

THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 536

Record No. [2021 No. 904 JR]

BETWEEN

**BB, NR, AND AB (A MINOR SUING THROUGH HER FATHER AND NEXT
FRIEND, BB)**

APPLICANTS

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr. Justice Mark Heslin delivered on the 30th day of September, 2022

Introduction

1. The primary relief sought by the applicants is an order of *certiorari* quashing the appeal decision of the respondent of 20 August 2021 refusing the second applicant’s application for a Join – Family Visa to join the first applicant in the State. The second relief seeks an order directing that the second applicant’s application for the aforesaid visa be remitted to the respondent for full reconsideration, whereas the third relief concerns declarations as to the legal rights and/or legal position of the applicants. A plea in damages is also made. There is no issue arising with regard to ‘time’. By order made on 8 November 2021 (Barr J.) the applicants were granted leave to apply by way of an application for judicial review for the reliefs set out at para. [d] on the grounds set out at para. [e] of the applicant’s statement of grounds as filed on 28 October 2021.

Relevant chronology

2. From a careful consideration of the pleadings and exhibits, a number of matters emerge which, for the sake of clarity, can be set out in chronological order as follows.

3. The first applicant is a gentleman who was born in Algeria in 1963. He came to Ireland in **1998** and applied unsuccessfully for asylum.

4. In **2005** the first applicant married an Irish citizen, Ms. SH. He was granted permission to remain in Ireland on the basis of this marriage. The couple had one child together who was born in Ireland in 2005. That child is the third named applicant.

5. The couple divorced in **March 2017**. The third named applicant, currently aged sixteen, resides with her mother, who is not a party to the proceedings. The first named applicant resides elsewhere in the same town in this State.

6. The second named applicant is an Algerian citizen who was born in that country in 1972. At para. 2 of the "factual grounds" it is pleaded that the first and second named applicants: -

". . . knew each other as children and were re – introduced as adults in November 2016, as their parents had agreed that they would be well suited as husband and wife and had arranged this meeting. They got on well during this time, and the first applicant returned to Algeria in April 2017 in order to marry the second applicant. They were married on the 29th April 2017 in Algeria. They are in regular contact and have been hoping to live together in Ireland".

7. The first named applicant has a very limited history of employment within this State between 2006 and 2017. He has been in receipt of Jobseeker's Allowance for a lengthy period of time and is currently unemployed.

8. On **11 September 2017**, the second applicant applied to the respondent for a Long Stay Join Family (Irish naturalised Spouse) Visa ("the visa") to join the first applicant in this State. The visa application was submitted through the Embassy of Ireland in Abu Dhabi.

9. On **10 October 2017**, the Irish Embassy requested copies of the first applicant's P60's. On **6 November 2017**, the first applicant replied stating that he had been employed by a certain restaurant in a particular town in this State, in 2014, but whilst he had payslips, he did not have a P60. The first applicant stated that he could not consistently work in 2015 and 2016 due to illness. The first applicant submitted *inter alia* a contract of employment in respect of work as a chef commenced by the first applicant on 4 September 2017. In addition to payslips from previous employment, between March and September 2017, a bank statement was furnished showing a credit balance on 31 July 2017 of €1,304.55 as well as receipts for three money transfers totalling €700 from the first applicant, between March and June 2017. The first applicant also submitted a letter explaining that he was living in a one-bed apartment, was working, and could support the second applicant in the State, and also that the second applicant was qualified in computer programming and management and was confident she could find work here. The first applicant also submitted photographs of the couple together. The application included a letter from the first applicant's doctor, the contents of which I will refer to presently.

10. On **16 November 2017** the respondent Minister refused the second applicant's application. This first instance refusal was communicated in a letter to the second applicant dated 16 November 2017 which summarised the reasons for the refusal. The two – page letter was accompanied by an eight – page appendix which went into detail in respect of the evidence analysed and the conclusions reached, upon which the adverse decision had been made. The aforesaid letter, as well as informing the second applicant that her application had been examined by the Irish Naturalisation and Immigration Service ("INIS") in accordance with "Policy Document on Non - EEA Family Reunification" ("the Reunification guidelines" or "the Guidelines") published by the respondent, effective from 1 January 2014, summarised the reasons for the refusal at first instance in the following terms: -

"Having taken all documentation and information submitted into consideration it has been decided to refuse your visa application for the following reasons;

ID: Policy Document: Your application does not meet the financial criteria as set out in para. 17.2 of the Policy Document on Non – EEA Family Reunification.

PF: Public Funds: The granting of the visa may result in a cost to public funds – your application does not satisfy the criteria as set out in para. 17.2 of the Policy Document on Non – EEA Family Reunification.

PR: Public Resources: The granting of the visa may result in a cost to public resources – your application does not satisfy the criteria as set out in para. 17.2 of the Policy Document on Non – EEA Family Reunification.

ID: Insufficient Documentation Submitted: Documentary evidence demonstrating the existence of a substantial and continuous relationship between you and your reference has not been submitted.

FM: There is no automatic right for non – EEA nationals who are family members of Irish nationals resident in Ireland to migrate on a long term basis to Ireland.

RH: Relationship History: You have not shown evidence of a relationship being in existence prior to your visa application/marriage.

In addition, your application has been considered under Article 8 of the European Convention on Human Rights and Article 41 of the Irish Constitution; a copy of this consideration is attached.

This decision can be appeal within two months of the date of this letter . . .”

11. Before proceeding further, it is appropriate to quote verbatim para. 17.2 of the guidelines which states as follows: -

“Where Sponsor is Irish Citizen

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)

12. It is common case that the first applicant did not and does not meet the criteria identified in para. 17.2. It is fair to say that at the heart of the within application is reliance by the applicants on para. 1.12 of the same guidelines which 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”.

13. By letter dated **12 January 2018**, an appeal was submitted to the respondent by the applicants' then solicitors. The said letter made submissions in respect of each of the grounds of refusal referred to in the 16 November 2017 decision.

14. At the hearing of this case which took place over two days on 30 June and 1 July 2022, counsel for the applicant made submissions to the effect that two matters constitute *exceptional circumstances* within the meaning of para. 1.12 of the Guidelines, namely (i) what was described as the first applicant's severe health problems; and (ii) the first applicant's daughter and issues concerning her situation. That being so, it is appropriate to look at certain submissions made in respect of both matters.

15. As to the first applicant's health, the 12 January 2018 appeal submitted *inter alia* that:

"Mr. B. suffers from a chronic respiratory condition (asthma and bronchitis) which causes severe breathing problems and respiratory infections. His medical condition has heavily impacted on his capacity to work. The physical demands of work exacerbate his condition and increase his exposure to the risk of infection. In the last year (2017) he was dismissed from four separate jobs (detailed below) because he was required to take extended sick leave due to severe respiratory infections contracted shortly after commencing employment in each of these jobs.

Job 1: Chef at . . . B&B and restaurant – commenced in March 2017;

Job 2: Chef at . . . golf club – commenced in May 2017;

Job 3: Chef at . . . Inn – commenced in June 2017:

Job 4: - Chef at . . . hotel – commenced in September 2017

It is Mr. B's strong wish to be in employment due to the mental health benefits that working brings. He continues to seek further work for this reason, and he is assessed as a job seeker for social welfare purpose. He has never applied to have his fitness for work assessed for social welfare purposes, although the factual evidence would suggest that he is not fit for work due to his medical condition and, (subject to independent medical assessment) he would qualify for a disability allowance if he were to apply for same.

As evidence of his medical condition and the impact it has had on his capacity to work please refer to the following documents enclosed herewith.

- *Letter from his GP Dr. KD dated 21 November 2017;*

- *P45 tax document in respect of termination of employment . . . at the golf club . . . duration of employment 11/05/2017 – 11/06/2017 & three payslips dated between 25 May 2017 and 1 June 2017 in respect of this employment;*

- *P45 tax document in respect of termination of employment as a chef at . . . Inn . . . (duration of employment 26/06/2017 – 16/06/2017);*

- *Contract of employment dated 4 September 2017 in respect of employment as a chef at . . . Hotel . . . this employment terminated in late September (Mr. B has replaced his P45 tax document for this job and his first job at . . . B&B and Restaurant)"*

16. The submission went on to acknowledge the fact that the first applicant does not meet the financial criteria set out in para. 17.2 of the Guidelines. Indeed, it was acknowledged in oral

submissions that the first applicant has *never* met the said financial criteria. As is clear from the aforesaid submission with regard to the first applicant's health, the only medical evidence proffered was a short letter dated 21 November 2017 written "to whom it may concern" by a Dr. KL who stated the following: -

"The above named is attending here as a patient since 2006 and has been treated for conditions outlined below and has been unable to work at times due to respiratory problems.

01/01/2006 1. Bronchiectasis

2. Asthma

3. Laparoscopic Appendectomy 09/09/13 MGH

Yours sincerely".

17. It is important to emphasise that this Court is not hearing an appeal. Judicial review is very obviously concerned, not with the merits of the decision, but with its lawfulness. This Court has kept the foregoing principle ever in mind. It is, however, necessary to look at the evidence which was before the decision maker to the extent necessary to consider the lawfulness of the decision made. This arises in circumstances where, among the legal grounds relied upon by the applicants, are pleas to the effect that the respondent acted unreasonably and irrationally in the findings she came to. Without for a moment purporting to step into the shoes of the decision maker, a number of comments can fairly be made as to what the letter from the first applicant's doctor says and does not say. It does not say that the first applicant suffers from a chronic respiratory condition. Although it certainly says that the first applicant has been "*unable to work at times due to respiratory problems*", it is entirely silent about the number, frequency and duration of those "*times*". In objective terms it goes no further than confirming that on occasions which are unspecified, the applicant has been unable to work due to respiratory problems. The letter is also silent about how serious or not these respiratory problems have been in the years (2006 – 2017) during which the first applicant has been a patient of the practice. No mention is made of what treatment was necessary and, to the extent provided, whether that treatment was or was not effective. The letter is also silent about whether, for example, certain types of employment, as opposed to others, would be possible notwithstanding the respiratory problems. The letter does not say that physical demands of work exacerbate the first applicant's condition. Nor does it say that these demands increase his exposure to the risk of infection. The letter does not state that in 2017 the first applicant was dismissed from four separate jobs because he was required to take extended sick leave due to severe respiratory infections.

18. From an objective perspective it could not be said that the doctor's letter comprises medical evidence supporting all of the various submissions made by his solicitor as to what his solicitor describes as severe breathing problems and respiratory infections as well as the consequences of same.

19. With regard to the first applicant's daughter, it is common case that the first instance application did not make any reference to her. The relevant submissions in the 12 January 2018 appeal begin in the following terms.: -

"It is accepted that Mr. B has no absolute legal right to family reunification with his wife in Ireland. However, as a citizen and long-term resident in Ireland, Mr. B's marital relationship with his wife is afforded special protection pursuant to Article 41 of the Constitution and Article 8 of the European Convention on Human Rights (ECHR). We submit that the within visa application engages these rights, and there is a legal obligation on the decision maker to determine the application in accordance with these rights. While these rights are not absolute in nature, they do require the decision maker to afford the appropriate weight to our client's interests and to reach a decision which does not disproportionately interfere with those rights.

Before proceeding to outline how these rights apply, it is important also that our client is the father of an Irish citizen child, AB, born in . . . on . . . 2005. Mr. B's ex-wife SH is AB's mother. AB lives with her mother in [Town] (Mr. B lives in separate accommodation in the same town). As is documented in the enclosed letter from her mother SH, AB enjoys a close personal relationship with her father. She sees him very regularly and he is very involved in her life. AB has autism spectrum disorder and is being home – schooled for this reason. Her mother provides for her academic learning whilst her father provides significant support to A in accompanying her to home – schooling events and extra – curricular activities. This support is vital to A and her mother, as Ms. H is unable to drive. The information was not included in the visa application because Mr. B and his wife (who prepared Ms. R's visa application without professional advice or support) were not aware of its relevance to the matters which fall for consideration. It is submitted that A's right to respect for her family life, including her rights to live in Ireland and to maintain on a regular basis a personal relationship and direct contact with her father, are also engaged by this application, and must be considered by the appeals officer in determining this appeal.

The following documentary evidence is enclosed in respect of our client's relationship with his daughter A:

- *Copy Irish birth certificate of AB;*
- *Copy bio data page of the current Irish passport of AB;*
- *Letter dated 8th January 2018 from SH, A's mother, signed and dated by her;*
- *Copy letter from TUSLA (Child and Family Agency) dated 12th January 2016 dated addressed to SB(H) regarding that office's assessment of her home – schooling of A in Ireland . . ."*

20. With regard to the documentation referred to in the foregoing submission, it is acknowledged that the third named applicant is an Irish citizen. The letter dated 8 January 2018 from her mother, the first applicant's first wife, SH, was enclosed and its contents are accurately reflected in the foregoing submissions. Although SH states in her 8 January 2018 letter that her daughter has autism spectrum disorder ("ASD") "*diagnosed by CAMHS*", it is fair to say that no medical evidence to that effect was furnished. The 12 January 2016 letter from TUSLA does not refer to the third named applicant having ASD. Nor does it confirm that she is home-schooled by reason of ASD. It begins with the reference "*Re: AB Home Education*" and the body of the letter starts as follows: -

"I refer to the ongoing assessment of the education being provided to your daughter which was carried out recently by PL.

Under s. 14(9) of the Education (Welfare) Act 2000, you are entitled to comment on the report and we are enclosing a copy of the ongoing monitoring review report and invite you, to forward your comments to the agency. . ."

21. The 12 January 2018 submissions included the submission that the financial criteria in the respondent's guidelines are no more than that, i.e. guidelines, and that the respondent had a discretion to grant a visa even where the relevant financial criteria were not met. I would pause at this juncture to observe that no issue is taken with the foregoing statement of principle. The fact and content of para. 1.12 of the Guidelines indicate that the guidelines do not constitute a rigid or fixed policy. There is no dispute between the parties that the respondent had a discretion to grant the visa even where the financial criteria were not met.

22. A submission was also made in respect of the qualifications gained by the second applicant in Algeria and it was submitted that this State would be likely to diminish the burden on the social welfare system, rather than add to it. The relevant submission made clear that the second applicant was "*. . . not formerly employed in Algeria but she uses her qualifications to teach students IT/computer programming in her home (grinds) and to mark exam papers. There is no reason why she would not be able to use her qualifications to find gainful employment in Ireland, thereby supporting herself and also diminishing her husband's dependence on social welfare assistance in the State*".

23. Documents were enclosed in respect of the second applicant's qualifications which were described as: (i) Diploma Certificate (Business Data Processing) – 2006; (ii) Degree Certificate (Bachelor in Business Administration – Business Data Processing – 2008); and (iii) Certificate – Engineer in Business Data Processing – 2009.

24. With regard to the foregoing submissions and, again, without for a moment purporting to usurp the role of decision - maker, it is entirely fair to say that no evidence was provided in respect of (i) any qualifications the second applicant gained *after* 2009; (ii) any income earned as a result of any formal employment in Algeria which the second applicant engaged in subsequent to obtaining her qualifications; or (iii) any evidence with regard to any earnings from informal employment of the type described in the submissions (namely offering "grinds" and marking exam papers).

25. In respect of the second matter said to constitute exceptional circumstances, emphasis was laid in the 12 January 2018 submissions on the rights of the applicant's daughter under Article 41 of the Constitution, Article 8 of the ECHR and Article 21 of the Treaty on the Functioning of the European Union. It was submitted *inter alia* that the first applicant cannot spend lengthy periods of time away from Ireland, because of his responsibilities to his daughter. It was also submitted that the first applicant leaving Ireland in order to have his marital life in Algeria was not a viable option, having regard to the important role he plays in the third applicant's life, particularly as she was described as a child with ASD. Submissions were also made in light of the Court of Appeal's judgment in *Gorry v. Minister for Justice and Equality* (delivered 27 October 2017). In the manner presently discussed, on 23 September 2020, the Supreme Court delivered judgment in *Gorry v. Minister for Justice and Equality & ABM v. Minister for Justice and Equality* [2020] IESC 55 ("Gorry"). The *Gorry* decision

was a significant feature of the submissions to this Court, both written and oral, and I will return to the principal submissions during the course of this judgment.

26. By letter dated **30 January 2018** the applicant's solicitors submitted further documentation. This comprised the following: (i) P45 in respect of the termination of the first applicant's most recent employment as a chef (termination date 24 September 2017); (ii) Letter from the second applicant's father and an English translation of same; copy national identity card of the second applicant and translation of same; (iii) Letter from the first applicant's mother and English translation of same; (iv) Copy national identity card of first applicant's mother and English translation; (v) Copy birth certificate of the second applicant and English translation; (vi) Copy birth certificate of the second applicant and English translation; (vii) Copy birth certificate of the first applicant and English translation; (viii) Copy marriage certificate of the first and second applicants dated 29 April 2017 and English translation; and (ix) Copy Air France flight itinerary in respect of a flight from Algiers to Dublin, via Paris, on 30 November 2016 which was described in the 30 January 2018 letter as being "*following his first face to face meeting with his wife in Algeria*".

27. By letter dated **21 March 2018**, the respondent Minister refused the appeal and upheld her first - instance decision. Judicial review proceedings were subsequently brought by the applicants (record no. 2018/489 JR). These proceedings were struck out in the context of a settlement reached.

28. On **18 February 2019**, the solicitor for the first applicant made representations in support of the visa appeal. These submissions were sent to the Visa Appeals Officer in Abu Dhabi and copied to the respondent Minister's offices in Dublin. This was in the context of the respondent having agreed to reconsider the visa appeal as part of the settlement reached. On or about **7 May 2019**, the respondent refused the appeal and the appellants challenged this decision by way of judicial review in proceedings bearing record no. 2019/615 JR. These proceedings were struck out on 30 April 2021 in the context of a settlement agreement involving a reconsideration of the visa appeal.

29. On **20 May 2021**, the applicant's current solicitors made updated submissions in support of the appeal. The 20 May 2021 submissions also attached certain documents comprising the following: -

- (i) Photocopies of pages from the first applicant's Algerian passports showing certain stamps. These were said to relate to visits to his wife in Algeria over the previous years;
- (ii) Copies of flight itineraries in respect of flights from Dublin to Algiers on 15 November 2018 and on 27 April 2019, respectively;
- (iii) Photographs which were described as "*Screenshots from his video chats with his wife*"; and;
- (iv) Copy extracts from the first applicant's tenancy agreement which referred to a 12 - month term commencing 6 November 2017 at a monthly rent of €390.

30. By letter dated **20 August 2021**, the respondent refused the visa application. It is this decision which is challenged in the present proceedings.

The decision challenged in these proceedings

31. On any analysis it is a very lengthy and detailed decision, running to 26 pages. Although, during the course of this judgment, I will refer to certain passages from the decision, a number of general comments seem appropriate to make at the outset. First, it is not disputed that the decision contains an accurate description of the submissions and representations made as well as the documents proffered by way of evidence. In other words, it is not contended that there is any inaccuracy in the manner in which the evidence or submissions are described. Nor is it asserted that any submission, representation or evidence was put to the respondent Minister which she failed to consider. A sense of both the comprehensiveness of the decision and the care with which it was prepared can be seen from its structure, wherein the analysis of the evidence and submissions was carried out under the following headings: -

Section 1: Background

- A. The Proposed Sponsor;**
- B. The Applicant;**
- C. Other Family Members (P. 1);**
- D. Relationship History / Evidence of contact, for example but not limited to, boarding cards, messages, emails, phonecalls, texts, photographs etc. ; (P. 2 -3);**
- E. Financial Situation of the Applicant (P. 3 – 5);**
- F. Financial Situation of the Sponsor (P. 5 – 6);**
- G. Accommodation Details of the Sponsor;**
- H. Other Information (P. 6 – 8);**

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

Eligibility of Sponsor (P. 8);

Financial Support (P. 10);

Social Support (P. 10);

Any Special Circumstances (P. 12);

The Sponsor’s Daughter (P. 12 – 13);

Health of the Sponsor (P. 13 – 14);

Employability of the Applicant (P. 14);

Cost of Living in Mayo (P. 14);

Conclusion (P. 15);

Section 3: Consideration under Article 41 of the Constitution (P. 15);

Rights of the Family (P. 16 – 18);

Finances of the Sponsor (P. 18 – 20);

Conclusion (P. 20 - 21);

Consideration under Article 20 Treaty on the Functioning of the European Union (P. 21 – 22);

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

Private and family life (P. 22 – 25);

Conclusion (P. 26).

32. The aforesaid consideration document comprised Exhibit “BB7” to the first applicant’s affidavit. The respondent’s cover letter, also dated 20 August 2021, which ran to two pages comprised Exhibit “MB 2” referred to in the affidavit of Melissa Brennan of the Irish Immigration Service delivery function in the respondent’s department. The two-page letter which set out the ‘headline’ reasons for the refusal stated *inter alia* the following: -

“The reasons for refusal are as follows:

FM: - There is no automatic right for non – EEA nationals who are family members of Irish citizens to migrate on a long – term basis to Ireland. Your case has been fully examined and on the basis of the documentation submitted, it has been decided not to grant the visa sought.

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

- *Insufficient documentary evidence of a substantive and continuous relationship between the applicant and the sponsor has been submitted.*

- *The application does not meet the financial criteria as set out in para. 17.2 of the Policy Document on non – EEA family reunification.*

PF: - The granting of the visa may result in a cost to public funds. Your application does not satisfy the criteria as set out in para. 17.2 of the Policy Document on non – EEA family reunification.

PR: - The granting of the visa may result in a cost to public resources. Your application does not satisfy the criteria as set out in para. 17.2 of the policy document on non – EEA family reunification.

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 as outlined in this decision”.

33. It is uncontroversial to say that 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). Not

only did the respondent's letter dated 20 August 2021 make explicit that "*all documentation and submissions made have been considered*", this was also made explicit in the 25 – page consideration documentation which accompanied the letter. The respondent not only referred in detail to all submissions and documentary evidence which had been furnished, she made explicit that all such information had been considered in the context of her determination that exceptional circumstances had not been established. In this regard it is appropriate to quote *verbatim* the respondent's conclusion in respect of s. 2, namely, "*Assessment under the Policy Document on non – EEA Family Reunification*", which included explicit consideration of whether exceptional circumstances existed. The following appears on internal p. 15 of the decision's consideration document: -

"Conclusion

Having regard to the foregoing, the sponsor has failed to demonstrate that they meet the financial criteria set out in para. 17.2 and 17.5 of the policy document on non – EEA Family Reunification and the granting of the visa sought may result in an immediate cost to public funds and public resources. Insufficient documentary evidence of ongoing social or financial support between the applicant and the sponsor in Ireland has been provided. Insufficient evidence of ongoing social or financial support between the applicant and the sponsor in Ireland has been provided. Insufficient evidence of a relationship prior or subsequent to the marriage has been provided. All information relating to the circumstances of the applicant and sponsor's marriage have been considered insofar as they are known.

I have considered all the information submitted with the visa application and the appeal, and have determined that the applicant has not demonstrated that the circumstances are sufficient to warrant the granting of the visa sought as an exceptional measure".

Discussion and decision

34. I want to express my thanks to Mr. O'Dwyer SC for the applicants and to Mr. Conlan Smith SC for the respondent, both of whom provided the court with very detailed written submissions which they supplemented by means of oral submissions made with clarity and obvious skill. These were of great assistance to the court, and I have carefully considered all submissions, written and oral. I will refer to the principal submissions during the course of this judgment. In circumstances where the *Gorry* decision was referred to by both sides, it seems useful to make reference to the facts in that case. *Gorry* concerned a lady from Nigeria who came to this State seeking international protection. She was unsuccessful in that application and a deportation order was ultimately made in June 2005. She remained in this State without permission and, in 2006, formed a relationship with Mr. Gorry. The couple travelled to Nigeria in 2009 and were married, after which an application for revocation of the deportation order and for a visa in respect of Mrs. Gorry was made. Both 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 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 Bunreacht na hÉireann 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. It was against the foregoing backdrop that the Supreme Court considered the rights attaching to the marriage of an Irish citizen to a third country national. Judgments were given by O'Donnell J. (as he then was) and by McKechnie J. As well as agreeing that Article 41 of the Constitution and Article 8 of the ECHR represent sources of different rights, the following principles emerge from *Gorry*.

35. For the majority, O'Donnell J. examined in *Gorry* 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 as opposed to Article 41 of Bunreacht na hÉireann. 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. At the heart of the present application, is not, of course, a right to cohabit, but a right to cohabit in this State. The Supreme Court's guidance on this issue is clear. At para. 23 the learned judge stated the following:

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"However, 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".

36. In view of the foregoing, the starting point is that the first and second named applicant do not have a *right* to cohabit in this State. That is not of course the end of the analysis and, from para. 25 onwards of the decision in *Gorry* the current Chief Justice emphasised (as the minority did in *Gorry*): - " . . . that a decision affecting the lives of a married couple in a fundamental way demands close scrutiny and requires justification under the Constitution". For present purposes the end of para. 25 has particular resonance: -

"Therefore, when any decision is made which has a fundamental effect on a married couple the decision - maker must normally take into account of those matters. 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".

37. I have no hesitation in saying that the evidence before this court supports a finding that the respondent in the present case took account of the status of the first and second named applicants as a married couple as well as the impact on them of the decision.

38. O'Donnell J. (as he then was) went on from para. 26 of his judgment in *Gorry* to give the following guidance: -

"26. A Minister's decision must, therefore, set out those matters and considerations which are considered to justify an outcome which may have that effect. This will, almost certainly, involve a consideration of the matters set out in the judgment of McKechnie J. and may, in

most cases, lead to the same conclusion, but the exercise starts from a different point, 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 preloading of the scales involved by characterising a right of cohabitation as worthy of the highest level of protection of feasible in a modern society.

27. Any decision to deport a married person from a country where their spouse is entitled to reside, to refuse to allow a non – national spouse to enter the country of residence of the other spouse, or to refuse the revocation of a deportation order preventing the lawful entry to such a country, necessarily impinges upon the marriage and the family created thereby. Any such decision will require analysis by reference to any human rights instrument such as the Irish Constitution or the ECHR which, whether expressly or implicitly, protect a right to marriage, the institution of Marriage, and family life. However, I entirely agree that the analysis under both instruments cannot be blended to provide a single homogenous approach. . .”

39. Applying the foregoing statement of principle to the facts in the present case, I am satisfied that the respondent considered all the facts which were put before her in the context of the evidence submitted and the submissions made. A careful reading of the decision as a whole does not entitle this Court to take the view that the respondent departed from the principles outlined in *Gorry*.

40. If one applies the principle which is stated at para. 28 in *Gorry* to the circumstances of the present case, the default position is not that the applicants have an established constitutional right to cohabit together in this State which right had to be overcome by the respondent Minister in the context of the decision which is challenged. Rather, as O’Donnell J. put it: -

“The correct starting point, in my view, is the opposite. It is that a non – citizen does not have a right to reside in Ireland and does not acquire such a right by marriage to an Irish citizen”.

41. Two important comments seem to me to be appropriate. Firstly, the foregoing represents the starting - point for the relevant analysis which a decision maker is required to make. Even at this juncture, it can confidently be said that a careful review of the entirety of the decision and the evidence on which it was based entitles this Court to hold that at no stage did the Minister regard the starting - point of the analysis as other than that.

42. The analysis engaged in was careful and comprehensive and, in the manner more fully explained in this judgment, I am satisfied that the decision was reached in a lawful manner disclosing no unreasonableness or irrationality in the sense in which those terms are used in judicial review.

43. A second comment which seems to me to be appropriate concerns the burden of proof. The views expressed by the current Chief Justice make clear that, as regards the decision which the respondent had to make, it was not a situation where she was required to overcome a burden of proof in the applicant’s favour. Remaining with this theme, and focusing on the burden of proof facing the applicants in the present proceedings, it rests squarely on them. This is not an appeal on the merits. Nor is it a situation such as might arise in the context of an application for protection where there might be a shared burden of inquiry. On the contrary, in these proceedings the

applicants claim that the decision is unlawful. That being so, and before proceeding further, it is useful to recall some well-established principles which arise in the context of judicial review, in particular where the matters at issue concern entry to this State.

Unreasonableness and Irrationality

44. Among the challenges to the lawfulness of the decision are those based on alleged unreasonableness and irrationality. The classic statements can be found in the oft – cited decisions in *State (Keegan) v. Stardust Compensation Tribunal* [1986] IR 642 and in *O’Keefe v. An Bord Pleanala* [1993] 1 IR 39. When reviewing the law on reasonableness, Henchy J. in *Keegan* stated: -

“I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, *inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision”.

45. It is uncontroversial to say that the learned judge linked unreasonableness to common sense and basic logic and indicated that where rights are affected by a decision, there is a constitutional requirement that the decision must not be unreasonable. In *O’Keefe*, Finlay C.J. stated that: “*The circumstances under which the court can intervene on the basis of irrationality with the decision maker involved in an administrative function are limited and rare*”. He also stated: -

“[I]n order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally . . . so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision”.

46. The then Chief Justice also emphasised that this Court cannot interfere with an administrative decision merely because (i) it is satisfied, on the facts as found, that the court would have come to different conclusions or drawn different inferences; or (ii) that the court came to the view that the case against the decision made by the administrator was stronger or much stronger than in favour of it.

47. Among the submissions made with such skill by counsel for the applicants was to suggest that certain findings in the decision were “*harsh*”. This submission was made with specific reference to internal p. 13 of the respondent’s decision in which the Minister discussed one of the two issues which, on the applicant’s case, are central to the contention that exceptional circumstances justified the granting of a visa, namely, the health of the first applicant. The Minister stated *inter alia* the following: -

“The GP letter provided in relation to the sponsor’s health states the sponsor “*has been unable to work at times due to respiratory problems*”. It is not clear from the letter exactly what “*at times*” means”.

48. It is contended on behalf of the applicants that the foregoing was "harsh". Leaving that subjective assessment aside, what the Minister stated is in objective terms entirely accurate. The views expressed by the respondent undoubtedly flowed from the material which was put before her and constituted views open to her to express, having regard to the evidence.

49. Building on the proposition that what the respondent found was "harsh", the applicant's counsel asked rhetorically "*what sort of level of proof is expected here?*". That submission seems to me to speak to the very core of this claim, namely, the tension between, on the one hand, a decision which was made lawfully by the respondent on the basis of the evidence which was before her and, on the other hand, the applicant's dissatisfaction with the *outcome* of a lawful decision making process in circumstances where they simply failed to meet the burden of proof.

50. Speaking to the issue of the first applicant's health in respect of which the GP's letter was the only medical evidence provided, counsel for the applicants made a submission to the effect that: *When one puts together the first applicant's statements; what his solicitors have said on his behalf; coupled with the medical report; and his poor employment history; one would imagine that this would be accepted as sufficient proof.* The reality is that it was not, and it seems to me that the present claim boils down to that fundamental point, namely, the respondent carefully considered all the evidence and took the view that it was insufficient to justify the grant of the visa, even though the applicants believe that she should have taken a different decision. There was, however, no unlawfulness in the process by which she arrived at that decision. There was no departure from any principle with which the respondent was required to comply. In truth, this is a case which is fact - specific, rather than one in which the court is asked to, or where it is at all necessary to 'break new ground' in terms of principle.

51. As to other well - established principles of relevance, the respondent's decision must be read as a whole and this Court must be wary of attempts to parse the decision (see *Balc v. Minister for Justice and Equality* [2018] IECA 76 at para. 99). The respondent's decision is not a piece of legislation and it is impermissible for this court to subject it to granular analysis as if it were. Rather, the correct approach is for this Court to stand back and look at the decision as a unitary whole and decide whether, read as such, the findings flow reasonably and rationally from the evidence submitted. In my view, they do.

Evidence and Documentation

52. It is also well - settled that it is not for the Minister to advise the applicants on their proofs. The onus is, at all times, on an applicant to 'put their best foot forward'. It is also well - established that the documentation submitted by an applicant will be the subject of a qualitative assessment (see *A.M.Y v. Minister for Justice* [2008] IEHC 306; *Khan v. Minister for Justice* [2017] IEHC 800; *Badshah v. Minister for Justice* [2018] IEHC 758; *Qureshi v. Minister for Justice* [2019] IEHC 446; *Akhtar v. Minister for Justice and Equality* [2019] IEHC 411; *Elmabayad v. Minister for Justice and Equality* [2019] IEHC 412; *Shihsu v. Minister for Justice* [2021] IECA 1; *Straczek v. Minister for Justice and Equality* [2019] IEHC 155 at para. 45 and 46; *Subhan & Anor v. Minister for Justice and Equality* [2018] IEHC 458, at para. 67; *Safdar v. Minister for Justice* [2019] IECA 329 and *Subhan & Ali v. Minister for Justice and Equality* [2019] IECA 330).

53. Despite the obligation which at all times rested on the applicants, not on the Minister, to put forward evidence in support of their application, it was submitted to this court on behalf of the applicants that if there was any doubt on the part of the Minister as to the fact of the third applicant's ASD diagnosis or the nature of her situation, the Minister could have asked for this evidence. Emphasis was laid by the applicant's counsel on the fact that his clients had not been asked to provide any medical evidence with respect to the third named applicant. This submission was made in the context of certain findings in the decision including (on internal p. 13) the following: -

"Documentary evidence that AB has been diagnosed with autism spectrum disorder has not been provided. Documentary evidence to support the statements made regarding the sponsor's involvement in his daughter's life has not been submitted. It is not evident from the documentation provided that the sponsor's daughter is aware of his marriage to the applicant. A copy of a custody agreement has not been submitted and it is therefore unclear whether the sponsor has custody of his daughter".

54. The foregoing statements by the respondent are, in objective terms, entirely fair to make, having regard to what was before her. The submission to the effect that the Minister should have *asked* for additional evidence and the emphasis on the fact that the Minister did not ask for same seems to me to ignore the burden of proof which rested on the applicants. Although skilfully made, it is a submission which seems to me to constitute an attempt to shift the burden on to the respondent and to create an obligation for her to advise an applicant as to their proofs or to inform an applicant as to what evidence might be required to meet the burden of proof. The respondent in the present case had no such obligation.

55. It is also appropriate to make clear that no respondent decision-maker can be expected to regard *submissions* as to a particular factual position as the same as being *evidence* which establishes the facts to which those submissions relate. A useful example, in the present case, is to contrast, on the one hand, the medical evidence in the form of the very short report from his GP dated 21 November 2017 (which goes only as far as saying that he "has been unable to work *at times* due to respiratory problems" and which identifies "(i) Bronchiectasis (ii) Asthma (iii) Laparoscopic Appendectomy – 09/09/13 MGH") and, on the other hand, the 12 January 2018 submission from the first applicant's solicitors which asserts that (i) he suffers from a chronic respiratory condition, which (ii) causes severe breathing problems; and (iii) causes respiratory infections; and (iv) that this medical condition has heavily impacted on his capacity to work; and (v) the physical demands of work exacerbate his condition; and (vi) the demands of work increase his exposure to risk of infection; and (vii) in 2017 the first applicant contracted severe respiratory infections shortly after commencing each of four different jobs which were commenced in the months of March, May, June and September 2017; and (viii) as a result of contracting these four severe respiratory infections, the first applicant was required to take extended sick leave on four occasions; and (ix) as a result of taking this sick leave he was dismissed from these four separate jobs and; he is not fit for work due to his medical condition; and (x) although he has never applied to have his fitness for work assessed for social welfare purposes.

56. There is a very obvious difference between the extent of what is *submitted* with regard to the first applicant's health situation and the facts which were verified by way of medical *evidence* in the

form of the GP's report dated 21 November 2017. It is entirely uncontroversial to say that the former went far further than the latter. It is perfectly clear that the respondent did not ignore the submission. She engaged with it and understood from it the nature of the claim being made and the context in which, according to the applicants, extraordinary circumstances were said to exist which justified the granting of a visa. However, the respondent cannot be expected to take submissions as established facts. In this regard, counsel for the respondent directed the court's attention to the recent decision of the Court of Appeal (Binchy J.) in *Abbas v. Minister for Justice* [2021] IECA 16. The case itself concerned an appeal from the decision of this Court (Barrett J.) whereby an order of certiorari was granted in respect of a 13 November 2018 decision to refuse an application for a residence card. That application had been made on the basis that the second named respondent was, as a matter of law a "permitted family member" of the first. It is useful at this juncture to quote *verbatim* paras. 80 – 82 of *Abbas*: -

"80. There was also included with the Application a two - page statement of the first named respondent, in which he describes the dependency of the second named respondent on him, firstly in London between 2010 and 2011, then in Pakistan from November 2011 to January 2014, and then in Ireland from that time onwards. A further single page statement in support of the Application was provided by the first named respondent on 26th September 2017, in connection with the appeal of the First Decision. The statements also provide information about the first named respondent, in particular relating to the exercise by him of his EU travel rights. The statements contain substantially the same information set out by the respondents in their affidavits grounding these proceedings, as summarised under the heading "Background" at the outset of this judgment.

81. As I have mentioned earlier, it was a matter of some controversy in the court below as to whether or not these statements constitute "evidence" in support of the Application. The trial judge took into account that the first statement made by the first named respondent was included as part of the Application, the standard form of which concludes with the stern warning that it is an offence to provide false information or make false statements for the purposes of the Application. He therefore considered it appropriate to accord the statement the status of evidence, in effect thereby accepting the contents of the statement in relation to matters of fact.

82. However, in my opinion, the legal character of the statements made by the first named respondent is not of any particular significance. If the statements had been sworn, then they would of course constitute evidence in a legal sense, but the contents of the statements, regardless as to their legal character (i.e. statement or affidavit) could never amount to anything more than mere assertion. For the purposes of such applications, the appellant clearly requires to be provided with supporting or vouching documentation in relation to the matters asserted therein. While the statements are necessary in order to provide the appellant with essential background information relating to the Application, and to give a context to assist in explaining supporting or vouching documentation provided by an applicant, it is really only the latter documentation that constitutes evidence i.e. it is evidence provided in support of the factual background relied upon by an applicant in his

supporting statement(s). Without such supporting or vouching documentation, the appellant would have great difficulty adjudicating favourably upon an application for residency”.

57. Binchy J. went on at para. 83 to state that: -

“. . . [T]he appellant cannot be expected to accept either the contents of an unsworn statement made or an affidavit sworn by an applicant for residency at face value, in the absence of supporting documentation. The quality of that documentation is obviously central to the consideration of such applications. On the other hand, it is not open to the appellant to ignore such statements either. Their credibility should be assessed in the light of the supporting documentation provided . . .”

58. Obviously, *Abbas* arose in a different context, but the distinction identified between submissions, on the one hand and evidence on the other seems to me to be highly relevant to the decision made in the present case. The respondent plainly considered the submissions, but her assessment took place having regard, not only to the submissions, but to the supporting *evidence* provided. The comments made by the respondent with regard to what might be called ‘gaps’ in the evidence put before her were not unreasonable or irrational in any sense. They were fairly made in light of what was, and was not, put before the respondent. This, once again, throws into sharp focus that at the core of this matter is the failure of the applicant to furnish sufficient evidence for the decision contended for.

59. It should also be emphasised at this juncture that the decision makes perfectly clear that it was one taken, at that point, on the basis of the evidence then before the Minister, but in no way ruled - out the possibility of a positive decision being made if a further application was made in due course. There is nothing in this decision which would allow for a finding that the respondent Minister engaged in the decision-making process with other than an ‘open mind’. It is equally clear that the respondent remains open to the grant of a positive decision at a future point, depending, of course, on what evidence is proffered. This brings to mind another very well – established principle of relevance, namely, that the weight to be given to the evidence is quintessentially a matter for the relevant decision maker (see *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192 per Bermingham J. at para. 27).

History and nature of Relationship

60. Before proceeding further to look at the evidence which was, and was not, before the Minister, it is appropriate to return to *Gorry* to get further guidance by way of relevant principles. This is particularly important given the nature of the first three challenges (a) – (c) in the pleaded case. Counsel for the applicants laid emphasis on the principle, made clear in para. 64 of *Gorry*: “. . . *that the State is obliged to recognise and value the fact of marriage when it takes a decision that directly affects one party to the marriage*”.

61. The evidence before this court allows for a finding that the foregoing principle was respected. Nowhere is it stated or implied in the decision that the desire on the part of the first and second named applicants to cohabit had “*no value*”, notwithstanding the applicant’s submission to that effect. The respondent most certainly recognised and accorded weight to the fact of the marriage in light of the consequences for it of the decision. However, the true nature of the complaint seems to

me to be the merits of the decision taken, i.e. the outcome in circumstances where the applicants have not established that it was a decision unlawfully-made.

62. At para. 65 of *Gorry* O'Donnell J. (as he then was) made clear that all marriages should be given the same weight in terms of recognising the *status* of marriage. He made explicit that there is no difference between their *status* as married couples of "*at one extreme the couple marrying on a whim in Las Vegas*" and, on the other, the couple in "*a lengthy happy marriage blessed with children*". The learned judge went on to make clear that: -

"However, since it is the fact that it is a status that can be voluntarily chosen and, subject to the constraints of the law, dissolved, the law must consider more carefully the consequences of such a marriage. The State is not obliged by the requirement to protect the institution of Marriage to accord any automatic immigration status consequent on a marriage. Indeed, it might be said to be inconsistent with the State's obligation to guard with special care the institution if it were otherwise, since the respect for the institution would be significantly reduced if it could be entered into to achieve immigration status and, perhaps, dissolved soon after. Such marriages would, moreover, not assist in achieving the object the Constitution envisages of providing a stable unit for society".

63. O'Donnell J. proceeded, at para. 66, to make the following clear: -

"This is not to say that the length and duration of a relationship is irrelevant. It is, however, weighed under that heading: that is, an enduring relationship of considerable duration rather than that of marriage".

64. The respondent's decision in the present case set out and considered the history and nature of the first and second applicant's relationship, having regard to the evidence presented. This was not at all impermissible. A submission was made on behalf of the applicant to the effect that a reading of the respondent's decision demonstrated that the Minister took the view that proof was required of a long personal relationship prior to their marriage in order for the first applicant to benefit from family unification with his spouse. That is not at all a fair reading of the decision. The respondent did not impose a test such that evidence of a relationship or a long relationship in existence prior to the marriage was required. Rather, as she was entitled to do, she looked at all evidence tendered in respect of the relationship between the first and second named applicants, both prior to and subsequent to their marriage. Doing so was not at all inconsistent with the principles in *Gorry*. Indeed, I take the view that it could not be seriously suggested that in approaching the question of whether to grant or not a visa of this type, the Minister must confine her consideration of the evidence to the period beginning from the date of the marriage in question. Such a period would obviously encompass the length of the marriage. However, the Minister's analysis was not confined merely to the length of the marriage. That issue is one of simple mathematical calculation. Relevant considerations concerned the nature of the relationship, namely, what O'Donnell J. referred to in *Gorry* as the "durability of a relationship". The Minister was entitled, indeed obliged, to consider all of the evidence before her, including, very obviously, such evidence as was put forward as to the nature of the relationship between the first and second applicants, not merely the chronological length of the relationship as a married couple, but also what the evidence demonstrated as to the enduring nature of the relationship.

65. As a matter of first principles, there is very obviously a difference between, on the one hand, evidence of very regular communication over social media as well as regular visits and, on the other hand, the absence of same. That is not for a moment to suggest where the 'bar' lies in any given case, particularly in circumstances where this Court is not the decision - maker. It is to say, however, that it was perfectly legitimate, indeed required, for the Minister to consider the evidence before her touching on the relationship. As O'Donnell J. stated at para. 68 in Gorry: "*The length and durability of a relationship formed by persons (whether married or not) is something that must be valued and respected by a State which guarantees to protect individuals as human persons*". Later, at para. 69, the learned judge stated that: "*The fundamental question is whether, where a couple is married, the ministerial decision can be said to have failed to recognise the relationship, or to respect the institution of Marriage because of its treatment of the couple concerned*".

66. O'Donnell J. went on, at para. 70 to state the following:-

"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".

At para 71 in Gorry, the learned judge went on to state:-

"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".

67. There is simply no question, in my view, of the foregoing principle having been breached by the respondent decision maker. On the contrary, not only did the Minister very obviously consider the fact of the relevant marriage, she considered such evidence as was proffered of an "enduring relationship" between the parties. This is clear from the contents of the decision, in particular the section entitled "Social Support" which begins on internal p. 10 of the decision. Among other things, the respondent Minister noted, in her 20 August 2021 decision that: "*The most recent dated communication between the applicant and the sponsor are brief, untranslated Facebook Messenger screenshots dated December 2017 and insufficient documentary evidence of the communication after that date has been provided.*"

68. There is no challenge to the accuracy of that finding. An element of the application made to the Minister was that the first and second applicants used Facebook Messenger and the following were findings made by the respondent with regard to messages furnished in support of the application: "*28 screenshots of messages on Facebook between BB and N were submitted. The messages relate to various dates in November 2017 and December 2017. There is also evidence of messages on 31/12/2016. The messages are not in English and they appear to be brief. Evidence of*

communication via Facebook Messenger since December has not been provided". (see internal pp. 11 – 12 of the decision)

69. Again, no issue is taken with the accuracy of the foregoing findings. They accord with the evidence proffered. Whereas the evidence put forward included *inter alia* a partial copy of the first applicant's Algerian passport with immigration stamps as well as certain printouts of flight bookings, the respondent stated *inter alia* the following on internal p. 11 of the decision: -

"While it is evident that the sponsor travelled to Algeria on six occasions between November 2016 and December 2019, these immigration stamps/flight bookings in isolation are not sufficient as evidence of ongoing contact with the applicant. It is noted that while the sponsor is an Irish citizen, he is also a citizen of Algeria and has family there. The most recent photograph submitted of the applicant and sponsor together was provided with the letter of appeal dated 12/01/2018. Evidence that the sponsor met with the applicant on his four visits to Algeria in 2018 and 2019 has not been submitted.

It is noted that the letter of appeal dated 12/01/2018 from the applicant's previous legal representatives states: '*Mr. B. used his Algerian passport to enter Algeria on the occasion of his visit to meet his wife face to face in November 2016. It was not indorsed with immigration stamps by the Algerian authorities (Algerian nationals not being subject to immigration control in Algeria). The only evidence of his travel to Algeria in November 2016 is his flight booking*'. No explanation has been provided as to how the sponsor is now in a position to provide immigration stamps when it was previously stated that the Algerian authorities do not stamp the passport of Algerian nationals".

70. The foregoing flows from the evidence which was before the respondent. It is not the case that the Minister reaches a conclusion that the first and second applicant did not meet during the period referred to. However, an objective reading of the evidence which was before the respondent illustrates the reasonableness and rationality of the respondent's finding that what had been proffered to her was not sufficient as evidence of ongoing contact between the first and second applicants.

71. At this juncture, it seems appropriate to return to certain statements of principle from *Gorry*. At para. 1, O'Donnell J., agreeing with views expressed in the Court of Appeal, stated 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".

72. With regard to the foregoing, and whilst emphasising that the decision to refuse was by no means based on the duration of the particular marriage, part of the factual backdrop in the present case is that the relevant marriage took place on 29 April 2017 in Algeria and shortly after, i.e. four months later, the second applicant made her application for the relevant visa, on 11 September 2017. Very obviously, she was not at the time of making the application, the long – term spouse of an Irish citizen seeking to return to live in Ireland. Nor had she ever lived in Ireland.

73. Part of the factual matrix is also that this is a couple whose courtship and marriage were conducted at all times outside this State. Plainly, their expressed wish, by virtue of the visa application and these proceedings, is to cohabit in this State. The Minister’s decision has prevented this. On that specific issue, O’Donnell J. stated the following at para. 73 of *Gorry*:

“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”.

74. In the present case, the “good reason” relied on is perfectly clear from the decision and earlier in this judgment I quoted the headline reasons as they appear in the 20 August 2021 letter. They comprise two themes, first, the insufficiency of evidence proffered; and second, that the grant of the visa may result in a cost to the public purse (be that in respect of public funds or public resources). This was, of course, in the context of the indisputable fact that the first applicant, as sponsor, did not meet and has never met the financial criteria set out in para. 17.2 of the guidelines.

75. In *Gorry*, O’Donnell J. continued, at para. 74 to make the following clear: -

“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”

I pause at this juncture to state that an examination of the respondent’s decision indicates that there was a very intensive consideration of all submissions and evidence as well as the facts which were or were not established from the evidence proffered. That careful consideration included and analysis

of the length and durability of the relationship insofar as it could be divined from such evidence as was proffered. Para. 74 of *Gorry* continued as follows: -

“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 . . .”

76. In the present case, there is no question of medical evidence having been put before the respondent which established that it would be impossible for the first applicant to cohabit with the second applicant anywhere but Ireland. On the question of the nature of the marriage as an enduring relationship, I have already quoted certain findings made with regard to the insufficiency of evidence of contact between them. No issue of risk arose in the present case.

77. Para. 74 in *Gorry* concluded as follows: -

“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”.

78. Having carefully considered all the evidence, the respondent took the view that this was not one of those “rare” cases to which the Supreme Court referred to in *Gorry*. Put simply, the process followed by the Minister was not unlawful, nor did she breach or fail to adhere to any relevant legal principle. There was no failure on the Minister’s part. Rather, the evidence proffered failed to justify the grant of a visa according to the view formed by the Minister – a view underpinned by relevant material and one which did not fly in the face of reason and common sense.

79. Although *Gorry* arose in the context of the Minister’s decision on an application to revoke a deportation order on the grounds of subsequent marriage, as opposed to an application for a visa of the present type, O’Donnell J. stated at para. 75 that the Minister was not required to make the decision “...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.”

80. The foregoing seems to me to apply with equal force to the visa application in the present case. O’Donnell J. concluded para. 75 in *Gorry* by stating that:

“The Minister is however, required to have regard in an[y] 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.”

81. The applicants in the present case have not established that the Minister failed to have regard to the foregoing considerations. On the contrary, a reading of the decision demonstrates the opposite. It is also entirely fair to say that a careful reading of the entirety of the decision brings home the reality that the adverse outcome to the visa application turned on the paucity of evidence furnished to the Minister. It might be appropriate at this point to refer to certain examples. On internal p. 6 of the decision, the Minister states *inter alia* the following:

"No P.60/employment details summary for the sponsor was submitted at first instance or at appeal. P.60s were requested for the sponsor for the years 2014, 2015 and 2016; however, these documents were not provided. The sponsor states he was unable to work consistently in 2015 and 2016 and therefore does not have P.60s."

82. Internal p. 7 of the decision states *inter alia* the following:

"Sponsor's Irish Citizen Child

The letter of appeal from the applicant's previous legal representative dated 12/01/2018 enclosed a letter dated 08/01/2018 stated to be signed by Sally Hill, the mother of the sponsor's child. The letter states:

"I hereby confirm that my daughter, AB, is home schooled due to extreme problems she encountered in the school environment caused by her having Autism Spectrum Disorder (diagnosed by CAMHS. These issues at school eventually led to school refusal on her part, leaving me with no choice but to home school..."

Absence of evidence

83. It is common case that no documentary evidence from any doctor or other professional, be they medical or educational, accompanied the visa application. Thus, there was no expert evidence regarding the diagnosis of ASD; or the effect of the diagnosis on the third named applicant, as regards needs or challenges. Thankfully we live in a world where there is increased awareness of neurodiversity. As commonly understood in society generally, ASD is a neurological condition which affects how a person learns, behaves, and communicates. However, the "Spectrum" referred to in the term "Autism Spectrum Disorder" appears to recognise the wide variation in the experience and presentation of those with the condition. It is fair to say that evidence as to the type and severity of symptoms experienced by the third named applicant was not put before the Minister. Thus, there was no evidence proffered as to the extent to which, if at all, the first named applicant met needs of the third named applicant which arose from ASD. The letter signed by SH referred to support provided by BB by way of driving (as SH was unable to drive). In addition, the letter stated that BB looked after AB when things like weekly shopping were being done. It was also said that BB had a good relationship with her, visits her a few times a week and takes her to places such as the cinema, restaurant, or bowling. It is fair to say that whether the "extreme problems" and "issues" referred to in the 08 January 2018 letter refer to *treatment*, by others, of the third named applicant at school (such as, for example, unkindness or bullying) or whether they relate to the third named applicant's

symptoms is entirely unclear. No additional clarity is provided in the 12 January 2016 letter addressed to Ms. SB from TUSLA. Having quoted SH's letter in full on p. 7 of the decision, p. 8 goes on to state the following:

"Documentary evidence to support the statements made regarding the sponsor's daughter health condition and the sponsor's involvement in his daughter's life has not been submitted. A letter dated 12/01/2016 addressed to Ms. SB from TUSLA in respect of AB's home schooling was enclosed with the applicant's previous legal representative's letter dated 12/01/2018. The letter states: *'I refer to the ongoing assessment of the education provided to your daughter which was carried out by PL. Under s. 14 (9) of the Education (Welfare) Act, 2000 you are entitled to comment on the report, and we are enclosing a copy of the Ongoing Monitoring Review Report and invite you, if you wish, to forward your comments to the agency. We would be grateful if you would forward your written comments to us within two weeks.'*"

The letter from TUSLA makes no mention of the sponsor's daughter's stated autism spectrum disorder diagnosis. No other documentary evidence has been submitted regarding the stated diagnosis."

84. The observations made by the Minister are objectively accurate. The letter from TUSLA neither refers to any diagnosis with ASD, nor states that the reason the third named applicant is being home - schooled arises from ASD. There is no reference to the type or severity of symptoms suffered by the child in question and nothing is said with respect to what particular or additional supports the third applicant might require consequent on a diagnosis of ASD.

85. The foregoing was the state of the evidence before the respondent, notwithstanding the submissions made to this court to the effect that the third named applicant was somebody with ASD and, as such, had extensive needs arising out of her ASD and that it was in this particular context that the love and support provided by the first applicant to the third made it impossible for him to leave this State to cohabit with his wife. This court is not the decision-maker, but it seems to me that the evidence necessary to underpin these propositions was not put before the respondent.

86. It also seems to me that the Minister engaged with the evidence which was put before her and did so in a reasonable and rational manner. The Minister did not reach any finding that the third applicant does not have Autism Spectrum Disorder, but it was not at all unfair for the Minister to consider the evidence carefully and to see what was and was not established. Focussing, for a moment, on the letter from TUSLA, it might fairly be asked what this letter was supposed to do by way of evidence in support of the visa application? There is no reference in the letter to the level of support the third named respondent requires due to an ASD diagnosis. There is no hint of the severity of her condition. There is no reference to any support provided by the first applicant to the third. Nor does TUSLA refer to ASD being in any way linked to home-schooling.

87. The Minister carefully considered all evidence which was proffered in relation to the third named applicant and the consideration of same by the respondent is clear from *inter alia* the following *verbatim* extracts from the decision:

"Documentary evidence that AB has been diagnosed with Autism Spectrum Disorder has not been provided. Documentary evidence to support the statements made regarding the sponsor's involvement in his daughter's life has not been submitted. It is not evident from

the documentation provided that the sponsor's daughter is aware of his marriage to the applicant. A copy of a custody agreement has not been submitted and it is therefore unclear whether the sponsor has custody of his daughter." (Internal p. 13 of decision)

88. There was nothing unreasonable or irrational in the foregoing. These findings flowed from the evidence which was put before the respondent. Similar comments apply in relation to the following which can be seen at the bottom of internal p. 20 of the decision:

*"I acknowledge the fact that the sponsor is the parent of an Irish child who is 15 years old; however, it is stated in the application that this child resides with her mother, her primary caregiver. It has been stated the sponsor's daughter has been diagnosed with Autism Spectrum Disorder; however, no documentation to substantiate this claim has been provided. No documentation has been submitted to substantiate the claims in Ms. SH's letter that the sponsor plays an active role in his child's life. No documentation has been submitted to indicate that this child has met with or spoken with the applicant. No documentation has been submitted to indicate that this child is even aware that her father was married to the applicant. The full rights of the sponsor's daughter as an Irish national and as a consequence an EU citizen will be dealt with ... under the **Consideration under Article 20 Treaty on the Functioning of the European Union** section below."*

89. The engagement by the Minister with the evidence concerning the third applicant can also be seen on internal p. 22 of the decision as follows:

"I have taken into consideration the best interests of the child, ASB, which may include having the care and company of both her parents.

The child is residing with her mother, her primary care giver, and it is stated that her father visits her a few times a week. In this regard, it is noted that her father elected to travel to Algeria on six occasions between November 2016 and December 2019.

His relationship with the applicant, as it is known to this office, does not demonstrate that the child will be without the care and company of her father. It is noted that no custody arrangements have been provided, nor any evidence that her father proposes to relocate to Algeria. As such, there is no evidence to suggest that the refusal of a visa application for the applicant will result in the child losing the care and company of one of her parents.

The visa appeals officer has considered all information presented with the application and the appeal, and has concluded the following:

- *The applicant has not established that she is involved in the Irish citizen child's life.*
- *The child does not reside with the applicant's husband.*
- *The child has been residing in the care/company of her mother, her primary carer, in Ireland for all of her life.*
- *It has not been established that the Irish citizen child is aware that her father has remarried.*
- *No evidence has been submitted to suggest that the applicant has ever met with or spoken with the child."* (Decision p. 22).

90. It is perfectly clear from the foregoing that there is no question of the letter from SH having been ignored by the Minister. On the contrary, it was engaged with for what it was. In essence, the respondent came to the view, after carefully considering all evidence, including SH's letter, that

exceptional circumstances did not exist such as would merit the grant of a visa at that particular point on the basis of the particular evidence furnished.

91. To see further examples where the evidence proffered was engaged with, reasonably and rationally, by the Minister but found wanting, it is useful to quote *verbatim* the following extracts from internal p. 19 of the decision in which the Minister addresses evidence concerning the other key element of the application, namely, the first applicant's health which was said to be the reason why it was impossible for him to meet the financial criteria in the relevant guidelines:

"Details regarding the sponsor's ability to work were outlined in **Section 1 Part H – Other Information Health of Sponsor** above. Statements made by the previous legal representative that the sponsor was dismissed from 4 jobs in 2017 due to "*extended sick leave due to severe respiratory infections contracted shortly after commencing employment in each of these jobs*" [emphasis added] have not been supported by documentary evidence. It is noted that there was a short period of time between the sponsor ceasing employment in one job and commencing employment in the next job. This is at odds with the explanation of dismissal due to extended sick leave. The letter of appeal from an applicant's previous legal representative also states that "*It is acknowledged that our client is not in a financial position to support his spouse in the State due to his difficulties maintaining continuous employment*". It appears that while the sponsor has the ability to find employment, he lacks the ability to maintain employment. The reasons for the sponsor's dismissal from four jobs in a nine-month period in 2017 are unclear. Letters from the employers regarding the reasons for dismissal were not submitted. The GP letter provided in relation to the sponsor's health states the sponsor '*has been unable to work at times due to respiratory problems*'. It is not clear from the letter exactly what '*at times*' means.

Two letters in relation to appointments with the sponsor had at Dr. Madden's medical clinic on 16/06/2017 and 27/09/2017 in Mayo University Hospital. No further documentation evidencing e.g. medical reports or a letter from Dr. Madden etc was submitted regarding the nature of these appointments..."

92. In the foregoing manner, the respondent engaged with the evidence put before her and did so in a logical reasonable and rational basis.

Inconsistencies

93. It is also fair to say that the evidence put before the respondent contains inconsistencies. One related to submissions made with regard to the first named applicant's health. This inconsistency was described by the respondent on internal p. 19 of her decision, as follows: -

"The applicant's previous legal representative states: -

'It is Mr. B's strong wish to be in employment due to the mental health benefits that working brings. He continues to seek further work for this reason and he is assessed as a jobseeker for social welfare purpose. He has never applied to have his fitness for work assessed for social welfare purposes, although the factual evidence would suggest that he is not fit for work due to his medical condition (and subject to independent medical assessment) he would qualify for a disability allowance if he were to apply for same.'

This statement is inconsistent with information provided to this office from our colleagues at the Department of Social Protection which shows that the sponsor had a Disability Allowance claim disallowed in 2012. It is noted that the sponsor has been in receipt of Jobseeker's Allowance since he ceased employment in September 2017, almost four years ago, despite his *'strong wish to be in employment'*.

Statements made by the applicant's previous legal representative that the applicant would not meet the habitual residence requirements to be eligible in her own right for social assistance and noted; however, the sponsor is in receipt of Jobseeker's Allowance and therefore could claim further assistance for a dependent spouse. As such, it is noted that a cost to public funds and resources in all probability, would arise as a result of a grant of a visa application".

94. The applicants do not claim in these proceedings that the evidence which was put before the respondent disclosed no such inconsistency. Nor is it the only inconsistency disclosed by the evidence submitted.

95. It will be recalled that the respondent Minister was being asked to make a decision in which it was suggested that exceptional circumstances arose. A key aspect of what were said to be the exceptional circumstances related to the health of the first named applicant. Among other things, it was submitted that the first named applicant lost a series of jobs due to what was contended to be a very severe respiratory condition. Focusing, for present purposes, on letters which referred to June 2017 and September 2017 appointments at a Dr. Madden's medical clinic, there is no evidence as to who Dr. Madden is and what their speciality might be. There was no evidence about what treatment his clinic provides. There is no letter from Dr. Madden referring to the first applicant's health or explaining the extent to which, if it be so, a specific medical condition, for which Dr. Madden was providing treatment, caused the first applicant to lose four jobs in quick succession in 2017.

96. It is also fair to say that the first applicant is someone who has been completely reliant on State benefits for the entire of the four-year period which preceded the decision challenged. Indeed, the evidence is to the effect that, apart from a relatively short period in 2017, the applicant has been completely reliant on State benefits for many years. The findings made by the Minister were open to her to make, having regard to the evidence proffered. In essence, the respondent came to the view that insufficient evidence was before her to justify the grant of the visa. Plainly, it was open to the applicant to submit additional evidence to the respondent prior to asking her to make the relevant decision. Without for a moment purporting to advise the applicant on proofs, it seems uncontroversial to say that, had they so decided, the applicant for the visa could have sought additional documentary evidence from, for example (i) Drs. Madden and/or Long with regard to the first applicant's health; and (ii) a doctor and/or relevant body, such as TUSLA, with regard to the third named applicant, in particular, on the question of ASD and the particular challenges or needs of the third named applicant in light of ASD, which needs the first applicant was said to be meeting.

97. Another inconsistency in the evidence was specifically pointed out on internal p. 10 of the decision wherein the respondent stated inter alia the following: -

“Insufficient documentary evidence has been provided to show evidence of a relationship in existence prior to marriage. It is stated that the applicant sponsor are known to each other since childhood as their families come from the same village in Algeria. It is stated that they were re – introduced to each other as adults; however, inconsistencies were noted regarding when they stated to be re – introduced:

- An unsigned letter from the sponsor submitted at first instance states ‘*I have known my wife since 2014, we met as she was a family friend and we decided to marry in April 2017*’.
- The letter of appeal dated 12/01/2018, the affidavit signed by the sponsor and the affidavit signed by the applicant state they introduced (sic) to each other as adults in November 2016.
- The letter dated 28/01/2018 signed by the applicant’s father states ‘*B came to us last November 2018*’. It is noted that the applicant and the sponsor were already married in November 2017”.

98. It was not at all unreasonable or irrational for the Minister to find and refer to the foregoing inconsistencies. In objective terms, there is clearly a fundamental inconsistency between, on the one hand, a statement that the first and second applicants have known each other “*since 2014*” and, on the other hand, that they were reintroduced as adults “*in November 2016*”.

99. As I commented earlier, it cannot be in doubt that it was legitimate for the respondent to look at what the Supreme Court in the majority decision in Gorry called the “*length and durability of the relationship*”. As is clear from the extracts from Gorry which I have quoted earlier, the Supreme Court used the term “*relationship*” rather than “*marriage*”. A feature of the respondent’s decision is that, having considered all the evidence proffered, she came to the view that there was insufficient evidence as to ongoing contact between the first and second applicants. As a matter of first principles, it cannot seriously be disputed that, where two people are, for whatever reason, unable to cohabit, the nature of their relationship in the sense of it being an enduring and durable one of closeness, can be garnered from the evidence of the contact between them throughout the length of the relationship itself, including of course contact from the date of the marriage onwards.

100. In this age of mobile phones, internet communication and social media, it is fair to say that contact between parties in a relationship might take several forms. Printouts of text messages would seem relatively easy to procure. Similarly, printouts showing messages sent via the couple’s chosen social media platform(s) would also constitute evidence of contact. Given that “video calls” via social media, are not at all uncommon, a “screenshot” of same might well constitute evidence of contact. In addition, were one spouse to fly from this State to visit their spouse in their country of origin, a photograph taken during such a visit could well constitute clear evidence of contact on the occasion in question, particularly given that it is common knowledge that photographs are often accompanied by a date stamp or verifiable information as to when the photograph was taken. In the present case, the respondent came to the following views which can be seen on internal p. 17 of the decision: -

“Insufficient documentary evidence of ongoing contact between the applicant and the sponsor has been provided. As set out elsewhere in the consideration, the most recent dated communication between the applicant and the sponsor is dated December 2017.

Documentation submitted with the applicant's legal representative's letter of 20/05/2021 stating to relate to video chats between the applicant and the sponsor are undated and do not contain the usual information that you would expect to see in such screenshots e.g., Skype logo or info bar from the top of a mobile phone screen showing such as time, battery level, reception etc.

Insufficient documentary evidence has been submitted to show that the sponsor met the applicant on his visits to Algeria in 2018 and 2019. The most recent photograph of the applicant and the sponsor together were taken on the sponsor's visit to Algeria in 2017, the visit during which they were married.

Having reviewed the documentation before me, I find that insufficient documentary evidence of ongoing social support between the sponsor and the applicant has been submitted".

101. In setting out the foregoing findings, the respondent made no error of fact. Insofar as inferences were drawn, it seems to me that they were reasonable and rational, having regard to the evidence proffered. Again, without purporting to make any decision on the evidence, it will be recalled that, under cover of a 20 May 2021 letter, the solicitors representing the second named applicant furnished the respondent *inter alia* with ". . . screenshots from his video chats with his wife". If one looks at these documents, it is entirely fair to say that, in objective terms, all that can be seen is a photograph of a lady on the left and of a gentleman on the right of each page. Taking the first of these, the lady in question appears to be standing in a wedding dress shop with dresses behind her and she is positioned at some distance away from the camera which captured her image, whereas the photograph which appears on the right shows the head and shoulders of a gentleman. There is no objective evidence to the effect that these two images, side by side, in fact constitute a "screenshot". Moreover, there is no objective evidence as to what date the images were captured. Thus, there was nothing at all unreasonable or irrational in the findings made by the respondent as to what the evidence before her did and did not disclose. In short, this is a situation in which deficiencies were identified in the evidence proffered. For the respondent to have noted these and for the respondent to have made an adverse decision which was based on the insufficiency of evidence was not at all unlawful in my view.

102. The foregoing were not the only inconsistencies or deficiencies in the evidence. On the topic of "Financial Support", internal p.10 of the decision stated *inter alia* the following: -

"Three Ulster Bank money transfer receipts dated 07/03/2017, 04/04/2017 and 13/03/2017 totalling €700 were submitted with the application. The receipts state the sponsor transferred the funds to the applicant by way of bank transfer and the reason for the payment is '*present*'. The beneficiary account number on the receipts is 21 digits long ending in **20133. While it is noted that credits for the same amount as the transfers appear on the applicant's bank statement 21 days after the transfers on 07/03/2017 and 04/04/2017; the reference number on the applicant's statement is not included on the transfer receipts. There is no credit evident on the applicant's bank statement 21 days after the transfer on 13/06/2017 (i.e. 04/07/2017). In addition, the account number on the bank statement

provided for the applicant is a 5 digit number and is not consistent with the beneficiary bank account number on the money transfer receipts. Based on the foregoing, the evidence provided is insufficient to show that the applicant received these funds from the sponsor”.

103. The foregoing findings by the respondent flowed directly from the evidence which was before her. It is not contended that the respondent made any error of fact in the manner in which she engaged with the foregoing evidence.

104. Exhibit “MB1” to Ms. Brennan’s affidavit comprises a copy of the December 2013 guidelines issued by the respondent’s department entitled “Policy Document on non – EEA Family Reunification”. As Humphreys J. stated in *Olakunori & Ors v. Minister for Justice and Equality* [2016] IEHC 473: -

“ . . . policy documents of this kind promote greater consistency in decision-making and serve the objective of equality before the law. At pp. 27 and 28 of the document, the economic impact of admission decisions on the State is considered. It is clear that this impact is a factor in decision-making, as is the capacity of the sponsor to support the person for whom admission is sought” [para.10].

105. Although I previously quoted para. 17.2, it is useful to repeat it at this juncture and when also quoting para. 17.5 of the guidelines: -

“Where Sponsor is Irish Citizen

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**.

. . .

17.5 Declared and verified savings by the applicant or sponsor may be taken into account in 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”.

106. On the facts of the present case, the income of the first named applicant did not even bring him 25% of the way to meeting the thresholds which reflect government policy. It is also very clear from the respondent’s decision that, in ease of the applicants, the respondent looked back over a number of years in order to get a clear picture of his earnings as far back as 2006. I am entitled to take it that the purpose of the respondent looking at the period of more than a decade was with a view to seeing if historic earnings might be relevant in the context of the exercise by the respondent of her discretion. As internal p. 9 of the decision records, the sponsor’s earnings from 2006 onwards, comprised the following: -

- 2006 – €4,233
- 2007 - €3,444
- 2009 - €0

- 2010 - €1,052
- 2011 - €0
- 2012 - €5,500
- 2013 - €6,308.

107. With regard to 2014, internal p. 5 of the decision records *inter alia* the following:

"An unsigned letter from the sponsor dated 06/11/2017 states: '*In 2014 I was employed by . . . Restaurant . . . and I can send you some payslips in evidence of this, but I do not have P60*'".

Internal p. 6 of the decision records that P60s were requested for the sponsor for the years 2014, 2015 and 2016, but were not provided. The decision also notes *inter alia* that: "*The sponsor states he was unable to work consistently in 2015 and 2016 and therefore does not have P60s*".

108. With regard to 2017, the decision notes that the P45s provided in respect of the first named applicant indicate gross pay of €1,089.40 in respect of four weeks employment as well as €810 for three weeks employment and a further €2,674.75 in respect of five weeks employment. As regards savings, the first applicant's bank account showed a balance of €1,304.55 as of 31 July 2017. The respondent also noted that an unsigned and undated letter from the sponsor was submitted at first instance stating that "*I am currently working and can support my wife financially*".

109. Internal p. 9 of the decision records that the sponsor had not been employed since ceasing work at a particular hotel on 24 September 2017, namely, four years prior to the decision. Elsewhere on internal p. 9 of the decision it was stated *inter alia* that: -

"Information provided to this office by our colleagues in the Department of Social Protection and the Office of the Revenue Commissioners indicates the sponsor earned a total of €5,956 in 2014, €0 in 2015, €0 in 2016 and €8,923 in 2017 and he has been in receipt of Jobseekers Allowance from 20/08/2014 to 28/03/2017 and from 02/10/2017 to date".

110. It was on the basis of a careful consideration of the evidence that the respondent came to the view that the grant of a visa was potentially going to lead to a drain on public resources. That view was not at all unreasonable or irrational, having regard to the evidence before the respondent. The Minister did not, of course, confine her analysis to the financial position of the first applicant.

111. Among the submissions made to this Court was that, if the second applicant were to get a visa, she would have no difficulty obtaining employment in this State and it was submitted that she would, in fact, support the first applicant. The engagement by the respondent with the second applicant's employment prospects can be seen from, *inter alia*, internal p. 14 of the decision where the following was stated: -

"Employability of the Applicant

The previous legal representative states that the applicant would be in a position to find gainful employment in Ireland thus diminishing the sponsor's dependence of (sic) the social

welfare system; however, insufficient documentary evidence has been provided to support this statement.

Evidence supplied of the applicant's qualifications are set out in *Section 1 Part E. Financial situation of the Applicant* above. It is noted that the applicant's most recent qualification is dated 2009, approx. 12 years ago. It is unclear as to how her qualifications have assisted in her employment in Algeria. The applicant states on their online visa application form that they are neither employed nor in full – time education in their home country. The applicant's previous legal representative states that while the applicant is not in formal employment in Algeria, she is teaching students IT and computer programming and also marking exam papers; however documentary evidence to support this statement was not provided. Given that it is unclear how the applicant's qualifications have helped her find employment in Algeria; it is unclear to the visa appeals officer how they will assist her finding employment in Ireland.

An unsigned letter from the sponsor submitted at first instance states: *'My wife is qualified in Computer programming and management and I am confident that she will get work very quickly as she completed her studies using some English and she is currently attending private English classes to enhance her English so that when she comes here she will be ready to take up employment'*.

Documentary evidence of the applicant's level of English e.g., IELTS test results etc. has not been submitted".

112. The foregoing findings made by the respondent flowed from the evidence before her. Nor was it unreasonable or irrational for the respondent to come to the view which she expressed on internal p. 20 of the decision in the following terms: -

"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 in all probability would become a burden on the State".

113. Given the total lack of evidence as to what, if any, income the second named applicant was earning in Algeria or had earned at any point from 2009 onwards (when she gained the last of her qualifications) one might rhetorically ask how could it be unreasonable or irrational for the Minister to take the view that it was not clear how the applicant's qualifications (i) had helped her to find employment in Algeria; and (ii) would assist her to find employment in this State?

114. I cannot accept the submission advanced on behalf of the applicants to the effect that the respondent's approach to considering the applicant's marital family was entirely contrary to the guidance given by the Supreme Court in *Gorry*. Earlier in this judgment I have quoted at some length from *Gorry*, and the applicants have not established that there was any breach by the respondent of the *Gorry* principles. The applicants have by no means established that the respondent approached her decision on the basis that cohabitation has no value. There is nothing in the decision which will allow this Court to take the view that the respondent disregarded an intention to cohabit or took the view that a desire to cohabit was not (to quote from the Supreme Court's decision in *Pervaiz v. Minister for Justice and Equality* [2020] IESC 27) "*an index of their commitment*". There is no dispute between the parties as regards the principle articulated by the European Court of

Human Rights in *Abdulaziz v. UK* (Application No. 92144/80: 9473/81; 9474/81) with regard to cohabitation namely: “. . . the expression “family life”, in the case of a married couple, normally comprises cohabitation”.

A Committed Marriage

115. A principal submission made on behalf of the applicants was to the effect that they have been “*In a committed marriage for almost five years*”; and that they have “*committed significant energy and resources*” for much of that period towards their goal of cohabiting. It was further submitted that there was an absence of consideration of the material demonstration of the applicant’s intention to cohabit; and that the respondent “*views cohabitation as effectively being of no consequence*”; and that the respondent “*made a finding, presumably on the balance of probabilities, that the first applicant does not even meet the second applicant when he visits Algeria (apart from when they married)*”. It is clear from the foregoing that, central to the applicant’s claim in these proceedings is a dissatisfaction with the merits of the decision made by the respondent. I am entirely satisfied, however, that the findings she made were findings the respondent was entitled to make, in circumstances where they bear a cogent relationship to the evidence.

116. The submission to the effect that the applicants have been in a *committed* marriage for five years is a submission which speaks not merely to the temporal length of the marriage, but to the nature of it insofar as it is contended to be a close and enduring relationship. However, the Minister looked at all the evidence which was proffered with regard to issues such as the *contact* between the first and second named applicants and came to views which she was entitled to reach. There was no error in the process of decision making and this Court has no jurisdiction to treat the present proceedings as if they constitute an appeal on the merits. They do not.

The Kahn decision

117. Considerable reliance was placed by the applicants on the recent decision of this Court (Burns J.) in *Kahn v. Minister for Justice* [2021] IEHC 789. Counsel for the applicants referred, in particular, to paras. 27 and 28 wherein Burns J. stated the following: -

“27. With respect to the Applicants' circumstances, the length and enduring nature of the Applicants' marriage was not given any weight. The fact that there have been regular visits to Pakistan by the Second Applicant and the couple's children is considered solely from the perspective of establishing that family life can continue in this manner rather than from the perspective of establishing an ongoing commitment to their marriage in very difficult separated circumstances. The fact that the couple chose to live in separate countries is treated as a choice to separate with no reference to the fact that the First Applicant has applied for and been refused two visas to visit his family in Ireland. . . .

28. The ultimate test for this Court is whether the Respondent failed to recognise the relationship between the Applicants, or to respect the institution of marriage because of its treatment of the couple concerned”. (Emphasis added by applicants)

118. On behalf of the applicants it is submitted that the decision in the present case should be quashed on the basis that the respondent failed to recognise the marital relationship between the

first and second named applicants and failed to pay due respect to the institution of marriage. To my mind, however, the decision in *Kahn* (which is not under appeal) concerns a markedly different set of facts and circumstances. Among other things, the following points of distinction arise: -

- (i) In *Kahn*, the relevant marriage was of 30 years duration;
- (ii) The couple in *Kahn* had three children;
- (iii) These three children were Irish citizens aged 23, 21 and 18;
- (iv) The married couple in *Kahn* lived together for many years prior to the second applicant coming to Ireland with two of the couple's children and giving birth to the third child in this State.
- (v) Furthermore, there was a radically different work-history established in the *Kahn* case. At para. 7 of her judgment, Burns J. referred to the fact that the first applicant had a master's degree in mathematics and claimed to have lectured for 30 years at a certain college in Lahore. She went on to state that: "*The evidence establishes that he has lectured on a part time basis at Lahore college since 2005 and has been a grinds tutor. The Second Applicant has worked as a part time mathematics teacher in this jurisdiction*".

119. What the evidence established in *Kahn* can be contrasted with what was not established in the present case, having regard to the evidence proffered. It will be recalled, for example, that as well as there being no medical or other evidence which, in objective terms, linked the first applicant's loss of four separate jobs in 2017 to an allegedly serious medical condition, as well as the fact that the first applicant (as sponsor in respect of the visa) was entirely dependent on social welfare payments for the four years preceding the decision, there was no evidence whatsoever with regard to any income earned by the second applicant (the party seeking the visa).

120. As a matter of first principles, a scenario where a married couple lived together in Pakistan for some fifteen years prior to Mrs. Kahn coming to this State with two of the couple's children could hardly be more different from a scenario where the couple never lived together, never had children together and, following a very short courtship, got married in Algeria full in the knowledge that there could be no guarantee of being able to conduct their family life in this State.

121. In my view, the applicants have not demonstrated in the present proceedings that the respondent failed to give due weight to their marriage. A further factual difference is that, in *Kahn*, there had been regular visits to Pakistan by the second applicant and the couple's children and there was no doubt about the fact that during these visits, the second applicant met with her husband, being the first applicant. In the present case, the respondent came to the view, following a careful consideration of the evidence, that insufficient evidence had been submitted to establish that the first applicant met with the second applicant when he visited Algeria in 2018 and 2019.

122. At para. 30 of the decision in *Kahn*, Burns J. stated the following: -

"It is the case that the Respondent was considering an application which related to the Applicants' children's rights, which was interconnected with marital rights and perhaps for this reason focus was lost on the marital rights of the Second Applicant. However, the Court

is of the view that the Respondent failed to recognise the marital relationship between the Applicants and to pay due respect to the institution of marriage”.

123. In the present case, the applicants have not established that there was any loss of focus on the part of the respondent Minister on the marital rights of the first and second applicant. Sight was not lost of the fact of the marriage and the applicants have not demonstrated that the respondent failed to pay due respect to the institution of marriage. However, in the manner referred to previously in this judgment, it was perfectly legitimate for the respondent to look at more than the mere fact of marriage and the duration in temporal terms of that marriage and to consider such evidence as was put to her which related to the nature of the relationship between the first and second applicants, insofar as the evidence disclosed, or not, contact between them during the relevant period and the nature of same etc. This was not to breach any principle, be that in *Gorry* or in *Kahn*. Doing so, in my view, was entirely consistent to the principles which emerged from *Gorry*. The respondent did so lawfully and, in simple terms, found the evidence ‘wanting’. That view was neither irrational nor unlawful.

The decision in A.Z.

124. I want to emphasise once more that this case is one which turns on its facts. That is perhaps a very obvious point to make, but it seems to me that statements of principle can only take matters so far. What is required is for the decision - maker to engage with the evidence and to do so consistent with relevant principles. Having said the foregoing, it seems to me that the facts in the present case are significantly closer to those in *AZ v. Minister for Justice* [2021] IEHC 770, than they are to the facts in *Kahn*. In *AZ*, the applicant was Iraqi-born and became a naturalised Irish citizen in 2014. Having met an Iraqi woman in 2009 and again in 2013, the couple married in Iraq on 12 August 2015, after which the applicant remained in Iraq for six months. In October 2015, an application was made for a join-family visa, which application was refused. In August 2016 an appeal was brought which upheld the refusal. A further visa application was made in January 2018 and refused in June 2018. An appeal was brought and upheld in February 2019 and, in May 2019, judicial review proceedings were brought. Just like in the case before this Court, it was common case that the applicant did not meet the financial criteria set out in the guidelines. In *AZ*, the applicant was in receipt of disability allowance from February 2018 following a workplace injury. The Minister, nonetheless, determined that there were not exceptional circumstances arising to waive the financial requirements.

125. In seeking to distinguish *AZ*, it is submitted on behalf of the applicants that the second applicant herein “*is highly skilled and informally employed currently*” and would be able to work. Furthermore, it is asserted that, prior to experiencing his allegedly serious health issues, the first applicant “*was not a burden on the State*” but “*consistently sought to avoid Jobseeker’s Allowance*”. Neither of these two submissions stand up to scrutiny, in light of the evidence which was before the decision-maker and is carefully examined in the decision which is challenged in these proceedings. As the respondent noted (internal p. 18 of the decision) the first applicant has been receipt of Jobseekers Allowance since 20 August 2014, with the exception of a six-month period in 2017. In objective terms, this is not indicative of a person who has “*consistently sought to avoid Jobseekers Allowance*”. As the Minister stated, it is not clear from the evidence submitted that the first applicant

has ever held a job for a significant period of time. Despite the fact that the first applicant's solicitors submitted representations on 20 May 2021, no update was provided in relation to any effort by the first applicant to avoid Jobseeker's Allowance. That is not a criticism of either the first applicant or his solicitors. It is however a fact and one which speaks directly to the evidence which was put before the respondent and on foot of which she was obliged to make her decision. The decision-making process engaged in was lawful and the respondent's findings were open to her to make, having regard to the evidence.

Highly skilled and informally employed

126. As to the proposition that the second applicant is highly skilled and informally employed, it was open to the Minister to note that the second applicant's most recent qualification was from 2009. Nor is it in any way inappropriate for the Minister to note that in the online visa application, it was stated that the second applicant was neither employed, nor in education in Algeria. Furthermore, although it was asserted that the second applicant was teaching students IT and computer programming and marking exam papers, it was open to the respondent to note that no documentary evidence had been submitted to support the foregoing assertion. Moreover, it was reasonable and rational for the Minister to note that: -

"Given that it is unclear how the applicant's qualifications have helped her find employment in Algeria; it is unclear to the Visa Appeals Officer how they will assist her finding employment in Ireland". (Internal p. 20 of the decision).

127. As Burns J. stated in AZ at para. 32: -

"Gorry v. Minister for Justice clearly establishes that while Article 41 of the Constitution recognises a right to have and develop a family life for a married couple, this is not necessarily a right to have and develop a family life within the State or a right to develop a family life in a preferred manner. There are competing State interests which, depending on the facts of an individual case, may result in the refusal of permission to co-habit in the State, after a balancing exercise is conducted with respect to the interests at play".

128. It seems to me that the decision-maker in the present case recognised the family rights at play (in particular family rights as between the first and second named applicant as well as family rights concerning the relationship as between the first applicant and his daughter, the third applicant) but, having conducted a balancing exercise in the context of a careful consideration of the evidence before her, came to a view which was lawful. The applicants are unhappy with that view, but have not established unlawfulness with regard to the decision making process.

129. From para. 36 onwards, Burns J. stated the following in AZ: -

"36. The Respondent had regard to the nature of the relationship between the Applicant and Ms. S and found that there was insufficient evidence to show the extent to which family life, communication and contact had been sustained between them. The Applicant submitted that

this was an inappropriate consideration for the Respondent to engage in: that the fact of marriage must be accepted by the Respondent.

37. The Court does not agree that this was an inappropriate consideration for the Respondent. *Gorry v. Minister for Justice* clearly envisages that marital relationships can differ”

130. In the present case, the respondent carefully considered the nature of the relationship as disclosed by the evidence which was proffered to her and came to a reasonable and rational view that there was insufficient evidence between the second named applicant (the applicant for the visa) and the first named applicant (the sponsor in that context) both in terms of a relationship history and ongoing evidence of contact.

131. It is clear from a reading of the respondent’s lengthy decision that the Minister had regard to the fact that the first applicant is a citizen of this State with a right to reside here. The decision states the foregoing explicitly. The respondent also had regard to the right of the first named applicant to marry and to enjoy a family life with his spouse. Indeed, a detailed consideration of family rights is contained in the decision wherein, from internal p. 15 onwards, reference is made to Articles 2; 40.3.1; 41.1; and 41.3.1 of the Constitution. This is followed by an analysis of the majority decision in *Gorry*. Internal p. 16 of the decision contains *inter alia* the following observations by the respondent: -

“Consequently, while it is recognised that the sponsor in the within case, as an Irish citizen, has a right to live in Ireland and an individual right to marry and found a family, there is no separate unspecified right to cohabit protected by Article 41, albeit that cohabitation is a normal incidence of marriage. In addition, as the applicant in the within case is a non – EEA national, they do not have a right to enter or reside in the State and do not acquire such a right to enter or reside in the State by dint of marriage to an Irish citizen.

While cohabitation 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”.

Balancing exercise

132. In my view, the foregoing statements made by the respondent are not at all inconsistent with the guidance given by the majority in the Supreme Court’s decision in *Gorry*. It is plain from the decision that the respondent engaged with the evidence before her and conducted a balancing exercise in respect of the competing rights at play. Indeed, the final paragraph on internal p. 16 of the decision appears in the following terms: -

“In the within application, 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 family/couple. My findings in this regard are as follows”.

133. The foregoing statement is followed by a range of findings under the heading "Rights of the family" after which appear findings under the heading "Finances of the Sponsor" following which a "Conclusion" is set out. Those findings are rational and reasonable and involved a weighing up exercise which was not tainted by any error of law or of fact. Having regard to the evidence which was put before and carefully examined by the respondent, it was reasonable for the Minister to come to the view expressed on internal p. 20 of the decision as follows: -

"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 Algeria 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".

The third applicant

134. The Minister went on, in the final paragraph on internal p. 20 of the decision, to have regard to the fact that the first applicant is the father of the third applicant, an Irish citizen, and to the representations submitted by the third applicant's mother to the effect that the first applicant plays an active role in her life. The Minister was entitled to find that, apart from this letter from Ms. SH, no documentation had been submitted to substantiate the claim that the first applicant is involved with her life. It was also open to the respondent to note that no documentation had been proffered to substantiate the asserted diagnosis with autism spectrum disorder. Furthermore, it was open to the respondent to hold that no documentation had been submitted to indicate that the third applicant had ever met with or spoken with the applicant for the visa (the second applicant in the present proceedings). It was also open to the respondent to hold that no documentation had been submitted to indicate that the child was even aware that her father had married the second applicant.

135. As O'Donnell J. (as he then was) made clear at para. 76 of the Supreme Court's decision in *Gorry*: - " a decision must be scrutinised by reference to the considerations addressed rather than the use of any particular form of language". In the present case, the applicants have not established that the Minister adopted an "insurmountable obstacles to visiting" test. No such finding appears in the decision, but the evidence before the Minister is that the relationship of the first and second applicants has always been a long-distance one.

136. In the context of Article 41 of the Constitution, the fundamental question is whether the respondent's decision failed to recognise the relationship as between the first and second named applicants or failed to respect the institution of marriage. It is clear from the decision that the respondent did recognise the relationship in question and considered the circumstances pertaining to it and, in so doing, adequately respected the institution of marriage. There is also a clear justification for refusing the visa to the second named applicant. As the Minister concluded on internal p. 20 of the decision: -

"It is 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”.

137. It should also be stated that the applicants have not established that the respondent applied the policy which is articulated in the guidelines in an inflexible manner or in any way curtailed her discretion. Rather, all evidence was carefully considered by the respondent who applied her mind to the particular circumstances in the application before her. The applicants have not established that any fixed policy was applied. In the present case the respondent considered whether exceptional circumstances arose sufficient to warrant granting the visa. The respondent answered that question in the negative stating, at internal p. 15: -

“I have considered all the information submitted with the visa application and the appeal, and have determined that the applicant has not demonstrated that the circumstances in this case are sufficient to warrant the granting of the visa sought as an exceptional measure”.

138. Having regard to the evidence before her, it was open to the respondent to find that exceptional circumstances had not been established such as to warrant the waiving of the criteria for a visa in this case. It should also be stated that the applicants have not sought to challenge the guidelines themselves. In other words, no challenge has been in respect of the legal validity of s. 1.12 of the guidelines. It seems to me that the core complaint of the applicants is a finding lawfully made, but this Court is not hearing an appeal against those findings.

Advising on proofs

139. As I have previously observed, it was a matter for the applicant for the visa to submit such documentary and other evidence as was deemed appropriate. The respondent did not ignore any submission or evidence submitted. All were carefully considered and the findings contained in the respondent’s decision, when read as a whole, flow reasonably and rationally from the documentary evidence which was submitted. As I have observed earlier, it was not for the Minister to advise on an applicant’s proofs and it seems to me that the conclusions drawn by the Minister in respect of the proofs furnished were reasonable, rational and, as such, cannot be set aside by this Court. Doing so would be for this Court to trespass impermissibly upon the respondent Minister’s power to make decisions in this area. This Court must also be conscious that the Minister is entitled to exercise a wide range discretion when it comes to decision making. As Humphreys J. observed in *Olakunori (a minor) & Ors. v. Minister for Justice* [2016] IEHC 473: “Clearly, in immigration matters, which are classically at the core of the executive power of a State, there must be a wide discretion vested in the decision-maker in the absence of clear statutory provisions to the contrary . . .”.

140. A series of assertions were made on behalf of the applicants to the effect that it would be very difficult for the third named applicant and her mother, were the first applicant to leave the jurisdiction. It is fair to say, however, that these are not underpinned by, for example, any medical evidence or any evidence from a relevant body such as TUSLA. The submission made was plainly understood by the respondent. In other words, the respondent’s decision makes it clear that the Minister understood that it would be very burdensome if the first applicant decided to go to Algeria.

It might be added that I cannot see that there was clear evidence before the respondent to the effect that the first applicant had chosen to relocate to Algeria.

141. Among the submissions made was a complaint to the effect that there was no reference in the decision to para. 1.12 of the Guidelines. However, internal p. 12 of the decision does make explicit reference to para. 1.12 and quotes same *verbatim*. There is also an explicit statement of the respondent's finding to the effect that exceptional circumstances have not been demonstrated on the evidence proffered (see mid-way through internal p.15).

142. Among the submissions made on behalf of the applicants is that the respondent failed to consider whether the first applicant could reasonably be expected to move to Algeria, and it is argued that, if such a consideration was undertaken, the third applicant was left out of that consideration. A core complaint is that the respondent allegedly did not engage with the facts put forward as regards the first applicant's involvement in the third applicant's life. In addition to a careful consideration of matters in the context of Article 41 of the Constitution, the respondent conducted a careful analysis through the lens of Article 8 of the ECHR (as can be seen from the bottom of p. 22 onwards of the decision). The Minister's decision explicitly recognises that family life exists between the first and second applicants under Article 8. The decision also states that consideration has been given to the fact that the first applicant is the father of the third applicant. The Minister's decision refers *inter alia* to the fact that Algerian nationals are subject to visa requirements, and it is noted that the second applicant married the first applicant "*at a time when the applicant did not have any entitlement nor could have had any expectation of any entitlement to enter into and reside in the State with ...*" the first applicant. Among other things, the respondent made reference to the principle that, insofar as immigration is concerned, Article 8 cannot be considered to impose upon a state a general obligation to authorise family reunion in its territory. The decision stated *inter alia* that: "*Factors to be considered include whether the applicant coming to the State to reside with the sponsor constitutes the best way of developing family life with the family, as it exists*". It is plain from the decision that (leaving aside the fact that the first applicant did not disclose that he had a daughter until the appeal stage representations on 12th January, 2018) the decision-maker carefully considered the entirety of the documentary evidence furnished in respect of the third named applicant. On internal p. 24 of the decision, the Minister stated *inter alia*:

"I have taken into consideration that the sponsor is the parent of a minor child, date of birth 11/11/2005, from his previous marriage. The child is stated to reside with her mother, Ms. S.H., who is her primary caregiver..."

On the basis of the evidence which was put to the Minister for consideration, and which was, in fact, carefully considered by her, she was entitled to come to the view expressed on internal p. 25 of the decision in the following terms:

"The applicant has lived apart from the sponsor for the entirety of their relationship. The applicant is a citizen of Algeria and has lived in Algeria for all of their life. It follows that they will have strong links with the linguistic and cultural environment of Algeria. In addition, in considering whether family life could be established elsewhere, insufficient reasons have been submitted preventing the sponsor, from continuing to travel to Algeria to visit the applicant and develop the relationship in the manner in which it has and continues to exist.

All information submitted with the application having regard to the family situation of the sponsor insofar as it has been made known has been considered."

143. Although I touched on this issue earlier, the applicants have not established that the Minister placed pre-conditions on the marriage by requiring a relationship to be in existence prior to it and/or requiring financial dependency. As O'Donnell J. made clear at para. 65 of the decision in *Gorry*, although all marriages should be given the same weight in terms of recognising that the *status* of marriage "*they almost consider more carefully the consequences of such a marriage*". It was perfectly legitimate, indeed necessary, for the respondent to consider the length and durability of the relationship between the first and second applicants. It is common case that they had been married for only a matter of months before making the application for the visa. In that context, the Minister considered the entire duration of the relationship, not merely the period commencing with the marriage. In doing so, the Minister did not place any preconditions on their relationship. Rather, the respondent simply considered the facts and circumstances having regard to the evidence put before her. A careful reading of the entirety of the decision does not allow this court to find that the Minister required financial dependence. Rather, the respondent carefully considered the financial and employment position of both the applicant for the visa (the second applicant in these proceedings) and the sponsor in respect of the visa application (the first applicant) and made findings which were reasonable, rational, and flowed from the evidence proffered.

ECHR

144. The applicants have not established that the Minister 'muddled' the ECHR test to the extent that the consideration given to family rights under Article 8 was fundamentally flawed. I am also satisfied that the applicants have not 'brought home' the claim that this was a case where a 'balancing exercise' pursuant to Article 8 (2) should have been concluded. It is clear from a reading of pages 22 – 25 of the Minister's decision that the applicable test pursuant to the ECHR was set out, including the standard applicable whereby a failure to grant family reunification will not necessarily infringe Article 8 ECHR. Internal p. 24 of the decision makes specific reference to the judgment of the European Court of Human Rights in *Nunez v. Norway* (June 28, 2011 No. 55597/09). It is appropriate for present purposes to quote *verbatim* from para. 70 of the *Nunez* decision, as follows:

"70. The Court further reiterates that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest ... Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion ... Another important consideration is whether family life was created

at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious ... Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances ..."
(emphasis added)

145. In the present case, the evidence before the respondent Minister was that, as of April 2017 when the first and second applicants entered into marriage in Algeria, their family life came into being at a time when there could have been no expectation of any absolute right to conduct that family life in this State. Regardless of whether the phrase "family life" relates to (i) the relationship between the first and second applicants; or (ii) the relationship between the first and second and third applicants; or (iii) the relationship between the first and third applicant, when the first and second applicants entered into marriage in April 2017 they did so fully in the knowledge that the prospects of engaging in family life within this State "*would from the outset be precarious*". The Minister, as she was entitled to having regard to the evidence proffered, took the view that insufficient reasons were submitted preventing the first applicant from continuing to travel to Algeria to visit his spouse and maintain the relationship in the manner in which developed. As a result, the decision - maker determined there was no lack of respect for family life under Article 8 (1) and, therefore, no breach of Article 8 ECHR. In these circumstances the Minister was entitled to conclude that: "*Having regard to all 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.*"

Conclusion

146. Although the decision has been challenged on a range of bases, and submissions in respect of each were made with great skill, clarity, and sophistication, I have come to the view, for the reasons expressed in this judgment, that the applicants have not established any of the grounds upon which they seek to impugn the decision. Therefore, this is an application which falls to be dismissed.

147. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: "*The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.*"

148. My preliminary view on the question of costs is that the 'normal' rule applies i.e. that 'costs' should 'follow the event', the Respondent being the entirely successful party. The parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs

which should be made. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office within 14 days of the start of Michaelmas Term (3 October 2022).