THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 504

Record No: 2022/125 JR

IN THE MATTER OF THE POLICY DOCUMENT ON NON-EEA FAMILY REUNIFICATION

BETWEEN

LTE and KAU

APPLICANTS

AND

THE MINISTER FOR JUSTICE

RESPONDENTS

JUDGMENT of Mr. Justice Mark Heslin delivered electronically on the 18th day of November 2022

Introduction

1. The first named applicant is a naturalised Irish citizen, originally from Ethiopia, who married the 2nd named applicant, an Ethiopian national, in a 'proxy' marriage over video call on 02 March 2019. The first applicant subsequently visited Ethiopia (departing Dublin 05 April 2019 and returning on 29 April 2019). The couple's marriage certificate records the date of their marriage as 02 March and the certificate was issued by the Ethiopian authorities on 13 April 2019. The second applicant made an application for a 'join spouse' Visa on 15 March 2021. This case concerns a challenge to the Respondent Minister's visa appeal refusal decision of 17 November 2021 (the "decision").

The Policy

2. The Applicants acknowledge that the Respondent issued a "*Policy Document on Non-EEA Family Reunification*" ("the Policy") and a copy of the Policy (dated December 2016) was before this court. The "Executive Summary" to the Policy begins in the following terms: "*The purpose of this document is to set out a comprehensive statement of Irish National immigration Policy in the area of family reunification. It is recognised that more comprehensive and transparent guidelines are necessary to assist Applicants and decision makers in this area. The policies outlined in this document will apply to all decision making in the immigration system in relation to family reunification cases in a harmonised way, incorporating both these applications and the various leave to remain processes… The guidelines do not create or acknowledge any new rights of family reunification. Ministerial discretion applies to most of the decision making in the area of family reunification and this will continue to be the case. It is more a question of providing greater detail on how that discretion is intended to be applied. The guidelines apply only in the area where ministerial discretion is retained....".* The Applicants do not challenge the Policy or its terms. The Policy provides *inter alia* the following:

> "*<u>Where Sponsor is Irish Citizen</u>*
>
> *17.2 An Irish citizen, in order to sponsor an immediate family member, must not have been totally or predominantly reliant on benefits from the Irish State for a*

continuous period in excess of 2 years immediately prior to the application and must over the three year period prior to application have earned a cumulative gross income over and above any State benefits of ***not less than €40k****".*(Emphasis in original.)

The first applicant did not, and does not, meet the criteria identified in para. 17.2.

Rare cases with exceptional circumstances

3. Paragraph 1.12 of the Policy relates to Ministerial discretion and states the following: -

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

Leave

4. By order made on 28 February 2022 (Meenan J), this Court granted the Applicants leave to apply by way of an application for judicial review for the reliefs set forth at paragraph [D] on the grounds set forth at paragraph [E] in the Applicants' statement of grounds. Such leave was granted "*Without prejudice to the determination at the substantive stage of any point which could have been contended for by the Respondent at the leave stage including any point in relation to time limits for the bringing of this application".* No issue concerning 'time' arises.

Relief sought

5. Paragraph [D] of the statement of grounds identifies the relief sought, as follows:

1. An order of *certiorari* by way of application for judicial review quashing the decision of the Respondent dated 17 November 2021 refusing the 2nd named applicant's appeal;
2. such declarations of the legal rights and/or legal position of the applicant and/or persons similarly situated as this Honourable Court shall consider appropriate;
3. if necessary, an order extending the time for the purposes of the institution and the conduct of these proceedings;
4. such further or other order as this Honourable Court shall deem appropriate; and
5. an order for costs.

The Applicants' claim

6. In summary, the Applicants make the following legal claims with respect to the decision:

- the Respondent's decision is irrational and/or unreasonable and/or disproportionate;
- the Respondent failed to have regard to relevant matters; the Respondent applied 'blanket rules' inflexibly and/or fettered her discretion;
- the decision is unlawful having regard to Article 41 of the constitution (with particular reference made to the Supreme Court's decision in *Gorry & Anor. V. Minister for Justice and Equality* [2020] IESC 55); and
- the decision is unlawful in light of Article 8 of the European Convention on Human Rights Act 2003 ("ECHR").

Background

7. Although I referred to certain facts in the introduction, it is appropriate to set matters out in more detail as follows. The first applicant was born in Ethiopia. Her passport issued by the Federal Democratic Republic of Ethiopia identifies her date of birth as 10 March 1993. She came to this state on 16 January 2014. Up to and including 11 November 2021, she held a "Stamp 4" permission to reside in this state. On 13 September 2021, she received a certificate of naturalisation and became an Irish citizen.

The 2nd applicant is an Ethiopian national. His passport issued by the Federal Democratic Republic of Ethiopia identifies his date of birth as 11 September 1985.

Childhood friends

8. The first applicant elsewhere describes the second application as her "*childhood friend"* and asserts "*we used to play together from childhood until we grow up, generally we're best friend"* (see the first applicant's "*Relationship history statement*" under the heading "*Our First meeting",* which statement comprised item 19 of the documents submitted by Messrs Abbey Law solicitors when making the application for a 'Join Spouse' visa on behalf of the 2nd applicant). Given their respective dates of birth, it is uncontroversial to say that, by the time the 2nd applicant was an adult, aged 18, the first applicant was still a child, aged 10. The first applicant asserts that, "*as children"* she and the 2nd applicant had a "*good and close relationship*" (see para 5 of her 16 February 2022 affidavit). The first applicant asserts that she has known the 2nd applicant "*since we were very young children".*

2 March 2019 – Marriage over video call

9. The first applicant asserts that, given the closeness of their families, it was agreed that she and the 2nd applicant should marry and that she was delighted by this proposal "*as he had been such a good and close friend as children…*" (see para. 6 of the first applicant's 16 February 2022 affidavit). It is asserted that they married on 2 March 2019 by holding a traditional *"Nika"* marriage ceremony *"over video call"* with their respective immediate families (see para. 7 of the first applicant's 16 February 2022 affidavit).

15 March 2021 - Visa application

10. On 15 March 2021 the 2nd applicant completed an on-line application for a 'Join Family' (spouse) "D" class long stay visa to join the first applicant in this State. The original application was submitted in person to the Irish Embassy in Addis Ababa on 19 March 2021 and a receipt was issued to the 2nd applicant. By letter dated 23 March 2021, Messrs Abbey Law, solicitors, furnished documentation and submissions with respect to the aforesaid application and I will presently look at same.

5 April 2019 - Blessing day with family

11. It is asserted that on 5 April 2019 "*a traditional blessing day with the 2nd named applicant's family*" took place. It is asserted that both of the applicants were present in Ethiopia for this.

13 April - Wedding day with 120 attendees

12. It is further asserted that, on 13 April 2019, "*we had our wedding day in Dire Dawa with approximately 120 attendees. We then had a week-long honeymoon at the MA Hotel in Dire Dawa*" (see para. 7 of the first applicant's 16 February 2022 affidavit).

This Court's role

13. Before proceeding further, it is appropriate to recall the proper role of this Court in judicial review. This Court is not hearing an appeal. This is a judicial review application where the Court is concerned, not with the *merits* of the decision, but with its *lawfulness.* Whilst

keeping the foregoing principle to the fore, it is now appropriate to look at the evidence which was/was not before the decision-maker in order to consider the lawfulness of the decision made. It is important to emphasise that the analysis of the evidence which appears in this judgment is made from that perspective, i.e. not *qua* decision–maker, but from the perspective of this Court considering the decision's lawfulness.

22 items which accompanied the first-instance application

14. The 22 items referred to in the aforesaid 23 March 2021 letter from Messrs Abbey Law comprised the following:

i. ***"Copy of visa application summary sheet*".**

This comprised a 2-page document relating to the application completed on-line by the 2nd applicant.

ii. ***"Copy of receipt for fees paid".***

This comprised a 19 March 2021 receipt issued to the 2nd applicant by the Irish Embassy in Addis Ababa.

iii. ***"Signed authority*".**

This is dated 16 March 2021. It confirms that Messrs Abbey Law, solicitors, act for the 2nd applicant and authorises the release of personal data.

iv. ***"Two passport photos of the applicant".***

v. ***"Original passport of the Applicant".***

vi. *"**Copy passport of the Sponsor**".*

vii. ***"Copy Irish Resident Permit of the Sponsor".***

viii. ***"Original marriage certificate and certified translation".***

This records the date of the Applicants' marriage as being 02 March 2019.

ix. ***"Bank statements of the Sponsor, 28 July 2020-26 January 2021 (the most recent available)".***

No reason is provided by the first applicant as to why these are the most recent available. The statements furnished record the balance, as of 28 July 2020, as being €30.58. The balance, as of 26 January 2021, is recorded as being €759.56.

x. ***"Three recent payslips of the Sponsor".***

The first of these (all of which describe *"CPL Solutions Ltd"* as the "*company*" and name the first applicant as the "*worker"*) is dated 05/03/2021 and records *"Total Payments*" for the "*W/k Ending 28/02/2021*" as being €504.00, with "*Net Pay*" after deductions (of €57.50) recorded as €446.50. The second of the payslips relates to the week ending 07 March 2021 and, again, records net pay as €446.50. The third payslip relates to the week ending 14 March 2021 and, once more, records net pay as €446.50.

None of these 3 payments are reflected as received in the first applicant's bank account, in circumstances where she did not submit bank statements covering this period. Each of the 3 payslips contain *inter alia* entries entitled "*Gross pay to date"* and in the most recent payslip this is stated to be €4,119.36.

It is uncontroversial to say that payslips do not, in objective terms, comprise a contract of employment; nor is it clear from the face of payslips the extent to which work for CPL is guaranteed into the future, or not.

xi. ***"Employment letter of the Sponsor from Manpower Group (for employment from July–December 2020)".***

This letter is dated 17 December 2020 and states that the first applicant *"is employed by the ManpowerGroup from 29 07 2022 present".* It goes on to state that she is employed "*as an Assembler on our client* [named] *premises located in* [address given] *Dublin 15".*

xii. "***Social welfare statement of the Sponsor".***

The cover letter from the Department of Social Protection's *"Social Welfare Services Office",* dated 15 December 2020, encloses a statement of the payments received by the first applicant from 09 March 2020, to 25 August 2020. The attached statement confirms that the first applicant received "*Jobseekers Allowance*" during that period of €5,160.20.

xiii. "***Employment Details Summary of the Sponsor, 2020".***

This one-page document was issued by the Department's *"Payee Services*" and confirms, *inter alia*, that the first applicant's gross earnings for 2020 came to a total of €10,351.43.

It also confirms that the first applicant started work with "*Manpowergroup (Ireland) Limited*" on 31/07/2020 and left employment on 18/12/2020 (i.e. the first applicant's employment with Manpower group ended the very day after the 17 December 2020 letter from Manpower Group in which that entity confirmed her employment).

xiv. "***Educational certificates of the Sponsor".***

These comprise two "*Component*" Certificates in respect of *"QQI Award - Further Education and Training Award"*, which are dated 14 June 2019 and 14 June 2020, respectively. Both refer to a number of "*Level 4*" and "*Level 5"* merits/passes and, cumulatively, the topics described are as follows: "*Business Calculations"; "Care of the Older Person"; "Care Skills"; "Communications"; "Personal Effectiveness"; "Work Experience"; "Airline Studies"; and "Customer Service"*.

In addition, a "*CPD"* certificate issued by the "*International Academy of Travel*", Waterford Airport, is furnished. This is stated to be with respect to the successful completion by the first applicant of "*Initial Training in Dangerous Goods by Air"* and records that the certificate is valid from 29/11/ 2019 to 28/11/2021.

In objective terms, the foregoing evidences that the first applicant has completed certain courses of study in a variety of topics. It is fair to say, however, that there is no indication given on any of the 3 certificates as to when each component was started; when each component was completed; whether, in respect of the topics identified, the first applicant was required to engage in full-time or part-time study, or the commitment required in terms of hours per day/week which the relevant courses, or components of courses, required.

xv. ***"Pinergy letter as proof of address".***

This letter, dated 8 January 2021, confirms that the first applicant [who is named in the letter] has been a customer of "Pinergy" since 18 August 2020 and that the relevant account [number given] is registered at the address specified [a particular flat in Dublin is identified].

xvi. ***"Letter from the Sponsor's landlord confirming that the applicant can reside with her in their apartment".***

This typed but unsigned letter states "*To whom it may concern. This is to certify that Mr* [KA] *can reside in flat* [address given] *as this is two bed* (sic) *apartment".*

xvii. ***"Call log showing contact between the Sponsor and Applicant".***

This comprised 13 A4 pages in total. In objective terms, the vast majority of entries record "*missed*" calls (noted to have been missed from a "KB", rather than "KAU"). Indeed, there would not appear to be any objective record of a call, be that a voice-call or a video-call, contained anywhere in the documents submitted.

Furthermore, many of the entries relate to the same day. For example, missed calls are recorded at 19:45; 20:40; 22:17 and again at 22:17, all being on 11/06/2020. Missed calls are recorded at 20:41; 20:49; 20:49 and again at 20:49, all being on 12/06/2020. A missed call is recorded at 13:32 on 13/06/2020, with further missed calls recorded at 16:53; 16:56; 19:02; 19:03 and 21:37, all being on 14/06/2020. On 17/06/2020, missed calls are recorded at 19:41; 20:28; 22:07; 22:07; and again at 22:07. Missed calls are recorded at 20:16 on 23/06/2020 and at 20:00 on 24/06/2020.

One of the A4 pages (which does not identify the particular year) records 5 missed calls on "Mon, 7 Dec"; a missed call on "Mon, 14 Dec"; 3 missed calls on "Tue, 15 Dec" and a missed call on "Fri, 18 Dec". A missed call is also recorded at 19:52 on 24/12/2020.

It is entirely fair to say that all of the missed calls are grouped together over a very limited number of days, with weeks and months elapsing between the dates recorded.

Without for a moment assuming the role of the decision-maker, but looking at this evidence from a purely objective standpoint, it is entirely fair to say that; (i) it relates to a limited period; (ii) it comprises, in the main, record of missed calls; and (iii) although the first applicant averred, at para. 8 of her 16 February 2022 affidavit, that: "*Since our marriage we have remained in* ***constant contact and communicate daily*** *in order to maintain our emotional and loving relationship"* (emphasis added), the documents submitted certainly do not reflect constant, or daily, or weekly, or even monthly contact.

Looking at this documentation objectively, it is also fair to say that it contains no documentation in the 'run up' to the couple's 2 March 2019 marriage. Given that it was an arranged marriage (involving one person in Ethiopia and one person in Ireland) it seems uncontroversial to say that there must have been a certain amount of communication (whether by phone calls, emails, text-messages or otherwise) to arrange it, but no such communication was furnished.

Furthermore, there is no documentation evidencing any communication between the now-married couple, in the period from 02 March to 05 April, i.e. in the 'run-up' to what the first applicant says was her first trip to see her husband (in the manner discussed presently, documents were furnished regarding flights by the first applicant from Dublin to Madrid on 05 April and from Madrid to Addis Ababa on 06 April 2019).

The first applicant left Ethiopia on 28 April 2019 (after what she describes in her grounding affidavit, para. 7, as "*a week-long honeymoon at the MA Hotel in Dire Dawa*") and she arrived back in Ireland, via Madrid, on 29 April 2019. Despite this, there is no documentation evidencing any communication between the couple in the days, weeks or, indeed the months after 28 April 2019. The first message in these documents is dated 9 months *after* the date of the Applicant's marriage (i.e dated 07/12/2019).

In the first named applicant's "*Relationship history statement"* (which comprised item 19 submitted by Messrs Abbey Law, solicitors, to which I will refer presently) she stated, *inter alia:* "***I left Ethiopia on 28th April 2019 and from that day we keep contacts each other by phone, WhatsApp, Imo and text messaging****. Every time [K] call me as I call him. We do* ***video chat nearly every day****"* (emphasis added). It is entirely fair to say that the foregoing statement is not reflected in the documentation submitted.

Again, looking objectively at what the evidence discloses (and without for a moment usurping the decision-maker's role) the latest date in this documentation certainly

appears to be 29/01/2021. In other words, no evidence of communication is provided in respect of the period of almost 3 months between then and the date of the letter submitted by Messrs Abbey Law, on 23 March 2021.

xviii. ***"Itineraries and boarding passes as evidence of the Sponsor's travel to visit the Applicant."***

This documentation identifies the first applicant and refers *inter-alia* to Ethiopian Airlines flights by her from Dublin to Madrid (05 April 2019); from Madrid to Addis Ababa, Ethiopia (06 April); from Addis Ababa to Dire Dawa, Ethiopia (06 April); from Dire Dawa to Addis Ababa (28 April); from Addis Ababa to Madrid (28 April); and from Madrid to Dublin (29 April).

xix. ***"Relationship history statement".***

In this undated 3-page document, the first applicant provided information under the following headings: "*Our First Meeting*"; "*Before Wedding*"; "*Our Wedding*"; "*Our First Honeymoon"; "After I left Ethiopia";* and *"Financial Status*".

With respect to the couple's relationship prior to their marriage in 2019, it is said (under the heading "*Our First Meeting"*) that the first and second applicant were childhood friends; lived in the same neighbourhood; played together from childhood until adulthood; were best friends; that their families were very close; that they had lots of shared memories; and that the first applicant's mother always asked her to marry the second applicant. Despite the foregoing, it is fair to say that no evidence of the couple ever having met *prior* to the first Applicant's move to this State was included at item 17.

Under the heading "*Our Wedding day*", reference is made to a blessing from the second applicant's family on 5 April 2019 *"before our wedding*" and it is stated that "*both families agreed on 13th April 2019 will be our wedding day".* It will be recalled that at the first applicant has averred that, in circumstances where she was residing in Ireland, a traditional marriage ceremony took place on 2 March 2019 "*over video call*". That date is reflected in the marriage certificate.

In submissions during the hearing, it was made clear that, other than their relationship in childhood, the parties did not meet face-to-face prior to the first applicant's trip to Ethiopia during which she and her husband had a celebration described in oral submissions akin to a "*White Wedding*", which took place on 13th April 2019.

With respect to the period from 28 April 2019 onwards, under the heading "*After I left Ethiopia*" the following, *inter alia*, is stated: *"It was hard for both of us when I had to leave Ethiopia. I left Ethiopia on 28th April 2019 and from that day we keep contacts each other by phone, WhatsApp, Imo and text messaging. Every time [K] call me as I call him. We do video chat nearly every day."* Again, and without purporting to 'step into the shoes' of the decision-maker, it is fair to say that the documentation which was submitted at item 17 (described as *"Call log showing contact between the Sponsor and Applicant*") does not offer objective support for the claim that, from 28 April 2019 onwards, the Applicants have kept in daily contact by phone, WhatsApp, Imo and text messages, or that the couple have video chats nearly every day.

The Relationship history statement went on to describe *"the situation in Ethiopia*" as being "*very dangerous"* and stated that the 2nd applicant was "*tortured heavily*".

Under the heading of "*Financial Status*", the first applicant stated that she was working as a "*full-time General Operator*" and she described herself as "*financially solvent*". She went on to say that she had a 2- bedroom flat where the 2nd applicant could easily be accommodated.

xx. ***"Photos of Applicant and Sponsor".***

Under the heading "*Our Wedding*", the first applicant stated *inter-alia* the following in her *"Relationship history statement"* (which comprised item 19, referred to above): "*We had our wedding on 13 April 2019 in a Convention Centre in the presence of both family members, Friends and other relatives (Approximately 120 people) in wedding party which was hosted by my family."*

Of the total of 6 photographs which were furnished, 4 photographs show only two persons (bride and groom); the 5th photograph shows a total of 9 persons (including bride and groom); and the 6th photograph shows a group of 9 persons (including bride and groom). None of the photographs include any date/time stamp. It is fair to say that, on their face, none of the 6 photographs offer objective support for the claim that there were approximately 120 people who celebrated the couple's wedding in a Convention Centre.

xxi. ***"Today News Africa article".***

This is entitled "*Has The World Forgotten About The Oromo People And The Detention Of Jawar Mohammed?"* and begins as follows: *"While the unfolding crisis in the Tigray region of northern Ethiopia has drawn international attention, conflict and tensions between the Oromo people and the Ethiopian government persist despite a lack of widespread media coverage or international action on the issue. Jawar Mohammed, a prominent Oromo political activist, has now been in prison for over eight months and little action has been taken to make his release a priority. Jawar was arrested in June 2020 and charged with a host of terrorism-related charges. Many have claimed that Jawar's arrest was politically and strategically motivated in order to suppress opposition to Prime Minister Abiy Ahmed heading into the 2020 election. Jawar had previously indicated plans to run in opposition to Abiy…"*

xxii. ***"Photographs of the applicant following his attack (discussed further below)".***

The letter from Messrs Abbey Law, solicitors, stated *inter-alia* that *"…the Applicant has recently been the victim of a violent attack which he instructs was inflicted by soldiers of the Ethiopian government. The attack took place on 29 June 2020 following a demonstration against the arrest of a number of Oromo political leaders. We enclose photos of his injuries. In view of the ongoing state of unrest in the Oromo region (see enclosed Today News Africa article) our client has reasonable fears that he may be subject to further abuse at the hands of government soldiers or supporters".* Three photographs are attached.

All three photographs show significant bruising, in particular, to the shoulder of what appears to be a male. In objective terms, it seems difficult if not impossible to identify the individual, given that none comprise a "full face" photograph and one of the photographs shows a body-part only.

First-instance submissions

15. The submissions made by Messrs Abbey Law also included the following: that the Minister must have due regard to Article 41 of the constitution, with particular reference made to *Gorry*; that the sponsor also has the right to family and private life under Article 8 ECHR; that these rights can only realistically be enjoyed if the 2nd applicant was allowed to join her in Ireland; that it would be unreasonable to expect her to return to Ethiopia permanently; that a refusal of the visa application would fail the test summarised by the European Court of Human Rights ("ECtHR") in *Connors v. UK,* as there was no "*pressing social need"* requiring that the Sponsor be deprived of the Applicant's company; that the Applicant's admission to the State would have no negative impact on the economic well-being of the country; that a denial of the visa could not be considered a proportionate interference with

article 8 rights, having regard to the House of Lords decision in *Huang v. Secretary of State for the Home Department* and *EB (Kosovo) v. Secretary of State for the Home Department;* that the sponsor has been lawfully resident in Ireland throughout the existence of her family life with the applicant and reliance was placed on the Court of Appeal's decision in *CI v. Minister for Justice,* with respect to the strength of her Article 8 rights *"as compared to migrants with precarious status";* that to refuse the visa application would amount to an interference with both privacy and family life rights; that the application met most of the criteria established under the Family Reunification Policy Document.

Acceptance that the Sponsor does not meet the financial criteria (para. 17.2 of Policy)

16. The penultimate page of the 23 March 2021 submissions by Messrs Abbey Law contains *inter-alia* the following:

> ***"It is accepted that the sponsor does not currently meet the financial criteria of the Policy document.*** *However, we draw your attention to paragraph 1.12 of the Policy Document, which states that*
>
> > *'It is intended that decision-makers will retain the decision* (sic) *to grant family reunification is in cases that on the face of it do not appear to meet the requirements of the Policy. This is allow* (sic) *the system to deal with those rare cases at present and exceptional set of circumstances, normally humanitarian, that would suggest that the appropriate and proportionate decision should be positive.'*
>
> *We submit that the circumstances of this case make it an appropriate one in which to exercise that discretion…"* (emphasis added).

17. The 23 March letter went on to refer to a violent attack which, according to the 2nd Applicant's instructions,"*…was inflicted by soldiers of the Ethiopian government"* on 29 June 2020 (and I have previously quoted the relevant passage when looking at document 22).

Initial refusal of application – 25 May 2021

18. The first-instance application was refused by way of a decision communicated to Messrs. Abbey Law solicitors in an email dated 25 May 2021 which confirmed that the application had been refused by the Irish Naturalisation and Immigration Service ("INIS") for the following reasons:

> *F:- Finances shown have been deemed insufficient.*
>
> *Sponsor has failed to demonstrate that they meet the financial criteria as set out in the Policy Document on Non-EEA Family Reunification section 17.6.*
>
> *The Visa Officer has reasonable concerns, based on the documentation submitted in the application, that the granting of a visa to the applicant to reside in the state could result in costs to the State.*
>
> *FM:- There is no automatic right for non – EEA nationals who are family members of:*
>
> *Non-EEA nationals with permission to reside in the State to migrate on a long-term basis to Ireland.*
>
> *Your case has been fully examined on the basis of the documentation submitted and it has been decided not to grant your application. As per section 15.6 of the Policy Document on non-EEA Family Reunification, proxy marriages may be recognised under Irish law. The parties must be able to show that they have met each other in person prior to marriage however this has not been addressed in the application.*

Furthermore as per letter from 'Abbey Law' it is stated that the applicant was the victim of a violent attack on the 29th June 2020, however while the Visa Officer notes the photographs submitted no medical report confirming same has been submitted.

ID: Insufficient documentation submitted in support of the application:-

Please see linked to "Documents Required" as displayed on our website – www.inis.gov.ie

Documentation submitted does not show that the application meets the qualifying criteria as set out in the Policy Document on non-EEA Family Reunification section 15.6.

Documentation submitted does not show that the application meets the qualifying criteria as set out in the Policy Document on non-EEA Family Reunification section 17.6.

Insufficient information has been submitted to show the extent to which family life exists between the sponsor and the applicant.

Full documentary account of relationship between applicant and sponsor not submitted.

Evidence of ongoing routine communication between applicant and sponsor both prior to and since marriage not submitted. As per evidence of communications submitted Visa Officer notes the name [KB] however the applicant's name is [KAU].

Evidence of applicant and sponsor meeting face-to-face prior to marriage not submitted.

Information provided regarding marriage would indicate it was done by proxy. Evidence supporting documentation regarding same has not been submitted.

Evidence of sponsor having visited applicant in home country since marriage not submitted.

Evidence of sponsor full and surely supporting applicant via remittances not submitted.

Sponsor has failed to submit evidence of finances over previous two years.

Sponsor has failed to submit copy of previous Ethiopian passport.

ID:- Quality of Documents

Marriage certificate. Applicant and sponsor married on the 2nd March 2019 as per marriage certificate submitted, and marriage was registered on the 13th April 2019. As per letter of invitation the sponsor states marriage was conducted by way of video, on the 2nd March 2019 while the applicant and sponsor were in their respective countries. The sponsor has not provided an explanation as to why she was not in the home country of the applicant at time of marriage.

INCO:- Inconsistencies e.g. contradictions in the information supplied.

Details surrounding relationship history. As per letter of invitation it is stated that the applicant and sponsor were childhood friends and their marriage was arranged. The Visa Officer notes there is nothing submitted to suggest the applicant and sponsor met prior to the sponsor coming to the State in 2014.

PR/PF:- The granting of the Visa may result in a cost to public funds and/or resources.

Sponsor has failed to demonstrate that they meet the financial criteria as set out in the Policy Document on non-EEA Family Reunification section 17.6.

RH:- Relationship history

As per section 5.3 of the Policy Document on non-EEA Family Reunification the onus of proof as to the genuineness of the family relationship rests squarely with the applicant and sponsor. This has not been sufficiently addressed in the application.

The applicant and the sponsor have not provided sufficient evidence of the stated relationship. In general for immigration purposes a relationship must include a number of face to face meetings (excluding WebCam) between the parties. Marriage is stated to be an arranged marriage. Insufficient documentary evidence has been provided in that regard. The onus rests with the applicant to demonstrate that the relationship is bona-fide and sufficient for immigration purposes.

This decision can be appealed within 2 months from the date of this letter. An appeal must be submitted in writing, fully addressing all the reasons for refusal to:

The Visa Appeals Officer

INIS…

All additional supporting documents should be submitted with your appeal…"

19. As can be seen from the foregoing, the first instance refusal was on multiple grounds including that the first applicant's finances were deemed insufficient. This was entirely consistent with the explicit acknowledgment (*via* solicitors) that the first applicant did not meet the financial criteria set out in the Policy (see para. 17.2 of same).

Cost to public funds / Insufficient evidence

20. Other grounds included that the documentation was insufficient; that there was no evidence to suggest that the Applicants had met prior to the first applicant coming to the State in 2014; that the grant of the visa may result in a cost to public funds; and that the Applicants had not provided sufficient evidence of their relationship history.

21. It is entirely fair to say that, by means of the first instance refusal and the detail contained in it as to the reasons for the refusal, the Applicants were squarely 'on notice' of the deficiencies found by the relevant visa appeals officer.

Appeal

22. Under cover of a letter dated 1 June 2021, an appeal was submitted via Messrs. Abbey Law solicitors. Submissions were made with respect to the reasons given for refusal. These included the following: -

"F: Finances shown have been deemed insufficient.

The application was expressly made on the basis that, ***although our client did not meet the financial criteria*** *of the non – EEA Policy Document on Family Reunification, the Minister's* ***discretion should be exercised in the particular circumstances of this case"*** (emphasis added).

23. In substance, this comprises a re–confirmation that the relevant financial criteria in the Policy have *not* been met. This is followed by a request that the Minister exercise her discretion, notwithstanding (given the particular circumstances of the case).

24. During the course of skilled submissions made on behalf of the Applicants, Mr. O'Dwyer SC asserted that the "*fundamental problem*" for the first named applicant is that, because she was a student and her studies did not finish until mid–2020, she had been unable to earn prior to that period and it rendered it impossible for her to meet the financial criteria in the Policy. With regard to the foregoing submission, it seems entirely fair to say that this was not a case made on behalf of the first named applicant by means of submissions or evidence tendered with the 1 June 2021 appeal.

25. Furthermore, earlier in this judgment, I looked at what the evidence discloses in objective terms. Item 14 of the 23 March 2021 letter from Messrs Abbey Law concerned *"Educational certificates of the sponsor*". They are, as a matter of fact, entirely silent as to when the applicant commenced her studies. They say nothing about how many hours the applicant was required to devote to each component. The certificates do not indicate when each component course ended. A date is given for when each certificate *issued*, but this says nothing about whether the relevant courses were 'full–time' or 'part–time', 'on-line' or 'in person'. In objective terms, the evidence which was submitted on behalf of the fist named applicant does not, in my view, establish that, by reason of commitments to full–time study, the first named applicant, was unable to engage in paid employment until mid–2020. Nor is a claim in these terms made in the 23 March 2021 letter from Messrs Abbey Law (concerning the initial application) or in the 1 June 2021 letter (comprising the appeal).

At college

26. Thus, regardless of the skill and sophistication with which submissions are made by the first applicant's counsel that she "*was at college for a large part of the three years*" and that this "*should have been credited to her*" by way of the Minister exercising discretion in favour of granting the visa, those submissions do not appear to me to be sufficiently underpinned by the evidence which was before the Minister.

27. A related submission was made on behalf of the Applicants to the effect that nobody in what was contended to be the first applicant's position (i.e. a full- time student for the first two, of the three years of relevance to the Policy) could hope to meet the qualification requirements. With respect to this submission, three points seem to me to be relevant. First, the evidence does not establish that the first applicant was in *full-time* education for two years. Second, no challenge to the terms of the Policy is made in these proceedings. Third, it is entirely uncontroversial to say that there will be many thousands of students in full-time education the length and breadth of this State who, by virtue of their full-time educational commitments, will not be in a position to earn an average of €13,333 per annum (i.e. €40,000 over 3 years). That scenario seems utterly commonplace, insofar as many in full time education will be concerned. Leaving aside, for present purposes, that the evidence does not establish full-time attendance in college, and also leaving aside that the Applicants did not assert at first instance or on appeal or in these proceedings that the Policy's financial requirements were unfair to the first applicant qua student, or that the Policy's terms were, or are, unfair or unlawful in any way, I find it impossible to see how a *commonplace* scenario can also constitute *exceptional* circumstances, justifying the exercise of the Minister's discretion.

"Viewed a certain way"

28. It was also submitted on behalf of the Applicants that if matters were viewed "*a certain way"* one could conclude that the first applicant *did* satisfy the financial criteria. It was submitted that this was "*in circumstances where, if the Minister applied a forward–looking analysis*" the first applicant would meet the criteria. The gravamen of this submission was that, if calculated with reference to the payslips submitted, the first named applicant's gross income would appear to amount to over €26,000 (if one projected that income into the future).

29. Insofar as it is suggested that, viewed from this very different perspective, the first applicant *did* satisfy the Policy's financial criteria, I feel bound to reject that submission, for the simple

reason that it is a submission which ignores the very basis upon which the Policy's financial criteria are assessed (i.e. on the basis of an established 'track record' not an extrapolation into the future based on a given pay-slip, or payslips). The latter approach must, of necessity, rely to a material extent on a 'hope-factor' (e.g. the very obvious hope that employment continues into the future at the same or a greater rate of pay for at least 2 years).

30. It bears repeating that no challenge is brought in the present proceedings to the legitimacy of the Minister *having* a Policy, or to the *terms* of this Policy (which, as a matter of fact, looks at a 3–year 'track record' of past earnings and does not adopt the approach contended for at the hearing, in submissions by the Applicants' counsel). Furthermore, and most importantly, it was never claimed, be that at first instance or on appeal, that the first applicant *satisfied* the financial criteria. On the contrary, it was made explicit that she did not. Nor was it ever claimed (be that at first instance or on appeal) that the first applicant had a *guaranteed* income of a minimum of €26,000 per annum for the following three years. In short, these submissions cannot avail the Applicants.

31. For similar reasons, I cannot accept the related but somewhat different submission made by the Applicants' counsel that it was unreasonable, irrational, disproportionate or in any way unlawful for the Respondent *not* to have approached this visa appeal by taking the first applicant's weekly earnings and extrapolating from them that, three years into the future, she would have earned in excess of the financial criteria set out at para. 17.2 of the Policy. Bearing in mind that no challenge is made to the contents of the Policy itself, it was and is entirely legitimate for the Minister to take a view (with reference to an established 'track record' over the previous three years) regarding a sponsor's financial position in the context of the legitimate aim of avoiding risk to finite public funds and public resources, if a visa were to be issued to an applicant.

'Proxy' marriage

32. Returning to the 01 June 2021 letter of appeal, a copy of the first applicant's naturalisation certificate was enclosed and it was submitted that, having regard to the decision in *Gorry*, any refusal decision would require clear and persuasive justification. The following submission was also made: -

> "*Proxy marriages.*
>
> *We are instructed that* ***the marriage was not a proxy marriage****. Although the Nikah (traditional Muslim ceremony) was carried out on 2 March 2019 over video call, the wedding itself took place on 13 April 2019 with both parties present. We refer to the half – dozen wedding photos submitted with the application, along with the sponsor's proof of travel. We also refer to the documentation submitted with the application which shows that the marriage was registered on 13 April 2019.*
>
> *We are instructed that the applicant was not able to be present for both the Nikah and the wedding, due to the long period of time this would require her to be absent from the State. Accordingly, she chose to be present for her wedding".* (Emphasis added).

33. Although I am satisfied that nothing turns on the following observation, it seems to me that the foregoing submission is materially different to the approach taken at the hearing on 20 October. During the hearing, the applicant's counsel made clear that the marriage *was* a proxy marriage, and that it was carried out on 2 March 2019, *via* video call. It was also submitted that proxy marriages are common in the applicant's culture and for people of their faith. That submission is entirely consistent with the averments made by the first named applicant to the effect that the *marriage* ceremony took place, over video call on 2 March 2019 (while she was in Ireland and the second applicant was in Ethiopia) whereas a family

blessing took place on 6 April and their *wedding* day took place on 13 April 2019 (with both present in Ethiopia).

34. The appeal went on to submit that, with respect to the assault on the second named applicant "*We are instructed that he did not seek medical treatment because he was too afraid that this would identify himself as an opponent of the regime and possibly lead him to be further targeted".*

No further details of relationship submitted on appeal

35. It will be recalled that the first instance refusal made clear that a full documentary account of the relationship had not been submitted. In the appeal, no further details were provided. Rather, the Applicants' solicitors took the stance that they were "*at a loss to understand why*" the relationship history statement *"is not deemed a full account*". It is unnecessary to quote again the first instance refusal which I set out *verbatim* earlier. However, it makes clear *inter alia* that: "*insufficient information has been submitted to show the extent to which family life exists between the sponsor and the applicant. Full documentary account of relationship history between applicant and sponsor not submitted. Evidence of ongoing routine communication between applicant and sponsor both prior to and since marriage not submitted*". The foregoing clearly put the Applicants on notice that the evidence submitted was regarded as deficient, but it is fair to say that no further evidence was proffered.

Missed Calls [KB]

36. With regard to the name [KB] (as opposed to [KAU] or [KU]) which appeared on the documents recording missed calls, the following submission was made in the appeal: -

> *"We are instructed that 'B' is the applicant's family name, which does not appear on his official documentation. In this regard, we refer to the enclosed article 'the entry word in Ethiopian names' which states as follows: -*
>
> > *'No one seems to follow the Civil Code which states that every individual 'be designated in administrative documents by his family name followed by his first names and by his patronymic'*
>
> *We enclose a screenshot from the applicant's Facebook page on which he uses the name 'KB' his cover photo very clearly is the same person in his passport and the same couple in the wedding photos submitted with the application".*

37. The letter of appeal went on to make a submission to the effect that sufficient evidence of the sponsor having visited the applicant had been submitted and comprised her flight tickets and passport stamps. It was also submitted that "*. . . it would be unfair to find against the applicant on this basis in circumstances where international travel has been all but impossible for more than half of the period since the marriage*". The appeal submitted that there was "*no requirement to show financial remittances in a Joint Spouse visa application*".

38. Whereas the first instance refusal noted that the sponsor had failed to submit her previous Ethiopian passport, the Applicants' solicitors made clear that, in the context of the appeal, the first applicant/sponsor declined to furnish her previous passport. The submission was made that "*. . . as the Sponsor is now an Irish citizen* . . .*her expired Ethiopian passport is wholly irrelevant".* It seems uncontroversial to say that the first applicant's expired Ethiopian passport would, for example, evidence whether she had been to Ethiopia as an adult prior to her marriage to the second applicant. If she had - and bearing in mind her averment at para. 5 of her 16 February 2022 affidavit that "*Following my move to the State, we maintained a friendly relationship, insofar as would be permitted by our Islamic cultural Mores*" - whether the first and second Applicants met in the context of this friendship on an *prior* trip to Ethiopia would certainly seem to be *prima facie* of some relevance. In any event, the first applicant declined to furnish her prior passport.

39. The appeal went on to submit that there were no inconsistencies or contradictions in the application. It will be recalled that the foregoing issue was raised in the first instance refusal wherein it was stated that "*the visa officer notes there is nothing submitted to suggest the applicant and sponsor met prior to the sponsor coming to the State in 2014*". Notwithstanding the details given with respect to the relationship history to the effect that the applicant and sponsor were "*childhood friends*" whose families knew each other and who were close in childhood, in objective terms, it is entirely fair to say that, just as the Applicants accept that they never met as adults, there was no documentary evidence furnished which would offer any objective support for the proposition that they ever met prior to the first applicant coming to Ireland in 2014.

40. With respect to the finding that the granting of the visa may result in a cost to public funds and/or resources, the appeal did *not* assert that the sponsor met the financial criteria identified in para. 17 of the Policy. Nor did the appeal assert, for example, that the second named applicant had particular skills or qualifications, or had a certain level of income or savings, or that there was any such evidence relating to the second named applicant which the decision maker should consider, be that at first instance or on appeal. Plainly, this is not a challenge to the first instance decision, but the question of whether the sponsor was or was not supporting the visa applicant, and the extent of that support, could hardly be considered irrelevant. The first instance decision had noted, entirely accurately, that no evidence of the sponsor financially supporting the applicant, *via* remittances, had been submitted. In the context of looking at what was submitted by way of appeal, no such evidence was provided.

41. Rather, with respect to the possible cost to public funds and/or resources, the submission was made, with reference to the *Gorry* decision, that the Minister could not refuse the visa application "*on the basis of a blanket application of an arbitrary financial threshold*". It seems entirely uncontroversial to say that, as a general proposition, the Minister is entitled to protect what are necessarily limited State resources by refusing visas to those who are not in a position to adequately provide for themselves. It will be recalled from my earlier review of the documentation submitted with the first instance application, what was disclosed on the topic of finance comprised, inter alia, the following: (i) the first applicant did not submit her latest bank account statements; (ii) those bank statements which she did submit indicated a credit balance on 28 July 2020 of €30.58; and a credit balance, on 26 January 2021, of €759.56; (iii) she had been on jobseekers' allowance from 9 March 2020 to 25 August 2020 and received a total of €5,160.20; (iv) she submitted no contract of employment or such documentation as might speak to the permanence, or otherwise, of her employment status; (v) she worked for Manpower Group from 29 July 2020, and that firm's letter dated 17 December 2020 confirmed that she was still employed in one of Manpower Group's clients; (vi) however, her employment details summary for 2020 confirms that she ceased working for Manpower Group the very next day, 18 December 2020; (vii) as of the week ending 14 March 2021, her gross weekly pay from "*CPL Solutions Ltd*" was €504, representing net weekly pay of €446.50; (viii) her cumulative gross earnings as of the week ended 14 March 2021 (specified to be €4,119.36) is, in objective terms, less than the total amount of jobseekers' allowance received by the first applicant in 2020 (€5,160.20). Against the foregoing backdrop, the first instance refusal afforded the opportunity for the first named applicant to submit such *additional* evidence, touching on the question of finances, as she wished. None was provided in respect of the first applicant. Similarly, no documentation or evidence was provided with respect to the second applicant's qualifications, earnings or earning potential.

42. Particular reference was made in the appeal submission to the following passage from *Gorry* wherein O'Donnell J. (as he then was) stated at para. 71: -

> *". . . that if the couple can add to the fact of marriage the evidence of an enduring relationship that if the State were to refuse the non-citizen party entry to the State for no good reason, and simply because it was a prerogative of the State, it could*

be said that such an approach failed to respect the rights of those involved and, in particular, the institution of Marriage".

43. With reference to the Supreme Court's decision in *AMS v. Minister for Justice and Equality* [2014] IESC 65 (concerning special consideration conferred on family members of refugees under s. 18(4) of the Refugee Act 1996) it was submitted that it would be disproportionate were the Minister not to exercise her discretion in favour of the second applicant.

44. The final aspect of the appeal related to the couple's relationship history and it is appropriate to set out *verbatim* what was stated by Messrs Abbey Law on their client's instructions: -

"*We would note that the applicant has submitted a number of wedding photos, a relationship history statement of the Sponsor, and evidence of ongoing contact between himself and his spouse over the past year.*

We submit that it is not open to the Minister, in light of the Gorry judgment to disregard all such evidence and impose a blanket rule that documentary evidence must be provided of face–to–face meetings prior to the wedding or of how the wedding was arranged. Indeed, it is not even clear what kind of documentary evidence of arranged marriage is envisaged in the decision.

We submit that rather than creating a tick box list of evidence that must be presented, irrespective of the individual circumstances of the couple or their background and culture, the Minister is required under Gorry to consider the weight of all the evidence and reach a decision based on the ordinary civil standard of proof. We submit that any fair assessment of the documentation submitted would lead any reasonable person to accept that theirs is a genuine and loving marriage".

45. With respect to evidence touching on the couple's relationship, in particular, their relationship from 02 March 2019 (the date of their marriage) onwards, the choice was made to submit <u>no</u> further evidence whatsoever when making the appeal. Rather, reliance was placed on such evidence as had been submitted at first-instance. This was a decision made by the Applicants notwithstanding the various deficiencies highlighted in the first instance refusal.

<u>17 November 2021 - Appeal Refusal Decision</u>

46. The decision under challenge is, in objective terms, an extremely detailed one. It comprises a four-page letter from the Respondent's appeals unit which is accompanied by what the Respondent describes as a "*detailed consideration document in which a full examination of the application presented has been provided"* (the "detailed consideration document" or the "consideration document").

47. By way of certain important preliminary comments, the Applicants do not suggest that the decision contains other than an accurate description of the submissions which were made and the evidence which was proffered in support of their application. In other words, it is not claimed that there is any inaccuracy in the manner in which the submissions, or evidence, is described in the decision. Nor is it claimed that there was any specific piece of evidence of submission which was before the Minister and which she failed to consider.

48. It is appropriate to quote *verbatim* from the 17 November 2021 letter to the second named applicant which stated the following: -

"*Dear Mr U,*

I am instructed by the Minister for Justice and Equality to refer to your appeal in relation to the above visa application.

*I wish to inform you that your visa appeal has been examined by a visa appeals officer from immigration service delivery and **all documentation and submissions made have been considered**.*

I am to inform you that your appeal for the visa sought has been refused.

The application has been examined under the Policy Document on Non EEA Family Reunification. The application has also been considered under Article 41 of the Constitution of Ireland and section 3 of the European Convention on Human Rights Act 2003 having regard to Article 8 of the ECHR.

I enclose a copy of the full consideration of your application under the Policy document on Non-EEA Family Reunification, Article 1 of the Constitution of Ireland, and section 3 of the European Convention on Human Rights Act 2003 having regard to Article 8 of the ECHR for your information.

The reasons for refusal are as follows: -

F:- Finances shown have been deemed insufficient.

- ***Sponsor has failed to demonstrate that they meet the financial criteria as set out in the Policy Document on Non-EEA Family Reunification section 17.2***

- *The Visa Officer has reasonable concerns, based on the documentation submitted in the application, that the granting of a visa to the applicant to reside in the State (**could result in costs to the State)***

FM:- There is no automatic right for non-EEA nationals who are family members of: -

In facilitating family reunification due regard must be had to the decisions which the family itself has made. As per section 6.1 of the Policy Document on Non-EEA Family Reunification the longer the elective separation, the weaker must be the claim to reconstitution of the family in Ireland.

ID: -Insufficient documentation submitted in support of the application:

Please see link to "documents required" as displayed on our website –

www.inis.gov.ie.

Documentation submitted does not show that the application meets the qualifying criteria as set out in the Policy document on Non-EEA Family Reunification section 17.5.

- ***Full documentary account of relationship history between applicant and sponsor not submitted.***
- ***Insufficient evidence of ongoing routine communication between applicant and sponsor submitted.***
- ***Evidence of sponsor financially supporting applicant not submitted.***

PF: - The granting of the visa may result in a cost to public funds.

Sponsor has failed to demonstrate that they meet the financial criteria as set out in the Policy document on Non-EEA Family Reunification section 17.6.

- *The Visa Officer has reasonable concerns, based on the documentation submitted in the application, that the granting of a visa to the applicant to reside in the State* ***could result in costs to the State****.*

PR: -The granting of the visa may result in a cost to public resources.

- *Sponsor has failed to demonstrate that they meet the financial criteria as set out in the Policy document on Non-EEA Family Reunification section 17.6.*
- *The Visa Officer has reasonable concerns, based on the documentation submitted in the application, that the granting of a visa to the applicant to reside in the State* ***could result in costs to the public resources of the State****.*

RH:- Relationship History

As per section 5.3 of the Policy document on Non-EEA Family Reunification the onus of proof as to the genuineness of the family relationship rests squarely with the applicant and sponsor. This has not been sufficiently addressed in the application.

- *The applicant and the sponsor have not provided sufficient evidence of the stated relationship being in existence prior to and since marriage.*
- ***Full account of relationship history between applicant and sponsor not submitted.***
- *The onus rests with the applicant to demonstrate that the relationship is bona fide and sufficient for immigration purposes.*
- *The applicant and the sponsor have not provided sufficient evidence of the stated relationship. In general, for immigration purposes, a relationship must include a number of face to face meetings (excluding webcam) between the parties. The marriage is stated to be an arranged marriage. Insufficient documentary evidence has been provided in that regard. The onus rests with the applicant to demonstrate that the relationship is bona fide and sufficient for immigration purposes.*
- ***Insufficient information has been submitted to show the extent to which family life exists between the sponsor and the applicant****.*

This refusal letter should be read in conjunction with the detailed consideration document in which a full examination of the application presented has been provided.

The application failed to meet the requirements of the Policy Document referred to above. Accordingly, the decision to refuse the granting of the visa sought at first instance has been upheld following appeal. The onus rests on the applicant to satisfy the Visa Officer that a visa should be granted for the purpose sought.

You should note that only one appeal per application is permitted.

It is however ***open to you to submit a fresh application*** *and should you decide to do so, I would advise that you address the refusal reasons outlined in this decision…"* (Emphasis added).

The decision states clearly that all documentations and submissions were considered, and this Court cannot second-guess that explicit confirmation.

Reasons F, PF and RP

49. With respect to the 6 reasons for the refusal which are identified in the aforesaid letter, 'F', 'PF' and 'PR' are inter-related, in circumstances where the Minister found that, because the first applicant (sponsor) does not have sufficient financial resources ('F') there is a

reasonable concern that the grant of a visa to the second applicant could result in costs to public funds ('PF') and public resources ('PR').

Reasons ID and RH

50. Similarly, 'ID' and 'RH' are intertwined in circumstances where the Minister took the view that a *"full"* documentary account of the *"relationship history between applicant and sponsor"* had not been submitted; that there was *"insufficient"* evidence of *"ongoing routine communication between applicant and sponsor"*; no evidence of the sponsor financially supporting the applicant; that the Applicants had not provided *"sufficient"* evidence of the stated relationship being in existence prior to and since marriage; that *"sufficient evidence of the stated relationship"* had not been provided; and that *"insufficient information"* had been submitted to show *"the extent to which family life exists between the sponsor and the applicant"*.

Detailed consideration document

51. In terms of structure, the detailed consideration document, which also comprises part of the decision under challenge, dealt with matters under the following headings: -

Section 1: Background

A. The Proposed Sponsor (p.1)

B. The Applicant (p.1)

C. Other Family Members (p. 1)

D. Relationship History / Evidence of contact, for example but not limited to, boarding cards, messages, emails, phone calls, texts, photographs etc. (p. 1-2)

E. Financial Situation of the Applicant (p.2)

F. Financial Situation of the Sponsor (p.3)

G. Accommodation Details of the Sponsor (p.3)

H. Other Information (p.3-4)

Section 2: Assessment under the Policy Document on Non – EEA Family Reunification

Eligibility of Sponsor (p.5)

Financial Support (p.6)

Social Support (p.6)

Any Special Circumstances – Section 1.12 (p. 6-7)

Section 3: Consideration under Article 41 of the Constitution (p. 8-9)

Rights of the Family (p. 9-10)

Finances of the Sponsor (p. 10)

Conclusion (p.10-11)

Section 4: Consideration under S. 3 of the European Convention on Human Rights Act 2003 having regard to Article 8 of the ECHR (p.12)

Private and family life (p.12-13)

Conclusion (p.13)

<u>Discussion and decision</u>

52. I am very grateful to Mr O'Dwyer SC and Mr Caffrey BL, counsel for the applicant and Respondent, respectively. Both furnished detailed written submissions which I carefully considered in the wake of the trial. Both made oral submissions with clarity and skill during the hearing. These were of great assistance to the Court and the principal submissions are referred to in this judgment.

Strike-out application

53. By way of a preliminary objection, the Applicants submit that the statement of opposition is unparticularised, contrary to Order 84, rule 22 (5) of the Rules of the Superior Courts ("RSC") and should be struck out. Mr O'Dwyer made clear that he took no pleasure in pressing this issue, but it was one pursued vigorously during the hearing and it is the first issue which the court should deal with in this judgment. The Respondent's statement of opposition is in the following terms:

> *"<u>STATEMENT OF OPPOSITION</u>*
>
> *(As per Part 6 of Practice Direction HC81 – Asylum, Immigration and Citizenship List)*
>
> ***TAKE NOTICE that the Respondent herein*** opposes ***the application for judicial review on the following grounds:***
>
> *1. The Respondent denies the grounds upon which the relief is sought as if same were set out hereunder and traversed Seriatim and the matters of fact and law relied on by the Applicants do not give rise to the legal grounds for the relief claimed.*
>
> *2. Accordingly, the Applicants are not entitled to the relief claimed any relief."*

54. As can be seen from the foregoing, the Respondent's Statement of Opposition was delivered with *specific* reference to "*Practice Direction HC81"* ("HC81"), which, it is not in dispute, complements the RSC, and is directed at proceedings of this type. Thus, whilst brief, it is plainly a considered response to the claim made and a response which takes particular account of practice direction made by this court. In circumstances where asylum immigration and citizenship judicial reviews are now dealt with along with other judicial review applications, counsel for the Applicants rhetorically asked whether there was a practice direction apply to some but not other cases in which judicial review is sought. For the sake of clarity, I feel bound to reject any submission that HC81 no longer applies to cases of this type (whilst acknowledging that the submission on behalf of the Applicants may not have gone that far).

55. During the hearing, it was submitted on behalf of the Applicants, *inter alia*, that "*The only possible **saver** for the Respondent is practice direction HC81*" (emphasis added) and that HC81 seems to "*water down"* O. 84, r.22 (5). These submissions seem to me to be a very appropriate acknowledgement of the significance of HC81 for the Applicants' 'strike-out' application and the reality that the Statement of Opposition must also be viewed through the lense of HC 81. That practice direction states, *inter alia*, the following:-

> *"(4) The attention of Respondents is drawn to Order 84 rule 22 (5), which provides that it shall not be sufficient for a Respondent in a statement of opposition to deny generally the grounds alleged by the statement grounding the application, but the Respondent should state precisely each ground of opposition, giving particulars where appropriate, identifying in respect of each ground that facts or matters relied upon as supporting that ground, and deal specifically with each fact or matter relied upon in the statement grounding the application of which he does not admit the truth*.

(5) ***In giving effect to the foregoing requirement it is however unnecessary*** *for a statement of opposition* ***to contain a denial of the allegations of fact or law*** *in a statement of grounds* ***individually, issue by issue or paragraph by paragraph****, or to assert that the applicant is not entitled to relief for costs, or that the Respondent(s) are entitled to costs.* ***It is sufficient for a statement of opposition to contain only the following:***

a) a statement that the allegations of fact and law in the statement of grounds are denied, save (if applicable) that specified matters in the statement of grounds are admitted and or that the applicant is put on strict proof of specified matters, and/or a statement that the matters of fact relied on by the applicant do not give rise to legal grounds for the relief claimed; and

b) a statement of any specific matters of fact or law positively relied on by the Respondent(s), for example that specified facts or circumstances preclude the grant of relief, that the proceedings are out of time or are an impermissible collateral challenge to a specified previous unchallenged decision, or that relief should be refused due to failure by the applicant to disclose specified facts or matters when obtaining leave, by reason of a specified alternative remedy, or in the discretion of the court having regard to specified facts and circumstances.

(6) Where contrary to the foregoing a statement of opposition contains excessively repetitive traverses or fails to specify with precision the positive matters relied on, without prejudice to any other course of action that the court may adopt, the costs of such statement of opposition may be disallowed by the court." (Emphasis added)

56. Although succinct, the Respondent's position is made perfectly clear. Furthermore, in the present case the Respondent does not rely, and therefore has not pleaded reliance upon, "*any specific matters of fact or law positively relied on"*. By that I mean, the Respondent does not argue, for example, that the application is 'out of time'; or that the Applicants failed to exhaust 'alternative remedies'; or that the proceedings are a 'collateral challenge' to a prior binding decision.

57. In light of the foregoing, it seems to me that neither the Applicants nor this court would be in a materially-different position, had the Respondent pleaded opposition to the claim in a lengthy issue-by-issue traverse.

58. Furthermore, no prejudice to the Applicants has been identified as a result of the way in which the statement of opposition has been pleaded. Plainly, the purpose of pleadings is so that the parties and the court can understand the matters in issue and what is or is not in dispute. The statement of opposition makes that clear. It was never the case that a more lengthy statement of opposition would have contained legal submissions. However, very detailed written submissions have been prepared by both sides and exchanged. The applicant's submissions are dated 20 May 2022 and the Respondent's dated 29 June 2022. The hearing took place on 20 October 2022 over 4 months after the exchange of submissions. The Respondent's position as articulated during the trial, namely, that the matters of fact and law relied by the Applicants do not give rise to an entitlement to any relief, reflected the stance articulated in the statement of opposition. No more, no less. There was no question of the Respondent attempting to raise in submissions at the trial, any legal issue not pleaded.

59. In applying to have the Respondent's Statement of Opposition struck out, the Applicants place particular reliance on the decision by Cooke J in *Saleem v. Minister for Justice & Ors.* [2011] IEHC 55. It is appropriate, however, to understand the factual context in which the learned judge decided the matter and it was very different to the case before this court. To see why, one need only quote the following paragraphs from *Saleem*:

"10. As indicated, following the grant of leave, a Statement of Opposition was filed on behalf of the Respondent dated the 26th November, 2010. It runs to some 29 paragraphs and it is fair to say that it amounts to a full denial and traverse of all elements of the grounds upon which the application is based.

11. The applicant has no quarrel with much of the pleading in that regard but brings this motion upon the basis that ***the pleading in paragraphs 19 et seq contains of a series of alternatives in relation to the precise legal status of the "scheme" with the result that the precise stance being adopted by the Respondent as to the manner in which he proposes to stand over the lawfulness of the refusal decision is unclear*** *and makes it difficult for the applicant to know in advance of the hearing what case he must* meet." (Emphasis added).

60. *Saleem* concerned an application for *certiorari* to quash a decision of the Respondent which refused the applicant's application under s. 4 of the Immigration Act 2004 for *"Long Term Residency"*. That term was not found in the Immigration Act 2004, but employed in S.I. No. 287/2009 (the Long Term Residency (Fees) Regulations 2009) which, Cooke J noted, seemed to have its origins in what the Minister describes as an "*administrative scheme*" (in the form of a notice published on the web site of the Irish Naturalisation and Immigration Service).

61. In the present case, there is no challenge to the Policy. Nor is there any question of the Applicants being unclear of the stance adopted by the Respondent with respect to their claim. Later in *Saleem*, Cooke J stated the following:

"16. This Court fully agrees with the principle that in the judicial review of decisions of a public authority, all parties to the proceedings owe a duty to the Court to cooperate in pleading so that the issues of law which the court will be required to determine are identified fully and accurately. This Court has on several occasions complained particularly about Statements of Grounds in which very large numbers of vague and unspecific assertions are pleaded and variations of repetitive and overlapping allegations of error of law are advanced."

62. Here, the pleadings identify fully and accurately the issues of law which this Court is called upon to determine and it is clear from the foregoing that in *Saleem* (which, it is of significance to note, pre-dates HC81) the learned judge deprecated the delivery of overly-long pleadings which do not serve the aims of clarifying what is truly in issue. Having referred, at para. 16, to the judgment in *O.S.J.L. & Others v. Minister for Justice, Equality and Law Reform* (Unreported, Cooke J., High Court, 1st February, 2011), in which the Court made clear that "*…a statement of grounds under O. 84, is inadmissible to the extent that it fails to specify with precision the exact illegality or other flaw in an impugned act or measure which is claimed to require that it be quashed*…." Cooke J proceeded, at para. 17 of *Saleem* to state the following:

"Equivalent considerations apply to the pleading of grounds of opposition. ***That is not to say that a Respondent is not entitled, simply because it is a public authority, to deny all essential elements of the grounds alleged and to put the applicant on proof of all material aspects of the claim.*** *Nevertheless because in judicial review the High Court is exercising its constitutional and public function of ensuring that delegated executive decision-making powers have been validly exercised in accordance with law, it behoves the Respondent to assist the court not only by identifying the issues of fact, if any, which it contests but also by stating frankly and clearly in its pleadings, so far as this can reasonably be done, the viewer stance it proposes to adopt on questions of law or issues of interpretation*

which it considers to be raised by the claim and to require determination…". (Emphasis added).

63. Although the Applicants place emphasis on the latter section of this passage, it seems to me that the words I have highlighted are particularly relevant to the present application and illustrate the legitimacy of the approach taken by the Respondent.

64. With reliance on *Saleem* and on the decision in the neighbouring jurisdiction *in R v. Lancashire County Council ex parte Huddleston* [1986] 2 ALL ER 941*,* the Applicants submit that the Respondent has failed "*to comply with her duty of candour to the Court*". I cannot agree. The Respondent takes issue with all matters pleaded and assert that they do not provide a basis for any relief. The decision in *R v. Lancashire Co. Co.* referred to a Respondent's duty to put "*all the cards face upwards on the table"* and the Respondent has done so in my view, particularly in circumstances where the Applicants have, at all material times known the basis for the Respondent's refusal, which is set out in the decision challenged. I can see no benefit to this court, or to the Applicants, for the Respondent to have pleaded, for example, that the Minister "*did not err in law*"; "*did have regard to relevant matters*"; and that the Minister's decision "*is rational and reasonable*" (as opposed to a *seriatim* traverse). Furthermore, given the succinct but clear manner in which the opposition to the claim was pleaded, I take the view that it was not necessary for a verifying affidavit to have been sworn. That view does not seem to me to be at all inconsistent with the provisions of Order 84; HC81 and the principles articulated in *Saleem.*

65. It also seems to me to be relevant to point out that the statement of opposition was served on the Applicants, and filed in the Central Office, in early April 2022. Yet, at no stage between then and the hearing, which took place on 21 October 2022, did the Applicants bring any motion seeking to strike out that pleading.

66. Finally, HC81 has the following to say with respect to non-compliance with that Practice Direction:

> "*In cases of failure to comply with this practice direction, the court may make such order as it considers appropriate including any order as to costs against a defaulting party, and for an order as to costs against a defaulting solicitor under order 99 rule 6, and/or an order disallowing costs as between a solicitor and his or her client under order 99 rule 7, and/or an order disallowing the costs of any otherwise successful party as against the other party*."

67. Several comments seem to me to be appropriate to make, as follows. Although the words *"in the interests of justice*" are not explicitly stated after the words "*the court may make such order as it considers appropriate*", it could hardly be suggested that furthering the interests of justice must not underpin HC 81 and, for that matter, the RSC.

68. Even if this court were to take the view that the Respondent's statement of opposition failed to comply with HC 81 (and for the reasons set out above, this court does *not* take any such view) it seems to me that it would be inimical to justice to take the dramatic step of striking out the statement of opposition as opposed to engaging in an analysis as to whether a fair trial is still possible; making such orders as may be appropriate with respect to further and/or amended pleadings; and making appropriate orders with respect to costs.

69. Striking out the statement of opposition would certainly seem to me to be very much an option of last resort, where the interests of justice require it. This is in circumstances where it cannot be in dispute that striking out the statement of opposition would be to interfere with what would otherwise be the proper and fair result of the proceedings, based on a consideration by the court of the evidence and the law. I am fortified in this view by the contents of HC81 in that, whilst I accept entirely that the list of possible orders referred to at para. 20 of HC81 is non-exhaustive, the examples given all relate to questions of costs.

However, the fundamental point with respect to the Applicants' preliminary objection in this case, is that it fails for the reasons outlined.

Guiding principles

70. Before proceeding further, it is useful to make brief preliminary comments which are based on well-established judicial review principles.

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

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

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

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

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

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

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

78. Conscious that the foregoing principles must guide the court, I now turn to the issues to be decided.

Whether the Minister's decision was irrational and/or unreasonable and/or disproportionate having regard to the information and documentation submitted with the application and appeal.

79. At paras. 1(a) to (e) and 2(a) – (c) the Applicants articulate a range of findings which they allege are unreasonable, irrational or disproportionate, having regard to the evidence proffered at first instance and on appeal. The onus rests on the Applicants to demonstrate that the decision itself is fundamentally at variance with reason and common sense (considering in this analysis the principle of proportionality as articulated in *Meadows v Minister for Justice* [2010] 2 IR 701). Considerable guidance was given on the question of irrationality or unreasonableness due to disproportionality in Cooke J's judgment in *ISOF v Minister for Justice* [2010] IEHC 386, wherein the learned judge stated the following at para. 12: -

> *"The High Court has, since the handing down of the judgments in Meadows, pointed out in a number of judgments that in order to substantiate a challenge to a decision of this nature as irrational or unreasonable because of its disproportionality, it is not sufficient merely to disagree with the evaluation made or the balance struck in the File Note. (See for example S.O. & O.O. v MJELR (Unreported, Cooke J. 1 October 2010.) It is not enough, in the view of the Court, to simply assert that the Minister*

ought to have given greater weight to some factors or less to others. The onus of establishing the unlawfulness of the decision lies with the applicant. The duty to balance proportionately the opposing rights and interests of the family on the one hand and the interests the State seeks to safeguard on the other, lies with the Minister. It is the Minister who must assess and decide by reference to all of the matters he is required to consider under the statutes and in light of all of the information and representations put before him, whether the latter interests should prevail or not. Contrary to the implication of the argument made by counsel for the Applicants, the High Court is not entitled or obliged to re-examine the case with a view to deciding whether, in its own view, the correct balance has been struck. To do so would be substitute its own appraisal of the facts, representations and circumstances for that of the Minister. As the Supreme Court made fully clear in the Meadows case, the test to be applied in assessing whether an administrative decision of this nature is irrational or unreasonable (including unreasonable by virtue of disproportionality,) remains that established in the Keegan and O'Keefe cases. Accordingly, the function of the Court is to consider the manner in which the evaluation has been made by the Minister as apparent from the order, the covering letter and the contents of the File Note, and ask itself in paraphrase of the terms formulated by Henchy J.: 'Does the conclusion to deport the applicant flow from the premises upon which it is based; or does it, by reason of some flaw or failure in the way in which the balancing exercise was apparently approached, result in a conclusion which 'plainly and unambiguously flies in the face of fundamental reason and common sense?'"

80. In my view it was open to the Minister to determine that there was insufficient evidence of *"family life"* submitted. In the consideration documentation which accompanied the Minister's letter and comprises part of the decision, she noted *inter alia* that: -

> *"The following documentation as evidence of ongoing communication between the applicant and sponsor has been submitted: -*
>
> - *A printout from WhatsApp covering the period from 07/12/2019 to 29/01/2021 was submitted."*

81. The Minister also referred to the photographs which accompanied the application and were before her in the context of the appeal. As the Minister accurately noted, the evidence of the couple's communication commences some nine months *after* they were married. It is unnecessary to repeat at this juncture the observations I made earlier in this judgment with respect to what this evidence discloses, in objective terms. I made those comments, not purporting to act as decision-maker, to see what was, and was not, before the Minister on foot of which she made her decision. There was nothing irrational, unreasonable or disproportionate about these findings by the Minister.

82. Similar comments apply in relation to the Minister's view that the first applicant was predominately reliant on social welfare. It is clear from the decision and the detailed consideration document that the Minister had concerns with respect to the first applicant's finances. These were rational and reasonable, in light of the evidence which was before the Minister and having regard to para. 17.2 of the Policy. Internal pages 2-3 of the detailed consideration document includes a setting-out of the financial situation of the applicant (at para. E) and of the sponsor (at para. F). There is no suggestion that the information detailed there is other than an accurate record of the evidence furnished. Internal pages 5-7 of the detailed consideration document sets out the Minister's assessment of the application with reference to the Policy. Among other things, paras. 17.2 and 17.5 of the Policy are quoted *verbatim*. It is unnecessary to repeat, here, the contents of 17.2, but para. 17.5 of the Policy states the following: -

"Declared and verified savings by the applicant or sponsor may be taken into account when assessing cases which fall short of the income thresholds set out above. (A suggested approach would be to annualise the savings as income spread over a 5-10 year period). Alternatively, a nominal income may be determined based on the amounts involved."

83. The Minister also recorded, entirely accurately that, *"the applicant has not provided a six-month up-to-date bank statement"* (see internal p.2, section E of the consideration document, under the heading: "*Financial Situation of the Applicant*").

84. On internal p.5 the Minister's decision also quoted the following from the "Executive Summary" of the Policy document: -

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

85. The Minister referred, accurately, to the details regarding the sponsor's financial situation (as outlined in s.1 part F) and went on to state *inter alia*: -

"The low level of income demonstrated above may result in a reliance on public funds/resources.

Based on the information provided, the sponsor does not meet the financial criteria set out in para. 17.2 & 17.5 of the Policy document. This low level of income demonstrated above may result in an immediate reliance on public funds/resources should the applicant be granted the visa as sought".

86. These were reasonable, rational, and not at all disproportionate findings, having regard to the evidence which was before the Minister. It is clear from the decision that the Minister expressed validly held concerns with respect to the first applicant's low level of income. Based on the evidence which was before the Minister, it was entirely reasonable for her to take the view that if a visa was granted to the first applicant, insufficient funds were available to support him and the sponsor. Not only were these findings lawful, they accord precisely with the Applicants' acknowledgement (made in the first-instance application, and repeated by way of the appeal) that the first applicant did *not* meet the financial criteria in the Policy document. For the sake of clarity, the following are direct quotes: -

-*"It is accepted that **the Sponsor does not currently meet the financial criteria** of the Policy Document"* (See 4th internal page of 23 March 2021 letter from Messrs Abbey Law, with respect to the first-instance application);

-*"The application was expressly made on the basis that although **our client did not meet the financial criteria of the Non-EEA Policy Document on Family Reunifications,** the Minister's discretion should be exercised in the particular circumstances of this case".* (See p.1 of letter of appeal dated 01 June 2021).

87. It is the financial criteria set out at para. 17.2 of the Policy which the Applicants acknowledge, have *not* been met. Paragraph 17.2 states *inter alia* that a sponsor must not have been *"predominately reliant"* on benefits from the State for a period in excess of two years prior to the application. The reference, in the Minister's *"Conclusion"* (see internal p. 10 of the detailed consideration document) refers *inter alia* to the first applicant being *"predominately reliant"* on the social welfare system of the State, mirroring the wording in para. 17.2. Quite apart from the acknowledged failure to meet the para. 17.2 financial criteria, the evidence before the Minister was that the first applicant was in receipt of social

welfare in the year immediately prior to the application (*i.e.* she received Job Seeker's Allowance totalling €5,160.20 in 2020, whereas the final pay slip submitted by the first named applicant showed cumulative (year to date) gross earnings of €4,119.36 to the weekend 14/03/2021). It will be recalled that, despite having the opportunity to so on appeal, no further financial information was provided in the appeal letter submitted on 1 June 2021. Having regard to the evidence before her, these findings by the Minister were not irrational unreasonable or disproportionate.

88. It is also very clear that the Minister applied her mind to whether the circumstances would warrant the granting of a visa, notwithstanding the failure to meet the relevant financial threshold. The careful consideration which the Minister gave to the question of whether it would be appropriate for her to exercise the discretion which is explicitly referred to at para. 1.12 of the Policy can clearly be seen from the decision. This can be seen, in particular, from internal p.6 of the detailed discussion document under the heading *"Any special circumstances"* which begins with a *verbatim* setting-out of para. 1.12.

Finding that the applicant had *not* demonstrated exceptional circumstances

89. Internal p.7 of the detailed consideration document records the Minister's conclusion on the issue of whether special circumstances would merit the disapplication of the financial threshold and the grant of the visa. The Minister's findings include the following: -

"I have considered all the information submitted with the visa application and the appeal, and have determined that the applicant has not demonstrated exceptional/humanitarian circumstances in this case which would warrant the granting of a visa".

90. It seems to me, that in circumstances where the Applicants have not challenged, in the present proceedings, the Minister's finding that their application does not involve exception circumstances which would warrant the exercise of her discretion in favour of granting the visa, the present application must fail. Even though it seems to me that the foregoing is dispositive of the application, it seems appropriate, nonetheless, to consider the entire of the claim. In other words, the following analysis has been undertaken lest I be entirely *wrong* in the view that (i) no challenge was made to the Minister's finding that there were no exceptional/humanitarian circumstances which would merit the exercise of her discretion and, (ii) thus, the Applicants' claim must be dismissed.

Meeting

91. I cannot hold that it was unreasonable or irrational for the Minister to find that it had *not* been established that the Applicants had contact with each other on the occasions the first applicant was in Ethiopia. Documentation regarding the first applicant's trip to Ethiopia in March/April 2019 was submitted as *"evidence of the sponsor's travel **to visit the applicant**"* (emphasis added). This documentation certainly evidences *travel* to and from Ethiopia, but, of itself, does not evidence the *purpose* of same. It will also be recalled that a central element of the Applicants' narrative is that they were childhood friends; they lived in the same neighbourhood; they played together from childhood until they grew up; they were best friends; their respective families were very close; they as well as having played together, shopped together, and having a lot of memories together, they also maintained contact after the first applicant moved to this State, insofar as their culture permitted. In the context of the foregoing, the Minister was entitled to take account of the fact that there was no evidence whatsoever submitted to show that the Applicants *did* meet one another prior to their marriage in 2019 (and since the first applicant moved to this State).

Fact and status of marriage

92. The Applicants have not established that the Minister failed to have regard to relevant matters, in particular, that both Applicants are Muslim and contracted their marriage in accordance with the religious and cultural mores of their faith, and that they reside in

different countries. Any objective and fair reading of the decision (comprising the four-page letter and the thirteen-page accompanying consideration document) demonstrates that the Respondent Minister took no issue with the fact that the Applicants' marriage was conducted in accordance with their faith. That both Applicants reside in different countries is very obvious, given the nature of the application and this was plainly taken into account by the Respondent as the decision demonstrates. Furthermore, the careful analysis conducted by the Minister under the heading *"Consideration under Article 41 of the Constitution*" (see internal pages 8-11 of the detailed consideration document) plainly proceeded on the basis that the Applicants' marriage was contracted in accordance with their faith and cultural mores, with no issue taken with the fact or status of the Applicants' marriage.

Employment

93. It is also pleaded that the Respondent failed to have regard to the following matter: - *"That the first named applicant has been in gainful full-time employment for over a year in advance of the application and has not had resource to public funds since then."* The decision demonstrates conclusively that the Minister took full account of all evidence which was put before her. The decision accurately records, in detail, the first applicant's financial situation and sets out the careful consideration which the Minister engaged in with reference to the evidence, including her earnings from employment. The Applicants have not established that the Minister failed to have regard to any relevant matter.

The second applicant's employment prospects

94. Similar comments apply in relation to the contention that the Minister failed to have regard to *"the second named applicant's individual prospects of finding employment in the State".* As I observed earlier in this judgment when looking at the evidence which was/was not submitted, the second named applicant chose *not* to submit any evidence touching on his education, qualifications, skills, current employment, or employment prospects. Nor has the second applicant filed any affidavit in the present proceedings. The only affidavit sworn on behalf of the Applicants in these proceedings is that which the first named applicant swore on 16 February 2022. The exhibits to that affidavit do not include a copy of the initial application (completed in "on-line", form) but internal p.10 of the detailed consideration document contains *inter alia* the following under the heading "*Finances of the Sponsor*":-

> *"The applicant stated on their application form that they were **<u>neither in employment or in education</u>**. Further to this, **<u>evidence of the applicant's educational qualifications or details of any previous employment was not submitted that could attest to the employability of the applicant.</u>***
>
> *I find therefore, on the basis of the documentation before me that should the applicant be granted a visa to join the sponsor in the State, it is likely that they may become a burden on the State."* (Emphasis added).

95. In short, the Applicants have failed to 'bring home' the legal grounds pleaded at paras. 1(a)-(e) and 2(a)-(c).

Art. 41

96. The Applicants also contend (at para. 3 of their legal grounds) that the visa refusal *"…is unlawful and disproportionate to the Applicants' rights as a lawfully married couple under Article 41 under the Constitution, in determining that the integrity and economic well-being of the State required the refusal of the second named applicant's application, particular in circumstances where the first named applicant is in full-time gainful employment".*

Merits

97. The very careful consideration which the Minister gave to the matter, having regard to the provisions of Article 41 of the Constitution, can be seen from internal pages 8-11 of the

detailed consideration document which comprised part of the decision. This discloses that the Minister recognised all relevant rights; engaged with the evidence before her; reached findings which were reasonable and rational as to what the evidence disclosed; and conducted a careful weighing-up of the competing rights at play. It is entirely uncontroversial to say that the relevant balancing exercise was for the Minister to conduct. Plainly, the Applicants do not like the outcome and believe that the proportionality assessment should have gone their way. In reality, that is to challenge the *merits,* or outcome, of a lawfully conducted decision making process.

Gorry

98. It is appropriate at this juncture to quote the "conclusion" to which the Respondent came (after referring to Article 41; citing various passages from the Supreme Court's decision in *Gorry*; analysing their significance for the application which was before the Minister; engaging with the Applicants' family rights in the context of what the evidence disclosed, including with regard to finance): -

> *"Conclusion*
>
> *All matters concerning the Irish citizen and the applicant, insofar as they have been made known, have been considered.*
>
> *On behalf of the applicant, it is submitted that the applicant and the sponsor are not financially supporting each other and they are both living on their own means. It is further noted that the sponsor does not meet the financial criteria as set out in the Policy document and that they are predominantly reliant on the social welfare system of the State, which gives rise to reasonable concerns that the applicant would be reliant on the social welfare of the State should the visa be granted as sought.*
>
> *In considering the nature of the relationship between the applicant and sponsor, it is noted that this has been entirely long-distance in nature since their marriage on 02/03/2019.*
>
> *In considering whether family life could be established elsewhere, insufficient information has been submitted demonstrating that the sponsor would be prevented from continuing to travel to Ethiopia to visit their spouse and maintain the relationship in the manner in which it developed or that it is more difficult or may be extremely burdensome for the applicant and sponsor to reside together anywhere else, be that in the applicant's home State or any other State of their choosing. It should also be noted that a decision to refuse the visa application, in respect of the applicant, after appropriate consideration of the facts, is not invalid merely because it affects the spouses' desire to cohabit in Ireland.*
>
> *All factors relating to the position and rights of the family/couple have been considered and these have been considered against the rights of the State. In weighing these rights, it is submitted that the factors relating to the rights of the State are weightier than those factors relating to the rights of the couple.*
>
> *In weighing these rights, it is submitted that a decision to refuse the visa application in respect of the applicant is not disproportionate as the State has the right to uphold the integrity of the State and to control the entry, presence, and exit of foreign nationals, subject to international agreements and to ensure the economic well-being of the country."*

99. The foregoing was a rational decision, rooted in the evidence, and one which explicitly took appropriate account of the couple's rights. The Applicants have not established that the Minister's decision was taken other than in accordance with the principles outlined by the Supreme Court in *Gorry,* a decision which featured significantly in submissions made on behalf of the Applicants.

100. The *Gorry* case concerned a lady from Nigeria who came to this State seeking international protection. She was unsuccessful in that application and a deportation order was made in June 2005. She remained in this State without permission and, in 2006, formed a relationship with a Mr. Gorry. The couple travelled to Nigeria in 2009 and were married, following which an application was made for a visa in respect of Mrs. Gorry and for revocation of a then extant deportation order. These applications were refused. Mr. Gorry visited his wife in Nigeria thereafter but, on his return to Ireland, suffered a heart attack. Against the backdrop of Mr. Gorry's medical condition, including advice not to fly and not to stay in Nigeria due to a lack of adequate medical treatment for his condition if he were to experience another heart attack, a second revocation application was made. This was refused and was the subject of a challenge. In this Court, MacEochaidh J. quashed the Respondent Minister's decision. The Court of Appeal upheld that decision but took a different view as to the relevant analysis. In particular, the Court of Appeal made clear that an Irish citizen did not have a right to have a non–national spouse reside with them in Ireland, or even a *prima facie* right in this regard. The Court of Appeal also took the view that the Minister had incorrectly treated the question of the married couple's rights under the Constitution as essentially indistinguishable from their ECHR rights. The Court of Appeal considered that the Minister erred in applying the analysis found in the case law of the European Court of Human Rights without separately considering the couple's family rights derived from the Constitution.

101. In the Supreme Court, judgments were given by O'Donnell J (as he then was) and by McKechnie J. The Supreme Court agreed that Article 41 of the Constitution and Article 8 of the ECHR represent sources of different rights. For the majority, O'Donnell J examined whether there was an unspecified right enjoyed by a married couple to cohabit and came to the view that, if such a right is constitutionally - guaranteed, it is pursuant to Article 40.3.1 (not Article 41). He went on to make clear that unmarried couples must have a similar right to cohabit with chosen partners and, thus, if a separate right exists, it does not depend on marriage.

102. At para. 23, the now Chief Justice stated the following: "*…even if it is assumed there is a right to cohabit, and irrespective of where it is located in the Constitution, I do not agree that there is a right to cohabit in Ireland. Nor is the decision to cohabit in Ireland within the exclusive authority of the Family".* Thus, it can be stated with confidence that the first and second named Applicants in these proceedings do not have a right to cohabit in *this* State.

Marriage cannot be *ignored* in decision-making

103. However, the decision in *Gorry* recognised very clearly that, given the constitutional requirement to guard with special care the institution of marriage:

> *"A decision which ignores the status of an individual as a married person would not be lawful and any decision which did not take account of that fact, or the impact on a married couple and the family of the decision, could properly be said to fail to respect the institution of Marriage which the State is obliged to guard with special care."* (see para. 25.)

104. In the present case, the Applicants have not established that the Minister's decision is one which *ignored* their status as married persons, or failed to take account of the *impact* of the decision upon them as a married couple.

Starting position

105. Having regard to the analysis in *Gorry*, it is clear that the starting position is *not* that the second named applicant acquired, by virtue of his marriage to the first, any right to reside in Ireland. As Mr Justice O'Donnell stated at para. 26 in *Gorry*: -

> *"The exercise starts from a different case: in this case the entitlement of the State to decide who should or should not be permitted to enter this country or reside here*

and without the pre-loading of the scales involved by characterising a right of cohabitation as worthy of the highest level of protection feasible in a modern society".

Marriage and family must be taken into account

106. Later, at para. 36, the learned judge put matters as follows: -

> *"While I agree that the Irish Constitution places a significant, and indeed high, value on marriage and also the family thereby created, and that this is something which must necessarily be taken into account in considering the lawfulness of any governmental or State decision to refuse permission to enter and reside…such a decision should be properly analysed by reference to the lawfulness of the Ministerial or State decision rather than by hypothesising a right on the part of the spouses to reside together in Ireland unless any interference with that right can be justified".*

No '*different categories*' of marriage

107. Later still, at para. 65 in *Gorry*, O'Donnell J emphasised that *"the Constitution does not conceive of different categories of marriage with some which are 'better' marriages or with more claims on the State".* He went on to state the following:

> *"It is, I think, consistent with respect to the institution of Marriage that the fact of marriage should be given the same weight whatever the length or circumstances of any individual Marriage."*

108. I pause at this juncture to say that the Applicants have not established that the Respondent Minister failed to give due weight to the fact and status of their marriage. There is no evidence which would allow this Court to hold that, because of the particular circumstances, including length of the Applicants' marriage, the Minister did not accord it the same weight as any other marriage or that she regarded it as, in some fashion, lesser *qua* marriage. Para. 70 in *Gorry* provides the following guidance:

> *"70. It seems clear that **the fact of marriage alone to an Irish citizen does not create an automatic right to enter the State** or to continue to reside here having entered illegally or after lawful entry but where any permission has expired. It is not per se a failure to respect the institution of Marriage to do so. **There may be legitimate considerations** of immigration, with added consequences for the rights of free movement in other E.U. Member States, **which are not simply trumped by the fact of marriage."*** (Emphasis added)

109. In the present case, in a decision which was reasonable and rational in the sense those terms are used in judicial review, the outcome of the weighting–up exercise conducted by the Respondent was that the Applicants' rights did not trump those of the State. This was not a decision reached unlawfully and this court has no jurisdiction to second-guess a lawfully made decision.

Fact of marriage + enduring relationship

110. Of relevance to the present proceedings is also what the learned judge had to say from para. 71 onwards in *Gorry:*

> *"71. It follows, however, that **if the couple can add to the fact of marriage the evidence of an enduring relationship** that if the State were to refuse the non-citizen party entry to the State for no good reason, and simply because it was a prerogative of the State, it could be said that such an approach failed to respect the rights of those involved and, in particular, the institution of Marriage. In that respect, I fully agree with the observation of Fennelly J., as slightly reframed by Finlay Geoghegan J. in the Court of Appeal, that – unless there was some other*

consideration in play – it would be difficult to envisage a valid decision refusing entry to the State to the long-term spouse of an Irish citizen seeking to return to Ireland to live. Indeed, I would consider that the same could be said of a long term partner in an established non-marital family with an Irish citizen partner. Nevertheless, the starting point is that citizenship of one spouse plus marriage plus prospective interference with cohabitation does not equal a right of entry to a nonnational spouse or give the Irish citizen spouse an automatic right to the company of their spouse in Ireland although, as discussed above, any refusal of entry would require clear and persuasive justification." (Emphasis added).

…

73. … It may be said, in some cases, that ***the provision refusing entry may have the effect of preventing a married couple from cohabiting since Ireland is the only country where that can, as a matter of law or fact, occur and is, moreover, the home of one of the parties****. There may be many reasons why a couple may not be able to cohabit, or to do so as, or where, they may like, and that may be a consequence of the marriage they have made. The parties remain married and* ***it does not fail to respect that institution or protect it if cohabitation is made more difficult, or even impossible, by a decision of the State for a good reason.*** *Imprisonment of one partner is one obvious example.*

74. Nevertheless, in the context of immigration, when it is asserted on credible evidence that the consequences of a decision is that the exercise of a citizen's right to reside in Ireland will mean not just inability to cohabit in Ireland with a spouse to whom that person is validly married and where, moreover, it may be extremely burdensome to reside together anywhere else, ***it would fail to have regard to and respect for the institution of Marriage not to take those facts into account and give them substantial weight****. This may, firstly, involve a more intensive consideration of the facts and evidence. The length and durability of the relationship may also be a factor since it tends to remove the possibility that the marriage is one directed in whole or in part to achieving an immigration benefit, and at the same time reduces the risk that any permission will establish a route to circumvent immigration control. There may come a point where the evidence of medical or other conditions establishes that it is impossible to cohabit anywhere but Ireland,* ***that the marriage is an enduring relationship****, and that the non-citizen spouse poses no other risk, and where it can be said that failure to revoke the deportation order would fail to vindicate the right to marry and establish a family life. Such cases will be rare. A refusal to revoke a deportation order, after appropriate consideration of the facts and circumstances, is not invalid merely because it affects the spouses' desire to cohabit in Ireland and it would be more difficult and burdensome to live together in another country. It is, however, important to recall that the Minister retains a discretion to revoke the order on humanitarian considerations, even if revocation is not compelled by the Constitution or the E.C.H.R. Furthermore, any decision is subject to judicial review."* (emphasis added).

111. Insofar as Counsel for the Applicants submits that it was impermissible for the Respondent Minister to seek and/or to consider evidence with respect to the couple's relationship *prior* to marriage, I cannot agree. It does not seem to me that Mr Justice O'Donnell's decision in *Gorry* supports that submission. In my view, it was not at all illegitimate for the Minister to seek / consider, in addition to the fact and status of the Applicants' *marriage*, such evidence as was put before her which spoke to the question of an *enduring relationship* between the Applicants.

112. Even if I am wrong in that view, there is no evidence which would allow this court to hold that, in the approach taken by the Minister, she set her face against allowing the appeal unless the evidence demonstrated that there was an enduring relationship *prior* to marriage. She did nothing of the sort.

113. It may well be that, in the context of arranged marriages, there will be no evidence of any relationship prior to marriage. However, the first-instance refusal plainly gave the opportunity for the furnishing, on appeal to the Minister, of, for example: "***Evidence of ongoing routine communication*** *between applicant and sponsor both prior to and* ***since marriage****…"* which, as the first-instance refusal noted, was "*not submitted*".

114. Thus, the Applicants were entirely 'at large' when making the appeal, in June 2021, as regards to what evidence they chose to submit in the context of demonstrating the enduring relationship between them (as opposed to the fact of their marriage). If, in fact, the only evidence available to them to furnish, related to the period commencing with the date of their marriage, there was no impediment to furnishing any and all of this evidence, insofar as the applicant wished the Minister to consider it.

115. From a first principles perspective, it is uncontroversial to suggest that, even if two people met for the first time on the day of their marriage (or, in the case of a proxy marriage, on the date of a subsequent wedding celebration), there is no bar to evidencing their enduring relationship from that point *onwards*. This is particularly so in our 'internet age' where smart-phones, video-calls, texts, and a various social media 'apps' facilitate 'real time' communication across the globe, whilst also creating contemporaneous record, i.e. a printable 'digital footprint', of such communication.

116. It will be recalled that, despite the insufficiency of documentation, as found in the first - instance refusal, the Applicants chose *not* to provide any further documentation in their appeal to the Minister. Thus, she had no more evidence before her, as regards the *enduring relationship* issue, than had been submitted at first-instance, of which the first-instance decision stated *inter alia*: *"The applicant and the sponsor have not provided sufficient evidence of the stated relationship".* The foregoing was a reasonable and rational finding, which flowed from the evidence.

117. On the first applicant's account, far more evidence exists than the Applicants chose to submit to the Minister (namely, evidence of daily contact via social media apps, text messaging and video calls). This is plain from statements made by the first Applicant by way of (i) what she stated in her *"Relationship history statement"* (see item 19 which accompanied the first instance application); and (ii) averments made in the context of these proceedings. Although involving repetition, it is appropriate to recall to these statements, as follows:

> -At para. 8 of her 16 February 2022 affidavit, the first named Applicant averred that: "***Since our marriage we have remained in constant contact and communicate daily*** *in order to maintain our emotional and loving relationship"* (emphasis added);
>
> -In the first applicant's "*Relationship history statement"*, under the heading "*After I left Ethiopia*", she states: *"It was hard for both of us when I had to leave Ethiopia****. I left Ethiopia on 28th April 2019 and from that day we keep contacts each other*** (sic) ***by phone, WhatsApp, Imo and text messaging****. Every time* [K] *call me as I call him* (sic). ***We do video chat nearly every day.***" (Emphasis added).

118. Evidence of *constant* and *daily* communication, taking place from 02 March 2019 onwards (the date of the marriage) until the first applicant's arrival in Ethiopia (on 6 April); and from 28 April 2019 onwards (when the first applicant left Ethiopia) was of obvious relevance to demonstrating an *enduring relationship,* despite geographical distance. However, this simply was not furnished. In the present case, the Minister examined such evidence as was put to her but certainly did *not* adopt the stance that, without evidence of a relationship *prior* to marriage, no visa could be granted. The fundamental issue was a different one, namely, the insufficiency of evidence.

119. The Applicants have not established that the Minister failed to take into account, and give appropriate weight to, the *consequences* of a refusal decision on their marriage, in the

context of her careful consideration of all the evidence before her, including, the evidence proffered with respect to their stated relationship.

120. Recalling para. 71 of Gorry, it seems to me that the Applicants (i) neither added to the *fact* of their marriage, evidence which, in the reasonable and rational view of the decision maker, established an enduring relationship; (ii) nor have they established in the present proceedings that the Respondent's decision to refuse a visa was because such refusal was a State prerogative. On the contrary, it is plain that the decision challenged was based on a carful consideration of all evidence and a weighing up of all matters, including Article 41 rights.

121. It is clear from the Minister's decision that she found the material which was furnished at first-instance (and not added - to in the appeal) to be insufficient. That was a finding which was open to her to make, having regard to the evidence before her. It was neither unreasonable, nor irrational in the judicial review sense.

122. For present purposes, there is no material difference between what was at issue in the Applicants' visa refusal appeal, and the application in *Gorry* (for revocation of a deportation order, on the grounds of subsequent marriage). In the context of dealing with the latter, the Supreme Court provided the following clear guidance, at para. 75, with respect to the proper approach which the Minister should take, to a decision with the potential to impact on Article 41 rights:

> *"75 In making a decision on an application for revocation of a validly made deportation order on the grounds of subsequent marriage the Minister is not, in my view, required to do so on the basis that Article 41 protects an inalienable, imprescriptible, or indefeasible right to cohabitation of a married couple which is entitled to the highest level of protection available in a democratic society. Rather, Article 41 protects a zone of family life and matters. Decisions on immigration and deportation are not matters within the authority of the Family.* ***The Minister is****, however,* ***required to have regard*** *in an such case* ***to:***
>
> > ***(a) The right of an Irish citizen to reside in Ireland;***
> >
> > ***(b) The right of an Irish citizen to marry and found a family;***
> >
> > ***(c) The obligation on the State to guard with special care the institution of Marriage;***
> >
> > ***(d) The fact that cohabitation – the capacity to live together – is a natural incident of marriage and the Family and that deportation will prevent cohabitation in Ireland and may make it difficult, burdensome, or even impossible anywhere else for so long as the deportation order remains in place."*** (Emphasis added).

123. The Applicants have not established that there was any failure on the part of the Respondent Minister to have regard to the foregoing factors. The Supreme Court went on, at para. 76, to emphasise that

> "…***a decision must be scrutinised by reference to the considerations addressed rather than the use of any particular form of language.*** *It follows that a decision will not necessarily breach any rights if it did not anticipate this precise formulation or use the same language. I agree with McKechnie J. that it is not necessary to address the issue of Constitutional and E.C.H.R. rights in any particular sequence"* (Emphasis added).

124. The Minister's decision carefully addressed all relevant considerations. The sequence in which this was done is perfectly clear from the decision itself, and each one of the factors

(a) to (d) are explicitly addressed (see internal page 9 – 11 of the detailed consideration document, with respect to Article 41 rights; and p. 12-13 as regards E.C.H.R rights).

125. The Minister's findings to the effect that there was a risk to the public purse were findings open to her to make. They were reasonable and rational. Thus, in the balancing exercise which the Minister undoubtedly conducted, having regard to the Applicants' Article 41 rights, the risk to public finances and public resources, constituted a legitimate factor to consider. The Minister engaged in a careful balancing exercise and there is no evidence which would allow for a finding by this Court that the Minister did not accord appropriate weight to the factors and rights balanced. In short, the Minister properly considered the Applicants' rights under Article 41 of the constitution consistent with the principles set out in *Gorry*. The Respondent conducted, lawfully, the balancing exercise which was hers to conduct. Disappointment with the outcome of a lawfully-conducted proportionality assessment does not entitle the Applicants to relief.

ECHR

126. The Applicants also contend that *"the visa refusal…is unlawful disproportionate to the Applicants' rights with regard to s.3 of the European Convention on Human Rights Act 2003 and Article 8 ECHR, in determining that the economic well-being of the State required the refusal of the second named Applicants' application, particularly in circumstances where the first named applicant is in fulltime gainful employment'".*

127. This legal ground appears to be based on the proposition that the Minister was incorrect in coming to the view that the evidence disclosed a risk to public funds and public resources. In the manner previously examined, the findings on this issue to which the Minister came were reasonable, rational and grounded in the evidence before her. It was these findings (*"that the granting of a visa to the applicant to reside in the State could result in costs to the State"*; and *"could result in costs to the public resources of the State"*) which comprised the justification, pursuant to Article 8(2) of the ECHR for the interference with the Applicants' family life.

128. The relevant analysis, which was carefully done by the Minister, is evidence from pages 12-13 of the detailed consideration document. There was an explicit acceptance *"that family life exists between the sponsor and the applicant within the meaning of Article 8"*. The Respondent also made reference to the principles governing the extent of the State's obligations *per* the decision in *Abdulaziz, Cabales and Balkandali v The United Kingdom* [1985] 7 EHRR 451. There was a setting-out by the Respondent Minister of all relevant factors considered by her in light of the principle that Article 8 does not impose on a State any general obligation to respect the choice of residence of a family (reference being made to the ECHR judgment in *Nunez v Norway* [2011] (June 28 2011) application No. 55597/09). It is appropriate to quote as follows from internal p.13 of the detailed consideration document: -

> *"I have considered the particular circumstances in this instance. It appears reasonable to state that at the time of the marriage the applicant and the sponsor would have been aware of the financial shortcomings as outlined in Section 1 part F – financial situation of the sponsor with regard to their particular circumstances. As outlined in that Section, the sponsor has a low level of income that could mean they are potentially reliance on social welfare to support the applicant upon arrival. Having considered the aforementioned, reasonable concerns arise that the granting of the visa sought may result in a burden on public funds or public resources.*
>
> *The applicant has lived apart from the sponsor for the entirety of their relationship. The applicant is a citizen of Ethiopia and has lived in Ethiopia for all of their life, it follows that they will have strong links with the linguistic and cultural environment of Ethiopia. In addition, in considering whether family life could be established elsewhere, insufficient reasons have been submitted preventing the sponsor from*

continuing to travel to Ethiopia to visit the applicant and develop the relationship in the manner in which it has and continues to exist or whether there are any unreasonable restrictions to establishing family life in the Applicants' country of origin or elsewhere, or whether an obstacle exists that could not be realistically or reasonably overcome.

While it may be the Applicants' and sponsor's preference to develop their relationship in this State, there is no general obligation on it to respect their choice in this regard given the State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.

Conclusion:

Having regard to all of the above factors, it is submitted that in refusing the visa application in respect of applicant, that there is no lack of respect for the family life under Article 8.1 and therefore no breach of Article 8."

129. The Applicants have failed to establish unlawfulness with respect to s.3 of the European Convention on Human Rights Act 2003 and Article 8 ECHR.

Fixed or inflexible Policy

130. The Applicants also plead that *"the Respondent erred in law and applied a fixed or inflexible Policy. While the Respondent is entitled to maintain financial requirements in the Policy Document on non-EEA family reunification, she cannot do so in a manner that is fixed and in effect forecloses any possibility of family reunion for the Applicants whatsoever. In the premises, the Respondent has fettered her executive discretion."*

131. The Applicants have not established that the Respondent applied the Policy in a fixed, inflexible or rigid manner or that she fettered her discretion. The contents of para. 1.12 of the Policy makes clear that it is neither fixed, nor rigid. It is clear from the decision that the Respondent never suggested that she *could* not grant a visa, having regard to the terms of the Policy. On the contrary, she recognised that an exception could be made, in appropriate circumstances (i.e. *per* the discretion which is explicitly referred to at para. 1.12 of the Policy). However, having considered all relevant matters, the Minister decided that it was not an appropriate case in which to exercise her discretion.

132. The evidence before this Court demonstrates that the Respondent actively engaged with the provisions of para. 1.12 in order to come to a view as to whether, notwithstanding the failure to meet the financial criteria in the Policy, it would nonetheless be appropriate for her to exercise discretion in favour of granting the visa, having regard to the specific facts and circumstances.

133. In the manner referred to earlier, pp. 6-7 of the detailed consideration document (entitled *"Any special circumstances"*) begins with a *verbatim* setting out s.1.12 and then evidences the Minister's consideration of the issue. Having considered all the information submitted with the visa application, and on appeal, the Respondent Minister came to the view that the applicant had not demonstrated exceptional/humanitarian circumstances which would warrant the granting of a visa.

134. At para. 54 of the Applicants' written submissions, it is claimed that: *"The Respondent has provided no reasons why a departure from the rigid terms of the scheme was not contemplated."* The foregoing submission is undermined by the evidence before this Court, which demonstrates conclusively that the Respondent gave active consideration as to whether an exception should be made. This is the opposite of the fettering of discretion. It is the opposite of operating a Policy in rigid fashion. The evidence supports a finding by this Court that the Minister looked at the entire facts and circumstances of the case before her in order to consider whether a visa should issue, notwithstanding the terms of the Policy document which sets out financial criteria (which, by admission, the Applicants did not

meet). It is worth repeating once more that, even though the foregoing submission refers to "…*the rigid terms of the scheme…*", no challenge to the contents of the scheme (i.e. Policy) is made by the Applicants in these proceedings.

135. As I stated earlier in this judgment, the reality that there was no challenge brought to the Minister's finding that the circumstances of the case did not warrant an exception being made seems to me to be dispositive of the case given that, at all material times, the Applicants acknowledged a failure to meet the financial criteria set out in the Policy. However, lest I was wrong in the foregoing view, I have nonetheless carefully considered the entire of the Applicants' case, as pleaded. In the manner examined in this judgment, none of the legal grounds pleaded have been established. In essence, this is because the evidence before this Court discloses no unlawfulness and the present proceedings cannot constitute a challenge to the merits of a lawfully made decision. .

Reliance on *Khan v Minister for Justice*

136. Reliance by the Applicants on the decision in *Khan v The Minister for Justice* [2021] IEHC 789 cannot avail them, given the very different facts and circumstances. These include: -

(i) In *Khan* the marriage was of 30 years duration;

(ii) the couple in *Khan* had three children;

(iii) the three children were Irish citizens aged 23, 21 and 18;

(iv) the married couple in *Khan* lived together for many years prior to the second applicant coming to Ireland with two of the couple's children and giving birth to their third child in the State; and

(v) the established work-history and qualifications of the applicant in *Khan* stands in marked contrast to the present case.

With respect to the last of those points, Ms Justice Byrnes referred, in the *Khan* decision, to the fact that the applicant for a join family visa had a master's degree in Mathematics and claimed to have lectured for 30 years at a certain college, going on to state that: *"The evidence establishes that he has lectured on a part-time basis at Lehore College since 2005 and has been a grinds tutor. The second applicant has worked as a part-time mathematics teacher in this jurisdiction".*

137. In short, the facts in *Khan* are utterly distinguishable from those in the present case. In *Khan*, the relevant couple married and lived together in Pakistan for some 15 years prior to Mrs Khan coming to this State with two of the couple's children, whereas, in the present case, the Applicants married full in the knowledge that there could be no guarantee of being able to conduct their family life in this State. Furthermore, and unlike the present case, the evidence before the court in *Khan* established that there had been regular visits by the second applicant and the couple's children to meet with the second applicant.

5 April 2019 blessing in Ethiopia

138. At para. 7 of the first applicant's 16 February 2022 affidavit she avers that the marriage took place, over videocall, on 02 March 2019 and that: *"Following this, I then travelled with my family members to Ethiopia and, on **5 April 2019**, we held a traditional blessing with the second named applicant's family. On 13 April 2019, we had our wedding day in Dire Dawa with approximately 120 attendees"* (emphasis added). The foregoing averments accord exactly with the oral submissions made during the hearing to the effect that, following the proxy marriage on 02 March 2019: *"Then there was a blessing day, and she was there and he was there. They had that **on 5 April** in Ethiopia and then, on 13 April, a 'white wedding'"* (emphasis added). Counsel also submitted, again entirely consistent with the first applicant's averments at para. 7 of her affidavit, that *"on **two** of the three dates, she was*

in Ethiopia" (emphasis added). The foregoing is also consistent with the following statement under the heading *"Before Wedding"* which appears in the first applicant's relationship history statement: *"On **5th April 2019** we had our first blessing from [K] family before our wedding"* (emphasis added). Before making the following observations, I want to repeat, yet again, that this Court is not the decision-maker and is not examining the evidence from the perspective of decisionmaker. That said, the itinerary and boarding cards submitted do *not* support the proposition that the first applicant was in Ethiopia on 5 April 2019.

139. There is evidence that the first applicant's flight arrived at 6.40am on Saturday 6 April in Addis Ababa (terminal 2) and that, at 2.30pm on 6 April, the first applicant's flight departed from Addis Ababa Ethiopia (terminal 1) arriving in Dire Dawa Ethiopia at 3.30pm on 6 April. The foregoing observations are made simply because they arise from an objective review of the evidence and, in objective terms, that evidence undermine the proposition that the first applicant was in Ethiopia on 5 April to be present at a "*family blessing*" (her flight did not arrive until the next day). I want to emphasise, however, that these observations have played no part in the outcome of the present proceedings, in circumstances where it does not appear that the decision-maker noted any such inconsistency in explicit terms. Nor does it matter in the least what this Court would have decided, were it the decision-maker. The fundamentally important point is that this Court is *not* making any decision, but reviewing the lawfulness of the decision made. For the reasons set out, I am entirely satisfied that the decision challenged was made lawfully.

"A little bit of flexibility"

140. It does not seem unfair to say, that at the very heart of the present application, is an unhappiness with the *result* of the decision and the assertion that the Respondent could have approached matters in a different way. As counsel for the Applicants put it during the course of oral submissions: *"All that's required in this case is a little bit of flexibility".* However, the difficulty from the Applicants' perspective is that the Minister came to a view she was lawfully entitled to reach, based on a careful consideration of the entire evidence, and she did so having taken account of all matters including competing rights and without ever regarding herself as 'straight-jacketed' by the Policy. By contrast, the *"flexibility"* which the Applicants say the Minister *should* have exercised was to hold that there was no reason to suspect that, *going forward,* the first named applicant would not meet the 40k criteria over the coming three years. This is not to show flexibility, but to discard the very Policy itself (a Policy the terms of which are not challenged).

Humanitarian considerations

141. In oral submissions, the following were said to be humanitarian considerations which arose and which justified the grant, by the Minister, of a visa, pursuant to her discretion: (i) that the sponsor is a family member of a refugee; (ii) that even if she has visited Ethiopia, it would be unlikely that she could go back to live there; (iii) that during the years since coming to this State as 'barely an adult' the first applicant has completed education, has established herself and is working; (iv) that one would imagine it would be very difficult for her to do likewise in Ethiopia; and (vi) that the information concerning the Oromo people and injuries to the second applicant would also amount to humanitarian circumstances which might apply in favour of a discretionary grant of visa.

142. The difficulty with the foregoing is that the Minister considered all the evidence which was before her and having carefully considered all factors, including all relevant rights, decided that the circumstances did not merit a discretionary grant of a visa. In other words, the fundamental issue 'boils down' to the Applicants' contention that the outcome of the exercise conducted by the Minister should have been different. That contention is not a basis for an entitlement to relief in these proceedings. Regardless of how much the Applicants might wish it to be otherwise, the reality that the Minister gave careful consideration to all matters, and came to a decision which was rational and reasonable having regard to what was and

was not before her, presents an insurmountable problem for them with respect to these proceedings.

No need to consider relationship prior to marriage

143. It was also submitted on behalf of the Applicants that *"there should be no necessity, where a couple have married, for any consideration of their relationship prior to marriage"*. The thrust of the submission was that for the Minister to seek evidence regarding the relationship prior to marriage or to consider same was impermissible. Respectfully, I disagree. The foregoing submission seems to me to ignore the guidance given in *Gorry* to the effect that, whilst every marriage (irrespective of duration) must be afforded the same weight, *qua* marriage, it is legitimate to take account of evidence with respect to the couple's relationship (e.g. does the evidence demonstrate an *enduring relationship*, as distinct from the fact of *marriage*?). To my mind nothing in *Gorry* renders it impermissible to consider evidence prior to, as well as subsequent to, the marriage itself. Indeed, doing so, may well be to the advantage of an applicant for a visa (e.g. who can evidence a long-standing close relationship prior to marriage, which continued to be an enduring relationship post the date of marriage). The Applicants in the present case were not disadvantaged by not having had a prior relationship as adults. The Minister never suggested that evidence of such a prior relationship was a *sine qua non* for a positive decision on the visa. In the manner examined earlier, had the Applicants chosen to furnish at first-instance (or on appeal, in the wake of having been put on notice that the evidence provided was considered to be insufficient) the entirety of the evidence which, according to the first applicant's statements, does exist (i.e. of constant and daily communication post marriage) it is conceivable that the decision may have been different. That was not the choice the Applicants made and the important point is that the decision was rational and reasonable and proportionate given what was (and was not) before the Respondent.

Cohabitation

144. Among the submissions made on behalf of the Applicants is that *"the Minister does not see cohabitation to be a natural incidence of marriage and something which the Applicants wish to do".* With respect, I have to disagree. The evidence discloses that the Minister applied her mind to this very issue. See for example, internal p.9 of the detailed consideration document wherein the Respondent Minister stated *inter alia* that: *"while cohabiting by a married couple in a committed and enduring relationship is something the State is required to have regard to in its decision making and to respect, the State is not obliged by the requirement to protect the institution of marriage, to accord any automatic immigration status consequent on a marriage."* Earlier in the analysis on the same page, the Respondent Minister noted, correctly, that there was no unspecified right to cohabit protected by Article 41 and immediately went on to say: *"albeit that cohabitation is a normal incidence of marriage"*.

Weight given to evidence

145. Among the submissions made on behalf of the Applicants was for counsel to ask rhetorically: *"If she was visiting Ethiopia and it is accepted that they are married, what level of proof is required?"* To my mind that this submission is, in substance, more a critique of the weight given to the evidence which was before the Minister, in the context of the role which is quintessentially hers to perform as decision maker. Elsewhere it was submitted on behalf of the Applicants that: *"The idea that the sponsor has enough income now, and probably going into the future, is not addressed".* It was not at all unlawful for the Minister *not* to 'tear up' the Policy (i.e. a Policy which involves a *retrospective* analysis of actual income) in favour of a *prospective* exercise of the type the Applicants now contend for. Again, the obstacle which prevents the Applicants from being entitled to relief in these proceedings is the reality that the Minister considered all evidence and all relevant matters and, having given due weight to same, came to a decision which was taken lawfully. It also seems highly relevant to say that neither in the first-instance application, nor in the context

of the appea,l did the Applicants make the argument which their counsel ran with such skill and conviction during the hearing. In other words, the case was *not* made to the Respondent that she should depart from the terms of the Policy because the first applicant, as sponsor, contended that she would meet the financial qualifications if the Minister were to extrapolate forward for a three-year period based on her current income. On the contrary, there is a clear acknowledgement that the Policy's financial criteria were *not* met. By contrast, all evidence and factors were weighed by the decision maker and the outcome was a lawful decision, albeit one the Applicants wish had gone different way.

Obligation to seek further evidence

146. Insofar as it may have been suggested that the Minister was under an obligation to press the Applicants for further information or evidence before reaching the decision which is now challenged, I am satisfied that the Respondent Minister had no such duty. However, it is equally clear that the first-instance refusal 'flagged' in the clearest of terms the various deficiencies in terms of evidence. This is plain from the 25 May 2021 letter wherein reference is made to *"insufficient documentation"* and *"insufficient information"* submitted.

Conclusion

147. There is a presumption that material has in fact been considered if the decision says so (see Hardiman J. in *G.K. v. MJELR* [2002] 2 IR 418; [2002] 1 ILRM 401). The decision under challenge says so in the clearest of terms. The reasons underpinning the Visa appeals refusal was squarely and soundly based on the evidence. It has never been suggested that the reasons were unclear. The decision itself – which must be read as a whole, rather than subjected to microscopic analysis on a word by word basis - was not reached unlawfully. It was argued on behalf of the Applicants that the Policy (including financial criteria contained therein) amounts to no more than guidelines, from which the Respondent had a discretion to depart. There can be no issue taken with the foregoing statement of principle. Indeed, the contents of para. 1.12 of the Policy illustrates that it is *not* a rigid or fixed Policy. Nor is there any dispute between the parties that the Respondent had a discretion to grant the visa, even where the financial criteria were not met. However, the Applicants have not established that the Policy was operated in a rigid or fixed manner. The evidence demonstrates the contrary. At all material times, the visa was applied for, *not* on the basis that the financial qualifications in the Policy had been met, or would be met, but on the basis that, despite the fact they were *not* met, the circumstances were such that the Minister should exercise her discretion in favour of granting a visa. The Minister decided otherwise. The process by which she came to that view was lawful. In coming to her decision, the Respondent clearly took account of*, inter alia*, the status of the Applicants as a married couple as well as the impact on them of the decision. Leaving aside the fact that the Applicants do not appear to have challenged the Minister's finding that this was not a situation where special circumstances rendered it appropriate for her to exercise discretion in favour of granting a visa, it does not seem an over-simplification to say that the reason for the Minister's decision stemmed, fundamentally, from the lack of evidence supplied by the Applicants. The outcome of these proceedings will doubtless come as a disappointment to the married couple in question but, for the reasons set out in this judgment, the Applicants' claim must be dismissed. My preliminary view on the question of costs is that there are no factors or circumstances which would justify a departure from the "normal" rule that "costs" should follow the event. If there is any dispute between the parties on this or any other issue touching on the form of final order, short written submissions should be furnished within 14 days.