THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 702

Record No. 2021 753 JR

BETWEEN

MAIDA ALAMIN AND YUNUSI BWANA

APPLICANTS

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan, delivered the 10th day of December, 2024.

INTRODUCTION

1. These proceedings arise from a refusal of a Long Stay Join Family (Irish Naturalised Spouse) Visa (hereinafter "the Visa") to a male Kenyan national who claims to have contracted marriage in 2013 with a female naturalised Irish citizen of Somalian origin, resident in the State since 1996, whom he met while she was on holidays in Kenya in 2012. This matter comes before me for determination of issues not already decided following a previous High Court hearing which took place on 13th and 24th October, 2022, having been remitted from the Court of Appeal.

2. In consequence of the decision of the Court of Appeal, it now stands finally determined that the Minister did not err in disregarding untranslated

communications and messages between unidentified numbers and persons when concluding that there was insufficient evidence of on-going routine communication between the Applicants both prior to and since the marriage.

3. Those grounds which remain for determination, and which now come before me principally concern the approach taken to the assessment of the rights of a married family under the Constitution pursuant to Article 41 and the European Convention on Human Rights (hereinafter "the Convention") pursuant to Article 8 which it was claimed by the Applicants were not considered properly, resulting in a decision which they claim was unlawful as a disproportionate interference with those rights. In addition, it is contended that the Minister's refusal was unlawful by reason of the approach taken to the first Applicant's disability and the application of financial eligibility criteria.

FACTUAL BACKGROUND

4. The first Applicant was born in Somalia on the 21st July, 1971. She came to Ireland in November, 1996, and applied for asylum. She was subsequently granted permission to remain as the parent of an Irish citizen child in 1999. She is now a dual Irish and Somali citizen, having become a naturalised Irish citizen on the 15th October, 2012. At the date of the application, the subject of the within proceedings, the first Applicant had two adult children and a minor child aged 16 who lived with her. Her three children have two different fathers. The father of the then minor child lived in Ireland and was said to be actively involved with the child's upbringing. All three children are Irish citizens and all three have now attained their majority.

5. The second Applicant is a Kenyan citizen, born in Kenya on the 14th July, 1980. He lives in Mombasa in Kenya. It is claimed that the Applicants met in Kenya while the first Applicant was holidaying there in July, 2012. After the first Applicant returned to Ireland, they stayed in contact, and a romantic relationship developed. They decided to get married and claim to have married on the 6th August, 2013, in Kenya. The first Applicant has travelled to Kenya almost every summer since 2013 apart from 2017 when she says she did not travel due to

security concerns in Kenya and 2020 due to Covid restrictions.

6. The first Applicant is not in employment as it is maintained that she suffers from several chronic health conditions. She has been further assessed as unfit for employment on these health grounds and was in receipt of a disability allowance payment when the Visa application was considered. Previously, she was in receipt of a one parent family payment from 1999. This payment was disallowed due to her marriage to the second Applicant in August 2013. She made a claim review for this payment in September, 2013 and 2014, in which she did not declare this marriage. In January, 2015, the Department of Social Protection determined that she would have to pay back the one parent family social welfare payments received since her marriage. She currently does this at a rate of thirty euros per week.

VISA APPLICATIONS

7. The Applicants have submitted three visa applications for the purposes of having the second Applicant join the first Applicant in Ireland, and all three have been refused.

8. The Applicants made the first two applications themselves and did not retain the documents. Their solicitors, Daly Lynch Crowe and Morris Solicitors, made a Freedom of Information request to the Minister for all documents relating to the Applicants' visa applications, and, following an internal review of the request by the Minister, received a response dated the 19th April, 2019, enclosing the available documents in relation to all three visa applications (with some of the documents relating to the previous applications having been no longer retained by the Minister).

9. The first visa application was refused at first instance on the 27th November, 2013, and on appeal on the 8th January, 2014. It appears from records exhibited that this application, VA13833092, was refused at first instance on the basis that the first Applicant, as sponsor, did not satisfy the various evidential burdens relating to the genuineness of the family relationship and satisfy

adequate documentary proofs, notably in regard to financial criteria as set out in Policy Document on Non-EEA Family Reunification and also in regards to inconsistencies within the information supplied. Further, available records suggest a concern that if granted, this may result in cost to public resources and funds of the State. From the records before me, the application appears to have been refused on appeal for reasons largely emulating the justifications provided in the first instance refusal decision.

10. The second visa application, VA17625612, was also refused at first instance on the 8th June, 2015, and on appeal on the 3rd September, 2015, both decisions refused on a similar basis to the first application.

11. As regards the third visa application, which resulted in the appeal refusal being challenged in these proceedings, on the 18th April, 2019, the Applicants' solicitors applied on behalf of the second Applicant to the Minister for a visa to join the first Applicant in Ireland. This visa application was submitted through the Embassy of Ireland in Nairobi, Kenya. A substantial volume of accompanying documentation was enclosed with this third application and the application was treated by the Minister as received in May, 2019. The reason advanced for making the application in the solicitor's correspondence was so that the Applicants could maintain a "*normal marital relationship*".

12. By letter dated the 16th September, 2020, the Minister refused the second Applicant's said visa application at first instance, stating reasons for such refusal, in summary, as follows:

(i) The first Applicant failed in demonstrating that they met the financial criteria as set out in the Policy Document on Non-EEA Family Reunification, pursuant to section 17.2.

(ii) There exists no automatic right for non-EEA nationals who are family members of Irish citizens to migrate on a long-term basis to Ireland, and that having examined the case on the basis of documentation submitted by the Applicants against this, the application was not granted.

(iii) Insufficient documentation was submitted in support of the application with regard to the following issues.

(i) The documentation submitted did not show that the application met the qualifying criteria as set out in section 15.2 of the aforementioned Policy Document.

(ii) Insufficient evidence was presented that demonstrated an on-going habitual communication between the second Applicant and the first Applicant both prior to, and since the inception of the marriage.

(iii) Insufficient evidence of the first Applicant having visited the second Applicant in his home country both prior to, and since their marriage.

(iv) Insufficient evidence submitted of the Sponsor's income over the last three years.

(v) Insufficient evidence submitted regarding the Sponsor's accommodation details.

(vi) That the previous refusal letters relating to the two prior visa applications was not submitted.

(iv) It was further stated that within the application and accompanying documentation, various inconsistencies and contradictions were supplied. The marriage certificate submitted presented the date of marriage as being the 6th August 2013. However, this same certificate states the date of registration of the marriage as being the 6th July 2013, with that certificate showing that it was signed by both the first and second Applicants on that same date (the 6th of July, 2013). From the perspective of the Visa Officer, it was stated to be unclear how the marriage came to be registered prior to the date of marriage and further how the first Applicant signed that same certificate, when according to the immigration stamp/flight ticket submitted, she had not travelled to Kenya until the 27th

July, 2013.

(v) The granting of such a visa for the second Applicant could result in a cost to public funds and public resources. Pursuant to section 5.3 of the aforementioned Policy Document, the first Applicant failed to adequately satisfy and address the onus of proof as to the genuine nature of the family relationship, as this rests wholly on the Applicants, further averring that insufficient information had been provided to demonstrate the level to which family life exists between them.

13. The Applicants' solicitors submitted an appeal on the 13th November, 2020, and followed this up with a more detailed appeal letter on the 16th November, 2020, enclosing relevant documents and addressing each of the refusal reasons in turn, i.e. finances, no automatic right to family reunification, insufficient documentation, inconsistencies, the perceived risk to public funds and public resources, relationship history and previous visa refusal. They sought to correct the inconsistency and contradiction in regard to the date of the marriage certificate registration, stating that it occurred due to a "*simple human typographical error*" (although the date was handwritten) and that an amended certificate of registration was being sought (note none had been provided by the date of the appeal decision).

14. Purported evidence of contact in the form of calls and messages was included. Financial details were supplied with the appeal demonstrating reliance by the first Applicant on a disability allowance for subsistence and showing an annual total income falling short of threshold levels fixed as a matter of general policy for persons sponsoring a visa applicant on family reunification grounds. Medical evidence was also included, with a letter from one Dr. Anver Amod stating that the first Applicant suffers from chronic back pain due to degenerative lumbar disc issues, that she also suffers from hyperthyroidism and that she was on disability allowance.

15. It was submitted that though the first Applicant's disability is a barrier to meeting the financial criteria of the Policy Document on Non-EEA Family

Reunification, this financial test should serve as a guideline and not a "*hard and fast*" rule to be rigidly enforced to every case. It was submitted that there were exceptional facts in this case which would warrant an appropriate assessment being made. It was further submitted that Paragraph 17.2 of the Policy Document relating to financial criteria cannot fetter the discretion of the relevant decision maker when deciding in an individual case. It was submitted that reasonable accommodation should be made in reference to the first Applicant's disability, and that the prohibition of direct and indirect discrimination should be noted, in accordance with the Equal Status Acts 2000-2015 and Article 21 of the EU Charter of Fundamental Rights (hereinafter "the Charter").

16. Reliance was also placed on Articles 40, 41 and 42 of the Constitution and Article 8 of the Convention. The decision under appeal was challenged on the basis that the decision-maker who refused the first-instance decision made no reference to those constitutional, ECHR or equality rights when making that refusal determination and as such, did not properly carry out an assessment of these rights during the decision process.

17. Substantial weight was placed on the decision of Barrett J. in *Ahmed v. Minister for Justice and Equality* [2018] IEHC 645, a case which it was maintained bears similarities to this case wherein medical evidence was submitted that would support the waiving of those Policy Document requirements. Legal submissions placed reliance on the decision of the Supreme Court in *Gorry v. Minister for Justice and Equality* [2020] IESC 55.

REFUSAL OF VISA

18. By letter dated the 30th June, 2021, the Minister refused the appeal. Enclosed was a consideration document dated the 30th June, 2021, upon which the decision had been based. The reasons given related to finances, to the fact that there is no automatic right to family reunification, an asserted insufficiency of documentation, asserted inconsistencies in documentation, a perceived risk to public funds and public resources and relationship history. More specifically, the decision letter states as follows:

"The reasons as to why the visa application was refused on appeal are as follows:

F: - Finances shown have been deemed insufficient

- *Sponsor has failed to demonstrate that they meet the financial criteria as set out in the Policy Document on Non-EEA Family Reunification Section 17(2).*
- *The Visa Officer has reasonable concerns, based on the documentation submitted in the application, that the granting of a visa to the Applicant to reside in the State could result in costs to the State.*

FM:- There is no automatic right for non-EEA nationals who are extended family members of: Irish citizens to migrate on a long term basis to Ireland

Your case has been fully examined on the basis of the documentation submitted and it has been decided not to grant your application.

ID:- Insufficient documentation submitted in support of the application - please see link to "Documents Required" as displayed on our website - www.inis.gov.ie

- *Insufficient information has been submitted to show the extent to which family life exists between the sponsor and the applicant.*
- *Evidence of ongoing routine communication between applicant and sponsor not submitted.*

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

- *According to the marriage certificate submitted the date of marriage is the 6th August 2013. However the marriage certificate states that the date of registration of the marriage is the 6th July 2013.*
- *The marriage certificate shows it was signed by both the Applicant and sponsor on 6th July 2013.*

- *It is unclear to the Visa Officer how the marriage was registered prior to the date of marriage. It is also unclear to the Visa Officer how the sponsor signed the marriage certificate on 6th July 2013 as according to the Immigration stamp/flight ticket submitted she did not travel to Kenya until 27th July 2013.*

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

- *Sponsor has failed to demonstrate that they meet the financial criteria as set out in the Policy Document on Non-EEA Family Reunification Section 17(2).*
- *The visa office had reasonable concerns, based on the documentation submitted in the application, that the granting of a visa to the applicant to reside in the State could result in costs to public funds of the State.*

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

- *Sponsor has failed to demonstrate that they meet the financial criteria as set out in the Policy; Document on Non-EEA Family Reunification Section 17(2). The Visa Officer has reasonable concerns, based on the documentation submitted in the application, that the granting of a visa to the applicant to reside in the State could result in costs to public resources of the State.*

RH:- Relationship history

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

- *The applicant and the sponsor have not provided sufficient evidence of the stated relationship being in existence prior to and since marriage. Full account of relationship history*

between applicant and sponsor not submitted. The onus rests with the applicant to demonstrate that the relationship is *bona-fide and sufficient for immigration purposes.*

This decision letter should be read in conjunction with the detailed consideration document.

The application failed to meet the requirements of the Policy Document referred to above. The applicant's rights under Article 8 of the ECHR and Article 41 of the Irish Constitution were considered."

19. The Consideration document which accompanied the Decision was detailed and ran to 19 pages. Additional points emerging from this Consideration document and the materials addressed include:

(i) The first Applicant indicated that she has three children, of which documentation attesting to their birth certificates and educational commitments was supplied. However, in the second Applicant's letter of application dated the 8th of May 2019, he stated that he has no family members in Ireland/Europe, bar his wife and child. It was confirmed during the hearing before me that the reference to a child in this letter appears is mistaken as the second Applicant does not claim to have a child in Ireland. It is clear that the Minister was not misled by the false claim made to have a child in Ireland in that initial letter and it appears to have been appreciated that this was incorrect.

(ii) Translations of transcripts of messages and documentation of calls to an individual named as "Lovely Wife" were not submitted. It was not established who the parties to the exchanges relied upon were and no names or numbers were apparent on the face of the documentary records submitted.

(iii) Although 56 photographs were provided by the Sponsor on appeal, these photographs were undated and were not accompanied by a narrative. Eleven photographs appear to have

been taken on the occasion of the wedding itself and it is unclear when and where the other photographs were taken.

(iv) There was an inconsistency in regard to the employment history of the second Applicant over the course of the three visa applications. Within the first visa application, he declared he was not employed, or in current education. With the second, he declared he had been employed for four years. Within the third and final application, he submitted that he had been employed for nine years.

(v) The Visa Officer further considered that no exceptional/humanitarian circumstances were demonstrated as present in this case which would support granting the visa application.

(vi) It was considered that the refusal of the granting of a visa to the second Applicant would not detrimentally interfere with the rights of the first Applicant's children to enjoy the benefits associated with EU citizenship as the second Applicant had not demonstrated that he is either involved in their lives or that the children are reliant on him for financial/emotional support. Such refusal of the application was concluded not to necessarily result in the EU citizen children having to leave the territory of the EU.

20. In his judgment delivered in this matter, Owens J. admirably summarised the basis for the refusal in terms which I adopt as follows [at paras. 13-14]:

> *"…the main reasons for the latest refusal to grant a visa to YB were failure to provide sufficient evidence of a relationship between MA and YB showing mutual social support and information which demonstrated a likelihood that YB would become a financial burden on the State if granted a visa to remain in Ireland with MA. The decision-maker concluded that there was insufficient vouching evidence of social contact to show a relationship and that MA and YB of a type that warranted exercise of discretion to permit YB to*

reside with MA in the State and that their relationship could be maintained in the same manner as that in which it has existed to date without granting a visa to YB. The decision-maker also considered that there were no special circumstances which would warrant, grant of a visa to YB notwithstanding that MA lacked means to support YB. The fact that MA was considered unfit to work due to illness and had limited means as a result was not of itself considered to be a special circumstance."

THE POLICY DOCUMENT ON NON-EEA FAMILY REUNIFICATION

21. Decision-making in respect of visa applications for non-EEA nationals seeking family reunification is the preserve of ministerial discretion. To assist in harmonising the way decisions are reached, the Irish Naturalisation and Immigration Service ("INIS") (now the Immigration Service Delivery or ISD) published a document entitled as the *'Policy Document on Non-EEA Family Reunification'* ("the Policy Document"). Its stated purpose is to set out a comprehensive statement and clarification on Irish immigration policy in the area of family reunification for this category of persons. No challenge is made to the Policy Document itself in this case. The Policy Document in its terms endeavours to reflect a fair balance between individual rights and those of the State (see *A and E (A Minor)* & *Anor. V. The Minster for Justice and Equality* [2017] IEHC 81 as determined by O'Regan J.). Reflected in the Policy Document is the legitimate policy that *reunification should not be an undue burden on the public purse.* As the Policy Document explains [at para. 1.6], however, its purpose:

"...is not to circumscribe Ministerial discretion, which will of course remain but rather to locate it in the overall framework where the elected Government of the day determines immigration policy and then sets out how that policy might apply in individual cases. In other words, the Minister's discretion will be largely exercised through setting down overall policies and parameters with some margin of appreciation retained

by decision makers in exercising their professional judgment on the Minister's behalf"

22. The Executive Summary of the Policy Document states that economic considerations are a very necessary part of family reunification policy and that while decisions should not be wholly determined based on financial merit or lack thereof, the State cannot be obligated to subsidise a family and the sponsor must be able to fulfil their responsibility to provide for family members if they are permitted to come to Ireland. Regard must also be had to whether the family elected to separate and the duration of such separation. As the Policy Document notes:

> *"if the family has elected to separate for many years it does not follow that the Irish State is obliged to facilitate its reconstitution in Ireland."* (p.6)

> *"the longer the elective separation, the weaker must be the claim to reconstitution of the family in Ireland. It is not intended to be prescriptive in respect of this issue but rather to highlight it as a highly relevant consideration in any case processing."* ([6.1], p.24)

23. It is set out at paragraph [2.2] that the Convention does not give an automatic right to a foreign national to enter or to reside in a particular country. The European Court of Human Rights has also stated that Article 8 does not impose a general obligation on a State to respect immigrants' choice of country of residence. The Policy Document also sets out that Article 41 of the Constitution has application but that the Article does not stand alone. Section [17] sets out the financial thresholds for non-EEA nationals. Paragraph [17.2] sets out the criteria for Irish citizen sponsors and states:

> *"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."*

24. It is common case that the first Applicant has not met the financial thresholds set down in the Policy Document.

PROCEEDINGS AND REMAINING GROUNDS

25. Leave to proceed by way of judicial review to challenge the appeal decision of the Minister refusing the second Applicant's application for a visa to join the first Applicant in the State was granted on the 28th of July, 2021 (Burns J.). Following the delivery of Opposition papers, the case was listed for hearing in October, 2022. Judgment was reserved (by Owens J.) and was subsequently delivered on the 21st of March, 2023, and is available using the neutral citation [2023] IEHC 291.

26. By the terms of the judgment delivered by the High Court, two of the grounds pleaded in the Statement of Grounds were determined (Grounds 8 & 9 – relating to the disregard of evidence of relationship and the requirement to provide translations). Although the plea at legal ground 9 in the Statement of Grounds regarding the lawfulness of the requirement to provide translations of personal messages was rejected, the High Court nonetheless quashed the impugned refusal decision of the 30th June, 2021, finding that the decision-maker erred in discounting completely documentary material (principally text messaging) which had been submitted as evidence of contact between the Applicants. Remaining grounds pleaded in the Statement of Grounds were not determined.

27. The Minister lodged an appeal to the Court of Appeal against the finding that she had erred in failing to any regard to the documentary material which, in

addition to not being translated, had not otherwise been properly proven to be communication between the parties. The Applicants cross-appealed in relation to the translation issue. The appeal was heard on 27th November, 2023.

28. Giving judgment for the Court of Appeal on 2nd February, 2024, Meenan J. allowed the appeal, finding, in essence, that the documents lacked probative value as there was nothing to establish that they evidenced correspondence between the Applicants and the Minister was therefore entitled to disregard them ([2024] IECA 26). Following a separate remittal hearing, on foot of a further judgment dated 21st of May 2024 ([2024] IECA 125), Meenan J. made an order remitting grounds 1-7 and 10-14 for consideration by the High Court by a different judge.

29. These remaining grounds, as summarised at paragraph 3 above, principally concerned the approach taken to the assessment of the rights of a married family under the Constitution (Article 41) and family rights under the Convention (Article 8) and the approach taken in the decision to the first Applicant's disability coupled with the application of financial eligibility criteria.

DISCUSSION AND DECISION

30. In this case, it has already been finally determined by the Court of Appeal that the Minister was entitled to discount material relating to communications (a) which were untranslated; and/or (b) in respect of which the identity of the parties involved had not been adequately established (i.e. that it was their phones). It is common case, however, that the discounting of such material is not determinative of the case. While not determinative, the Minister's conclusion that there was insufficient documentation submitted in support of the application to demonstrate the existence of a subsisting relationship is an unimpeachable finding which has wider implications in terms of the Applicants' ability to maintain a successful challenge to these proceedings.

31. In addition to the established absence of documents and lack of proof of an ongoing relationship, there is also the significant issue with the marriage

certificate. As set out above, the certificate shows a signature by the Applicants of the registration section of the certificate of marriage on the 6th July, 2013, a date which appears on the document twice even though the date of the marriage is given on the document as the 6th August, 2013. Flight information showed that the first Applicant did not depart from Ireland until the 27th July, 2013, and would therefore not have been in Kenya when the Applicants purported to sign the registration of the certificate on the 6th July, 2013. On the other hand, the Registrar's signed certification on the second page of this document is dated 7th August, 2013, and appears to show that the Registrar recorded registration on the 6th August, 2013. The certificate was accompanied by a document from an official in Nairobi authenticating its genuineness. This date discrepancy is a factor which is potentially fatal to a visa application of this kind, if not adequately explained.

32. Even though this issue with the marriage certificate was adverted to in the refusal of previous visa application(s) (or at least one of them), the only explanation which has been offered on the part of the Applicants in response to the issue being raised in the first instance refusal is that of simple error. The Applicants' solicitors requested that if the decision-maker was not prepared to accept this explanation, they should be advised to give the Applicants an opportunity to obtain further documentation from Kenya clarifying the position. It appears from the papers that the original documents were returned to the applicant and the letter of appeal records:

> *'Our clients are currently in the process of seeking an amended certificate of registration.'*

33. No amended documents or official letter stating that this was an error has been submitted since. The issue has not been addressed further in evidence and no amended certificate is relied upon in these proceedings. As already observed by Owens J. when hearing this case on the first occasion, a decision-maker may reject or refuse an application where an essential proof stipulated in the guidance is absent. Indeed, the Applicants have not challenged the entitlement of the Minister to take this unresolved discrepancy into account in evaluating their

social contact before and after their marriage in these proceedings.

34. Whilst the difficulty with the marriage certificate was but one of a number of factors considered to justify refusal of a certificate in this case, the failure to provide satisfactory proof of marriage by reason of inconsistencies in the documentation alone could, subject to the proper consideration of all of the circumstances of an application, be sufficient on its own to justify refusal of a visa sought on the basis of marriage. Afterall, as observed by Owens J. when delivering the first High Court judgment in this case ([2023] IEHC 291) [at para. 21]:

> *"Applicants for visas must produce acceptable verifying documentation. If there are discrepancies in documents, these must be explained."*

35. In *S.M. v. Minister for Justice* [2024] IECA 145, the Court of Appeal (Binchy J.) upheld a finding that deficiencies in the application in that case were such as to entitle the Minister to refuse an application in circumstances where that decision (which was in very similar terms to the decision in this case in material ways on the question of establishing marriage whilst nonetheless engaging in an assessment of rights protected under Article 41 of the Constitution and Article 8 of the Convention) can only be interpreted as meaning that the Minister was not satisfied as to the marital status of the applicants. In *S.M.* the Court of Appeal was satisfied that the question of whether the ratio of the Supreme Court in *Gorry* was correctly identified and applied falls away, as does the argument grounded upon Article 8 of the Convention, if the Court concludes that the Minister was entitled to reject the appellants' application on the basis that she was not satisfied as to their marital status.

36. It is clear from the Court of Appeal decision in *S.M.* that in some circumstances it might be open to me to conclude that the inconsistencies in the marriage certificate combined with the failure to provide sufficient documentation to evidence family life and ongoing communication, demonstrate sufficient basis for refusal either together, or on a standalone basis, and would justify me refusing relief even where other flaws are identified.

37. Significant as issues relating to marriage documentation may be, however, they will not be treated by me as determinative of these proceedings for two reasons.

38. Firstly, the Minister did not justify her decision on the basis that it has not been established that the marriage was a valid marriage. Instead, she proceeded to assess the application on the basis that the marriage was validly contracted before refusing on other grounds. This alone would not preclude me from deciding that the Minister's decision was entirely sustainable by reference to the documentation issue alone in reliance on *S.M. v. Minister for Justice* [2024] IECA 145.

39. Secondly, however, this case has already had a protracted history and has been remitted following a full previous hearing in the High Court and appeal to the Court of Appeal for determination of remaining issues. In the circumstances, there is a clear imperative for me to endeavour to be as complete as possible so that finality can be achieved in this litigation. It is therefore appropriate that I proceed to determine each of the remaining identified issues in the proceedings, although on one view the Minister's decision is amply justified on grounds which cannot be impugned and therefore it is not necessary to determine the remaining issues.

40. This does not mean that the inconsistencies in the marriage documentation are no longer relevant to my ultimate conclusion. These inconsistencies were advanced as one of several reasons for the ultimate refusal (letters setting out reasons for previous visa refusals also drew attention to this inconsistency) and this reason for refusal is not challenged in these proceedings. When the issue of marriage certification is added to the finding that insufficient documentation was submitted in support of the application to show the extent to which family life existed between the Applicants and to evidence ongoing routine communication, a finding which is now unassailable in consequence of the decision of the Court of Appeal in these proceedings, it is immediately apparent that the Applicants in this case bear a burden if they are to persuade me that there are legal frailties in

the decision sufficient to justify quashing it despite the existence of these potentially standalone grounds of refusal.

41. The case made before me may be broadly addressed under two broad headings (grouping diverse grounds in the Statement of Grounds) as follows:

(i) Adequacy of Assessment of Family Rights - Article 41 of Constitution (valuing marriage) and Article 8 of Convention (proportionality assessment) (Grounds 1, 2, 3, 4,11, 12, 13, 14);

(ii) Cost to Public Finance / Requirement to take up Work / Treatment of Disability / Discrimination on Grounds of Disability / Requirement of Financial Dependence (Grounds 5, 6, 7, 10).

Adequacy of Rights Assessment underpinning Decision under the Constitution and the Convention

42. Despite heavy reliance on *Gorry* in the file consideration supporting visa refusal in this case, the Applicants nonetheless contend that the approach adopted is contrary to the guidance given by the Supreme Court in *Gorry* by reason of a failure to properly assess rights safeguarded under Article 41 of the Constitution and is further undermined by a failure to respect rights protected under Article 8 of the Convention in the decision to refuse the Visa. The Applicants complain that the Minister erred in law and acted in breach of the Applicants' rights under Article 41 of the Constitution by failing to afford prominence to and sufficient protection of the Applicants' marital family and applied an incorrect test in considering the rights of the first Applicant, an Irish citizen, to have her spouse live with her in the State.

43. A separate complaint is advanced in relation to the treatment of Article 8 of the Convention, most specifically by reference to the requirement for a proportionality assessment. Further clarity has been brought to this area of law in the period since this case was first argued in the High Court. In addition to the decision of the Supreme Court in *Gorry* which clearly informed the consideration

of the visa application and the approach to the decision to refuse in this case, my attention has been drawn to a series of cases in which *Gorry* has arisen for consideration in the context of visa applications, including *Khan v. Minister for Justice* [2021] IEHC 789; *A.Z. v Minister for Justice* [2021] IEHC 770, which were available when this matter was first before the High Court. Further important decisions have been made including *M.K. (Albania) v. Minister for Justice* [2022] IESC 48; *B.B. v. Minister for Justice* [2024] IECA 36; *L.T.E. v. Minister for Justice* [2024] IECA 114; *S.M. v. Minister for Justice* [2024] IECA 145; *A.Z. v. Minister for Justice and Equality* [2024] IESC 35 and *F.S.H. and Ors. v. Minister for Justice* [2024] IECA 44.

44. It is acknowledged on behalf of the Applicants that certain aspects of some of these more recent decisions are unfavourable to arguments maintained by them, but they submit the present case is distinguishable on the facts. As the caselaw demonstrates, there is an inevitable overlap between the issues arising from a consideration of family rights under the Constitution and the Convention respectively. For coherence, I will nonetheless treat Article 41 of the Constitution and Article 8 of the Convention separately, as they are relied upon for their distinct features by the Applicants in these proceedings.

Article 41

45. It is submitted on behalf of the Applicant that the decision in this case "*is entirely contrary to the guidance*" given by the Supreme Court in *Gorry v. Minister for Justice* [2020] IESC 55. It is thereafter contended that:

(i) The Minister all but found that cohabitation has *"no value"* [contrary to findings of Supreme Court in *Gorry* at para.19];

(ii) In finding that technology and visits would suffice, insufficient value has been given to cohabitation as a fundamental element of marriage [contrary to findings of Supreme Court in *Gorry* at para.22];

(iii) There was an absence of consideration of the fact that they had

applied for a visa and been through the appeals process three times as well as bringing these proceedings which it is contended is an unambiguous sign of their desire to cohabit [contrary to findings of Supreme Court in *Gorry* at para. 24];

(iv) The finding that the Applicants could sustain their relationship by way of visits is not supported by *Gorry* [with reference to para.26 of judgment];

(v) The Minister had adopted an erroneous *"insurmountable obstacles to visiting"* test [contrary to findings of Supreme Court in *Gorry* at para.28];

(vi) No clear and persuasive justification was put forward by the Minister [contrary to findings of Supreme Court in *Gorry* at para.41].

46. In view of the grounds of complaint advanced, the decisions in *Khan v. Minister for Justice* and *A.Z. v. Minister for Justice* are illuminating because in these two cases the same judge (Burns J.) considered the decision of the Supreme Court in *Gorry* in some detail before applying the ultimate test, deriving from Gorry, as to whether the Minister had failed to recognise the relationship between the applicants or to respect the institution of marriage because of the Minister's treatment of the applications to reach contrary decisions on different facts and circumstances of the two cases.

47. In *Khan*, it was found that there had been a failure on the part of the Minister to properly consider marital rights arising under Article 41 because the Minister failed to conduct an intensive consideration of the underlying facts and evidence and did not consider countervailing factors such as the first applicant's impressive qualifications and work experience (which meant there might be no burden on the State), the educational endeavour of the second applicant, the fact that the family had paid for the children to attend private, fee paying schools and had the financial support of the second applicant's brother (a man of means) within the jurisdiction, the length and enduring nature of the marriage (over 30 years and pre-dating the second applicant's move to Ireland and three children of the marriage), the regularity of visits to Pakistan by the second applicant and the unsuccessful endeavour of the first applicant to get a visa to visit his family

in Ireland. The Court found that the Minister had not identified a properly justified countervailing interest that outweighed the importance of the Applicants' status as a married couple, one of whom was an Irish citizen, and ultimately failed to give due respect to the institution of marriage and marital rights under the Constitution.

48. On the other hand, in *A.Z.*, the Court, on an application of the same test found no failure to recognise the relationship between the Applicant and his wife and no failure to respect the institution or marriage. This different conclusion was reached in the context of a shorter marriage (4 years) contracted on the basis of a relationship commenced and developed when the parties were living in different countries, where the Applicant had failed to meet financial eligibility criteria in the Minister's published policy on Financial Criteria for a Non-EEA Family Reunification Visa, had failed to establish suitable living accommodation for the couple and was already in receipt of a housing assistance payment and had failed to produce sufficient evidence to show the extent of family life sustained since marriage and ongoing contact.

49. Since then, the Court of Appeal in *B.B. v. Minister for Justice* (Ní Raifeartaigh J.) [at para. 100] has further engaged with and summarised the key principles in *Gorry* and upheld the Minister's approach in considering, as part of her decision making process, whether family life could be maintained in the manner it which had developed or would it be extremely burdensome for the parties to reside together anywhere else be that in the home state or any other State of their choosing, noting the disjunctive nature of this consideration ("or"). The Court of Appeal noted that the fact that the couple had never lived together was a relevant consideration for the Minister in assessing rights under Article 41. The Court of Appeal also rejected the characterisation of the Minister's approach as over-weighing the threat to public finances and underweighing the difficulty in co-habiting elsewhere, reiterating that on an application of the decision in *Gorry,* the importance of cohabitation as a normal incident of married life was accepted but was not a matter of right.

50. The Court of Appeal in *B.B.* went on to confirm the right of the Minister to consider and attach importance to the nature of the relationship before and during the marriage, concluding on the facts of that case that there was very little to demonstrate the nature of the relationship (reliance had been placed on photographs, messages, flight details all of which amounted to "*scant*" evidence and repeated attempts to get a visa which were not considered "*cogent in terms of proving the nature of their relationship*" [at para. 108, *B.B.*].

51. I do not consider any of the complaints advanced under the rubric of Article 41 as summarised above to be well-founded having regard to the terms of the decision under challenge. As already noted, the visa refusal in this case post-dates the decision of the Supreme Court in *Gorry* and relies heavily on it with repeated reference during the consideration to important elements of that judgment. I do not propose to recite large tracts from it again for current purposes. Suffice to say that in *Gorry***,** O'Donnell J. for the majority, held that the starting point is that a married couple – one of whom is a non-national in the deportation system (or indeed a visa applicant like the second Applicant) - do not have a right *per se* to decide to cohabit in the State. While they do not have an automatic right to reside together in the State, there must be a specific analysis, nonetheless, of the various rights of the family which are recognised by the Constitution, in determining whether to make an adverse immigration decision. O'Donnell J. held [at para. 25]:

> "*Therefore, when any decision is made which has a fundamental effect on a married couple, the decision maker must normally take 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.*"

52. Contrary to the case made on behalf of the Applicants, however, the Minister did not ignore the status of the Applicants as a married couple, despite the difficulties with their documentation. Nor did she overlook any relevant matters or assign little or no value to the desire to cohabit. In its terms, the decision carefully considered the facts of the case by reference to the various representations and documentation that had been submitted. Having referred to the relevant provisions of the Constitution and to extracts from the *Gorry* judgment, the File Consideration expressly states (at internal pages 13/14):

> "*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... 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 protection the institution of marriage, to accord automatic immigration status consequent on marriage.*"

53. It can therefore clearly be seen that the Minister had regard to the fact that the desire to cohabit is a "*normal incidence*" of marriage and that it was something the State was required to consider in its decision-making process. Nowhere is it stated or implied in the decision that the desire to cohabit has "*no value*" and the Applicants' contention in this regard does not fairly acknowledge the terms in which the decision was expressed, and the careful consideration given to identified relevant factors in this case.

54. By referring to the extract of the *Gorry* decision where O'Donnell J. held that there is no right to cohabitation, it is my view that the Minister was simply and correctly stating the law as it is rather than improperly discounting cohabitation as a normal incidence of marriage as being of "*no value*". It is clear

from the decision in *Gorry* that Article 41 of the Constitution does not provide a presumptive right to cohabit in the State for a married couple, one of whom is a non-national. This is a statement of legal reality. No failure on the part of the Minister to properly take account of cohabitation as an important incidence of marriage has been established by the reiteration of these principles. It is not open to the Applicants to seek to reargue the decision in *Gorry* before me.

55. At paragraph 65 of *Gorry*, O'Donnell J. stated that while all marriages should be given the same weight in terms of recognising the *status* of marriage, "*the law must consider more carefully the consequence of such a marriage.*" In the majority view in *Gorry*, the State is not obliged to accord any automatic immigration status consequent on a marriage. As O'Donnell J. added, that is not to say that the length and duration of a relationship is irrelevant; such circumstances as arise must be considered and valued by the State [at para. 68 of *Gorry*].

56. In the present case, the Minister's decision set out and considered the history and nature of the Applicants' relationship as presented by them. It must be stressed that this is not a case where the Applicants have ever cohabited other than for holiday periods. Indeed, in a finding of fact which is not open to challenge, the Minister concluded that insufficient evidence of relationship had been provided which is a finding which bears negatively on the history and nature of the relationship as a relevant consideration. The untranslated communications between unidentified persons were properly discounted and very little weight attaches to photographs presented in the manner occurring in this case, without dates or other narrative. It was open to the Minister when weighing up matters to consider the fact that the Applicants relationship had been entirely long-distance both before and since the marriage was contracted when attaching value to cohabitation as an incidence of marriage on the facts of a particular case. As the Minister noted (p. 16 of the Decision):

"*a decision to refuse ….after appropriate consideration of the facts, is not invalid merely because it affects the spouses' desire to cohabit in Ireland*"

57. It is now well established that the Minister is entitled to choose who is permitted entry to the State [at para. 26, *Gorry*] subject to a balancing of interest exercise. The scales are, however, tipped in favour of the presumptive interests of the State and something special is required on the facts of a given case in terms of the applicants' circumstances to prevail over those interests. The mere fact of marriage does not trump these considerations [at para. 70, *Gorry*]. I am satisfied that the Applicants' submissions in contending for a failure to vindicate Article 41 rights fails to take due account of the significant State interest at issue from an immigration and resources perspective relative to the strengths and weaknesses facts of their case.

58. The economic interests of the State are affected in a real and tangible way when recourse is had to public funds. In my view, it is properly relevant and a factor to which the Minister was entitled to attach negative weight that the first Applicant has a very limited history of work in the State and has been reliant on State support for a considerable period (page 9, Decision). She did not meet the financial criteria set out in the Policy Document and is wholly reliant on the social welfare of the State giving rise to what the Minister described as *"reasonable concerns that the applicant* (the second Applicant) *would be reliant on the social welfare of the State should the visa be granted as sought"* (page 15, Decision).

59. The conclusion that the low level of income would likely result in a reliance on public funds/resources is a reasonable conclusion based on the information available to the Minister and was a factor to which she was entitled to attach negative weight when considering where the balance of interest lay on this visa application.

60. As submitted on behalf of the Minister, the State's interests are not

incidental or abstract matters of little import. It cannot fairly be said that the refusal of the visa to the Second Applicant was "*for no good reason, and simply because it was a prerogative of the State*" [at para. 71, *Gorry*]. Instead, as the Minister's decision letter and File Consideration explain, there are legitimate considerations at play as to why the visa was refused. Based on a now established body of authority such refusal does not constitute a failure to respect the institution of marriage in the case of the individual applicants under consideration. As O'Donnell J. held [at para. 73 of *Gorry*] "*the parties remain married and it does not fail to respect the institution or protect it if cohabitation is made more difficult, or even impossible, by a decision of the State for a good reason.*"

61. Noting that *Khan* and *A.Z.* are cases in which the Court was satisfied that the application of the same test to the facts in each case showed a failure of proper consideration in the first, but not in the second, I am bound to observe that the facts of this case are more readily comparable with those in the *A.Z.* case. Similarities include the fact that the relationship commenced and developed when the parties were living in different countries, financial eligibility criteria are not met, there has been a failure to establish suitable living accommodation for the couple, a failure to produce sufficient evidence to show the extent of family life before marriage and sustained since marriage and ongoing contact combined with the added important factor that there has been a failure to properly deal with inconsistencies in marriage documentation in this case (a factor which was not present in *A.Z.*). Otherwise, the facts of *A.Z. v. Minister for Justice* are strikingly like those in the present case.

62. As in *A.Z.*, in this case, I am satisfied that the Minister properly sought to strike a balance between the competing interests of the individual and the State and in doing so had regard to the nature of the relationship between the Applicants finding that there was insufficient evidence to show the extent to which family life, communication and contact had been sustained between them (either before or since marriage). In the balance of the State interests measured against the personal interests of the Applicants conducted by the Minister, she was entitled to have regard to the fact that the Applicant had been able to travel to Kenya annually (with only two exceptions) since 2012. She Minister did not adopt an "*insurmountable*

obstacles to visiting" test as claimed on behalf of the Applicants when considering Article 41 rights.

63. Conversely, the Minister had also express regard to the fact that the first Applicant was a citizen of Ireland; that she had a right to reside in Ireland; that she had a right to marry and develop a family life; and that cohabitation was a natural incident of marriage and the family. She furthermore had regard to the fact that not permitting the first Applicant's husband to enter this jurisdiction had a significant impact on both Applicants. However, she also had regard as she was obliged to do, again as in *A.Z.,* to the significant State interests at play, namely the engagement of State resources and the expenditure of public funds together with maintaining the integrity of the immigration process.

64. Although, the Applicants have sought to distinguish *A.Z.* on the basis that the second Applicant "*would be fully capable of working if he were permitted to come to the State.*" [at para 41, Applicants' Legal Submissions], this claim does not stand up to scrutiny and the Second Applicant's employment prospects were considered by the Minister. The varying accounts provided by the Second Applicant regarding his employment history and his resources were noted (page 5, File Consideration) together with the fact that he was not currently employed at the date of the application under consideration. In addition, it is noted that his "*educational qualifications and ability to gain employment has been deemed insufficient*" (page 15, File Consideration).

65. These were entirely reasonable findings for the Minister to make in the light of the submissions and information provided with regard to the information submitted that the second Applicant had varying periods of employment in the past, was currently unemployed, was paid cash in hand from May, 2017, for slaughtering animals and since May, 2020, had been "*financially supported*" through selling fruit and vegetables from a kiosk. Decisions as regards whether a person has the qualifications and experience to reasonably obtain employment in the Irish labour market are peculiarly matters for the Executive branch. Therefore, absent some form of legal irrationality, not present in this case, the Applicants have no basis for

their contentions in this regard.

66. The contrast between the facts of this case and the circumstances in *Khan v. Minister for Justice*, where the Minister's refusal was quashed, is striking. There, the first Applicant was a Pakistani national married to a naturalised Irish citizen for over thirty years and they had three Irish citizen children. The second applicant had come to the State in 2005 with their children, while the first applicant remained in Pakistan, from where he continued to support the family. The first applicant held a Master's degree in mathematics and was said to have lectured for 30 years. The second applicant had unsuccessfully sought a visa in 2006 and 2011. In November, 2017, a fresh visa application was submitted. Reliance was placed on the fact that the second applicant's brother, who is a doctor resident in Ireland, had pledged financial support to the applicants and had demonstrated significant savings in his bank account.

67. As apparent from her judgment in *Khan*, Burns J. quashed the decision based on the consideration given to the application because the first applicant's "*impressive qualifications and work experience*" were not considered sufficiently and the fact that he might "*not transpire to be a burden on the State's finances was not envisaged*" [at para. 26 of her judgment]. The second applicant's training for work purposes, their ability to pay for their children to go to a leading private school and her brother's offer of financial assistance had not been given sufficient consideration. None of these factors, or like factors, apply in this case.

68. In the present case, the Applicants married knowing that a visa was not an automatic entitlement or that the marriage gave rise to any expectation. Their courtship was always long-distance. There are no children of the marriage. The first Applicant's work history is extremely limited and neither Applicant supports the other financially since the marriage. As regards any suggestion that the decision-maker was not aware of the fact that this was the third visa application made as evidence of a commitment to the relationship is dispelled by the fact that the File Consideration in the present case begins by noting on the first page that this was the third visa application made by the Applicants. Repeat visa

applications do not necessarily equate either with a high level of commitment to a marriage in all circumstances (as apparent from Court of Appeal decision in *B.B.*). The Applicants' marriage has not possessed the same length or durability as the marriage in *Khan***,** and the judgment in that case falls to be distinguished on that basis.

69. While the Applicants take issue with the Minister's view that married life could reasonably be sustained "*by way of visits, or telephonic and electronic means of communication,*" I note that Burns J. did not find any fault with a similar finding in *A.Z.,* observing [at para. 34] that as there had been visits to Iraq, that it was possible to continue to maintain and develop a relationship which had been entered into on the basis of separation without any expectation that the spouse would be permitted to enter Ireland. She concluded that having regard to the facts of the relationship, it was reasonable for the Minister to conclude as she had. In this case, the Minister reached a similar conclusion stating (at p. 14 of the Decision) that:

> "*insufficient reasons have been submitted preventing the sponsor continuing to travel to Kenya to visit their spouse and maintain the relationship in the manner in which it developed.*"

I am satisfied that this was a finding reasonably open to the Minister to make in the circumstances of this case and flows from the evidence providence.

70. Looking at the decision as a whole, the undeniable reality is that the Applicants' relationship has always been a long-distance one and the Minister was entitled to have regard to this fact in the way that she did.

71. Specifically, for the avoidance of doubt, I reject the case advanced that the Minister was wrong to seek evidence of a relationship in existence prior to marriage. Evidence of the existence of a relationship prior to marriage is relevant to as assessment of the "*enduring*" nature of the relationship referred to by O'Donnell J. at paragraph 71 of his judgment in *Gorry.*

72. It must be emphasised, as O'Donnell J. did at paragraph 65 of his judgment in *Gorry*, that while all marriages should be given the same weight in terms of recognising the *status* of marriage, "*the law must consider more carefully the consequence of such a marriage.*" The Minister was not only entitled to but obliged to consider the length and durability of the relationship between the Applicants. In so doing, she is entitled to seek evidence of the relationship both prior to, and following, the marriage. It is clear from the terms of her Decision, however, that there was no pre-condition imposed in this regard to establishing rights under Article 41 as is asserted on behalf of the Applicants but rather it was treated as a relevant consideration to be weighed in the mix with other considerations.

73. Furthermore, there is no evidence to suggest that the submission made that acts of intimacy or co-habitation would be prohibited pre-marriage in the cultural norms and religion of the Applicants was in any sense disregarded. Indeed, the submission was repeated in the File Considerations. As an aside, I profess some skepticism about this submission, in circumstances where the first Applicant had three children from two separate fathers without ever before being married. This does not seem to me to be immediately reconcilable with the suggestion that acts of intimacy or co-habitation are prohibited in the Applicants' culture prior to marriage as an explanation for the absence of a relationship history. As this submission was not questioned on behalf of the Minister, it is not necessary for me to probe the issue any further.

74. The Minister was perfectly entitled to have regard to the fact that there was very limited evidence to corroborate the pre-marriage relationship or history in weighing the rights of the Applicants in the light of her assessment as to the enduring nature of the relationship, with due regard to cultural norms. The decision to refuse the visa is in no way undermined by the fact that the Minister attached negative weight to the absence of a pre-marriage history or relationship. It is a factor that the Minister may have regard to in the overall consideration of an application of this nature.

75. In the context of Article 41 of the Constitution, as O'Donnell J. held in *Gorry*, the fundamental question is whether the Minister's decision failed to recognise the relationship or to respect the institution [at para. 69]. It is clear from the decision under review that the Minister recognised the relationship, considered the circumstances pertaining to it, and in doing so, adequately respected the institution of marriage in the light of the facts and circumstances of this case. Further, the justification for refusing the visa to second Applicant has been clearly reasoned in both the Decision letter and the File Consideration which accompanied it.

76. Having had regard to all the relevant considerations which included the nature of the relationship between the Applicants and the implications for public resources, the Minister determined that the public interest favoured refusing the visa. I am satisfied that in so doing, the Minister did not fail to recognise the relationship between the Applicants or fail to respect the institution of marriage and the Applicants' complaint in this regard is not substantiated. No failure to properly assess Article 41 rights has been established.

Article 8

77. There have been important developments in the jurisprudence in relation to the consideration of Article 8 rights since these proceedings were first commenced. While the decisions in *Khan* and *A.Z.* were handed down before these proceedings first came on for hearing in the High Court in 2022 and were addressed in written submissions exchanged in advance of the first hearing, the Supreme Court had not then yet delivered its important judgment in *M.K. (Albania) v. Minister for Justice, Equality and Law Reform* [2022] IESC 48. In *M.K. (Albania)* it was found that the approach to Article 8 of the Convention endorsed by the Court of Appeal in *C.I. v. Minister for Justice, Equality and Law Reform* [2015] IECA 192, [2015] 3 IR 385, as to the threshold to be reached to trigger the application of Article 8(1), was wrong in law. In reliance on this incorrect legal test, it seems the Minister had failed in many cases to conduct an overt and clear proportionality assessment under Article 8(2) because it had been improperly concluded that Article 8(1) was not engaged

at all due to the application of a higher threshold than properly applies.

78. Since the decision in *M.K. (Albania),* it is established that a low test or threshold applies when determining whether family life falling to be protected under Article 8(1) of the Convention is demonstrated. Crucially, while finding an error of law in the Article 8 assessment carried out in *M.K. (Albania),* the majority of the Supreme Court found, in essence, that this was an error of sequencing rather than substance. The majority were agreed that the outcome of the process was not, in that case, affected by the failure to conduct a separate proportionality assessment on the basis that rights under Article 8(1) were being interfered with.

79. The starting point for any proportionality assessment on the authority of *M.K.(Albania)* is that it is pre-loaded (O'Donnell C.J. at para. 26 (i)) in a manner where on one side of the balance there is the State's interest in maintaining an orderly immigration system, which it is well established weighs heavily as a legitimate State interest, and on the other side there are family or private ties substantiated. While other factors such as personal circumstances including health and the length and nature of the relationship may exceptionally tip the balance, without "*something more*" on the other side of the scales, the State's weighty interest in maintaining the integrity of the immigration system will always justify interference with rights. O'Donnell C.J. went on to find [at para. 28] that:

> *"[it will] only be in exceptional circumstances, and where there is something more than the inevitable disruption of removal from a country in which a person has lived that it can be argued the Article 8 rights can prevail, or more precisely that interference with that private life will not be justified by the state interest involved. This was the question addressed in this case, albeit it was addressed in order to consider if the applicant could satisfy the stage two test, rather than as I consider appropriate, in the context of the stage five of the Razgar analysis".*

80. It is now clear that those factors which might previously have been relied

upon to find that Article 8(1) was not engaged (e.g. the length and duration of the relationship, precarious residence status etc.) are more properly reflected in the decision-making assessment through the weight to be given to the rights asserted when balanced against the State's competing or countervailing interests upon the conduct of a proportionality assessment. The majority judgments in *MK (Albania)* made concluded, however, that a failure to carry out an overt proportionality assessment will not lead to the quashing of the decision in every case. The court must look at the substance of the decision essentially to ascertain if a *de facto* proportionality assessment was carried out.

81. This was then the approach taken by the Supreme Court in *M.K. (Albania)* resulting in a conclusion that as the question as to whether there were exceptional circumstances over and above the necessary interference with any private life which would be a consequence of a refusal of leave to remain was addressed and answered (albeit at an earlier stage of the process to establish if Article 8(1) engaged, instead of on the basis of an overt proportionality stage under Article 8(2)), there was no failure of proportionate decision making. As observed by O'Donnell C.J. (who was in the majority) in his judgment in *M.K. (Albania)* [at para. 28]:

> *"Here it is clear and unavoidable that there was nothing in the facts of this case which was capable of amounting to such exceptional circumstances, and which could have conceivably led to a different conclusion."*

Accordingly, the majority were satisfied that the flaw in the sequencing did not lead to an unlawful outcome (O'Donnell C.J., at para. 30).

82. The real question for me, as identified in *M.K. (Albania)*, is whether it can be said that had a proportionality assessment been conducted as a part of the framework for the decision, it would have been capable of leading to a different conclusion on the particular facts. More recent decisions confirm me in my view that this is the question I must determine in respect of the Article 8 complaints made in these proceedings. Where there are compelling reasons to believe that

even had the assessment been conducted, no difference in result would have occurred, then, as established by *M.K. (Albania)*, the decision should not be quashed.

83. This is borne out by the Court of Appeal decision in *B.B. v. Minister for Justice* which, like this case, involved a challenge to a D visa appeal refusal. The Court of Appeal appeared to reject the argument put forward by the Minister in that case that the principles from *M.K. (Albania)* did not apply in a D visa context (or outside deportation). Although Ní Raifeartaigh J., giving judgment for the Court, ultimately found it unnecessary to make a finding on the precise scope of *M.K. (Albania)*, she commented as follows:

> "*I am inclined to think that the overall approach in MK. (Albania) is not confined to deportation cases, because it sets out a general framework for the assessment of Article 8 considerations,· that said, it is likely that in the application of that general framework, outcomes ·will actually vary considerably depending on the context and facts of each case and the specific aspect of immigration law in issue. However, I do not think it is necessary to engage minutely with the question of the scope of the decision in MK. (Albania) in the present case because I am of the view that the appellants face a more significant difficulty, namely that the factual premises underpinning their arguments on this issue are not sufficiently in place to give substance to their proportionality argument in any event.*"

84. Giving judgment for the Court of Appeal in *L.T.E. v. Minister for Justice* [2024] IECA 114, Ní Raifeartaigh J. went further than she had in *B.B*, and expressly accepted that the *M.K. (Albania)* principles applied not only in a deportation context but also in the D visa context which was before her in *L.T.E.* (at paragraph 128 of her judgment). The Court of Appeal found it to be of significance, however, that the decision was not challenged by reason of a failure to conduct a proportionality assessment in *L.T.E.* stating at 139-140:

"*In my view, until the very last minute (being the oral submissions on appeal), the appellant's case did not encompass a plea or argument that the decision-maker should have explicitly carried out a proportionality assessment...*

In any event, whether it was advertent or not; the pleadings did not advance the case that an explicit proportionality assessment should have been carried out by the decision-maker and I am of the view that in those circumstances the Court may, and should, confine itself to the question of ·whether the decision was in fact proportionate."

85. The Court of Appeal proceeded to consider the proportionality of the decision in substance having regard to Article 8 of the Convention on much the same basis as she had earlier in the judgment considered its proportionality under Article 41 of the Constitution on an application of *Gorry* principles. Borrowing from the language of O'Donnell C.J. in *Gorry*, she observed that the decision-maker was entitled to arrive at the conclusion that the circumstances lacked the "*something more*" that was required to tip the balance in favour of the visa and outweigh the interests of the State.

86. I accept that this case is distinguishable from *L.T.E.* to the extent that the visa refusal has been challenged on the basis that the Minister failed to carry out a proportionality assessment but, crucially, in my view it is similar in two important ways. It is similar in that, as in this case, an express proportionality assessment was carried in relation to Article 41 of the Constitution, where considerations also relevant to an Article 8(2) assessment were considered and weighed. It is also similar in that factors relevant to a proportionality assessment were considered in arriving at a conclusion that there was no interference with Article 8(1), albeit not in the proper order or sequence. In the proper order, the Minister would have found an interference with Article 8(1) but then proceeded to determine whether the interference which was permissible in accordance with Article 8(2). It is also worth noting that despite pleading issue in *L.T.E.***,** the Court of Appeal went on to carry out a consideration of whether the decision in that case

was disproportionate, finding that it was not.

87. Despite these clear findings in *M.K. (Albania)*, it was nonetheless contended in submissions on behalf of the Minister before me that a sufficient basis for engaging Article 8(1) had not been shown in this case. I am satisfied that this submission cannot be correct in law if it is accepted that the parties entered a marriage contract and have maintained a long-distance relationship for in or about a decade as at the date of the visa refusal decision. In her File Considerations, the Minister did not arrive at a concluded view that no valid marriage had been contracted which means that it is appropriate to proceed on the basis that the relationship may well be one based on a lawfully contracted marriage.

88. In the absence of a concluded view on the validity of the marriage and while there are real issues in this case in relation to the formal proof of marriage due to inconsistencies on the documents, and this remains a legitimate consideration weighing against the grant of a visa on a proportionality assessment, the better approach when considering Article 8 rights is to proceed on the basis that even though marriage may not be established, family life rights protected under Article 8(1) may still be engaged. Afterall, family rights protected under Article 8(1) are not limited to families based on marriage.

89. Based on the narrative advanced on behalf of the Applicants as to their relationship dating to 2012 and presuming then that the first Applicant cannot and will not move to Kenya, resulting in the Applicants never having the opportunity to cohabit and recalling also that in the present case it was never suggested by the Minister that there were not insurmountable obstacles to the first Applicant moving to Kenya, it seems to me that decision to keep the Applicants living apart by refusing a visa engages the application of Article 8(1) of the Convention to ensure respect for family rights. This is so notwithstanding that this is a case of a long-distance relationship based on a marriage in precarious immigration circumstances. In my view, the conclusion that the low threshold requirements which trigger the application of Article 8(1) are present in this case flows from a proper application of *M.K. (Albania).*

90. Of course, as equally clear from *M.K. (Albania)* and a host of decisions of the European Court of Human Rights, the fact that Article 8(1) of the Convention is engaged does not mean that there is a breach of rights contrary to Article 8. Where Article 8(1) is engaged, this is determined on an application of the Article 8(2) test.

91. On the clear and uncontested basis that the interference is in accordance with law and is necessary in a democratic society for a purpose recognised under Article 8(2), the only real issue for the Minister in this case is whether refusal of the Visa constitutes a disproportionate interference with the Applicants' rights as required to be respected under Article 8.

92. If I am correct in my application of *M.K. (Albania)*, it then follows that the Minister fell into error in failing to carry out an "*in sequence*" Article 8(2) proportionality consideration because she had wrongly concluded that Article 8(1) was not engaged on the facts and circumstances of this case. It is clear from *M.K. (Albania)* and subsequent decisions, however, that this error, in and of itself, does not mean that the visa refusal in this case is terminally undermined.

93. Even where an error of approach is established and there has been a failure to conduct a proportionality assessment when one ought to have been done, where I am satisfied that a proportionality assessment was conducted in substance and nothing capable of affecting the outcome of the Minister's visa decision-making process has been identified on the facts and circumstances of the case, I should nonetheless refuse relief by way of judicial review.

94. Therefore, on the approach endorsed in *M.K. (Albania)* and followed in subsequent decisions, I must next consider whether a proportionality assessment was conducted in substance by the way in which it was concluded that Article 8(1) was not engaged. This requires me to consider the facts and circumstances of the case for the purpose of deciding whether, in structuring her decision as she did, the Minister has made a decision which may result in a disproportionate interference with rights in a manner which contravenes Article 8 of the

Convention. I must, however, remain mindful that I am not a primary fact finder, and it is not for a judge in judicial review proceedings to step into the shoes of the decision-maker and substitute his or her decision for that of the Minister.

95. The essence of the test that I must now apply is whether the decision produced in the Minister's decision-making process is sustainable in law as flowing from the evidence before her on a fair and proper weighing of the identified negative and positive factors, and whether the decision reached results in a proportionate (and therefore lawful) interference with rights protected under Article 8(1) of the Convention recalling, most importantly, that it will only be in exceptional circumstances and where there is "*something more*" that it can be argued that interference with Article 8 rights will not be justified by the state interest involved (O'Donnell C.J. in *M.K. (Albania))*. To this end, I must consider whether there is anything on the facts and circumstances of this case which had the potential to affect the outcome on a proportionality assessment, had the Minister properly sequenced her decision-making by conducting her proportionality assessment having first concluded that a refusal of the visa would give rise to rights protected under Article 8(1) of the Convention.

96. In my view, this case suffers a similar frailties to *M.K. (Albania)*, *B.B.* and *L.T.E*. While it has been correctly pointed out that the first Applicant's medical problems have not been called into question by the Minister and she has been in receipt of a disability allowance since 2017, with specific medical issues documented both by letter from her GP Dr. Anver Amod, and in the 29th December 2017 Social Welfare Appeals Office decision to approve a disability allowance claim, it remains the case that there is little to no evidence of any pre-marriage relationship, the couple purport to have married at a time when they lived on different continents and much of the evidence adduced to support the existence of a long distance relationship has been found to be non-probative (a finding endorsed by the Court of Appeal and binding on me) and the financial thresholds identified in the Minister's Policy are not met.

97. This case falls to be distinguished from *L.T.E.* in that the question of

whether an Article 8(2) proportionality consideration was required, has been a live issue in the case as pleaded and leave was granted to pursue relief in this regard. In considering whether the decision was disproportionate in *L.T.E.*, the Court of Appeal (Ní Raifeartaigh J.) went on to carry out a review of whether the decision in that case was disproportionate. It is worth setting out what she saw as the relevant factors in this regard, for comparison with those in the present case [at para. 41]:

> "*In an earlier section of this judgment I have dealt with the proportionality of the decision having regard to the evidence submitted by the appellants to the decision-maker and having regard to the constitutional principles as explained in Gorry. I consider the same evidence (and my remarks in relation to it) to apply in this*
>
> *context also. Taking into account the caselaw of the ECtHR as described above, and the factors enumerated in MA v. Denmark, I am of the view that the decision was also proportionate in light of Article 8 of the Convention. The marriage was created at a time when the appellants were aware that the immigration status of one of them was precarious. The second appellant has no ties to this jurisdiction other than through the first appellant. The evidence did not demonstrate "insurmountable obstacles" in the way of the family living in Ethiopia: I say that, even taking into account the photographs submitted, the News Africa article, and the assertions in the "Relationship history" document. The first appellant did not demonstrate that she had sufficient independent and lasting income. No children were involved. There were no particular physical or mental health difficulties ....The length of the marriage was relatively short at the time of the Minister's decision. The "depth and intensity" (to use the language of O'Donnell CJ in MK (Albania)) had not been demonstrated in any particular way, although I hasten to add that this is not to call into question the validity or genuineness of the marriage in any way."*

98. It seems to me that this reasoning finds a compelling resonance on the facts of this case, and I find no reason to see why it does not equally

apply here, notwithstanding some factual differences between the cases. As again recently confirmed by the Court of Appeal in *L.T.E* and *K.A.U. v. The Minister for Justice* [2024] IECA 114, there is no general obligation on a State to respect the choice by married couples as to where they would like to live. The Strasbourg jurisprudence points to exceptional circumstances being required to be present before there can be a breach of Article 8 in the context of immigration and family reunification (*Jeunesse v. Netherlands, Application no. 12738/10).* The State has a wide margin of appreciation under Article 8. Where family life arises at a time when the family members in question must have been aware that the immigration status of one or more of them is, in the words of the European Court of Human Rights, "*precarious*" (see generally *Nunez v. Norway, Application no.* 55597/09, para. 70), it will generally be difficult for family rights under Article 8 to prevail against the State's rights (*M.K. (Albania) v. Minister for Justice and Equality*).

99. As a matter of law, the failure to carry out an express proportionality analysis is not of itself fatal to the validity of a decision made by the Minister in circumstances where the decision on its face and its outcome are manifestly proportionate. In the present case, the Minister was entitled to reach the conclusions she reached regarding the future maintenance of the first Applicant's relationship with her husband and/ or that it had not been established that the first Applicant's visits to Kenya were an indication "*of continuous social contact*" with insufficient documentation submitted to show that they met on each of these visits to Kenya and with insufficient reasons submitted preventing the sponsor continuing to travel to Kenya for spousal visits thereby maintaining their relationship in the manner in which it developed together with insufficient evidence of ongoing, routine communication between them.

100. I consider it to be of importance also that the question of the proportionality of rights interference was expressly considered in as part of the Article 41 analysis, where it was concluded that the factors relating

to the rights of the State were weightier than those factors relating to the rights of the couple and that in weighing these rights a decision to refuse the visa application was not disproportionate as (p. 16, Considerations document):

> "*the State has the right to uphold the integrity of the State and to control the entry, presence, and exit of foreign nationals subject to international agreements and to ensure the economic well-being of the country*"

101. Express consideration was also given to whether there were any exceptional/humanitarian circumstances which would warrant the grant of a visa and it was concluded that there were not (p. 12, File Considerations). There is nothing to suggest that the refusal of a visa in the present case could constitute a breach of the Applicants' Article 8 right to family/private life, properly assessed or that had a proportionality assessed occurred in proper sequence, a different outcome might have been achieved. It cannot therefore be said that had a proportionality assessment been conducted as a part of the framework for the decision, it would have been capable of leading to a different conclusion on the facts. There are compelling reasons to believe that even had the assessment been conducted in its proper sequence, no difference in result would have occurred.

Requirement to take up Work / Treatment of Disability / Discrimination on Grounds of Disability

102. The starting position in relation to the financial criteria indicated in the Minister's Policy Document is that, as reiterated in *F.S.H. v. Minister for Justice* [2024] IECA 44, visa applications of this kind invoke the discretionary power of the Minister to permit family reunification of non-EEA citizens with an Irish citizen and not statutory rights. The Minister is entitled to adopt a Policy Document, albeit on the basis that its terms would not be applied in an inflexible or rigid manner, but

could be departed from in exceptional circumstances.

103. It is common case that the financial criteria set down in the Minister's Policy Document in this case are not met and there is no challenge to the Policy *per se.* Accordingly, the only possible grounds of challenge arising where the criteria are plainly not met is that the Minister failed to properly exercise her discretion to depart from her general policy in the exceptional circumstances of the case.

104. The Minister's policy as reflected in the Policy Document and as clarified through response to Parliamentary Question exhibited in the proceedings, which clarification is reflected in the terms of the Considerations document, demonstrates a more flexible or nuanced approach to financial considerations in the case of persons in receipt of disability.

105. It is plainly acknowledged in the Policy Document that persons with a disability should not be treated the same as others on State benefits. It is for this reason that reliance on disability allowance does not disqualify an application in the same way as reliance on other social welfare payments does. Nonetheless, it is abundantly plain from the Policy Document that financial considerations and the likely burden on State resources remain relevant and is an important consideration for the Minister.

106. Where there is no challenge in this case to either the Policy Document or to the decision of the Minister that no special/ exceptional/humanitarian circumstances present in this case warranting a departure from the financial criteria contained in the Policy Document (page 12, File Consideration), it begs the question as to what basis there can be for complaint. If the Applicants have not established circumstances warranting a departure from the Policy Document, they cannot complain that the application has been unlawfully refused on the basis of financial considerations relating to disability.

107. Despite this at Ground 6 of the Statement of Grounds the Applicants complain of the Minister's "*apparent requirement that the First Named Applicant take up work, notwithstanding her chronic health conditions*", contending that this is unreasonable and irrational. This complaint was developed in argument in a number of ways, and it was specifically argued, albeit briefly, that the first Applicant is discriminated against on grounds of disability.

108. The Applicants' claim of irrationality and discrimination needs to be

seen in its proper context, which is, as noted, that there is no challenge to either the Policy Document or to the conclusion that a basis from departing from the financial criteria there set down has not been demonstrated. Even if on one view of the case I could stop there, I propose, for completeness, to consider briefly the primary two issues arising from the first Applicant's disability on the case as argued before me. To address the merits or substance of the complaints articulated, it is now appropriate to describe in some detail the approach taken in the Considerations document in relation to disability and financial considerations.

109. In the File Consideration, the relevant provisions of the Policy Document are referred to, specifically, paragraph 17.2 (which provides that the sponsor must not have been totally or predominantly reliant on State benefits for a continuous period of in excess of 2 years immediately to the application and must over a 3 year period prior to the application have earned a cumulative gross income over and above any State benefits of not less than €40k and paragraph 17.5 which provides that savings may be taken into account in cases where income thresholds are not met.

110. The File Consideration further refers to the executive summary of the Policy Document which sets out the principled position that family reunification should not be an undue burden on the public purse with economic considerations a very necessary part of family reunification policy, before adding that family reunification determinations should not be purely financial assessments, adding that nonetheless the State cannot be regarded as having an obligation to subsidise the family concerned.

111. With regard to the financial information provided on this application, the File Consideration notes what appears to me to be an obvious and entirely rational consideration, namely, that the low level of income demonstrated on this application "*may result in a charge on public resources*" against the background also set out of the first Applicant's history of previously being in low paid employment, not working since 2015, receiving first jobseeker's allowance (from August, 2016) and then disability allowance (from May, 2017).

112. In terms of the discrimination claim advanced, it was clearly stated in the File Considerations that while the sponsor should "*in general*" be in a position to support such family members, financial capacity is just one of the factors considered when making a determination on a family reunification application and "*the circumstances*

of the sponsor concerned are considered in the round, on a case-by-case basis" (p. 9 of the File Consideration).

113. The File Consideration then goes on to address disability allowance payments generally, and in this case, calculates that the first Applicant had received slightly over €36,000 in disability allowance payments in the three years prior to the application. At page 10 of the File Consideration, it is stated:

> "*Currently, persons in receipt of this allowance are allowed, under the scheme, to work (which includes self-employment) and earn up to €120 per week (after deduction of PRSI, any pension contributions and union dues) without their payment being affected. In addition, 50% of their earnings between €120 and €350 ·will not be taken into account in the Disability Allowance means test. Any earnings over €350 are fully assessed in the means test. It is therefore reasonable to conclude that over the proceeding 3 years, the sponsor, while in receipt of this allowance, held the potential to meet the criteria as outlined in the Policy Document e.g. a cumulative gross income over and above any State benefits of not less than €40k.*"

114. This reasoning appears to envisage a situation where the first Applicant could potentially supplement the income she receives on disability allowance by working in order to bring her above a cumulative gross income of €40k. It bears emphasis, however, that the File Consideration then expressly records that disability allowance is excluded from the general condition that a sponsor have not been reliant on social welfare payments, because such payments recognise a lack of capacity to otherwise earn a living. It is duly recorded in the File Considerations that persons on disability allowance are considered eligible sponsors, subject to meeting any other necessary requirements, including the financial requirement.

115. Having set the position out thus, the Consideration document arrives at the hardly surprising, and not contested, conclusion that the first Applicant did not meet the financial criteria set out in paragraphs 17.2 and 17.5 of the Policy Document and the low level of income demonstrated:

"*may result in a reliance of the within applicant on public funds/resources*."

116. The reasoning set out and as summarised above is characterized on behalf of the Applicants as the Minister forcing a disabled lady to work which it is contended is unreasonable or irrational.

117. On a proper reading of the File Consideration, however, it seems to me that the language and words used merely reflect what the Minister's general policy is (recalling that the Policy Document itself is not challenged), while noting that financial considerations are not the only factor, and matters are considered "*in the round*" and on a case-by-case basis.

118. Insofar as the potential of someone on a disability allowance to earn additional money is concerned, this is a statement of fact. It in no way imposes a requirement that the first Applicant work or suggests a conclusion on the part of the Minister that she is fit to work but chooses not to work.

119. The interpretation urged on behalf of the Applicants, namely that the Minister seeks to force a disabled lady to work as a condition of maintaining a marital life with her non-resident spouse, is not supported by the language used and is not an argument for which an evidential basis exists. The Minister nowhere says that family reunification would only be entertained if the first Applicant were working thereby making work a condition of eligibility for family reunification.

120. Far from requiring a disabled lady to work as a condition of family reunification, instead the File Consideration paints a factual picture in relation to the Applicants' financial circumstances to better inform the exercise of an overall discretion in relation to the grant of a visa where the financial criteria set in the Policy Document are clearly not met, but the application is being considered "*in the round*".

121. It is contended on behalf of the Applicants that even if the Minister did not have undisputed medical evidence before her which expressly stated that the first Applicant cannot work, it would still be incumbent on the Minister, before finding that it was reasonable to conclude that the first Applicant had the potential to earn €40,000

over and above her disability allowance over the course of 3 years, to actually examine the nature of the first Applicant's disability.

122. While the Minister refers to a potential to earn €40,000 as aforesaid and this finding is not expressly reconciled with the doctor's letter to the effect that the first Applicant cannot work when properly it should have been, I am not prepared to read this as meaning that the Minister treated the application on the basis that the first Applicant could work, but did not, or indeed should work if reunification is to be permitted, which is what the argument made presumes. This is to take the words used out of the overall context of the File Consideration and imbue them unfairly with a meaning which was unintended.

123. It is clear from the overall terms of the File Consideration both that the decision maker was aware of the terms of the medical evidence (which was quoted from) and that the failure to earn an income was not a determinative consideration leading to the refusal of this application. It was plainly stated that financial criteria are considered in the round and that receipt of disability allowance reflects an inability to work.

124. I read the File Consideration as a rational and reasonable acknowledgement of the fact that the first Applicant does not have the means to support an expanded household. What emerges from the terms of the File Consideration is that the financial eligibility requirements identified in the Minister's Policy Document are not met a fact which is not disputed and which is indisputable.

125. That said, under the Policy Document, a failure to meet financial criteria is not determinative. As already noted, specific provision is made for the different treatment of a disability allowance even under the General Policy in that receipt of disability allowance is not treated as a disqualifying factor. Nonetheless, as the unchallenged Policy Document makes clear, the implications for public finances remain relevant and fall to be weighed as a negative consideration against the grant of the application in the exercise of this discretion. This means that the Minister was obliged to consider these implications.

126. Receipt of a disability allowance was not treated as determinative in this case. It was properly acknowledged in this case that a disability allowance is treated differently from other social welfare allowances and the Minister retains a discretion to grant a visa, albeit regard must still be had to financial considerations. Having thus

acknowledged the different approach to the treatment of disability allowance under the Policy Document, the failure to meet financial criteria was considered together with other factors.

127. I reject as unfair and inaccurate, the characterisation of the approach taken in the File Considerations as being to require a disabled lady work. No such requirement was imposed. I read the decision as a rational and reasonable acknowledgement of the fact that the first Applicant does not have the means to support an expanded household, albeit not through choice, but because of her disability. When this fact is view together with all the circumstances including the nature and duration of her relationship and the second Applicant's work history, it contributed to justifying the refusal of her application. In other circumstances, however, the existence of a particular disability, might be a factor which weighs in favour of the grant of a visa.

128. The fact that the first Applicant has a disability and was in receipt of disability allowance resulted in more favourable treatment of the application in this case because the general condition that the sponsor have no reliance on social welfare payments is disapplied as a matter of general policy. In this case the existence of a disability is not itself a reason relied upon for refusal. Under the Policy Document, however, financial considerations remain relevant to the overall exercise of discretion. No discrimination, either contrary to Article 40.1 of the Constitution or the Article 21 of the Charter, is established on the facts of this case. I am satisfied that neither the nature and duration of the relationship nor the disability itself were established in a manner which could warrant the exercise of an exceptional discretion to grant a visa notwithstanding non-compliance with general policy considerations.

129. The Minister has not made any requirement, whether express or implicit, of the first Applicant to take up work. The Minister was entitled to take the view that the grant of a visa is likely to result in a cost to public finances and the Minister is entitled to consider the impact of such a grant. Financial capacity is one of the conditions that is considered, and a finding was reasonably and logically made that the Applicant may become a burden on the State. Accordingly, it does not seem to me that the arguments claiming unlawful discrimination based on disability or an apparent requirement being imposed by the Minister that the first Applicant must take up work do not have any basis.

130. Insofar as it was submitted that the application of the Minister's Policy is discriminatory under s. 5 of the Equal Status Act, 2000, it is established that a remedy under that Act does not lie to the High Court in the first instance. If the Applicants complain that either the Policy or its application is discriminatory it is open to them to bring a complaint using the redress mechanisms established in accordance with the provisions of the 2000 Act (as amended). Similarly, a discrimination claim grounded on a breach of a requirement to provide reasonable accommodation under s. 4 of the 2000 Act (as amended) lies to the WRC under the prescribed statutory redress mechanisms. Any such claim necessarily involves a consideration of cost having regard to the terms of s. 4(2) of the 2000 Act. I do not propose to engage further with this argument for present purposes.

131. For completeness and because it is specifically pleaded (Ground 10), I reject as without substance any contention that the Minister imposed a requirement that a financial dependency be demonstrated between the first and second Applicants as a condition of the grant of a visa. No such requirement is apparent and the evidential basis to sustain this ground of challenge is not established. Furthermore, although a claim is advanced in the pleadings that the Minister failed to have adequate regard to the fact that the second Applicant could work to support the family on arrival in the State, it seems to me that this was a factor which the Minister was entitled to accord very little importance to given non-compliance with the Policy Document and the second Applicant's uncertain work history as apparent from the file.

132. I am satisfied that the Minister's decision to refuse a visa insofar as financial matters are concerned was based on the fair and correct conclusion that the financial thresholds were not met and a basis for exercising a discretion to grant a visa notwithstanding this was not demonstrated. The balance of the decision insofar as financial matters is concerned is directed to the inquiry as to whether in the circumstances obtaining the grant of the visa would be likely to lead to a burden on public resources. This is an entirely legitimate and appropriate consideration and no error of law in the exercise of the Minister's discretion is demonstrated.

CONCLUSION

133. The Minister's conclusion that there was insufficient documentation submitted in support of the application is an unimpeachable finding given the decision of the Court of Appeal in this case and the material before the Minister. I have not proceeded as I might to conclude that this finding might be sufficient to justify the Minister's refusal of the application without more having regard to the fact that there are also issues with the marriage certification but have considered the broad range of overlapping and interwoven arguments advanced.

134. Having done so, I have concluded that there was a proper assessment of rights protected under Article 41 of the Constitution and Article 8 of the Convention in the decision-making process. Specifically, I have concluded that it is not open on the facts of this case for the Applicants to challenge the Minister's conclusion that insufficient evidence of the stated relationship being in existence prior to marriage had been provided. This damning finding cannot be called into question on the facts of this case in view of the information provided to the Minister in support of the application. It was an entirely rational conclusion which flows from the material before the Minister.

135. In circumstances where there is no challenge to the Policy Document, the financial criteria set down in the Policy Document are not met and where there is no challenge to the finding that exceptional circumstances which would warrant a departure from the Policy have not been demonstrated, any complaint in relation to the Minister's consideration of financial matters in terms of the risk of a burden on public resources requires strong justification. No basis for finding that the Minister discriminated against the Applicants because of the first Applicant's disability or that the first Applicant is treated less favourably as regards her right to family reunification because of her disability has been established. The application was considered in the round and considerations weighing against the grant of a visa were found by the Minister, following a rational consideration of the application in a reasoned and intelligible manner, to outweigh the Applicants' interest in the grant of a visa. Specifically, the application was not refused because the first Applicant had a disability.

136. Accordingly, I will dismiss these proceedings. I will hear the parties in relation to the form of the order or any consequential matters arising. A listing before me can be sought if the terms of a final order cannot be agreed and have not been communicated within two weeks of the electronic delivery of this judgment.