded the objective of section 56 as being to facilitate family reunification for persons who have been declared to be refugees. In the absence of a self-standing right to family reunification, the rights against which a proportionality analysis was required to be conducted were the right to respect for family life, the right to be free from invidious discrimination and, potentially the rights of children. He did not regard the choice to determine whether a child was a minor by reference to the date of a family reunification application as failing a proportionality test in light of these rights. It did not follow from the fact that the law might be perceived as harsh by those falling just outside the cut-off date, that it was unconstitutional or in breach of the ECHR. He regarded the case law of both the Irish courts and of the European Court of Human Rights as supporting this conclusion (see *ASSI* (above) and *Tanda – Muzinga v. France* 2260/2010 (10th July 2014)).

21. Ferriter J. did not conclude that the failure to have made an application under the Policy Document precluded the applicants from challenging the decisions under section 56. Nonetheless he dismissed *SH*'s assumption that he could not come within the Policy Document as he did not meet the financial thresholds. At para. 81 of his judgment he notes that while the Policy Document and its process "*should be validly regarded as a manifestation of the Minister's overriding discretion*" it was "*not exhaustive of that discretion*". Even if the applicants were unable to bring themselves within the financial thresholds which are generally applicable, the Minister had a residual discretion (expressed at para. 1.12 of the document) to grant family reunification in exceptional circumstances which would normally be humanitarian in nature. Ferriter J. acknowledged the permission granted under the Policy Document would not confer the same level of legal right as a permission under section 56 but the existence of the scheme was nonetheless relevant to the Court's assessment of the State's broader ability to vindicate the family rights of the

applicants. Interestingly, although Ferriter J. expressly found that the State respondents had not been guilty of culpable delay due to the length of time it took to determine the applications for international protection, he nonetheless regarded that delay as something which could be relevant to the exercise of the Minister's discretion and to the scheme (see paras. 63, 67 and 149 of his judgment). He characterised the situation as one in which the applicants may have missed out on a statutory right to family reunification by reason of a significant delay in the processing of their applications for which they were not responsible. This was something to which "*appropriate weight*" should be given by the Minister in assessing any application under the Policy Document.

Overview of the Legal Framework:

22. The basic equality argument made by the appellant is similar under all three headings – i.e., EU Law, the Constitution, and the ECHR – but the working out of the argument necessarily differs in each case because of the variation in the legal instruments by reference to which the argument is made. In all cases the appellant contends that the application of section 56(9)(d) to the particular facts has resulted in an inequality of treatment of her case compared to someone with a child of the same age who made an application for international protection on the same date but who received a declaration at least three and a half months earlier. No actual comparator was identified by her but in fairness, given the statutory confidentiality of the protection process and the applicability of general rules regarding data protection to family reunification, it would be very difficult if not impossible for her to do so. The respondent does not dispute the possibility that an applicant with a similarly aged child might benefit from a statutory right to family reunification if their application for international protection were determined in a shorter period.

23. In so far as relevant, section 56 of the 2015 Act provides as follows:-

(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 for a family member of the family of the sponsor to enter and reside in the State…*

Note that under section 2(1) of the 2015 Act a "*qualified person*" is defined as someone who is "*a refugee and in relation to whom a refugee declaration is in force*". [Similar provision is made in respect of persons who have been recognised as being eligible for subsidiary protection but for convenience I will refer only to these provisions in so far as they affect refugees].

"*(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…*

(8) An application under subsection (1) shall be made within twelve months of the giving under section 47 of the refugee 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."

24. A few things might be noted about these provisions. Firstly, a refugee does not become a "*qualified person*" and thus is not eligible to make an application for family reunification until he or she has been granted a refugee declaration. Thereafter, any application for family reunification must be made within twelve months from the date of the grant. Therefore, the statutory scheme regards the grant of a refugee declaration to be key both in terms of a refugee's eligibility to make an application for family reunification and for the purposes of commencing the time limit within which such an application must be made.

25. Secondly, if the application is verified by the Minister under subsection (2) (i.e. the identity and domestic circumstances of the family member and the relationship of that person to the sponsor have been established) then under subsection (4) the Minister does not have discretion to refuse permission to the family member to enter and reside in the State save on very limited grounds under subsection (7) which do not apply here. Not only is the Minister obliged to permit the family member to enter and reside in the State, that person will also be entitled under section 53 to seek and enter employment or carry on business, to receive medical care and social welfare benefits subject to the same conditions applicable to Irish citizens. The entitlement to work in the State and to receive social welfare constitute substantial benefits conferred upon the family members of a refugee which will not necessarily be available to other migrants entering the State. At the same time unless the

family member is in a position to seek and obtain gainful employment, the obligation on the State to provide the same medical care and social welfare benefits to a refugee's family members as are provided to Irish citizens may impose a significant financial burden on the State.

26. It is notable that the four categories of family members in respect of whom an application may be made are treated differently depending on whether the relationship is one between adults (marriage/ civil partnership) or between parents and child. In the case of the former the relevant date of establishing the subsistence of the relationship is the date on which the application for international protection was made. In the case of the latter and regardless of whether the application is made by a child to bring their parents into the State or *vice versa*, the relevant date for assessing whether the person concerned qualifies as a family member (i.e. is under eighteen or is the parent of someone who is under eighteen) is the date of the application of family reunification. In the circumstances, this distinction must be presumed to have been deliberately intended by the Oireachtas.

Overview of the Appellant's Case:

27. In her written legal submissions, it was clearly stated that the appellant's case was not based on asserting either that there was a free-standing right to family reunification or that family reunification was itself a fundamental right. Her case is exclusively based on the premise that by choosing the date of the application for family reunification as determinative of whether her daughter qualifies as a family member under section 56(9)(d) the Oireachtas has acted unfairly. This is because it has chosen a date which is outside the control of the appellant and which creates the potential for different outcomes depending on the length of time it takes for the State authorities to determine the application for international protection.

Precisely how this is contended to be illegal varies under each of the three headings which I will examine in due course.

28. There was some discussion at the hearing of the appeal as to why a choice of the date on which the application for asylum is made is inherently fairer in circumstances where many refugees may spend weeks if not months in transit from their countries of origin to a State in which they can make an application for international protection. A teenage child left behind by a refugee in those circumstances could equally age out before the refugee had the opportunity to submit an application for international protection in a safe country. While the grant of a declaration is declaratory of the refugee's existing status, there is no particular reason for linking the date of the application for asylum with the commencement of that status. In reality, save in the case of a refugee *sur place*, the refugee's status as a refugee is likely to have crystallised at the point when they felt compelled to flee their country of origin.

29. The appellant points to the administrative convenience of treating the date of application for international protection as the basic date from which someone should be considered to be a refugee but accepts that not all of the benefits which flow from that status should be backdated. No logical rationale was advanced for distinguishing between the rights the appellant says should be treated as having accrued retrospectively (i.e. family reunification) and those which she accepts do not (e.g. the right to social welfare payments) This is particularly striking in circumstances where our social welfare legislation has an established mechanism for paying arrears of benefit to a claimant in respect of a period for which they are subsequently determined to have been eligible.

30. Although it will only become relevant if the appellant succeeds, there is potential for different outcomes depending on the heading or headings under which she might succeed. If section 56(9)(d) is inconsistent with EU law it may in certain circumstances be disapplied so as to allow directly effective EU law provisions to apply in its stead. However,

if it were found to be unconstitutional, then unless the unconstitutional portion could be severed in a constitutionally permissible manner, the only solution available to the court would be to strike down the subparagraph as a whole. This could be counterproductive in terms of the benefit intended to be conferred on other people. If section 56(9)(d) were found to be incompatible with the ECHR, then the appellant's remedy would be a declaration of such incompatibility under section 5 of the ECHR Act 2003 (damages under section 3 of that Act have not been sought). The provision itself would remain valid and enforceable and the Minister would not be obliged to disapply it in ease of the appellant and her daughter. Whilst it might be reasonable to expect that the Oireachtas would move promptly to examine and replace a law found to be incompatible with the ECHR, this is not an automatic and certainly not an immediate consequence of such a finding.

31. Before turning to consider the equality argument under the three different headings, it might be useful to understand the particular way in which the appeal has been framed by the appellant. Firstly, as previously noted, the appellant does not contend that there is a free-standing right to family reunification at any level. Her case is that she and her daughter have been subject to an impermissible difference in treatment because of the manner in which section 56(9)(d) operates. Secondly, the respondents have not contested the proposition that the appellant and her now-adult daughter constitute a family for the purposes of the analysis which follows.

32. Significantly, the appellant does not challenge in principle the entitlement of the Oireachtas to differentiate between children who are under eighteen and those who are over eighteen for the purposes of family reunification. It seems inferentially to be accepted by her that such age differentiation has a logical underpinning and that it marks the distinction between childhood and adulthood and the point at which society regards a young person as no longer being dependent on their parents in any legal sense. The case made is narrower

and focuses only on the point in time by reference to which the daughter's adulthood is to be assessed. It is not disputed that the daughter is now an adult and was so at the time the application for family reunification was made. Apart from her date of birth, the court knows very little about the daughter and in that sense she is strangely absent from the proceedings. Although an adult, she is not a party to this litigation which has ostensibly been brought for her benefit. The court knows very little about her relationship with her mother and absolutely nothing about her current circumstances.

33. Finally, as noted the appellant's case is not premised on the respondents being responsible for any culpable delay in the determination of her application for international protection. In the course of the appeal hearing it was accepted by counsel on her behalf that the processing of any application for international protection will necessarily take some time during which a teenage child could age out even if the protection decision were made very promptly.

EU Law:

34. The appellant's case under European law is based on the interrelationship between the Charter and two EU Directives, the Qualification Directive (2004/83/EC) and the Family Reunification Directive (2003/86/EC). It is particularly complex as the directives in question are ones which fall within the area of freedom, security and justice ("AFSJ") in respect of which Ireland has a flexible "opt out". This means that Ireland is not bound by the directives in issue but can, if she chooses, opt in and become so bound. That choice can be made at the time the directive is adopted or at a later stage. Ireland has not opted into the Family Reunification Directive. She has opted into the Qualification Directive but did not opt in to a subsequent recasting of that directive in 2011. The scope of the Charter is defined in Article 51 which clarifies that it is addressed to Member States "*only when they are*

implementing Union law". One of the key issues under this heading is the extent to which Ireland can be said to be implementing EU law when that law is contained in directives in respect of which the State has opted out.

35. Article 18 of the Charter recognises a right to asylum in the following terms:-

> "*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union*."

36. The respondents point out that the Geneva Convention focuses on the right of a "*qualified person*" to be recognised as a refugee rather than on the content of that status once it is granted. Further, the Geneva Convention does not require its signatory states (of which Ireland is one) to provide for the reunification of the families of recognised refugees in the states in which they have been granted refuge although the UNHCR in its Handbook on the Procedures and Criteria for Determining Refugee Status Guidelines on International Protection ("the UN Handbook") encourages the facilitation of family reunification. The substantive content of refugee status, as a matter of EU law, is to be found in a series of directives.

37. Before moving to these directives, Chapter III of the Charter which deals with "Equality" should be noted. Article 20 headed "Equality before the law" provides as follows:-

> *"Everyone is equal before the law."*

Within the same chapter, Article 21 expressly prohibits discrimination on a number of grounds including "*age*". Article 24 sets out "*the rights of the child*" and includes a right to "*such protection and care as is necessary for their wellbeing*" (Article 24(1)); that their "*best interests must be a primary consideration*" in all actions relating to children (Article 24(2))

and that every child has a right "*to maintain on a regular basis a personal relationship and direct contact with both his or her parents*" (Article 24(3)). It is easy to see how these provisions support family reunification for the minor children of recognised refugees.

38. The first of the two directives on which the appellant relies is the 2004 iteration of the Qualification Directive (Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or persons who otherwise need international protection and the content of the protection granted). Ireland was not obliged to but did opt into the Qualification Directive. There is a more recent recast version of the Qualification Directive (Directive 2011/95/EU) but Ireland has not opted into it and remains governed by the original 2004 Qualification Directive. The Qualification Directive introduced the notion of subsidiary protection as a parallel form of international protection and its provisions apply either identically or with some variation to both refugees and persons entitled to subsidiary protection. Again, for convenience I will refer to only refugees in the discussion which follows as that is the status which has been afforded to the appellant in the case.

39. In the context of the appellant's argument, it is potentially significant that the purpose of the Qualification Directive (as defined in Article 1) is in part to lay down minimum standards for the content of the protection granted to refugees. The appellant relies on two elements of the Qualification Directive, Recital 14 and Article 3.

40. Recital 14 states that "*the recognition of refugee status is a declaratory act*". In simple terms a person does not become a refugee because they are recognised as such; rather they are recognised as already having that status by reason of the circumstances which led them to seek protection. Therefore, when the law confers rights on refugees, those rights accrue by reason of a person's status as a refugee and not by virtue of the formal recognition of that status. On the basis of this reasoning the appellant argues that she became entitled to

family reunification because she is a refugee at the point where she made her application for asylum in Ireland at which time her daughter was still a minor. Consequently, she argues that it is not open to the State to frame the law giving effect to family reunification in a manner which excludes her daughter.

41. There are a number of difficulties with this argument some of which I have already adverted to. It is both practically and legally impossible to confer rights on a person who is a refugee before it has been formally acknowledged that they have that status through procedures established for that purpose. Nothing in the corpus of EU law requires the back-dating of the substantive rights and benefits to which a refugee becomes entitled on recognition as such, retrospectively to the point where they made their application in the host country. Instead, the law ensures a level of protection and support for people who have made applications for asylum before those applications have been determined, most notably by preventing a forcible return to their country of origin until their application has been fully considered and then only if rejected.

42. In the context of the declaratory nature of a decision recognising someone as a refugee, save for administrative convenience it makes no more sense to fix the starting point at the time of the application for protection than at the time the refugee fled their country of origin. Picking any cut-off point by reference to which the ages of a refugee's children fall be determined for the purposes of family reunification will necessarily leave some people on the wrong side of the point chosen. Short of a scheme where somebody validly the subject of an application for family reunification would become ineligible if they turned eighteen whilst that application was being processed, the real complaint in equality terms is that some young adults would be able to benefit from family reunification because of the happenstance that they turned eighteen after the application for family reunification had been made in

respect of them whereas others who had turned eighteen before an application was made will not be able to do.

43. The second element of the Qualification Directive on which the appellant relies is Article 3 headed "*more favourable standards*" which states as follows:-

> "*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*."

The appellant argues that section 56, by providing for family reunification in circumstances where Ireland is not legally obliged to do so, is a more favourable standard regarding the content of refugee status. Thus, it is argued that family reunification under Irish law comes within the scope of EU law and, consequently, Articles 18 and 20 of the Charter even though Ireland has not opted into the Family Reunification Directive.

44. This argument was vehemently opposed by the respondents who argued that it simply cannot be the case that by legislating in the field of asylum and immigration generally, Ireland brings itself within the competence of EU law in an area in respect of which it has expressly opted out. This is even more so in circumstances where the Qualification Directive does not itself deal with family reunification. There are separate provisions in the Qualification Directive directed at the maintenance of family unity (Article 23). These apply to the family members of a refugee who do not themselves qualify for protection and entitle them to claim certain practical benefits under the directive. However, the application of this provision is limited by the definition of "*family members*" in Article 2 of the Qualification Directive. This covers only family members of the beneficiary of refugee status "*who are present in the same Member State*". Thus, there is no provision in the Qualification Directive which confers a right on a refugee to have his family members

join him in the State in which his status as a refugee has been recognised. Although the Recast Qualification Directive makes more generous provision regarding family members by expressly including unmarried partners and the parents of an unaccompanied minor, it equally does not confer a right of family reunification on refugees.

45. The Family Reunification Directive on the other hand does confer a right upon refugees to be joined by certain family members in the Member State where they have been granted asylum. The Directive itself is broader and applies to all settled migrants (i.e. non-EU citizens) residing lawfully in the territory of a Member State. Whilst Member States are required to authorise the entry and residence within their territory of family members (as defined in the directive) of settled migrants, they are entitled to set conditions requiring the migrant to be able to provide accommodation, health insurance and financial support to ensure that any family members who are admitted do not become a burden on the social assistance system of the State in question (see Article 7). However, Chapter V makes special provision for the family members of refugees, largely by way of derogation from the conditions that Member States are otherwise entitled to impose on migrants and their families. In particular, refugees do not have to meet the financial conditions of Article 7 and are entitled to make an application for family reunification immediately upon being granted refugee status whereas settled migrants may be required to have been lawfully resident in the Member State for up to two years. Indeed, in order to benefit from the derogation from Article 7, Member States may require an application for family reunification to be made by a refugee within three months of being granted that status.

46. Article 4 of the Family Reunification Directive sets out the family members who may be the subject of an application for family reunification by a migrant and comprise basically the migrant's spouse and minor children (including the minor children of the spouse and adopted children). A minor child is defined as being "*below the age of majority*

set by the law of the Member State concerned and must not be married". Provision need only be made for adult, unmarried children "*where they are objectively unable to provide for their own needs on account of their state of health*" (Article 4(2)(b)).

47. Article 10 makes broader provision regarding eligible family members in the case of refugees. Article 10(2) allows Member States to make provision for family reunification of other family members "*if they are dependent on the refugee*". Article 10(3) requires Member State to make provision in the case of unaccompanied minor refugees for the entry and residence of their "*first-degree relatives in the direct ascending line*" (i.e., the parents). The term "*unaccompanied minor*" is defined in Article 2(f) in terms which require the person to be below the age of eighteen years. This definition is identical to the definition of unaccompanied minor in the Qualification Directive. Neither Article 4 nor Article 10 stipulates the point in time at which a family member must be a minor in order to qualify either to enter and reside in a Member State with their parent or to bring their parents to the State in order to reside with them.

48. The appellant relies on the views expressed in a series of decisions of the CJEU considering these provisions to contend that whether a child is a minor must be assessed at the point in time when the refugee made an application for asylum. Needless to say, the respondents argued that this line of jurisprudence is largely irrelevant as it deals with the terms of a directive by which this State is not bound. The appellant accepts this on one level but contends that the observations of the CJEU are nonetheless "*pertinent*" as section 56 of the 2015 Act confers a statutory right similar to that conferred by the Family Reunification Directive and that the broader principles discussed in these judgments apply on the basis that the Oireachtas was acting within the scope of EU law (i.e. in the area of asylum and immigration and thus the AFSJ) even if it was not purporting to implement the Directive. It may assist to look at the decisions in questions.

49. In *A&S* (above) an unaccompanied minor had arrived in the Netherlands and made an application for asylum some three months before she turned eighteen. Four months after that she was recognised as a refugee. She then made an application for a residence permit for her parents (the applicants in the proceedings) and three minor siblings for the purposes of family reunification. These applications were rejected by the Dutch authorities on the basis that she was no longer a minor on the date in which they were made. This refusal was challenged and the court hearing the case made a reference to the CJEU querying whether the term "*unaccompanied minor*" in Article 2(f) covered a person who was below the age of eighteen on entering the State in question and at the time she made an application for asylum but who had reached the age of eighteen during the asylum procedure and subsequently made an application for family reunification. It may also be relevant to note that under Dutch law asylum and the residence permit accompanying it are granted expressly with retrospective effect to the date of the application which is not the case in Ireland.

50. The parties before the court took materially different approaches to the issue. *A&S* contended that their daughter must be regarded as an unaccompanied minor for family reunification purposes because she entered the Netherlands and made her application for asylum whilst under the age of eighteen. The Dutch government held that it was a matter for a Member State to define the relevant moment for determining whether someone should be considered an unaccompanied minor. The court did not accept this. Although neither Article 2(f) nor Article 10(3) explicitly determined the moment until which somebody must be considered an unaccompanied minor in order to benefit from a right to family reunification, neither provision conferred a discretion on Member States so "*the determination of that moment cannot be left to each Member State to assess*" (para. 45).

51. The Commission and the Polish government agreed with this analysis and contended that the moment could be determined on the basis of the Directive; however, they

each advanced a different point at which they contended the Directive determined whether somebody was an unaccompanied minor. The Commission contended for the point at which the application for family reunification was submitted, which is what section 56(9)(d) expressly provides. The Polish government contended for the later point at which a decision is made on the family reunification application. In rejecting both of these suggestions and finding in favour of the parents the CJEU stated:-

> "*48. The question, more precisely, as to what is the specific moment by reference to which the age of a refugee must be assessed in order for him or her to be regarded as a minor and be able therefore to benefit from the right to family reunification under Article 10(3)(a) of Directive 2003/86 must be answered by reference to the wording, general scheme and objective of that directive, taking into account the regulatory context in which it is found and the general principles of EU law.*
>
> *49. In that regard it follows from paragraphs 38 and 39 above that the wording of neither Article 2(f) nor Article 10(3)(a) of Directive 2003/86 in itself enables an answer to be given to that question*."

The court then referred to the declaratory nature of a decision recognising refugee status and continued:-

> *"54. Thus, after the application for international protection is submitted in accordance with Chapter II of Directive 2011/95, any third-country national or stateless person who fulfils the material conditions laid down by Chapter III of that directive has a subjective right to be recognised as having refugee status, and that is so even before the formal decision is adopted in that regard.*
>
> *55. In those circumstances, to make the right to family reunification under Article 10(3)(a) of Directive 2003/86 depend upon the moment at which the competent national authority formally adopts the decision recognising the refugee status of the*

person concerned and, therefore, on how quickly or slowly the application for international protection is processed by that authority, would call into question the effectiveness of that provision and would go against not only the aim of that directive, which is to promote family reunification and to grant in that regard a specific protection to refugees, in particular unaccompanied minors, but also the principles of equal treatment and legal certainty.

56. Such an interpretation would have the consequence that two unaccompanied minors of the same age who have each submitted, at the same time, an application for international protection could, as regards the right to family reunification, be treated differently as a result of the duration of the processing of those applications on which they generally have no influence and which, beyond the complexity of the situations at issue, may depend both upon how much work the competent authorities have and the political choices made by Member States as regards the staff made available to those authorities and the cases to be dealt with as a priority."

52. The appellant places particular reliance on these paragraphs. Indeed, the legal plea made in the statement of grounds is framed on and uses the language of para. 55. The appellant also emphasis the point made in para. 56 regarding the potential for a difference in treatment as a result of the duration of the application process, being a matter over which an asylum applicant has no control. The court continued in this vein in paras. 57 and 58 pointing out that the length of time taken to process an asylum application and possible variations depending on the volume of applications could operate to deprive persons who make their applications as unaccompanied minors from the benefit of family reunification under Article 10(3). It expressed a concern that this could lead Member States to delay rather than expedite the processing of such applications notwithstanding the particular vulnerability of this group

of applicants and the need to take account of the best interests of the child in making any decisions relating to them. It then continued:-

> "*59. In addition, that interpretation would have the consequence of making it entirely unforeseeable for an unaccompanied minor who submitted an application for international protection to know whether he or she will be entitled to the right to family reunification with his or her parents, which might undermine legal certainty.*
>
> *60. Conversely, taking the date on which the application for international protection was submitted as that by reference to which it is appropriate to assess the age of a refugee for the purposes of Article 10(3)(a) of Directive 2003/86 enables identical treatment and foreseeability to be guaranteed for all applicants who are in the same situation chronologically, by ensuring that the success of the application for family reunification depends principally upon facts attributable to the applicant and not to the administration such as the time taken processing the application for international protection or the application for family reunification …".*

53. Were it not for the fact that Ireland has not opted into the Family Reunification Directive this judgment would offer strong, albeit not necessary determinative, support for the appellant's arguments. The reason it may not be determinative is because there is a potential distinction between the position of an unaccompanied minor – i.e., a child forced to flee their country of origin and in doing so to leave their family behind – and the position of a child left behind by a parent who is forced to flee. The unaccompanied minor will almost invariably be in a particularly vulnerable position by reason of their age and the absence of a responsible adult caring for them combined with the circumstances which forced them to flee. The left-behind child will not necessarily be as vulnerable. They will suffer the loss of direct day to day contact with the refugee parent but in other respects their everyday life may or may not be detrimentally affected. Whilst the circumstances of each case will be different,

the left-behind child may have the support of other family members and may remain living, studying or working in the environment in which they have always lived and with which they are familiar.

54. This is not in any way to minimise the difficulties the left-behind family of a refugee may face but to acknowledge that the analysis in *A&S* is specifically directed at the particularly vulnerable position of unaccompanied minor refugees and the rights afforded to them under Article 10(3)(a) of the Family Reunification Directive as a result of that vulnerability. Of course, this distinction is not relevant, and its potential consequences do not need to be teased out if, as the respondents contend, this line of case law has no application to the circumstances in which a refugee may be entitled to seek family reunification under section 56 of the 2015 Act in Ireland.

55. The nuances between the various situations which may arise are evident from the two other cases cited in argument – *BMM and others v. État Belge* Cases – 133/136 and 137/19 and *Bundesrepublik Deutschland v. SE* Case – 768/19.

56. In *SE* a parent entered Germany to join his child, an unaccompanied minor who had made an application for international protection. The father made an application for asylum whilst his son was still a minor and before the son's application was determined. The son turned eighteen and a month later was granted subsidiary protection. The father's application was subsequently refused. The German Administrative Court ordered that the father be granted subsidiary protection under relevant national law provisions under which the parent of an unmarried minor child benefitting from international protection was entitled to be granted a similar status. It took the view that the relevant date for assessing whether the child was a minor was the date in which the parent had made his application for asylum.

57. The German government appealed and the Court made a reference to the CJEU. As both members of the family were present in Germany the EU law provisions in issue were

the family unity provisions in Articles 23 and 24 of the Recast Qualification Directive rather than the Family Reunification Directive. The CJEU agreed with the Administrative Court and held that the relevant date for assessing whether the beneficiary of international protection was a minor was the date of the parent's application for asylum. This was held to be consistent with the right to respect for family life and the rights of the child protected under Article 7 and 24 of the Charter respectively and the incorporation into the Recast Qualification Directive of the principle that the best interests of the child must be a primary consideration in any decision made implementing Article 24 of that Directive.

58. Of course, it follows from this conclusion that had the father made his application for asylum two months later (i.e., after his son had turned eighteen) he would not have been considered a family member for the purposes of the family unity provisions of the Recast Qualification Directive. This is so notwithstanding the fact that the son was a minor at the time he himself had made his application for international protection and that there had been a delay in over three years in determining that application by the time the father arrived in the State. Crucially, the father's entitlement (which was of course premised on his physical presence in Germany) was not treated as applying retrospectively to the date of his son's application but only to the date of his own.

59. In *BMM* a refugee sought residence permits for his minor children under a Belgian law implementing the relevant provisions of the Family Reunification Directive. The application was refused in respect of all three children and a legal challenge taken against that refusal. The eldest child turned eighteen during the course of the legal procedure and the question referred to the CJEU asked whether it followed, regardless of the outcome of the legal procedure, that he no longer enjoyed a right of family reunification with his parent as he was not a minor child. The CJEU held that "*the date which should be referred to for the purposes of determining whether an unmarried third country national or refugee is a*

minor child within the meaning [of Article 4(1) of the Family Reunification Directive] *is that of the submission of the application for entry and residence for the purpose of family reunification*" and not the date of the decision on that application.

60. The respondents point out that on the basis of this conclusion the daughter in this case would not be considered a minor child since she had turned eighteen before the application for family reunification was made. However, they also point to the observations of Dunne J. in *ASSI* (at para. 118) as to the inapplicability of the Family Reunification Directive in this jurisdiction and the respondents' principal argument remained that these decisions are not relevant as the State is not bound by the Directive in question.

61. The respondents also make an insightful argument which illustrates the potential difficulty in attempting to lift and make applicable in this jurisdiction general principles from the case law of the CJEU on specific directives to which the State has not subscribed. They point out that much of the concern of the CJEU to ensure legal certainty and equality of treatment in these cases arose from the need to establish an autonomous EU law meaning of the particular concepts (unaccompanied minor and minor child) for the purposes of the directives. This would in turn avoid administrative variations as between different Member States. Thus, the equality and certainty referred to was primarily focused on ensuring that similar situations would be treated in a similar manner by all Member States subject to the directive. Without understating the need for either legal certainty or equality of treatment, both of which principles apply within our own constitutional order, I see merit in this argument.

62. The appellant on the other hand points to para. 42 of the judgment in *BMM* and the CJEU's statement that the interpretation contended for by Belgium would make it impossible "*to guarantee, in accordance with the principles of equal treatment and legal certainty, identical and predictable treatment for all applicants who are chronologically in the same*

situation, in so far as it would lead to the success of an application for family reunification depending mainly on circumstances attributable to the national administration or courts, in particular to the greater or lesser speed with which the application is processed …".

63. Having considered the implications of these decisions in some detail, I am not convinced that the contention that section 56 of the 2015 Act comes within the scope of EU law is correct. Recital 17 of the Family Reunification Directive expressly records that in accordance with Articles 1 and 2 of the Protocol to the Treaty European Union, Ireland "*is not participating in the adoption of this directive and [is] not bound by or subject to its application*". It would render the creation and exercise of a legal entitlement on the part of the State to opt out of a particular measure meaningless if the State is to be regarded as acting within the scope of EU law when adopting analogous provisions in national legislation just because they fall generally within the area of asylum and immigration.

64. Equally, in circumstances where the Qualification Directive does not deal with family reunification much less confer a right to family reunification on recognised refugees, it is difficult to see how a right to family reunification can be characterised as part of the content of refugee status as conferred by the Qualification Directive. EU law clearly distinguishes between family unity under the Qualification Directive which confers a particular status on the family members of a refugee within the host State and family reunification under the Family Reunification Directive which confers an entitlement to bring family members from a refugee's country of origin into the host State. Thus, the "*more favourable standards*" referred to in Article 3 of the Qualification Directive cannot be regarded as extending to cover something which is regulated by an entirely separate directive in respect of which the State has exercised an opt out of which it is entitled to avail at Treaty level. For these reasons I do not accept the appellant's case that section 56(9)(d) or its application to the facts of her case is a breach of European law.

Is Section 56(9)(d) Unconstitutional?

65. As noted, although the statement of grounds pleaded unconstitutionality solely on the basis of the equality provisions of Article 40.1 of the Constitution, the notice of appeal also evoked Article 40.3 (personal rights) and Article 41 (the family). The appellant's written submissions do not appear to make any argument based on Article 40.3 nor was it expressly addressed at the hearing of the appeal and therefore I do not purpose to consider it further.

66. The written submissions do contain a section headed "*attack on family unit*" and the facts of the case are obviously based on the familial relationship between the appellant and her daughter, although not specifically pleaded as such. The argument made does not identify any particular provisions of Article 41 which are allegedly breached but contends generally that the legislation does not adequately protect children close to majority on the date on which their parent applies for or is granted refugee status. The decision of the Supreme Court in *Gorry v. Minister for Justice* [2020] IESC 55 is invoked in aid of an argument, which I have to say I struggle to understand, that because the Constitution protects "*the area within which the institution of the family, primarily and presumptively, is in control and within which the State cannot interfere*" the provisions of section 56(9)(d) fail to protect equally all members of the family subsisting at the time the appellant qualified for refugee status. This is characterised as an assault on the constitution of the family unit. I regard these arguments as unsustainable in circumstances where counsel for the appellant conceded that there was no obligation on the State to legislate for family reunification at all and, thus, no obligation to protect the minor children of a refugee who are located outside the State.

67. In the circumstances I propose to focus my analysis on the core case made on behalf of the appellant, namely that section 56(9)(d) is in breach of her constitutionally protected right to equal treatment as regards family reunification. This argument faced an immediate

difficulty in circumstances where the appellant accepted that there was no free-standing right protected by the Constitution to family reunification. This necessarily impacts on the court's analysis of her equal treatment arguments since it must necessarily focus exclusively on the terms of the legislation in the absence of a factual basis for contending that any substantive right has been breached. This, in turn, brought into focus the different roles of the Oireachtas and of the courts in relation to legislation, particularly in circumstances where legislation draws distinctions in order to frame the categories of people who are intended to benefit from or indeed be subject to its terms.

68. O'Malley J. considered these difficulties in *Donnelly v. Minister for Social Protection* [2022] IESC 31 a case which upheld the legislative exclusion of an entitlement to payment of domiciliary care allowance to the parents of a severely disabled child during a prolonged period when the child was in hospital and not residing at home. At the outset out her analysis O'Malley J. made the following observations:-

> "*163 The point is that the allocation of different roles by the Constitution means that the courts must be particularly aware of the danger of usurping the task of the legislature and imposing their own choices in the areas under consideration. This danger is, I think, more likely to arise in a case such as the instant appeal, where the claim is based purely on a claim to equality and the appellants do not suggest that any other right has been interfered with. I would not see the distinction between different types of legislation as giving rise to a separate test with different criteria, but it is one of the significant factors that determines the level of intensity of the court's scrutiny.*
>
> *164 The distinction between a challenge based on infringement of a substantive constitutional right and a pure equality claim arises in this way. Where a claim is made that legislation breaches a substantive constitutional right, then, whether or*

> *not there is also a claim that the breach involves a violation of the right to equal treatment, a court will first consider (even if only for the purpose of determining that the claimant has standing to make the case) whether the claimant has established that he or she has such a right and whether the legislation in question interferes with it. If there is such an interference, the Heaney test is an appropriate tool in the analysis of the lawfulness of the interference*."

O'Malley J. went on to explain why a *Heaney* proportionality analysis, which is predicated on the measure in question having been shown to interfere with a substantive constitutional right, is neither appropriate nor capable of direct application in such a scenario. She characterised the argument in the case as being "*that it is unfair to the point of unconstitutionality to confer the benefit on others while excluding him or her*". She emphasised that the separation of powers precluded the courts taking an approach whereby any legislative differentiation between categories of people that resulted in disparities between individuals was to be perceived as a potential breach of rights which required justification by the State. I will return to this theme in due course.

69. The other difficulty faced by the appellant was the lack of judicial support for her contention that the declaratory nature of refugee status meant that certain rights arose retrospectively as of the date the application for international protection had been made. On the contrary, a number of decisions of the Superior Courts suggest that this is not the case. In *BK v. Minister for Justice, Equality and Law Reform* [2011] IEHC 526 Feeney J. considered whether a period of residence in the State on foot of a temporary permit granted to a mother who was seeking and was subsequently granted refugee status could be considered "*reckonable residence*" under the Irish Nationality and Citizenship Acts, 1956-2004. This was relevant to the calculation of three years lawful residence required in order

for her child, born in the State, to be entitled to Irish citizenship. Feeney J. acknowledged the declaratory nature of a refugee status decision stating:-

> "*A person is a refugee within the meaning of the 1951 Convention as soon as that person fulfils the criteria contained in the definition and that occurs prior to the time at which that person's refugee status is formally determined. It follows that in logic the recognition of a person's refugee status does not make that person a refugee but declares him to be one, the person having been a refugee from the time that such person departed from the country from which he or she is seeking refuge*".

However, in looking at the terms of the then applicable legislation, the Refugee Act 1996, he went on to say:-

> "*The provisions of the Act are such that a person who is found to be a refugee does not have the benefits of refugee status backdated under the Act and it follows that if this Court were to accept the interpretation of s. 9(2) of the Act contended for by the applicant, such interpretation would be inconsistent with the other provisions of the Act."*

On that basis he found notwithstanding her subsequent recognition as a refugee, that at the time of the applicant's birth her mother's entitlement to remain in the State was temporary for the purposes of ensuring a final determination of her application for refugee status. Given these restrictions it did not qualify as reckonable residence under the 1964 Act.

70. In *Michael and Emma v. Minister for Social Protection* [2019] IESC 82 the Supreme Court had to consider, *inter alia*, a claim for child benefit from the mother of a child who had refugee status in circumstances where the mother and other members of the family were then granted residence permits by way of family reunification on the basis of the child's status. Child benefit was granted prospectively in respect of all the children in the family from the date of the positive family reunification decision. The mother sought payment of

child benefit retrospectively in respect of the refugee child from the date on which he was granted refugee status. Much of the analysis looks at whether the entitlement to child benefit is for the benefit of the child or, as the Supreme Court held, the parent. On that basis, the principal judgment (of Dunne J.) held that regardless of the child's potential eligibility, child benefit did not become payable until the claimant (i.e., the mother) became a qualified person and met the relevant criteria under the Social Welfare Consolidation Act 2005. This did not occur until she was granted a residence permit allowing her to be regarded as habitually resident in the State. Furthermore, Article 28 of the Qualification Directive under which beneficiaries of refugee status are to be granted the same social assistance as provided to nationals of the Member State in question, did not require the payment of child benefit be backdated to the date in which the child was recognised as a refugee.

71. In a concurring judgment O'Donnell J., as he then was, observed that drawing legislative distinction between those whose immigration status has not been positively resolved and those whose status has been resolved is not a discrimination forbidden by Article 40.1. In looking at the fact that child benefit was not backdated he stated (at para. 25 of his judgment) :-

> "*A rational distinction is made between those applying for such status and those whose applications have been successful, and the legislature has also decided that such an entitlement shall only arise on a successful determination of the application, and is not backdated to the date of first application, or indeed arrival in the State. It is possible to argue that the policy could have been different, and more generous, or its application more nuanced, as indeed suggested by the learned High Court judge, but it is not possible, in my view at least, to contend that it impermissibly discriminates, still less discriminates on the ground of citizenship*."

72. The distinction in *Michael and Emma* was between those with a right to reside and who could therefore be regarded as habitually resident for social welfare purposes and those whose presence in the State was permitted on a temporary and limited basis. O'Donnell J. regarded this as a rational distinction directed towards the purpose for which the benefit is made available and "*clearly within the decision-making power of the Oireachtas*" (para. 18 of his judgment). Crucially, the legislation did not have to retrospectively alter its characterisation of the mother's residence based on the recognition of her son's status.

73. In my view the principle is also capable of being applied to the rights conferred on the family members of qualified persons by section 56. The fact that it could have been framed in more generous terms so as to make a wider range of family members eligible for family reunification, such as younger adult children, does not detract from its purpose which is to facilitate virtually automatic family reunification for the spouses, partners and minor children of recognised refugees.

74. The constitutionally of two different provisions in section 56 was considered and upheld by the Supreme Court (Dunne J.) in *ASSI* (above). The first of these was section 56(9)(a) under which a refugee is only entitled to family reunification with a spouse of a marriage subsisting on the date the refugee made his application for international protection in the State. The second was the time limit of one year from the date of recognition as a refugee within which an application for family reunification must be made under section 56(8). The judgment also considers the implications of the appellants not making applications for visas under the Policy Document, a point to which I shall return.

75. In looking at the equality issues, Dunne J. acknowledged at the outset that it was necessary for the appellants to identify a comparator stating (at para. 69):-

> "*There is no doubt that an argument based on equality necessitates that an individual claiming to have been treated unequally must be able to identify an appropriate individual by comparison to whom it can be shown that there is unequal treatment*."

She quoted in turn from the decision of O'Donnell J. in *MR and DR v. An tArd Chláraitheoir* [2014] IESC 60in which he states:-

> "*Any equality argument involves the proposition that like should be treated alike. Any assertion of inequality involves identifying a comparator or class of comparators which it is asserted are the same (or alike), but which have been treated differently (or unalike). In each case it is necessary to focus very clearly on the context in which the comparison is made. It is important not simply that a person can be said to be similar or even the same in some respect, but they must be the same for the purposes in respect of which the comparison is made. A person aged 70 is the same as one aged 20 for the purposes of voting, but not of retirement.*"

76. Dunne J. accepted the argument made on behalf of the appellants that, in identifying the appropriate comparator, it was necessary to have regard to the essential feature of a refugee which is that they cannot return to their country of origin. She also acknowledged the jurisprudence of the European Court of Human Rights (*Tanda-Muzinga v. France* (above)) in which family reunification is seen as an essential right of refugees and an essential element in enabling persons who have fled persecution to resume a normal life. In so far as the European Court of Human Rights saw this as leading to a need for refugees "*to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens*", Dunne J. regarded the provisions of section 56 as providing a family reunification procedure "*which is undoubtedly more favourable than that for other aliens seeking to bring about family reunification*". The real question was whether the limits placed by the statutory scheme on the family members entitled to family reunification or procedural

requirements such as a time limit within which the application had to be made rendered the legislative choices made by the Oireachtas unconstitutional.

77. Despite the fact that Dunne J. upheld the constitutional validity of section 56(9)(a), the appellant relies on portions of her judgment which outline the rationale underlying the legislative choice which excluded from family reunification spouses where the marriage occurred after the refugee had left his or her country of origin. In essence, where a married refugee is forced to leave their spouse in order to flee their country of origin for their own safety, the marriage and family life between the spouses has been ruptured because of the persecution experienced by the refugee. Allowing the spouse to join the refugee facilitates the resumption of normal family life by the refugee. Dunne J. held that a distinction between spouses whose family life had been so ruptured and spouses who married after the refugee left his or her country of origin and therefore were not affected in this manner was "*legitimate and proportionate having regard to the need to provide for family reunification on the one hand and the need to have regard to immigration control on the other*" (para. 99). The appellant argues that the same rationale applied to the rupture of her family relationship with her daughter.

78. On one level this is of course correct. However, in my view the two situations are not analogous. There is a material difference between the relationship between spouses and the relationship between parents and their children. Marriage is intended to be a lifelong union unless ended by death of divorce. Absent the persecution which forces the refugee to flee, a refugee and his or her spouse would expect to reside together as part of the one household indefinitely. This is not the case with parents and their children. It is an inherent part of that relationship that children, who in infancy will invariably live with and be totally dependent on their parents, grow to adulthood, become independent and leave home. Parents will no doubt hope to have a lifelong relationship with their children but do not expect that they will

reside together indefinitely as part of a single household. Whilst the nature of intergenerational family relationships vary between different cultures as does the extent to which adult children remain living with or close to their parents, there is a general rule of thumb which is recognised internationally and reflected in both the Qualification Directive and the Family Reunification Directive that children become adults at the age of eighteen. Therefore, a legislative differentiation between children who are under that age and adult children who are over that age is clearly rationally based.

79. Indeed, the same distinction is reflected in the other criteria in section 56(9)(d) which is not apparently in dispute, namely that to be eligible for family reunification a minor child must be unmarried. (I say apparently because we know nothing about the circumstances of the daughter in Zimbabwe). A child who marries assumes, by virtue of doing so, some of the indents of adulthood and becomes part of a different household to their parents. This is capable of justifying a legislative distinction between married and unmarried minor children.

Constitutional Analysis:

80. In drawing these strands together to consider whether it is unconstitutional for the Oireachtas to have stipulated the date on which an application for family reunification is made by a recognised refugee rather than the date of that person's application for asylum as the date upon which the eligibility of minor children would be determined, it may be useful to start by identifying what were largely uncontroverted propositions.

81. First, the constitutional challenge in this case was based solely on equal treatment grounds under Article 40.1. It was not contended that there is a free-standing right to family reunification nor that any substantive right of the appellant had been breached. Consequently, the challenge is not to any individual decision affecting the appellant but to the terms of the legislation under which such a decision might be made. This has important

consequences as identified by O'Malley J. in *Donnelly*, namely that a *Heaney* style proportionality analysis is not appropriate in the circumstances (as that proceeds from the basis that there has been an interference with a substantive right and queries whether the interference was justified) and also that the level of intensity of the court's scrutiny is different and presumably lower than if it were contended the legislation interfered with the appellant's substantive rights.

82. Secondly, it is part of the legislative function entrusted by the Constitution to the Oireachtas to define the parameters within which benefits may be granted to or burdens imposed upon people by legislation. This necessarily involves the Oireachtas drawing distinctions between and categorising groups of people for the purposes of legislation. Whilst such distinctions are not immune from constitutional challenge, particularly where they are capable of impinging upon substantive rights, a considerable margin of appreciation must be afforded to the Oireachtas to make policy choices which may have social and economic ramifications. The court must be mindful that its role under the Constitution is not to second guess the legislative choices made by the Oireachtas, even where the court is convinced a better or fairer choice might have been made. Rather its role is to examine the legislation to see if it exceeds the boundaries set by the Constitution. In the context of this case that means the question the court must ask itself is not whether the Oireachtas has chosen the best or most rational date for the determination of the eligibility of a child on the brink of adulthood for family reunification, but whether the date chosen is positively irrational or arbitrary.

83. Thirdly, it was accepted by the appellant that it was legitimate for the Oireachtas to distinguish between minor children and young adults for the purposes for family reunification. Although I believe this concession was properly made, the implications of it may go further than the appellant appreciated or intended. Clearly, this cannot be characterised as discrimination based on age as there is an objective reason for differentiating

between the two groups by reference to the capacity of adults to live independently from their parents. This provides a justification for affording more favourable treatment to children.

84. It follows that the distinction between minor children and adults is a legitimate and proper one to make in a legislative context even where it results in differences of treatments between persons who might otherwise be regarded as roughly comparable – i.e., minor children in their late teens and young adults who are not much older. Because age is chronological and constantly changes for every individual, fixing any point in time by reference to which someone will be considered a minor or, alternatively, an adult, will leave some people on the wrong side of the line thus drawn. The mere fact that the appellant's daughter loses a potential benefit by not being a minor on the date chosen by the Oireachtas does not make the choice of that date unconstitutional.

85. There is a further distinction inherent in the legislative choice to make it a precondition for the making of an application under section 56 that someone be recognised as a refugee and dating the age of the refugee's children from the point in which the application for family reunification is made. This is the distinction between people who have been granted refugee status and those who have merely applied for such status. Decisions such as *BK v. Minister for Justice Equality and Law Reform* and *Michael and Emma* (above) establish that it is legitimate for the Oireachtas to maintain this distinction even after an applicant for asylum has been successfully recognised as a refugee. Notwithstanding the declaratory nature of a decision recognising a refugee as such, the appellant was unable to point to any legislative provision either in this jurisdiction or at EU level which required that the rights to be afforded to a recognised refugee be backdated to the date of the application for refugee status rather than the date of recognition of such status.

86. It is a little difficult to understand the suggestion that fixing the date of the family reunification application as that by reference to which the daughter's status as a minor will be determined somehow lacks legal certainty. The date of an application for family reunification is obviously one which can be ascertained with absolute certainty as can the consequences of having made the application on that date. Of course, the date on which an asylum application is made can also be ascertained with certainty but is it important to bear in mind that the test is not whether it is a better or more rational date to have chosen but whether the date of the application for family reunification is an unreasonable and arbitrary choice. For the reasons set out in the preceding paragraphs I do not think that it is.

87. The high point of the appellant's argument on the level of certainty lies in the comments made by the CJEU in *A&S* and the related cases to the effect that legal certainty will be achieved if an unaccompanied minor subsequently recognised as a refugee is entitled to bring their parents to the host Member State because of his minority as of the date of the asylum application no matter how long it takes the host country to determine that application. I have already pointed out that the primary concern of the CJEU in that regard appears to have been to achieve an autonomous EU interpretation of the relevant legal instruments so as to achieve legal certainty as regards to the position of unaccompanied minors in this respect as between all Member States bound by the Family Reunification Directive. It is relevant to the extent to which an analogy can be drawn for the purposes of the appellant's constitutional argument that Ireland has not opted into that directive. There is also a potentially relevant distinction to be drawn between the position of an unaccompanied minor in the host State and a left-behind child in their country of origin, (although this issue does not appear to have been addressed yet at an EU level).

88. I do not regard either the nature or the degree of uncertainty created as a result of an asylum applicant not knowing how long it will take to determine their application from the

point when it is made and the effect this may have on the eligibility of their children for family reunification as sufficient to render unconstitutional the choice made by the Oireachtas to fix the date of the application for family reunification as the relevant date.

89. It should be apparent from the preceding analysis that I do not regard section 56(9)(d) of the 2015 Act as unconstitutional. In coming to this conclusion, I have also had regard to the fact that the application under section 56 is not the sole means by which the appellant can seek to benefit from family reunification with her daughter. Section 56 provides a statutory scheme under which recognised refugees receive more favourable treatment in this regard than other third country nationals.

90. Because the control of aliens (to use the traditional albeit outdated phrase) has always been regarded as a matter falling within the Executive power, the Minister has a discretion to admit to the State people who do not otherwise have a legal entitlement to enter or reside here. The Policy Document sets out the terms upon which that discretion will normally be exercised, and which enables the family members of economically active settled migrants to join them in the State. The document does not purport to exhaustively regulate the Minister's power in this regard, and indeed could not do so. The Minister has a residual discretion to grant a visa to a person to join a family member already in the State even where the terms of the Policy Document are not satisfied. This is expressed as follows in para. 1.12 of the Policy Document

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

I agree with the views of Ferriter J. in *SH and AJ* that it is relevant to the overall constitutional analysis that there is a mechanism available to persons who do not fall within section 56 to seek family reunification. Similarly, in *ASSI* Dunne J. (at para. 126) expressly adverted to the existence of an alternate route to family reunification:-

> "*It should also be recalled, as explained previously, that the Act of 2015 is not the sole means by which family reunification can take place. As is clear, it is also possible to pursue family reunification through the* [Policy Document on Non-EEA Family Reunification] *referred to previously. The extent of family reunification is not unlimited and the State is entitled to have regard to the requirements of immigration control in making such provision*."

91. Falling outside the statutory provisions does not automatically exclude a refugee from applying for or being granted family reunification albeit that the Minister's decision is discretionary and the terms upon which family members might be permitted to enter and reside here may not be as favourable as those under the statutory scheme. When taken in conjunction with the level of judicial scrutiny appropriate in cases where legislation is challenged on equality grounds alone (*per Donnelly*) and the deference to be afforded to policy choices made by the Oireachtas in legislation, I am satisfied that this supports the conclusion that section 56(9)(d) is not unconstitutional.

92. Finally, although an analysis of the constitutionality of statutory provisions on equality grounds will normally start with the identification of the relevant comparator, I have deliberately not taken that approach in this case. This is because each side advocated for a comparator in terms which mirrored the conclusion they wished the court to draw rather than in terms which would have assisted in assessing the operation of the legislation from an equality perspective. The appellant contended that the appropriate comparator was someone with a child of the same age who had made an application for asylum on the same date but

whose application was determined more quickly and at a point where the child was still a minor; the respondent contended for a person who made an application for family reunification on the same date.

93. For reasons which I have already explained, I do not accept the respondent's criticism of the fact that the appellant did not (or was unable to) identify an actual comparator. The confidentiality of the process and GDPR considerations would make that virtually impossible. I am also not minded to be overly critical of the fact that the appellant's hypothetical comparator involves a number of different moving parts aligning in order to achieve the necessary level of similarity. Thus, the comparator has a child of the same age as the daughter, had made an application for asylum on the same date as the appellant and, critically, not only is the time taken to determine the comparator's application shorter but it is sufficiently shorter to ensure that the comparator's child is still a minor when refugee status is granted. Ultimately, I did not find it necessary to identify the appropriate comparator because of the lack of anything substantive in respect of which a comparison had to be made.

<u>European Convention on Human Rights</u>:

94. The appellant contends that section 56(9)(d) is incompatible with Article 8 and Article 8 taken with Article 14 of the ECHR. These Articles provides as follows:-

> "*Article 8 Right to respect for private and family life*
>
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the*

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

"Article 14 Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

95. The appellant also relies on the views of the European Court of Human Rights as expressed in para. 75 of *Tanda-Muzinga v. France* (above) as follows:-

"*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 … it further reiterates that it has held that obtaining such international protection constitutes evidence of the vulnerability of the parties concerned … 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 ...."*

Both Dunne J. in *ASSI* and MacMenamin J. in *KN v. Minister for Justice and Equality* [2020] IESC 32 have endorsed this passage, with Dunne J. also accepting that Article 8 rights are engaged in decisions affecting the family reunification of refugees. That said, there are two potentially relevant observations to make. The first is to note that in identifying family unity as "*an essential right of refugees*" the European Court of Human Rights goes on to say that for that reason a family reunification procedure which is more favourable to refugees than

that applying generally to third country nationals is required. It does not elaborate on what such a procedure must provide in terms of which family members should be eligible much less stipulate anything regarding the point in time at which it may be determined whether a refugee's children are minors. Dunne J in *ASSI* characterised the scheme under section 56 as one which provided more favourable treatment for refugees.

96. Secondly, it is unclear whether Article 14 adds anything to Article 8 in this case in circumstances where the inequality of treatment complained of does not arise as a result of discrimination on any of the grounds set out in Article 14 or on any equivalent grounds but rather as a result of a legislative choice to fix a point in time for making a particular determination. Equally, it was not contended by the appellant that section 56(9)(d) was indirectly discriminatory by reason of having a disproportionality adverse effect on these or analogous grounds. In my view an argument based on the contention that, given the potential for variable circumstances, somebody else might fare better in light of the particular terms of the legislation does not amount to a case of discrimination even where it is acknowledged that the legislation is operating in a sphere covered by Article 8.

97. In this regard the reliance placed by the appellant on *Vrountou v. Cyprus* 33631/06 (13th October 2015) is misplaced. This case arose out of the Turkish invasion of Northern Cyprus and the displacement of persons from their homes in that area. The Cypriot government introduced an aid scheme under which displaced persons were entitled to a refugee card which in turn made them eligible for a range of benefits including housing benefits. Under the scheme children whose fathers were displaced could be registered on their father's refugee cards but no equivalent provision was made to register the children of displaced women on their mother's refugee cards. The applicant was the adult child of a displaced women who held a refugee card. She was denied housing assistance on the basis that she was not a displaced person because, although her mother was, her father was not.

Unsurprisingly the court held that there was a difference in treatment on the basis of sex, which the court described as "*one of the protected grounds set out in Article 14*". As the court did not accept that the reasons advanced by the Cypriot government constituted a reasonable and objective justification for the difference in treatment it followed that it was discriminatory and in breach of Article 14.

98. Thus, accepting as I do that the facts of this case fall within the ambit of Article 8 the difference in treatment between the appellant and her hypothetical comparator (if such difference there be – and I do not find it necessary to determine this) was not on the basis of any of the protected grounds set out in Article 14 of the Convention. I acknowledge that the phrase "*other status*" at the end of that Article indicates that the grounds expressly set out are not exhaustive. In this case the appellant suggests that the "*other status*" by reference to which she has been discriminated is "*protection status*." I accept that discrimination against a person on the basis that they are a refugee may in principle be capable of coming within Article 14 although the consequences of differential treatment based on that status would need to be considered very carefully in any case in which it arose. The difficulty with the appellant's analysis is that section 56 is designed to afford more favourable treatment to recognised refugees precisely because of their protection status. The appellant became eligible for this benefit as soon as she was recognised as a refugee. Whilst certain rights must be afforded to protection applicants before their applications have been determined, the appellant has not pointed to anything in the jurisprudence of the European Court of Human Rights which suggests that making provision for favourable treatment for recognised refugees in terms of family reunification impermissibly discriminates against protection applicants who have not yet been recognised as refugees.

99. The respondent approached the ECHR argument by pointing out that Article 8 is designed to protect against arbitrary interference by the State with private and family life.

Thus, it creates a negative obligation on the State not to interfere with the autonomy of the family rather than a positive obligation to take particular steps (see *Libert v. France* 585/13 (22nd February 2018)). In this regard it is relevant that the interference in *Tanda Muzinga* was not the denial of family reunification *per se*, but in circumstances where the applicant's application for family reunification had been approved in principle, a three-year delay in processing the application such that the applicant was unable to give effect to the rights which the French State had already determined he had.

100. The appellant did not expand significantly upon her ECHR argument at the hearing of the appeal. This was no doubt because much of the argument, particularly as regards the margin of appreciation open to the Oireachtas in legislating for family reunification, had already been canvased under the constitutional heading. In essence, the additional element of the argument boiled down to the acceptance that family reunification engaged Article 8 of the ECHR (*per* Dunne J. in *ASSI*) and that family reunification is an essential right of refugees (*per Tanda-Muzinga*). Obviously, I do not disagree with either of those propositions, but it does not follow from them that s.56(9)(d) is incompatible with the ECHR.

101. Acceptance that family reunification falls within Article 8 does not establish that there has been a breach of that article. Even if family reunification is seen as an essential right of the appellant as a refugee (and the appellant argued this case on the basis that there was no free-standing right to family reunification), the high point of *Tanda-Muzinga* is to say that there must be a more favourable regime for refugees which facilitates members of their family joining them in the host state. It does not require that adult children be included within the scope of the family members entitled to benefit from family reunification nor that the ages of children be assessed for the purposes of establishing that they are minors on the date of an application for asylum or any date earlier than the date of the application for family reunification. Circumstances in which an adult child has a particular level of dependence on

their parent going beyond normal emotional ties (such as those arising from a disability or medical condition) may require that adult child to be treated as part of the parent's immediate family for family reunification purposes. In the absence of such circumstances, the relationship between the daughter, an adult child, and the appellant would not normally fall within the scope of the family life protected by Article 8. The appellant's case is that the more favourable treatment afforded to refugees by section 56 is not sufficiently favourable because it excludes her daughter. Whilst this is understandable on a human level, unfortunately for the appellant and her daughter it does not disclose an impermissible interference by the State with the exercise of their right to family life.

102. In all of the circumstances I find that the appellant has not made out the case that section 56(9)(d) is incompatible with the ECHR.

Alternate Remedy:

103. One of the features of this case upon which the respondents place significant reliance, was that the appellant has not sought to avail of the option open to her to make an application to the Minister under the Policy Document for a visa for her daughter to join her in this State. The appellant took the position that she would not have succeeded in such an application because she could not meet the financial thresholds which are normally imposed on third country nationals seeking family reunification in the State. These thresholds are designed to ensure that the admission of a third country national's family members does not become a burden on the health or social assistance systems in the State.

104. However, as noted above, the Policy Document sets out the guidelines which will normally apply to such applications but expressly provides that the Minister has a residual discretion to admit family members where either the third country national or the family members do not come within the scope of the Policy Document. Thus, it is open to the

appellant to apply for a visa for her adult daughter to join her in the State even though she does not meet the financial threshold normally applicable.

105. Para. 1.12 of the Policy Document suggests that the exceptional cases in which the Minister's discretion is likely to be exercised will usually have a strong humanitarian component. I have already noted that the appellant's daughter is strangely silent in the context of this appeal. Although she is an adult, she is not a party to the proceedings. Absolutely no information has been provided about her nor about her current circumstances in Zimbabwe. I appreciate that this is likely because the case made on behalf of the appellant asserts an absolute right to family reunification to include her daughter based on her daughter's age on the date on which she made her application for asylum. It does mean that while it is open to the appellant to make an application to the Minister it is unclear whether there are humanitarian grounds upon which it might succeed. I note that Ferriter J. in *SH and AJ* expressed the view, quite strongly, that the delay in determining those applicants' asylum applications was a matter which should be taken into account by the Minister in deciding whether there were exceptional circumstances which would justify the exercise of her discretion. The delay here is of a similar order and there is equally no suggestion that it was due to any fault of the appellant.

106. During the course of the hearing of this appeal the parties handed in a decision of this court in *FSH and others v. Minister for Justice* (Allen J. [2024] IECA 44) which dealt with the refusal of the Minister of applications made on humanitarian grounds pursuant to the Policy Document for four Somali children to be permitted to join their mother who had been granted residence pursuant to a family reunification application made by her sister, a recognised refugee. It was not suggested that this decision had any precedential bearing on the outcome of this case since it dealt with an application under the Policy Document which has not been invoked by the appellant rather than the statutory scheme for which the

appellants in the *FSH* case were not eligible as their mother was not a refugee. It was relied on by the appellant as illustrative of the height of the bar which she would have to meet in order to succeed in an application for family reunification on humanitarian grounds in circumstances where the terms of the Policy Document were not otherwise met. I accept that this may well be so but in circumstances where the court has not been given any information regarding the daughter, it is impossible to form any view as to the merits of such an application as an alternative remedy.

107. The parties took a somewhat disjointed approach to the significance of the existence of this alternate mechanism to the issues in the case. The appellant tended to dismiss its relevance entirely on the basis that it did not constitute an effective remedy. The term "*effective remedy*" comes from Article 13 of the ECHR and reflects a requirement that there be an effective remedy for a violation of the rights protected under the Convention within the national legal order even where the violation has been committed by a person acting in an official capacity. Thus, the need for an effective remedy arises where there has been a breach of a right. If the State does not provide an effective remedy in those circumstances that in turn can amount to a breach of Article 13 of the Convention. In circumstances where the appellant has not established the breach of any protected right, the issue of an effective remedy does not arise.

108. The respondent treated the possibility of making an application under the Policy Document as an "*alternative remedy*" which it contended had to be exhausted before the appellant could complain that section 56(9)(d) was unconstitutional. This in effect was a quasi *locus standi* argument relevant to the availability of a remedy in judicial review where a case for a grant of relief has otherwise been made out. In effect the State argues that unless that appellant has gone through the process provided for in the Policy Document, she cannot argue that the distinction drawn in the legislation is irrational.

109. Support for the respondents' position can be found in the decision of the European Court of Human Rights in *MT v. Ireland* 54387/20 (6 April 2023). The facts of the case are unusual and arose because the family reunification provisions under the 2015 Act are somewhat narrower than those which previously applied under the Refugee Act 1996. In particular the children covered by section 56(9)(c) are only the sponsor's own children and not children in respect of whom the sponsor may be acting *in loco parentis*. The applicant, who had been granted refugee status, sought permission to be joined in Ireland by two children in respect of whom he had been granted guardianship by a court in his country of origin. The Irish authorities requested that the applicant undergo DNA testing to establish his relationship with the children which he refused to do. The applicant complained that the refusal of the Irish State to give him permission to bring the children to live with him in Ireland was a failure to respect his family life under Article 8. The court pointed out that family reunification could have been sought under the terms of the Policy Document which was broader than the statutory scheme in that the potential beneficiaries include children in the care of the sponsor. It went on to state (at para. 25):-

> "*Given that there was at all relevant times another procedure by which the merits of the applicant's request for family reunification could have been examined by the Minister and possibly granted, the Court considers that this case does not in fact reveal a refusal or failure by the domestic authorities to respect the family life of the applicant and the children.*"

110. The question of whether the appellant should be disentitled to relief by reason of her failure to exhaust the alternative remedy to her does not really arise in circumstances where I have not found her to be entitled to the relief claimed. However, the authority relied on by the respondent does suggest that the appellant cannot contend that there has been a failure on the part of State to respect her family life and that of her daughter until she has made an

application under the Policy Document through which the merits of her claim based on the relationship between herself and her daughter can be examined by the Minister.

111. However, I do not see the failure to make an application under the Policy Document as precluding the bringing of constitutional proceedings by the appellant. The challenge brought, admittedly unsuccessfully, is to the terms of the legislation under which the appellant and her daughter definitely did not qualify for family reunification. I think she was entitled to challenge those terms even if there was another, non-statutory, route open to her to achieve family reunification. The non-statutory route is discretionary, and her application may or may not be successful. The entitlements granted pursuant to it are not as generous or legally secure as those which would follow from a successful application under section 56. Therefore, there is a material difference between the outcome of a successful application under the Policy Document and a successful application under the statutory scheme.

112. For these reasons I do not think that the appellant was precluded from bringing this application insofar as it related to the Irish Constitution or the ECHR by reason of the fact that she has not exhausted all of the options available to her under domestic law. This does not mean that the availability of an alternate mechanism through which family reunification might be achieved is irrelevant to the assessment of whether the legislation is unconstitutional or incompatible with the ECHR. As I have held, the obligation of the State to protect the family life of a recognised refugee can be met through the combination of a statutory scheme under which minor children have an absolute right to join their refugee parents and a discretionary scheme under which the position of adult children of refugees can be considered. As regards her entitlement to bring a challenge to the validity of s.56 having regard to EU law, if EU law mandated family reunification in these circumstances the possibility of it being available on a discretionary basis would not meet the State's obligations under EU law. To this extent I would disagree with the judgment of Barr J.

However, as I have already found against the appellant on the substantive issues in the appeal this has no bearing on the outcome of the appeal.

Conclusions:

113. In light of the conclusions set out above it follows that this appeal should be dismissed.

114. In circumstances where the appellant has been entirely unsuccessful in her appeal, I am of the view that an order for the costs of the appeal should be made in favour of the respondents. If the appellant wishes to contend for a different order they should notify the office prior to 10th September 2024.

115. This judgment has been read in advance of its delivery by my colleagues Whelan J. and Power J. who have indicated their agreement with it.