THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 611
[Record No.: 2021/1100 JR]

BETWEEN:

S.M. AND T.A.

APPLICANTS

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 4th day of November, 2022

INTRODUCTION

1. In these proceedings the Applicants challenge a decision communicated by letter dated the 12th of October, 2021, refusing an appeal against the negative determination of the Applicants' application for a D-visa to permit the Second Applicant entry to the State for the purposes of family reunification with his Irish Citizen spouse. The decision is challenged as based on a flawed process with regard to findings of fact and a failure to properly consider and weigh the family rights, including the right to cohabit, of the Applicants.

BACKGROUND

2. The First Applicant is a dual national of Ireland and Somalia. She arrived in the State when she was three years old (she is now 28 years old) with her mother and siblings, through the Family Reunification process, her father having previously been granted asylum. The First Applicant was granted Irish citizenship in 2001. She is a qualified

health care professional and works full time as such in the State having completed her Master's degree in 2019.

3. The Second Applicant is Ethiopian. He lives with his family in Ethiopia in Jigjiga, near the Somali border. The Second Applicant has a primary degree in procurement and logistics and more than six years' experience of working in that area with NGOs in Ethiopia.

4. The Applicants claim that they first met online in November 2017. It is claimed that their families were known to each other and they belong to the same tribe. A long-distance relationship developed and it is claimed that in May 2018, they notified their families that they wished to marry and arrangements were made with their families' approval and assistance. It is claimed that the First Applicant could not attend the Nikkah-Islamic wedding (on the 24th of June, 2018) as she was required to re-sit important university examinations. In her culture and religion, attendance by the bride at the wedding is not necessary. It is claimed that her mother attended the Nikkah-Islamic wedding which took place in June, 2018 as her representative, the First Applicant's father seemingly having confirmed his consent to the marriage as required by Nikkah-Islamic law.

5. The Applicants claim to have first met in person in July 2019 in Ethiopia, a little over a year after their wedding. The "*White Wedding Ceremony*" took place with the Applicants and their families in Jigjiga in August, 2019. The Applicants then lived together for a period of four months before the First Applicant returned home to Ireland. She claims to have returned home because she encountered difficulties securing employment in Ethiopia and the couple had decided to make their home in Ireland instead.

6. The Applicants claim to have maintained their relationship through telephone calls, electronic means such as Facebook and emails and visits by the First Applicant to the Second Applicant in Ethiopia.

7. Delayed by the COVID-19 Pandemic, in or around December, 2020 (approximately one year after her return to Ireland from Ethiopia), the Applicants applied

for a D-visa to permit entry to the State by the Second Applicant. By way of letter dated the 15th of March, 2021, this application was refused. The Applicants sought to appeal the said refusal by letter dated the 11th of May, 2021 with supporting documentation. The appeal was also refused by way of letter dated the 12th of October, 2021. It is this refusal that is impugned in the within proceedings.

DECISION MAKING PROCESS AND THE IMPUGNED DECISION

8. As stated above, by decision dated the 15th of March, 2021, the Irish Naturalisation and Immigration Service ('INIS') who were working out of the Irish Embassy in Addis Ababa in Ethiopia, refused the "D" reside visa which would have permitted the Second Applicant to enter the State to join the First Applicant.

9. There were five separate headings set out in the refusal letter under which the visa was refused as follows:

> **FM** – No automatic right for non-EEA nationals who are family members of Irish citizens to migrate on a long-term basis to Ireland.
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> **ID** – Referring to the quality of documents. It was found that the marriage certificate submitted was in the name of *'S [Name removed]'* and noted the date of marriage as the 24th of June, 2018. The First Applicant changed her name from *'Z [name removed]'* to *'S [name removed']* on the 15th of March, 2019 - which is a date after the marriage took place.
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> **ID** – Referring to the insufficiency of documentation submitted in support of the application. In this regard, the following issues / matters were indicated as not supported adequately or at all:
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> - That the First Applicant was in the home country of the Second Applicant at the time of marriage.
> - The extent to which family life exists between the First and Second Applicant.
> - The relationship history.

- Ongoing routine communication both prior to and since marriage.
- Face to face meetings prior to marriage.
- Visits by the First Applicant to the Second Applicant's home country prior to and since marriage.
- No full copy Irish passport from the First Applicant was submitted.
- Why the First Applicant did not travel to Ethiopia for the marriage ceremony.
- Accommodation details of First Applicant.

INCO – this refers to inconsistencies. There was no evidence to suggest that the First Applicant's mother was in Ethiopia at the relevant time and represented her. Moreover, it was noted by the visa officer that the marriage was not registered until the 16th of March, 2020.

The birth certificate of the Second Applicant was not registered until the 16th of March, 2020 also despite him being born on the 12th of April, 1991 and that there was no explanation for this. It was also noted that the registration of the Second Applicant's birth and the registration of the marriage both took place on the 16th of March, 2020.

RH - this refers to relationship history. The visa officer refers to the fact that section 5.3 of the Policy Document on Non-EEA Family Reunification ('the Policy Document') places the onus of proof as to the genuineness of the family relationship with the First and Second Applicants and that same had not been sufficiently addressed in the application. In particular, it was stated "*for immigration purposes, a relationship must include a number of face to face meeting (excluding webcam) between the parties*". The decision goes on to highlight that there was nothing submitted to suggest that the First and Second Applicant met face to face prior to the First Applicant travelling to Ethiopia on the 30th of June, 2019.

10. In the said first instance refusal, the Applicants were notified that they had a period of two months within which to lodge an appeal with the Visa Section in Dublin.

11. In the letter of appeal lodged in May, 2020, various matters were urged. Of note, the differentiation in the name of the sponsor was explained as originating in an administrative

error when registering her name when it was spelt with a *"Z"* instead of an *"S".* It was pointed out that the two letters are used interchangeably in Somalia and the First Applicant had used both notwithstanding that it was spelt with a *"Z"* on her birth certificate. It was explained that this discrepancy was addressed by deed poll after her marriage but because of the delay in registering the marriage, the change had been effected by the date of registration and in registering her marriage, her new legal name was used. The First Applicant submitted a different copy of the marriage certificate previously furnished showing the spelling of her name with a *"Z"* instead of an *"S".*

12. As for her absence from the wedding ceremony, documentation was submitted (from a Dublin university, the Dublin Mosque and the Islamic Court) supposedly to show that the First Applicant was required to retake examinations for her Master's degree programme at the time of her marriage, that her culture precludes premarital relationships and unsupervised meetings in private and that the First Applicant was not required to be present at the wedding ceremony provided both she and her father gave consent. It should be noted that the letter from the Court appeared undated and unsigned in the version exhibited by the Applicants. A different version of the same letter was subsequently exhibited on behalf of the Respondent.

13. She submitted vouching documentation in respect of her trip to Ethiopia post marriage for the marriage celebrations, vouching in respect of the wedding celebration itself together with photographs from the celebrations. She further submitted voluminous documentation in respect of text messages and social media communication between the couple as evidence of family life and relationship history and a USB stick (described in a cover letter as containing wedding photos and a full video, Nikkah photos and full video, original wedding invitation, chat history of social media – Instagram, Facebook and Whatsapp and Facebook posts and congratulatory messages).

14. Additional documentation was submitted proving travel to and from Ethiopia post marriage. The letter claimed that the "*full*" Irish passport of the sponsor was being submitted but this does not appear to have been the case. Correspondence from the Dublin Mosque (Islamic Foundation of Ireland) was relied on in relation to the lawfulness of a proxy marriage. A bank statement was included as proof of residence only as no issue had been raised at first instance in relation to her finances. A letter from the Ethiopian Registration Agency was relied upon to explain that marriages and births are registered retrospectively in Ethiopia. It was

stated that the Applicants only registered their marriage when certificates were required for the purpose of the visa application. As regards the issue with the date of registration of the Second Applicant's birth, a certificate from Karamara General Hospital confirming that he was born in Ethiopia in April, 1991 was relied upon.

15. In support of the appeal the First Applicant stated:

> *"My hope is that this application be process as soon as appropriately possible to allow [name] to join me as it is no longer possible to travel to Ethiopia as it is now on Ireland's Red list for travel."*

16. This appears to be the sole reference to any safety issues pertaining to travel to Ethiopia. The First Applicant did, however, outline her difficulties in securing employment in Ethiopia, despite being well qualified for the positions for which she applied, and indicated that she had encountered discrimination.

17. By way of letter dated the 12th of October, 2021 the appeal was refused. It is this decision that is under challenge. The three-page decision is accompanied by a lengthy 17-page consideration document. The headings for the reasons for refusal in the letter are as follows:

F – referring to finances – the visa officer had concerns that the granting of a visa could result in costs to the State.

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

ID - referring to supporting documentation the visa officer found:

- The marriage certificate was unattested (and it was highlighted that the First Applicant changed her name to the name on the marriage certificate after the alleged marriage).
- Insufficient information submitted regarding marriage by proxy has been submitted (i.e. in relation to the First Applicant's mother being in attendance).

- Insufficient information to show extent to which family life exists between the Applicants.
- Insufficient evidence of First Applicant visiting Second Applicant in home country both prior to and since marriage.
- First Applicant failed to submit a full current Irish passport.
- Insufficient evidence relating to accommodation of First Applicant submitted.

INCO – referring to inconsistencies and contradictions – the visa officer found:

- The unattested marriage certificate, submitted on appeal, has the First Applicant's name as *'Z [Name removed]'* as opposed to the one submitted at first instance issued by the Federal Democratic Republic of Ethiopia Vital Statistics Registration which has the First Applicant's name as *'S [Name removed]'.*
- Nothing was submitted to demonstrate that the First Applicant's mother was in Ethiopia at the time the marriage was conducted on the 24th of June, 2018.
- The visa officer noted that the marriage and the Second Applicant's birth were both registered on the 16th of March, 2020 despite the Second Applicant being born on the 12th of April, 1991 and that no explanation had been provided for this given it was nearly 29 years after his birth. The visa officer also rejected the letter from the Ethiopian Registration Agency in circumstances where it did not meet with the condition that such letters must be on official headed paper and give full contact details so that they can be verified.

PF/PR – referring to public funds/resources - the visa officer had reasonable concerns that the granting of the visa could result in costs to the State.

RH — referring to relationship history – the visa officer stated:

- As per Section 5.3 of the Policy Document the onus of proof as to the genuineness of the family relationship rests squarely with the Applicants and that it had not been sufficiently addressed in the application.

- The Applicants had not provided sufficient evidence of the stated relationship being in existence prior to and since the marriage. Full account of relationship history between the Applicants not submitted.

18. The following are some of the more noteworthy points contained within the accompanying consideration document:

- The Applicants submitted no details of any other immediate family members either in Ireland or any other State.
- Evidence of face-to-face meetings could only have begun, by reference to flight details, on the 30th of June, 2019 (after the marriage).
- The USB Key submitted was not checked as they are unacceptable and unverifiable and this is clearly stated on the INIS website.
- With the exception of undated documentation (and copies of Facebook from the 7th of November, 2017), the earliest dated correspondence is from the 10th of April, 2018 and the vast majority of the balance post-dated the wedding.
- There was no documentation suggesting or evidencing that the Second Applicant is financially dependent on the First Applicant.
- The First Applicant provided no details on her current residence (utility bills, rental agreement or mortgage account).
- The letter from the 'Somali Regional State Vital Events Registration of Ethiopia was not accepted. It did not meet with the condition that such letters must be on official headed paper and give full contact details so that they can be verified.
- Whilst the First Applicant meets the requirements of section 17.2 of the Policy Document (the three-year period prior to application earned a cumulative gross income of not less than €40,000) that the balance in her account was very low and that the Second Applicant may become reliant on public funds.
- The marriage registration certificate was not accepted as proof of marriage.
- There was no evidence submitted to suggest that the First Applicant's mother was in Ethiopia at relevant time.
- The First Applicant did not submit her ***full*** passport (to verify the travel indicated).

19. In sum, it seems from the refusal letter and accompanying considerations documentation that there were concerns about the different spelling of the First Applicant's name on the two certificates produced in respect of her marriage. There was also a concern about the failure to furnish a full copy of her passport. Only pages 6 & 7 along with the biodata page was submitted. The pages submitted showed a multi visit visa from Ethiopia which was valid for three months in 2017 but no passport entries were provided in respect of other trips taken including the trips alleged to have taken place in 2019 and 2020, albeit that boarding cards and e-flight tickets were provided. The failure to submit documentation in relation to the First Applicant's accommodation such as rental agreement, mortgage agreement or utility bills was identified. It was pointed out that the letter from the Ethiopian High Court did not provide full contact details to allow for verification notwithstanding that it is clear from the INIS website that all such documentation should be on official headed paper giving full contact details. The absence of any confirmation that the First Applicant's mother was in Ethiopia for the 2018 wedding, any record of the father's consent and any record on the marriage certificate that the marriage was by proxy were further matters identified by the Respondent

20. As regards the financial position it was noted that the sponsor meets the requirement as set out at paragraph 17.2 of the Policy document (on an annual vouched basic salary of in excess of €42,000 under contract with a State agency) but explained that the low level of funds in the First Applicant's bank account "*might result in an immediate reliance on public funds/resources, should the applicant be granted the visa as sought*".

21. In the consideration document, extensive reference was made to the constitutional rights safeguarded under Articles 2, 40.3.1, 41.1 and 41.3.1 of the Constitution and the decision of the Supreme Court in *Gorry v. Minister for Justice and Equality* [2020] IESC 55. It was recognised in express terms that the Irish citizen has a right to live in Ireland, to marry and to found a family. This did not include a separate unspecified right to cohabit protected by Article 41 albeit that cohabitation is a normal incidence of marriage. It was acknowledged that cohabitation by a married couple in a committed and ensuring relationship is "*something the State is required to have regard to in its decision making and to respect, the State is not obliged by the requirement to protect the institution of marriage, to accord any automatic immigration status consequent on a marriage*."

22. In concluding that the interests of the State outweighed those of the Applicants, consideration was given to the fact on the one hand that the State has a right to pursue immigration control, to uphold immigration law and to ensure the economic well-being of the country and these interests were balanced against the rights of the Applicants when consideration is given to the fact that the relationship had been almost entirely long distance since marriage in June, 2018 and there being no apparent restriction on the First Applicant returning to Ethiopia.

23. Separate consideration is recorded as having been given to the Applicants' rights under Article 8 of the European Convention on Human Rights.

EVIDENCE

24. In her Affidavit grounding these proceedings the First Applicant refers to the fact that at the date of swearing she was pregnant. She also refers to political changes in 2019 in the Somali region of Ogadenia, within that Jijiga, which made it dangerous. She explains that the then President Cabdi Mohamud Ilay of the local region was removed from power and arrested and all of his supporters and his government were removed from power. She confirms that a new President (Mustafe Cajaf) was placed as interim president and continues to rule the Somali region within Ethiopia. She states that power in the region is unstable as people are divided and the army and police forces are still loyal to the old president. Any person thought to be loyal to the old regime can be arrested without question and detained. She avers that Jijiga is a very corrupt and unsafe place to live. She states that there are very strict gender roles where women are homemakers and men work. She says decent jobs are mainly given to people based on their tribe or clan and rarely on their merits and challenging the status quo is not welcomed and can sometimes cost you your life. She says the current political unrest in Ethiopia has only exacerbated this and people continue to disappear in Jijiga.

25. She maintains that the situation in Ethiopia was getting increasingly dangerous and unstable from 2019 when she left. Conflicts between Government forces and local forces were becoming more frequent and violent. There were several people the Second Applicant had known who were targeted and arrested and not heard from again. Inflation was rising in the country and jobs becoming scarce as international funding for organisations was lessening. The Second Applicant and many other staff in the office he worked in were fired in December 2019

due to lack of project funding. He was fortunate enough to find another job in the NGO sector and began this role in January 2020 where he continues to work. She says that she was very sad to be leaving her husband behind and scared for his safety because of the worsening political situation.

26. Much of the information given on affidavit in relation to safety concerns in Ethiopia is new information and only tangential reference was made to Ethiopia having a travel alert during the application process.

27. In opposing the proceedings, the Respondent's deponent exhibits the full first instance visa application file, the full visa appeal file and confirms that the Applicants made no contention or submission to the Respondent at any point in the application or on appeal that Jigjiga was unsafe for them.

SUBMISSIONS

28. In broad terms the Applicants complain in these proceedings that in refusing to grant the Second Applicant a visa, permitting him to enter the State and settle into married life with his Irish citizen wife in Ireland, the Respondent has acted in breach of the rights of the Applicants, a married couple and family unit under Article 41 of the Constitution and under Article 8 of the European Convention on Human Rights. It is claimed that the Respondent's conclusion that if the Applicants wish to live together as a family unit, the First Applicant should leave Ireland and the European Union to live with her husband in Ethiopia is unreasonable and the Respondent has not conducted a proper proportionality assessment, particularly with regard to the weighting given to the First Applicant's right to live in Ireland and to cohabit with her husband in Ireland and/or in the European Union as against the Respondent's countervailing concerns. It is further contended the Respondent has erred in her proportionality assessment and/or the reasoning shown in the making of that assessment, by failing to identify, except in the broadest terms, the legitimate countervailing interests of the State that outweigh the significant rights of the Applicants and further has failed in her legal duty to establish and/or to show that the restriction of those rights is no more than is strictly necessary to achieve that object.

29. It is also contended that the Respondent has erred in her determination that there are no unreasonable restrictions preventing the Applicants establishing family life in Ethiopia in view of the fact that the Irish Department of Foreign Affairs has recently declared Ethiopia a *"No Travel Zone"* and conflict in Ethiopia between government and regional forces is reported to have rapidly escalated since November, 2020 with a nationwide state of emergency being declared on the 2nd of November, 2021 (after the impugned decision).

30. It is maintained that the Respondent failed to apply the ratio of the Supreme Court decision in *Gorry v Minister for Justice and Equality* [2020] IESC 55 and specifically it is contended that the Respondent has proceeded as if *Gorry* establishes *"a presumption against the non-citizen spouse residing in Ireland"* and has placed the *"rights of the State"* in presumptive conflict with the rights of the Applicants without due regard to the fact that the rights of the Applicants as a married couple and/or a family unit are constitutionally guarded rights and do not conflict with the *"rights of the State"* absent significant countervailing circumstances.

31. Greatest focus is placed on behalf of the Applicant on the Respondent's determination that the Applicants have failed to meet the Respondent's financial requirements notwithstanding that the First Applicant has earnings which exceed thresholds identified in the Respondent's Family Reunification Policy. It is contended that this decision was taken in breach of fair procedures in circumstances where finances were not an issue raised at first instance with the Applicants and in circumstances where no further information was requested from the Applicants by the Respondent when determining the appeal to allow the Applicants address any concerns the Respondent had from a financial perspective. In this regard, reliance is placed on the fact that the First Applicant had savings of €7000 which would have been relevant to the Respondent's considerations had she known that the Respondent considered the Applicants risked not being able to sustain themselves financially.

32. It is further argued that in arriving at conclusions in relation to financial matters that the Respondent has also unreasonably failed to take into account that the Second Applicant proposes to work in the State in circumstances where the Second Respondent has a primary degree in procurement and logistics and six years' experience of working in that area with NGOs in Ethiopia. It is contended that the Respondent's conclusion that the Second Applicant was likely to become dependent on State subsidies or benefits was unreasonable in

circumstances where there was no consideration of whether he would in fact be eligible for any such payment, given his wife's income, which would form part of any such assessment.

33. It is argued with particular reference to the documents evidencing marriage that the Respondent has taken an unreasonably rigid approach in her consideration of the supporting documents provided by the Applicants and has failed to take into account explanations given by the Applicants in, for example, discrepancies in the spelling of the First Applicant's name. It is contended that where documentary issues arose, fair procedures required that the Respondent seek further documentation before making adverse findings. In this regard the failure to contact the Applicants to raise with them specifically and directly that it was not sufficient to provide only extracts from the passport but that a full copy of the passport was required was pressed with some force.

34. For her part, the Respondent maintains that a comprehensive assessment was carried out in this case with a full and correct application of the ratio in the *Gorry* case. It is contended that competing interests were properly weighed and a proportionate balance struck. It is acknowledged that obstacles to establishing a family home elsewhere in the country or countries of origin of applicants for permission to reside as spouses are relevant but it is contended that the decision cannot be impugned by matters that were not put before the decision-maker.

35. Separately, it is accepted on behalf of the Respondent that financial concerns had not been raised with the Applicants during the decision-making process. It is contended nonetheless that in the facts and circumstances of this case any unfairness arising from the failure to raise financial concerns with the Applicants during the process should not lead to the quashing of the decision because there were other problems with the application which had been raised at first instance and had not been addressed on appeal which would in themselves ground the decision to refuse irrespective of any financial concern. Specifically, reliance is placed, inter alia, on the quality of the documentation confirming the marriage (for example, absence of attestation, inconsistencies between the First Applicant's name on the marriage certificates submitted at first instance and on appeal and absence of evidence of father's consent which is said to be a legal requirement), insufficient evidence that the First Applicant's mother was present in Ethiopia for a proxy marriage and a failure on the part of the sponsor to submit a full copy of her current Irish passport.

36. In reply, it is submitted that the financial concerns were an important feature of the refusal decision and that coupled with the other issues undermining the decision, rendered the decision unsustainable.

POLICY DOCUMENT ON NON-EEA FAMILY REUNIFICATION

37. In 2013 (revised in 2016) the Respondent published a detailed policy document to set out a comprehensive statement of Irish national immigration policy in the area of family reunification. Reference was made to a number of specific elements of this policy document namely, paras. 1.8, 1.12, 8.4, 17.2 and 17.8 which provide as follows:

> *"1.8 It is intended however that family reunification with an Irish citizen or certain categories of non-EEA persons lawfully resident will be facilitated as far as possible where people meet the criteria set out in this policy. It is considered as a matter of policy that family reunification contributes towards the integration of foreign nationals in the State. Special consideration will also be given to cases where one of the parties concerned is an Irish citizen child.*
>
> *1.12 While this document sets down guidelines for the processing of cases, it is intended that decision makers will retain the discretion to grant family reunification in cases that on the face of it do not appear to meet the requirements of the policy. This is to allow the system to deal with those rare cases that present an exceptional set of circumstances, normally humanitarian, that would suggest that the appropriate and proportionate decision should be positive.*
>
> *8.4 It is a question of finding the correct balance between rights and responsibilities. All other things being equal however, a non-EEA resident of Ireland in active well paid employment will have a considerably greater opportunity of being joined by family members than a person who is subsisting on State supports. Indeed a person who is unable to support him/herself cannot expect the State to assume the necessary financial obligations on his/her behalf.*
>
> *17.2 An Irish citizen, in order to sponsor an immediate family member, must not have been totally or predominantly reliant on benefits from the Irish State for a*

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

17.8 The onus will be on the applicant to satisfy the immigration authorities as to the level of earnings or financial resources and to provide any evidence required in support thereof. The immigration authorities may also consult directly with the Revenue Commissioners as appropriate."

38. Separately, the Guidelines make clear (see para. 13.4) that the onus is on the applicants for family reunification to satisfy the immigration authorities that the familial relationship is as claimed.

39. The Guidelines set out (at para. 15.2) that as a general principle applicable to all decision making, marital relationships or those involving civil partnership must be monogamous, freely entered into by both parties, lawfully conducted and recognised under Irish law.

40. The Guidelines also refer specifically to "*proxy marriages*" and confirm that they may be recognised under Irish law. A proxy marriage is identified for the purpose of the policy as one where an appointed substitute (proxy) stands in for a party to the marriage at the ceremony. Such marriage is considered to have been contracted in the country in which the ceremony took place. Where the country in which the ceremony takes place permits proxy marriages, such a marriage will meet the requirements of the Respondent's policy. It is noted, however, that a proxy marriage gives rise to additional concerns not only in immigration terms but also for the protection of the parties.

41. The Guidelines confirm that the immigration authorities will enquire into the circumstances of the marriage and must be satisfied that the marriage is genuine and freely entered into by both parties and that it is "*not a device aimed predominantly at securing an immigration advantage*". The parties must also be able to show that they have met each other in person.

DISCUSSION AND DECISION

42. In argument and through their written and oral submissions, the Applicants present what is in essence a two-pronged attack on the impugned decision. Firstly, they challenge the Respondent's process in finding the facts in this case. Secondly, they challenge the approach taken by the Respondent to an assessment of the family rights of the Applicants in arriving at the decision to refuse, contending that there has been a failure to properly interpret and apply the decision of the Supreme Court *in Gorry v. Minister for Justice*. I propose to address these two separate and broad grounds of challenge in turn.

Fact Finding Process and Approach to the Evidence

43. It is clear to me, and it is not really disputed on behalf of the Respondent, that there was a want of notice in the decision-making process insofar as matters of financial concern arise. As no financial concern had been raised in the first instance decision, the Applicants were not on notice that there were concerns to be addressed and they were not given an opportunity to do so. In circumstances where the First Applicant's demonstrated earnings well exceeded the minimum specified in the Respondent's policy and the Second Applicant has an established work record, it seems to me that any adverse conclusions as to whether the Applicants meet the Respondent's financial eligibility requirements would require to be carefully reasoned following consideration of such material as the Applicants might present once put on notice of those concerns.

44. Were financial considerations the only basis for the decision or were I satisfied that they were pivotal to the decision, then it seems to me that the decision to refuse the visa could not be allowed to stand and would properly be made amenable to an order of *certiorari*. The significance of the flawed process regarding the consideration of the Applicants' finances has to be seen, however, in the context of the decision as a whole. The Respondent has met this case on the basis that there were sufficient other grounds justifying the decision, regardless of the treatment of the financial considerations.

45. It is clear that the refusal in this case was grounded on a series of findings. Some of the other grounds of refusal have not been adequately addressed by the Applicants, even though issues with the state of the application had been notified to the Applicants in the first instance refusal, thereby putting them on notice of the matters which they were required to deal with on appeal. Specifically, the First Applicant failed to submit a full copy of her current Irish passport

despite it being expressly pointed out in the first instance refusal that this was considered to be a necessary missing document. The Applicants were also on notice of a requirement that certificates be attested. Not only did the Marriage Certificate submitted on appeal have a different spelling of the First Applicant's name to that which had been submitted at first instance (a fact which is not clearly explained by registration of the marriage taking place after the deed poll had been executed), it was also rejected by the Respondent as unattested. Different versions of marriage certificates have been submitted as between first instance application and the appeal application. Accordingly, questions remain in relation to the marriage certificates which have not been satisfactorily addressed.

46. Furthermore, the Applicants were on notice that the Respondent considered that they had failed to submit supporting information regarding the fact that their marriage was done by proxy and that the First Applicant's mother was present in Ethiopia for this purpose. No explanation is forthcoming as to why this lacuna was not addressed during the application and appeal process. It is suggested that had the Respondent viewed the USB stick, the photos and recordings of the ceremony would have addressed this concern. It is not clear to me that this is so (in circumstances where the contents of the USB stick have not been put in evidence). Even if the USB stick did contain material in relation to the 2018 ceremony in respect of which an issue was raised, it was made clear by INIS on its website that it would not accept a USB stick.

47. I am satisfied that despite the fact that a question as to the First Applicant's mother's attendance at the 2018 service as proxy was raised in the first instance decision, no proper attempt was made to address this concern on appeal. Where the First Applicant's mother is claimed to have been in Ethiopia as proxy at her daughter's wedding, it is not unreasonable of the Respondent to require some evidence that she was in fact present in Ethiopia at that time. It is noted that the Applicants have submitted evidence of flights and hotel bookings in respect of their time together in Ethiopia and no explanation has been given as to why no evidence at all has been produced to confirm the First Applicant's mother's presence for the ceremony in 2018.

48. Leaving aside the matters which were notified to the Applicants as adverse to a positive consideration of their application at first instance which have not yet been addressed which I have sought to summarise above, it should also be recalled that it is further a feature of the impugned decision that in addition to the financial matters (which were not properly notified),

the Respondent appears to ignore other evidence which was in fact given. In deciding whether the refusal may be sustained on grounds which appear unimpeachable notwithstanding some identified and accepted deficiencies, I must consider the significance of the apparent failure to have full regard to all of the evidence submitted.

49. A prime example of material seemingly overlooked is the explanation offered by the Applicants for the late registration of the Second Applicant's birth. It was claimed in the refusal decision that no explanation had been provided as to why the Second Applicant's birth was not registered until the 16th of March, 2020 (the same date as the registration of the proxy marriage) - 29 years after his birth. In fact, an explanation had been given. The Applicants had confirmed that the system of registration was not universally applied in Ethiopia and registration occurs when application in this regard is made. In this case, it is claimed that application for registration only took place when certificates were required for the visa application which is why both registrations occurred together. Rather than proceed on the basis that no explanation was given, the proper course for the Respondent was to record the explanation given and if she were dissatisfied with the explanation, to set out why. It is therefore of concern that there are examples in the impugned decision of an apparent overlooking of explanations given in the documentation. If the absence of regard for the explanation provided could be identified as a primary reason for the refusal, this failure could not be excused.

50. Separately a concern arises from the apparent failure of the Respondent to appreciate that the Applicants were contending that there were safety concerns pertaining to residence by the First Named Applicant in Ethiopia. This failure would, in my view, be a serious omission and would be fatal to the refusal of the application but for the fact that only a very passing reference is made to the existence of a travel alert affecting Ethiopia and no proper or real submission was made in this regard in support of the application. On the contrary, the evidence presented to the Respondent was that the Applicant had travelled to Ethiopia and lived there for several months without any reference to a security concern for her during that period. Furthermore, it seems that from an evidential perspective, the Applicants contend that the situation in Ethiopia has deteriorated since the application was made.

51. While there are undoubted issues with the decision-making process insofar as some issues were not raised (specifically the financial issues) and some explanations were ignored (for example, in relation to late registration of births and marriages) and relevant submissions were not made and therefore not considered (notably in relation to safety concerns arising from

the political situation in Ethiopia), the question for me is whether the identified issues render the decision unsustainable or whether, on the contrary, the refusal should be allowed to stand because a sufficiently sound and stand-alone basis for the decision is demonstrated to be present.

52. In *Olakunori v Minister for Justice, Equality and Law Reform* [2016] IEHC 473 Humphreys J. provided a summary of the principles to be applied in a judicial review involving a challenge to a visa refusal which applied the Policy Document (such as the within). He found (at para. 23) that all applicants must be taken to be on notice of the published criteria for applications. At para. 64, he summarised the principles to be applied as follows:

> *"(i) […]*
>
> *(vii) in immigration matters, which are classically at the core of the executive power of a State, there must be a wide discretion vested in the decision-maker in the absence of clear statutory provisions to the contrary;*
>
> *(viii) the integrity of the immigration system is promoted by consistency in decision-making, and the Minister may lawfully take this into account in deciding on a visa;*
>
> *[…]*
>
> *(x) if in a particular decision the correct test is not articulated in a precisely legally correct manner, that is not fatal as long as the correct test is applied in substance;*
>
> *(xi) the weight to be attached to various factors is quintessentially a matter for the decision-maker;*
>
> *[…]*
>
> *(xiii) where a decision is based on a number of independent grounds each capable of supporting the result, the decision will not be quashed if any one or more grounds stand unaffected by any error in any impugned grounds."*

53. Similarly, in *Mukovska v Minister for Justice & Equality* [2018] IEHC 641 in the High Court, Barrett J. stated at paragraph 2:

"Administrative decisions do not fall to be parsed like statute-law. By reason [1] the court understands the decision-maker to mean that, viewed in the round, the decision-maker considers that the applicant's need to undertake the desired course has not been demonstrated/warranted to the decision-maker's satisfaction. That may seem to Ms Mukovska to be a harsh or unexpected conclusion. However, it is a conclusion that the decision-maker was entitled to reach on the evidence at hand. Entry to the State is a privilege governed by ministerial discretion; the onus rests on applicants at all times to satisfy the relevant minister of the day that s/he should grant the visa sought. Here the decision-maker is not so satisfied on the evidence before her or him. Even if either or both of reasons [2]/[3] are flawed, absent some deficiency in the decision-making process (and the court sees none) the Minister's decision can stand on reason [1] alone."

54. It is noted that the High Court judgment in *Mukovska* was successfully appealed to the Court of Appeal. In the refusal decision challenged in that case, the Respondent had found that the Applicant had not demonstrated *"[her] need to undertake her course of study in this State"*. The Court of Appeal found that the reasoning for that ground contained in the refusal was insufficient and thus the decision in that case quashed. Relevant to my considerations, however, the Court of Appeal found (at para. 40) that:

> *"The deficit in this case arose from an insufficiency in the totality of the information available to the applicant."*

55. Nonetheless, the Court stated at para. 44:

> *"That being said, I do not think that I could accept the appellant's argument that the infirmity of one reason must always result in the decision being condemned. There may well be cases where a decision is based on valid and properly expressed reasons which would allow a decision to stand, notwithstanding defects in some other aspect of the decision-making procedure."* [emphasis added]

56. Having considered the files put before the Respondent, I am satisfied that there were significant shortcomings in the application presented by the Applicants. While they claim that

they were not asked to provide an attested copy of the marriage certificate (while Counsel on his feet suggests that an attested copy was in fact submitted), the INIS website, through which the Applicants would have applied (and were referred to) states in the 'Guide to Supporting Documentation':

> *"The visa officer considers each application on its merits and may request additional information or documentation.*
>
> *If you do not submit the required documentation your application may be refused on the basis of insufficient documentation.*
>
> *Any State issued official documents, such as Birth Certificates, Marriage Certificates, Death Certificates, Divorce Certificates that were issued by a State outside of the EEA or Switzerland, must be attested/apostilled as genuine by the Ministry of Foreign Affairs in the State that issued the document, in order that it can be accepted as evidence for Irish visa purposes. Such documents are required to be translated into English or Irish, if necessary."*

57. Similarly, while it is complained in submissions that it was not made clear that copies of *"every page of the First Applicant's passport were required. This would have been easily addressed if requested by the Respondent",* it is undeniable that in refusing the application at first instance, it was stated under the heading "*Insufficient Documentation*":

> *"Sponsor has failed to submit a full copy of current Irish Passport."*

58. Irrespective of the controversy as to whether an attested marriage certificate was submitted or not which only arose during the hearing and is not dealt with on affidavit and regardless of the discrepancies in the First Applicant's name as between the two marriage certificates separately submitted at first instance and on appeal which has not been satisfactorily addressed, it is manifestly clear that the Applicants failed to provide sufficient evidence to the Respondent to allow her to be satisfied in relation to important matters including the First Applicant's travel in and out of Ethiopia (due to the absence of the full passport which she had been expressly requested to provide) and her mother's attendance in Ethiopia as proxy for the marriage ceremony in the summer of 2018 (despite the fact that this was raised as an issue in

the first instance decision). These difficulties with the application are not tangential or minor difficulties in my view and they are not unreasonably relied upon to ground a refusal of the reunification application in this case. In all the circumstances, it was open to and proper for the Respondent to conclude that the state of the documentary evidence presented was inadequate and to refuse on this basis, even in view of the explanation provided for late registration and the change in the First Applicant's name by deed poll which appears to have been overlooked.

59. I accept, however, that financial conclusions are also not tangential or peripheral, their importance depending on the circumstances of the case and other reasons advanced for refusal. Financial considerations are clearly important in reunification applications and are separately addressed in the policy document. Notwithstanding that two of the grounds of refusal on appeal related to conclusions in relation to the Applicants' finances in this case, if I could be satisfied that financial considerations, while identified as grounds of refusal, were not determinative of the outcome of the application, then I would not quash the decision to refuse on this basis.

60. It follows that a frailty with the financial findings does not necessarily undermine the integrity of the decision made to refuse on the facts and circumstances of this case, where, as in this case, the other reasons advanced for refusal stand unimpeached and are such as to provide a separate and clear basis for refusal. Similarly, in view of the other reasons advanced in this case, I am satisfied that a failure to have regard to the explanation for the late registration of the Second Applicant's birth provided would not warrant quashing the decision if it is clear that this failure did not materially affect the outcome of this application. Nor do I consider it would be proper for me to intervene to quash the decision because there has been a failure to consider the deteriorating political situation in Ethiopia where no real information in this regard was urged on the Respondent prior to the decision to refuse. I am satisfied that it would be unfair or wrong for me to interfere with a decision on the basis of information which was not before the decision maker, even where I am satisfied that the information not considered is both relevant and material.

61. In this case, the evidential gaps identified in other grounds of refusal advanced by the Respondent were such that I am driven to conclude that it was almost inevitable that the decision to refuse would have been made on the standalone grounds relating to documentation,

even if there were no concerns in relation to finances and full regard to the explanations given were had.

62. To be clear, there may well be cases where a failure to provide notice of a financial concern would be fatal, notably where the financial concern is pivotal or central to the decision or is likely to have impacted on the ultimate decision to refuse. Likewise, an overlooked explanation could in certain circumstances render a decision liable to being quashed where it is established that the overlooked explanation could have had a bearing on the outcome. It is necessary to consider the decision as a whole. While I have concluded that there was a clear want of notice with regard to financial concerns and some explanations provided were improperly overlooked, I am satisfied that even cumulatively these factors combined do not render the decision unsustainable on the facts and circumstances of this case. This is because in this case there were other free-standing and untainted grounds for refusal. These grounds arise from issues which were fairly and properly identified by the Respondent at first instance without these issues being addressed during the appeal process. These issues were real, weighty and proper and on their own clearly ground a refusal irrespective of any financial considerations and considerations arising in connection with overlooked information in this case. It is recalled that the onus remains on the Applicants to produce evidence to satisfy the Respondent that it is an appropriate exercise of discretion to grant the application. Reasonable concerns raised with the documentation were not adequately addressed such that a refusal was properly and independently grounded even had the Respondent been fully satisfied as regards finances and matters such as the late registration of the Second Applicant's birth.

63. Given the particular facts in this case, where there were identified issues with the decision making process but where there were also new matters raised in the judicial review proceedings which did not form part of the information considered in the decision making process but which were clearly relevant (e.g. safety concerns in Ethiopia and pregnancy of the First Applicant), I queried during the hearing whether this is a case where a court should properly refrain from intervening on the basis that a fresh application is available and would constitute a more appropriate course of action on the basis that resubmitting the application afresh would allow the Applicants to cure evidential gaps in their application and would also allow them to properly present alleged safety concerns affecting the Applicants' ability to enjoy family life in Ethiopia together with updated particulars relating to their family life including the fact of the First Applicant's subsequent pregnancy. The Applicants contend, however, that

the adverse consequences for them of the first refusal could not be addressed by a fresh decision, even where that decision is positive. In this regard, I have been referred to the decision of the Court of Appeal in *Mukovska.*

64. In its deliberations in *Mukovska*, the Court of Appeal reflected the lasting significance of a refused visa application stating (at para. 22):

> *"If the appellant applies for a visa here or elsewhere in future, she will have to disclose the letter relating to the impugned decision. The appellant's assertion that she could be prejudiced if a letter of refusal is subsequently examined by immigration authorities elsewhere is undoubtedly correct. The potential for prejudice is sharpened if the refusal letter is not expressed accurately, clearly and cogently or if the underlying decision is irrational or unreasonable. In my view, the realistic potential for future adverse consequences entitle her to relief if she establishes the legal defects contended for by her, irrespective of her changed circumstances."*

65. It is also a fact, acknowledged by the decision of the Court of Appeal in *Mukovska* that if required to disclose the visa refusal letter in this case in the future, the Applicants will be required to disclose adverse findings unfairly reached as to financial considerations affecting their application. This factor has been considered by me in deciding whether the requirements of justice and fairness support the grant of relief in this case because of the identified frailty with the financial conclusions drawn and a concern in relation to overlooked explanations. I have concluded that given the separate stand-alone reasons advanced to ground the refusal, which I am satisfied independently support and adequately ground the decision to refuse, and in the light of the particular manner in which financial concerns are identified in this case and the refusal is couched, that no separate real potential future adverse consequences flow from a refusal which includes those financial concerns together with the other, unassailable grounds. I do not consider that the financial concerns raised can be read as findings touching on the character of the Applicants which might have ongoing adverse implications. Their financial position should be capable of being objectively verified and is not static, such that a finding in 2021 on financial grounds, perhaps in the absence of full information, is unlikely to have any bearing on an assessment which is informed by better facts.

66. Similarly, insofar as findings made may fail to reflect explanations offered, I do not consider that it is demonstrated that a prejudice flows from the failure to reflect the explanations offered which would warrant me quashing a decision which is otherwise properly grounded.

67. I have decided not to quash the decision to refuse notwithstanding findings made by me that the process was flawed in part because I am satisfied that the application would have been refused anyway on the separate and standalone grounds identified but also because the conclusions arrived at absent proper process in the manner expressed in the refusal letter do not reflect negative character findings which could be considered prejudicial in a lasting manner. Notably, in the case of a young couple where the Irish citizen spouse is becoming established in a new career, as occurs in this case, financial considerations are not inherent to the parties, are subject to change and are objectively verifiable.

Whether the Respondent erred in her interpretation or application of the Supreme Court judgment in Gorry v Minister for Justice and Equality [2020] IESC 55.

68. The Applicants assert that the Respondent operated under the '*misunderstanding'* that *Gorry* establishes a presumption '*against'* the non-citizen spouse residing in Ireland. I do not accept that it is established that the Respondent operated under any such misunderstanding. At para. 71 of the principal judgment in *Gorry*, O'Donnell J stated:

> *"... the starting point is that citizenship of one spouse plus marriage plus prospective interference with cohabitation does not equal a right of entry to a non-national spouse or give the Irish citizen spouse an automatic right to the company of their spouse in Ireland although, as discussed above, any refusal of entry would require clear and persuasive justification."*

69. The considerations which accompanied the review decision correctly sets out paras. 26, 28 and 69 of the judgment of O'Donnell J. in *Gorry* and properly summarises the ratio of that decision stating:

> *"...it is recognised that the sponsor in the within case, as an Irish citizen, has a right to live in Ireland and an individual right to marry and found a family, there is no separate unspecified right to cohabit protected by Article 41, albeit that*

cohabitation is a normal incidence of marriage. In addition, as the applicant in the within case, is a Non-EEA national, they do not have a right to enter or reside in the State and do not acquire such a right to enter or reside in the State by dint of marriage to an Irish citizen. While cohabitation by a married couple in a committed and enduring relationship is something the State is required to have regard to in its decision making and to respect, the State is not obliged by the requirement to protect the institution of marriage, to accord any automatic immigration status consequent on a marriage."

70. In my view, this statement demonstrates a proper understanding of the decision of the Supreme Court in *Gorry*. It is clear from the decision of the Supreme Court in *Gorry* that marriage does not carry with it an automatic right to co-habitation (or an automatic visa) as was properly found by the Respondent.

71. The Supreme Court was quite clear to state in *Gorry* that the scales should not be "*preloaded*" by characterising a right of cohabitation as worthy of the highest level of protection. The fact of marriage to an Irish citizen is treated as a consideration which undoubtedly weighs in support of the grant of the visa (and was so weighed in this case), but it does not give rise to an automatic entitlement. I believe that this was accurately reflected by the Respondent in her consideration.

72. The Applicants complain that the Respondent placed:

"the "rights of the State" in "presumptive conflict with the rights of the Applicants when the rights of the Applicants as a married and/or a family unit are constitutionally guarded rights and do not conflict with the "rights of the State" absent significant countervailing factors."

73. I am not satisfied having regard to the terms of the considerations document that this complaint is substantiated. Properly acknowledging that marriage does not carry with it an automatic right to co-habitation (or an automatic visa), as occurred in this case, does not equate to a presumption against the non-citizen spouse residing in Ireland as contended on behalf of the Applicants. There is no "*presumptive conflict*" as claimed but rather a legitimate tension between pursuing immigration control and other State policies to include economic policies on

the one hand and also respecting the rights of the married couple on the other. Those competing considerations vary from case to case and attract different weight depending on the particular policy engaged and the circumstances of the applicant for permission.

74. While the institution of marriage itself is constitutionally protected and therefore the fact of marriage is a weighty consideration, the ratio of the Supreme Court in *Gorry*, properly understood by the Respondent in my view, is that an ancillary entitlement of co-habitation is not afforded the same level of constitutional protection. Accordingly, due respect for the constitutionally protected institution of marriage does not require the State to provide for an automatic right to cohabit in the State in every case. Such a right would arise, however, where following an assessment of the individual case specific circumstances, the Respondent decided that the rights of the applicant(s) outweighed any legitimate countervailing State interest.

75. I am satisfied that the Respondent assessed the application with due regard to both rights under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights including the proportionality of interference with those rights, albeit it should be recalled in circumstances where she also found that the documentation adduced to establish the marriage was unsatisfactory. Insofar as additional information which is material and relevant to these considerations has been identified in grounding the judicial review proceedings brought on behalf of the Applicants, that information was not before the Respondent. While clearly relevant material pertaining to obstacles to establishing a married life together in Ethiopia for safety reasons and the fact that the Applicants are expecting a child ought properly to be considered and weighed in the decision making process and will impact on conclusions regarding the proportionality of a refusal of permission, a failure to consider and weigh material does not render a decision liable to be quashed where it has not been put before the Respondent on behalf of the Applicant during the process and before the decision is made.

76. In the considerations attaching to the review decision under challenge in these proceedings, it was made abundantly clear that the Respondent weighs the right to uphold the integrity of the immigration policies of the State and to control the entry, presence and exit of foreign nationals and to ensure the economic well-being of the country. Under the heading 'Conclusion' on page 15 it was stated:

"All matters concerning the Irish citizen and the applicant, insofar as they have been made known, have been considered.

On behalf of the applicant, it is submitted that the applicant and the sponsor are not financially supporting each other and they are both living on their own means. The low level balance maintained in the sponsors' bank account, gives rise to reasonable concerns that the applicant would be reliant on the social welfare of the State should the visa be granted as sought.

In considering the nature of the relationship between the applicant and sponsor, it is noted that this has been entirely long-distance in nature since their marriage on 24/06/2018 and since they first met in July 2019 and the commencement of the relationship.

In considering whether family life could be established elsewhere, insufficient information has been submitted demonstrating that the sponsor would be prevented from continuing to travel to Ethiopia to visit their spouse and maintain the relationship in the manner in which it developed or that it is more difficult or may be extremely burdensome for the applicant and sponsor to reside together anywhere else, be that in the applicant's home State or any another State of their choosing. It should also be noted that a decision to refuse the visa application, in respect of the applicant, after appropriate consideration of the facts, is not invalid merely because it affects the spouses' desire to cohabit in Ireland.

All factors relating to the position and rights of the family/couple have been considered and these have been considered against the rights of the State. In weighing these rights, it is submitted that the factors relating to the rights of the State are weightier than those factors relating to the rights of the couple.

In weighing these rights, it is submitted that a decision to refuse the visa application in respect of the applicant is not disproportionate as the State has the right to uphold the integrity of the State and to control the entry, presence, and exit of foreign nationals, subject to international agreements and to ensure the economic well-being of the country".

77. In this way, the Respondent identified legitimate countervailing interests of the State and justified the refusal of the visa as necessary in order to achieve those interests or objectives. In the absence of a legal right and it being a decision falling within the discretion of the Respondent, it is for the Respondent to weigh and balance these competing interests subject only to the requirement that she do so in a proportionate manner and in accordance with the requirements of constitutional justice.

78. A comprehensive assessment was carried out in this case in which it was noted that the relationship was almost entirely long distance, that the First Applicant has been entitled to travel to Ethiopia and that the relationship could be maintained in the manner in which it developed. While issue is taken with this finding on the basis that a passing reference had been made to the existence of a travel alert in a letter accompanying the application, I am satisfied that no case was ever made that it was unsafe for the First and/or Second Applicant to travel and reside together in Ethiopia. As noted above, I would not consider it correct or fair for me to fault the Respondent's decision consequent upon a failure to consider and address safety concerns arising from unfolding political difficulties in Ethiopia absent this case having been presented to the Respondent by the Applicants in advance of the negative decision. No such case was made. As the Respondent highlighted in the consideration document, the State is entitled to pursue immigration control, uphold immigration law and ensure its own economic well-being.

79. Where the countervailing personal and family rights of the applicants have not been demonstrated to outweigh the State's interests following an assessment which respects principles of proportionality, the Respondent is entitled to refuse permission to reside notwithstanding that this interferes negatively with the cohabitation rights of the couple and precludes cohabitation in the State. The Applicants have failed to persuade me that there is anything in the consideration document leading to refusal of this visa application which suggests that the Respondent misapplied the ratio in *Gorry*. Further, while the Respondent did not consider ostensibly relevant information relating to safety concerns affecting Ethiopia in arriving at her conclusion by reason of the Applicants' failure to properly present this information during the decision-making process, this should not undermine the validity of the decision when the option of re-presenting the application supported by better and fuller information exists. The competing or countervailing considerations which arise on a full and

properly supported application presented now would be different to those which prevailed when the decision challenged in these proceedings was made.

80. I am troubled, however, by the fact that one of the countervailing considerations identified in carrying out the proportionality assessment is the economic well-being of the State in circumstances where I have found there has been a flawed process in assessing the Applicant's financial circumstances in this case. In view of this flawed process, it cannot be said that the facts relied upon regarding the Applicants' financial position in reaching a decision regarding the requirements of the State's economic well-being have been properly determined. Notwithstanding that I have already found that separate, stand-alone grounds of refusal arise in relation to documentary issues identified and not addressed, I have considered whether the treatment of the family rights of the Applicants in the considerations document support a conclusion that the application was not refused on the basis that the parties had not demonstrated through the submission of all necessary and appropriate documentation that they were married and had not established a family life simpliciter but rather on the basis of a proportionality assessment in which the fact of marriage is accepted but the economic interests of the State are identified as countervailing considerations which would justify refusal. Were this the basis for the refusal, it would tend to suggest that the financial conclusions improperly arrived at were potentially relevant to the Respondent's conclusion that a refusal did not result in a disproportionate interference with the Applicants' rights and therefore core to the decision to refuse.

81. Having considered the structure of the decision letter and the considerations document, however, it seems to me that the consideration of the application with regard to Article 41 of the Constitution and Article 8 of the European Convention of Human Rights are compartmentalized and in separate sections of the considerations document. Although financial considerations are therefore clearly relevant to a balancing exercise in a consideration of Article 41 rights and any countervailing State interests and there is a want of notice in the approach to those financial considerations which undermines the fairness of the decision-making process in that regard, it seems that the consideration of Article 41 rights in this case occurred separately from a consideration of the documents and sufficiency of evidence. As I have already found that the other considerations regarding the deficits in the evidence relied upon were independently capable of grounding the decision, the fact that financial considerations cannot be taken to have been properly weighed in the proportionality assessment conducted does not

render the decision to refuse unsustainable. In other words, although the proportionality assessment is flawed by the underlying failure to properly determine the facts regarding the Applicants' financial position, it had already separately been concluded in the considerations document that insufficient evidence had been provided such that the application stood to be refused regardless of any conclusions drawn on a proportionality assessment following a proper consideration of the financial situation of the Applicants.

CONCLUSION

82. In the context of the decision made in this case, I conclude that the financial findings which were made absent due process do not affect the overall integrity of the decision, given the nature of the other grounds identified for the decision to refuse which I consider to be sufficiently weighty in themselves and unassailable. The evidential gaps identified during the decision-making process were such that I am satisfied it was almost inevitable that the decision to refuse would have been made on the grounds of the gaps and issues identified, even if there were no concerns in relation to finances and full regard was had to the explanations given. Further, I do not consider that the potential longer-term consequences of the said adverse financial findings unfairly made are such as to warrant intervention by me on the facts and circumstances of this case simply because visa refusals require to be disclosed and remain part of the Applicants' record.

83. I am also satisfied that the Respondent correctly identified and applied the ratio of *Gorry* in her assessment of the circumstances of the Applicants' case, subject only to the caveat that the proportionality assessment was itself undermined by the flawed process affecting the financial conclusions arrived at which said conclusions potentially impacted on the Respondent's consideration of the State's economic interests in the conduct of a proportionality assessment.

84. It seems to me that the appropriate course of action for the Applicants in this case is to resubmit their application with further and up to date supporting documentation. Significant new information which is clearly material to the consideration of the application was relied upon in these proceedings but was not properly before the Respondent when the application was considered and refused. It should be possible for the Applicants to address concerns repeatedly identified not least the failure to submit a full copy of the First Applicant's passport

or any evidence as to her mother's attendance as proxy at a wedding ceremony in Ethiopia in June, 2018.

85. In the light of my conclusions, I will dismiss the proceedings. I will hear the parties with regard to consequential matters.