THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 239

[Record No.: 2022/ 345 JR]

BETWEEN:

Q.U.A

AND

K.D.A

APPLICANTS

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 9th day of May, 2023.

INTRODUCTION

1. These proceedings concern a challenge to a refusal of a join spouse visa to a Pakistani national on foot of a proxy marriage as confirmed on administrative appeal against a first instance refusal. The first instance refusal was justified in succinct terms on the basis that the Second Applicant, sponsor, was resident in Ireland on Stamp 1 conditions. These include a condition that it is accepted that the granting of temporary permission to remain does not confer any entitlement or legitimate expectation on any other person to enter or remain in the State.

2. In contrast, the refusal on appeal, which is the decision impugned in the within proceedings, was more fully reasoned on different grounds. While the refusal as confirmed on appeal was based on several factors, at the heart of the impugned decision was a finding that the Applicants had not produced documentation which could support a finding of a marriage which was legally recognisable in the State. As explained in the decision considerations, a concern about the marriage certificate arose from the fact that it did not record that the marriage was by proxy or identify the proxy representative.

3. The central finding as to the recognisability of the marriage, having regard to the documentation submitted to confirm the marriage, was made without notice to the Applicants. The Applicants claim that the concern which underpins the decision to refuse is based on a mistaken understanding of what is normally recorded in a marriage certificate in Pakistan, where proxy marriages are lawful. The Applicants rely on uncontested expert evidence to this effect.

BACKGROUND

4. The first Applicant was born in 1991 in Pakistan. The second Applicant was born in 1992, also in Pakistan. Both Applicants are citizens of Pakistan. The second Applicant entered the State in 2016 without permission. A deportation order was made in May, 2017 but was not enforced at that time. It is claimed that in January, 2018 the Applicants married in Pakistan in a proxy marriage which was not attended by the second Applicant who was at that time unlawfully in the State.

5. Notwithstanding the existence of a prior deportation order, as an exceptional measure the Second Applicant was granted temporary permission to remain in the State under stamp 1 conditions for 1 year valid from June, 2020 until June, 2021 with permission to work. One of the conditions of the Second Applicant's permission was that no rights to be joined in the State would flow from the status being granted. The condition is couched as follows:

> *"the following conditions will apply to your temporary permission to remain in the State:*
>
> .....

-that you accept that the granting of your temporary permission to remain does not confer an entitlement or legitimate expectation on any other person, whether related to you or not, to enter or remain in the state"

6. Subsequently, in March, 2021 the Second Applicant travelled to Pakistan and shortly thereafter, the First Applicant applied for a visa enabling her to join her husband in the State (where he resides and works). The Second Applicants' permission was renewed from June, 2021 until June, 2023 with the same conditions attached.

7. An application for a join spouse visa for the First Applicant was presented in July 2021 with supporting documentation and solicitor's correspondence. By email dated the 1st of October, 2021 this application was refused. An appeal was sought in November,2021 and a further refusal decision issued on the 25th of March, 2022. This is the decision impugned in these proceedings.

THE POLICY DOCUMENT

8. In 2013 (revised in 2016) the Respondent published a detailed Policy document entitled "*Policy Document on non-EEA Family Reunification"* [hereinafter "the Policy Document"] to set out a comprehensive statement of Irish national immigration policy in the area of family reunification. I have had occasion to consider this document on a number of occasions including in the case of *S.M. v Minister for Justice* [2022] IEHC 611 [under appeal], a decision relied upon on behalf of the Respondent, which bears some similarities with this case at least insofar as it concerned a proxy marriage in which financial considerations were a factor in the decision. Of note, however, while some issues were raised with regard to the genuineness of the marriage in that case, the respondent nonetheless proceeded to conduct a consideration of how a refusal would impact on the applicants' rights as safeguarded under Article 41 of the Constitution. There was also no question of an identifiable and uncontested error of law and fact. Insofar as the Respondent relies on it in this case because of its reference to the Policy Document, it is noted that the decision merely identifies the relevant provisions of the Policy Document, without any views being expressed thereon.

9. It is necessary to return to the Policy Document again in this case because reference was made to specific elements of the Policy Document in the record of the decision-making process herein. Provisions of the Policy Document identified as relevant to the refusal included as follows:

> *"6.2 It might also be recalled that in some cases leave to remain in Ireland was granted by the Minister subject to the express limitation that no rights to be joined by spouse or other family member would flow from the status being granted. Therefore, the family must be deemed to have made an informed choice in favour of Irish immigration status for certain members over the alternative of all residing together in their country of origin."*

10. The Policy Document makes clear (at 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. The Policy Document further sets 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 as follows:

> *"15.2 - As a general principle applicable to all decision making, marital relationships or those involving civil partnership (CP) must be monogamous, freely entered into by both parties, lawfully conducted and recognised under Irish law. Cases involving de facto relationships must be exclusive for the full duration of the qualifying period set out under section 15.3 below.*
>
> *15.3 The following relationship durations will apply in order to establish eligibility*
>
> - *For marriage or civil partnership no minimum duration of the marriage will be required;*
> - *De facto Partnerships (whether heterosexual or same sex) must have existed in a relationship akin to marriage including cohabitation for 2 years prior to application for family reunification."*

11. The Policy Document refers specifically to "*proxy marriages*" and confirms that they may be recognised under Irish law (at para. 15.6) as follows:

> *"15.6 Proxy marriages may be recognised under Irish law. Where this is the case the marriage will meet the requirements of this policy. However, a proxy marriage gives rise to additional concerns not only in immigration terms but also for the protection of the parties. 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 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."*

12. 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. The Policy Document continues (at para. 20.4) as follows:

> *"20.4 All marriages must be legally contracted, freely entered into and with both parties free to marry at the date of the marriage. The marriage must also be capable of recognition under Irish law for other purposes outside of the immigration system."*

13. Accordingly, the Policy Document confirms 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.

14. Financial considerations are addressed at paragraph 17 including in relevant part as follows:

"17. Financial resources for family reunification (nuclear family and de facto partners)

...

17.4 Category B sponsors must have a gross income in each of the previous 2 years in excess of that applied by the Department of Social Protection in assessing eligibility for Family Income Supplement (FIS) and the expectation must be that this level of income will be maintained.

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

17.6 The FIS does not apply in cases of couples where there are no children. Therefore, a minimum level of gross income in such cases would be - €30,000. This is the minimum salary for which an employment permit would issue...."

15. Addressing the requirement to give reasons for a refusal, the Policy Document states (at para. 21.3):

"21.3 In any decision to refuse an application, reasons shall be given. These may include, inter alia, one or more of the following:

- *Refused on grounds of public policy, public security or public health;*
- *Refused on financial criteria (to include failure to meet the income levels specified or uncertainty of future income);*
- *Refused on grounds that any commitments entered into by the applicant or sponsor might not be met;*
- *Refused on the basis of previous immigration history of the applicant or sponsor where this is considered on reasonable grounds to be relevant*
- *Refused due to inadequate or inconsistent information;*

- *Refused due to false documents or deception (see also Section 25 of this document);*
- *Refused due to failure to establish that special circumstances exist that would warrant an exception;*
- *Refused due to failure to establish the existence, durability or closeness of relationship (this condition may also apply where the family has voluntarily separated itself);*
- *Refused where in the opinion of INIS the marriage, partnership or adoption was contracted for the sole or predominant purpose of facilitating the family member to enter and reside in the State."*

16. It is therefore clear from the terms of the Policy Document that proxy marriages may be recognised but will be subject to scrutiny to ensure the marriage is genuine and legally recognisable. It is also clear that financial considerations are important but not determinative as the Policy Document expressly recognizes that decision makers retain a discretion to grant family reunification in cases that on the face of it do not appear to meet the requirements of the policy (see paras. 1.6 and 1.12). In publishing her general policy, the Respondent is not laying down rules and is not exercising a law-making power. Key to the lawfulness of decision making guided by the Policy Document is an understanding that the Respondent's discretion is not circumscribed or curtailed by the Policy Document but rather the Policy Document serves to provide consistency and transparency in identifying the Respondent's general policy and guiding decision making in cases involving applications for family reunification.

VISA REFUSAL

17. By email dated the 1st of October, 2021, the Applicants were notified of a first instance refusal of the application for the following stated reasons:

"FM:- there is no automatic right for non-EEA nationals who are family members of: Non-EEA nationals with permission to reside in the State to migrate on a long-term basis to Ireland. Your case has been fully examined on the basis of the documentation submitted and it has been decided not to grant your application. As per section 6.2 of the policy

document on Non-EEA Family Reunification sponsor was granted permission to remain subject to the express limitation that no rights to be joined by spouse or other family member would flow from the status being granted."

18. No further consideration of the application was reflected in the terms of the first instance refusal.

19. By solicitor's letter dated the 10th of November, 2021, an appeal was sought. It was noted in this letter that the Visa Officer does not raise any question as to any other aspect of the application and it was suggested that this constituted "*silent acquiescence*". Reliance was squarely placed on the Applicants' rights as married persons protected under Article 41 of the Constitution and on their right to family and private life protected under Article 8 of the ECHR in support of the appeal. It was urged that consideration be given to the exercise of the Respondent's discretion and submitted that policy should not be applied in a fixed manner but in a manner which allows for exceptions.

20. There was some further correspondence from the Respondent while the appeal was under consideration, notably a letter dated the 17th of February, 2022 in which it was pointed out that attachments referred to in the appeal letter had not been enclosed and affording time for delivery of same and a letter dated the 7th of March, 2022 referred to by the parties before me as *a "fair procedures"* letter in which further information was sought in respect of the Second Applicant's earnings and the parties relationship history. No mention was made in either of these letters to the fact that the marriage certificate did not confirm that the marriage was a proxy marriage and did not identify the Second Applicant's representative. By letter dated the 10th of March, 2022, the Applicants' solicitor replied with further information in relation to the Second Applicant's earnings and detail and proof of relationship history, as requested. It was indicated that should any further information or documentation be required, that the Applicants' solicitor could be contacted.

21. In correspondence confirming the refusal of the application dated the 25th of March, 2022, the Applicants were advised that the visa appeal had been examined by a Visa Officer from the Irish Naturalisation and Immigration Service in accordance with the Policy Document and had

also been considered under Article 8 of the European Convention on Human Rights and Article 41 of the Constitution of Ireland. The reasons signalled for refusal were identified as (F) finances, (FM) the sponsor was granted permission to remain subject to the express limitation that no rights to be joined by spouse or other family member would flow from the status being granted (section 6.2 of the Policy Document) and (RH) failure to satisfy the Respondent as to the genuineness of the family relationship. It was stated that the refusal letter should be read in conjunction with the detailed consideration document.

22. The detailed consideration document which accompanied the refusal letter runs to 16 pages. In the consideration document the background to the application is properly set out. The consideration document further contains additional information relating, *inter alia*, to:

I. the narrative account given as to the relationship history including supporting documentation;
II. the financial situation of each of the Applicants is set out noting limited evidence of financial support of his wife by the sponsor and gross earnings of €10,000 in 2020 (the year he commenced employment during the Pandemic) and €30,000 in 2021;
III. the accommodation situation of the sponsor in the State (with evidence of tenancy agreement).

23. The considerations document next records an assessment of the application having regard to the Policy Document on Non-EEA Reunification. It is noted that the financial eligibility requirements identified at paragraph 17 of the Policy were not met and it is concluded that (see p. 7):

> *"this low level of income demonstrated above may result in an immediate reliance on public funds/resources should the applicant be granted the visa as sought."*

24. In addressing the level of income, no reference is made to the fact that the Second Applicant commenced employment in late 2020 having obtained permission for the first time in June, 2020 during a global pandemic.

25. The considerations document next addresses the provisions of the Policy Document concerning proxy marriages noting that proxy marriages may be recognised under Irish law but that 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 not a device aimed predominantly at securing an immigration advantage. The considerations document then states:

> *"The marriage between the sponsor and the applicant is stated to have been a proxy marriage, the marriage certificate provided does not indicate this, as would be expected by this office. The marriage certificate does not state who represented the sponsor at the marriage ceremony or indicate in any other way that the ceremony was held by proxy."*

26. It is noted that the *Nikah Nama* had not been provided. The *Nikah Nama*, as I understand it, is a traditional marriage document which records certain details in relation to the marriage in accordance with Islamic law. It is separate from the official computerized marriage certificate which was submitted. It is further noted that an address in Pakistan is recorded for the Second Applicant on the official certificate submitted in circumstances where he was resident at the time of the purported marriage in Ireland. The decision maker records (at p. 8) that it is:

> *"unclear from the documentation provided as to whether the representative of the Ministry of foreign affairs in Pakistan who attested the stated marriage certificate was aware that the groom was in fact residing in Ireland and undertook the ceremony proxy."*

27. It is further noted that insufficient documentary evidence had been provided that the Applicants ever met face to face, for example, travel documentation indicating travel to Pakistan etc. Based on the factors considered, the considerations document then records the following conclusion (p. 9):

"….the visa appeals officer is of the considered opinion that the marriage documents provided are not of sufficient quality to satisfy them that the stated marriage presented by the applicant and sponsor is a legally valid one and recognisable in this state."

28. Having outlined the facts in relation to financial and social report and noting the decision maker's residual discretion, the considerations document further records (at p. 10):

"the issues surrounding the applicant and sponsors marriage documents provided have been set out elsewhere in this document and the visa appeals officer has deemed these marriage documents insufficient for immigration purposes in respect of proving the marriage is a legally valid one and recognisable in this state. It is noted that this particular relationship has been long-distance in nature and the applicant and sponsor appear to have only met once face to face in 2021 however no immigration steps have been provided to sufficiently document same. It is a relationship that is capable of being sustained in the same manner in which it was developed, whether by way of telephonic and electronic means of communication without the grant of a visa to the applicant. Based on the foregoing, it is submitted that the circumstances in this case do not warrant an exception being made."

29. Moving on from her conclusions upon assessment in accordance with the provisions of the Policy Document, the decision maker then proceeds to address at "*Section 3*" of the considerations document the constitutional rights of couple deriving from marriage under a heading "*Consideration under Article 41 of the Constitution*." The fact that citizens and non-citizen rights are not protected in the same way under the Constitution is set out (most specifically having regard to a right of residence) with reliance placed on the decision of the Supreme Court in *Gorry v. Minister for Justice and Equality* [2020] IESC 55. While it is noted that the Constitution protects the institution of marriage and the right to marry, it is recorded that (at p.12):

"As the applicant in the within case, is a non-EEA national, they do not have a right to enter or reside in state. In this case, concerns in relation to the marriage certificate arose and this has been outlined elsewhere in this decision letter. In any event, as neither the

sponsor nor the applicant (who are both Pakistani citizens) are Irish citizens, it is felt that the correct consideration of all factors relating to the position or rights of the family/couple, would be best addressed under section 3 of the European Convention on Human Rights Act 2003 having regard to Article 8 of the ECHR."

30. Having thus seemingly determined that there was no requirement to consider Article 41 of the Constitution, the decision maker proceeds to consider the application under s. 3 of the European Convention on Human Rights Act, 2003 having regard to Article 8 of the European Convention on Human Rights. Having repeated the earlier expressed concerns regarding the documentary evidence confirming the marriage, the decision maker records (at p. 13):

"The visa appeals officer is of the considered opinion that the documentation provided in respect of the applicant and sponsor's marriage is not of sufficient quality to demonstrate that they are in a legally undertaken marriage which can be legally recognized in this State."

31. The conclusion recorded (p. 15) is:

"it may be the applicants and sponsors preference to develop their relationship in this State, there is no general obligation to respect their choice in this regard given the State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations. Having regard to all the above factors, it is submitted that in refusing the applicants visa application, there is no lack of respect for family life under article 8.1 and therefore no breach of Article 8."

32. It bears note that while the decision letter records the limiting condition on the Second Applicant's temporary permission to remain as one of the reasons for refusing the visa, this condition is not addressed in the fuller considerations document.

PROCEEDINGS

33. The within proceedings were commenced by way of judicial review pursuant to a leave order granted on the 16th of May, 2022. Leave was granted to seek the primary relief of an order of *certiorari* quashing the decision of the respondent dated the 25th of March, 2022 refusing a visa to the First Named Applicant. Subsequently an application for leave to amend the Statement of Grounds to expand the legal grounds of challenge was successfully moved.

34. While various legal grounds of challenge were identified in the Statement of Grounds, the case argued at hearing was more focussed. The legal issues identified during the hearing as being of any substance or as actively pursued might be summarised as follows:

a) the reason given for refusing the visa relating to the immigration status of the sponsor (the second named applicant) was irrational in circumstances where he holds a Stamp 1 permission and such a permission does not preclude a family member joining the holder of that permission in Ireland;
b) there had been a failure to properly assess financial considerations with due regard to the fact that the First Applicant was only permitted to work from late 2020 during a period of global pandemic in refusing to exercise a discretion to depart from the financial criteria prescribed in the Respondent's Policy document;
c) the decision maker erred in fact and/or in law and/or breached natural and/or constitutional justice in finding that the documentation provided in respect of the applicant's marriage is not of sufficient quality to demonstrate that they are in a legally undertaken marriage which can be legally recognized in this State;
d) the decision maker failed to properly consider the Applicants' rights protected under Article 41 of the Constitution in proceeding on the basis that the correct consideration of all factors relating to the position or rights of the family/couple, would be best addressed under s. 3 of the European Convention on Human Rights Act 2003 having regard to Article 8 of the European Convention on Human Rights.

35. Affidavits sworn by both Applicants, the Applicants' Solicitor and a Pakistani lawyer are relied upon to ground the relief claimed. In his Affidavit, the Pakistani lawyer confirms that he

has 20 years practice experience in Pakistan. He refers to the Applicants' marriage certificate which has been provided to him. He confirms that proxy marriages are permitted under Pakistani law. He confirms that the concerns raised regarding the marriage certificate on the basis that it did not state that the marriage was a proxy marriage and did not name the groom's representative are based on a misunderstanding of the nature of the information contained in such a document. He confirms that marriage certificates in Pakistan do not record the fact that the marriage was a proxy one or state the name of the representative of the groom if he was not physically present.

36. In the Opposition papers filed, issue is joined across the range of legal grounds pleaded on behalf of the Applicants. Specifically, it is contended that the application has been properly assessed and rationally refused, including insofar as it is suggested that the Applicant's Stamp 1 permission precluded a family member from joining the holder of that permission in Ireland. It is further denied that there has been any breach of the Applicants' right to fair procedures or natural and constitutional justice in the conduct by the Respondent of the visa appeal. In response to the amended grounds pleaded on behalf of the Applicants, it is denied through amendment of the Statement of Opposition that the Respondent erred in considering the Applicants' rights pursuant to Article 8 of the European Convention of Human Rights, rather than under Article 41 of the Constitution in circumstances where it has been established by the Supreme Court in *Gorry* that:

> "*Article 8 ECHR is broader in the sense that it may be invoked by non-marital families. It protects all forms of family life and so can be called in aid even by de facto families not based on marriage."*

37. Opposition papers are grounded on an Affidavit of an official in the Visa Section of the Irish Immigration Service Division of the Department of Justice. This Affidavit does little more than exhibit the Policy Document and confirm that the decision maker was guided by section 15.6 of the said Policy Document which provides that proxy marriages may be recognised under Irish law but proxy marriage gives rise to additional concerns not only in immigration terms but also for the protection of the parties with the result that the immigration authorities will enquire into the circumstances of the marriage and must be satisfied that the marriage is genuinely and freely entered into by both parties and that it is not a device aimed predominantly at securing immigration

advantage. It is further provided that the parties must also be able to show that they have met each other in person.

38. Of note, the Respondent has not sought to reply on affidavit to the evidence of the Pakistani lawyer confirming that the Respondent's decision was based on a misunderstanding of the requirements of Pakistani law regarding marriage certificates and what is normally recorded on them. In effect, therefore, the error of law and fact identified on behalf of the Applicant has been conceded by the Respondent and counsel for the Respondent acknowledged as much in his submissions before me.

DISCUSSION AND DECISION

Whether Conditions of Stamp 1 Permission a "Roadblock"

39. It may be somewhat questionable to what extent the application for a visa in this case was in fact ultimately refused because of the condition on the Second Applicant's temporary permission that he accept that his legal status did not confer an entitlement or legitimate expectation on any other person, whether related to him or not, to enter or remain in the State. While the first instance decision was clearly predicated on a view that acceptance of this condition was determinative and obviated the need for any further consideration of the application, this was not the approach reflected in the considerations document on appeal. It remains the case, however, that the decision letter itself placed reliance on this condition notwithstanding that it was not addressed in the considerations document. Furthermore, the Respondent has sought to stand over a policy of not considering applications from persons whose permissions are similarly conditioned in the terms of the Opposition filed and in the submissions before me. It was urged on me by counsel for the Respondent that even if I were to conclude that there was an identifiable error of law or fact which might otherwise be considered sufficient to render the refusal decision unsustainable in judicial review proceedings, it would nonetheless be futile to order relief in this case because the condition constituted a "*roadblock*" to the grant of permission. Reliance was placed in this regard on the decision of Keane J. in *Omara v. Minister for Justice and Equality* [2018] IEHC 25 where he states (paras 33 to 34):

"33. A further difficulty that Mr Omara faces flows from his concession that, whether or not their marriage still subsists, he and his Irish citizen spouse are no longer living together, precluding him from meeting the relevant condition under s. 15A(1)(c) of the Act of 1956 for the exercise by the Minister of the discretion to grant or refuse him a certificate of naturalisation.

34. In the course of argument, the Court ventured to suggest that it must surely follow as a corollary to that concession that no useful or legitimate purpose would be served by granting an order of certiorari in respect of the Minister's letter of 20 September 2016, even if Mr Omara could otherwise establish an entitlement to one, since he now acknowledges that he could not then, and cannot now, meet the relevant condition precedent to the exercise of the Minister's discretion under s. 15A(1)."

40. While finding against the Applicant on the substantive grounds of challenge raised in any event, at para. 39 of his judgment, Keane J. stated that even if Mr. Omara could establish a defect in the decision that would otherwise entitle him to an Order of *certiorari* he would still be in a situation where no useful or legitimate purpose could be served by the making of any such order and as judicial review is a discretionary remedy, if necessary, he would have declined to grant the relief sought on that basis also. As I am invited by the Respondent to take that approach in this case and given that issue is joined in any event on the pleadings as to the effect of the condition, it is necessary for me to consider the condition to the Second Applicant's temporary permission further, even though it seems not to have been a central consideration in the decision on review impugned in these proceedings.

41. I understand the Respondent's position on this application to be that the Second Applicant is precluded from seeking to rely on his legal residence in the State, such as it is, for the purpose of obtaining permission for his spouse to join him because he has been granted that residence permission on the express basis that he accepts that it does not give rise to an entitlement or legitimate expectation that permission will be granted to a person, including a spouse, to enter and remain in the State. I cannot accept this position to be correct in law.

42. It seems to me that as a matter of plain English the condition in question does not bear the

meaning ascribed to it on behalf of the Respondent. Acknowledging that a particular legal status does not have the effect of creating a right or expectation on the part of a third party does not disentitle a third-party spouse from making an application to join their Irish spouse and from having that application determined in accordance with law. In determining the application in accordance with law it would, of course, be a relevant factor that the spouse's permission does not give rise to an entitlement or right on his or her part to enter and remain in the State. I might observe in this regard, however, that in general the applicants whose applications are considered under the Respondent's Policy have no right *per se* to enter and remain in the State. They have a right only to have their applications considered. While a legitimate expectation might conceivably arise based on lawful representations made or assurances given and relied upon, absent such special circumstances it is not normally the position that persons applying to join spouses who are resident in the State on foot of temporary permission remain in the State can legitimately assert a right or entitlement to be permitted to enter and remain. In this way the position of persons lawfully present in the State on foot of a temporary permission falls to be contrasted with those of whom a statutory entitlement to family reunification exists or who can assert derived rights under EU law.

43. It follows that insofar as it is maintained on behalf of the Respondent that a condition of residence which provides that the sponsor has no "right" to be joined by a family member means that such a person may not be lawfully joined by a family member, then this position is wrong in law. The existence of a conditional permission of the type in question here does not preclude family reunification at the discretion of the Respondent in the proper discharge of her functions. This is not to say that the conditionality of an existing permission is not a relevant consideration. For one thing, it means that it has always been abundantly clear to the Applicant that his marriage does not automatically or "*as of right"* entitle his spouse to a visa permitting her to join him and it would be difficult for him to assert a legitimate expectation in the face of such a clear condition on his visa, absent special circumstances. Such conditionality might potentially be relied upon as a factor in a decision to refuse permission upon fuller consideration of the application but a condition of the type in question here does not operate to preclude consideration of the application.

44. In this case, I am satisfied that there was in fact a fuller consideration of the application, at

least at appeal stage. The decision maker on appeal did not treat the application as one which fell to be automatically refused because of the existence of the condition in question. Instead, it is manifestly the case that she considered the application on the basis that it fell to be assessed in accordance with the Respondent's Policy Document and the requirements of the Constitution and the European Convention on Human Rights. Accordingly, I would not be prepared to quash the decision because the first instance decision was predicated on a mistaken understanding of the effect of the condition in question if I were satisfied that there has otherwise been a proper consideration of the application on appeal because I consider this error cured on appeal. On the other hand, I do not consider the existence of the condition to be a "*roadblock*" to quashing the impugned decision if I am not so satisfied because the condition does not relieve the Respondent of the obligation to consider the application in accordance with law.

Fair Procedures and Error of Law and Fact

45. The Respondent included different reasons in the appeal decision to those that had been given at first instance. Concerns regarding the fairness of the process are identified on behalf of the Applicants in this regard. It is submitted that as there is only one appeal per application, a failure to raise issues in a first instance decision can give rise to a problem for Applicants who are deprived of an opportunity to address those concerns before a final decision is made.

46. Identified as a particular concern is the fact that the reason pertaining to the financial situation of the second named applicant did not form a basis for refusal at first instance but appeared in the appeal decision. I do not consider this complaint to be substantiated. It seems to me that there is no want of fairness arising from the fact that financial considerations were relied upon to refuse on appeal in circumstances where the Respondent's general criteria in this regard are well publicised in the Policy document. In addition, it is noted that the Applicants were specifically afforded an opportunity to address financial considerations further in response to the so-called "*fair procedures"* letter and were therefore clearly on notice that the Respondent was not yet satisfied in relation to financial matters.

47. I am quite satisfied that there is no principle of law, and no authority to this effect was

identified in argument before me, to support a conclusion that a decision maker on appeal in this context is bound by the reasons offered at first instance and precluded from reaching the same decision for different reasons. There may, however, be circumstances where it is appropriate to afford an applicant an opportunity to address specific concerns, for example, where it appears that incomplete information has been submitted on a mistaken view that a particular issue is no longer live or where an issue arises for the first time on appeal which might not have been foreseen and is of a nature that fairness dictates that an opportunity be provided to address it. The conclusions arrived at based on financial considerations in this case have no distinct significance such as would warrant any further notice of an issue being flagged to the Applicants.

48. I do not consider that the Applicants were entitled to take the view in this case that there was any "*silent acquiescence*" arising from the terms of the first instance decision. It could not reasonably be inferred from the terms of that decision that, excepting the identified basis for refusal at first instance, all other matters were in order. It was clear that the first instance decision maker gave the application short shrift and refused it without full consideration on the basis that it was not open to the Applicants to make the application because of the condition attaching to the Second Applicant's temporary permission. The Applicants should not properly have drawn any comfort from the terms of the first instance refusal or construed it as an indication that there were no other issues with the application.

49. It seems to me, however, that the concerns underpinning the refusal decision as regards the recognisability of the certificate of marriage are in a different category to the financial concerns expressed. It is clear from the Respondent's Policy document that proxy marriages can be recognised for immigration purposes. As far as the Applicants were concerned evidence of a lawful marriage had been submitted in the form of their duly attested and translated marriage certificate. Absent notice of an issue concerning their documentation or a request for the Nikah Nama to be submitted in addition to the marriage certificate, the Applicants had no reason to suspect that the Respondent questioned whether the marriage attested to by the documentation was recognisable. A request for additional information to demonstrate relationship history does not suffice in my view to notify a concern as to the validity of the marriage as a reference to relationship history extends beyond questions of formal validity and recognisability. The decision

maker did not avail of the option available to her to write to the Applicants about her concerns regarding the recognisability of the marriage before making a decision, even while writing about other matters. I am satisfied that the concerns raised in the considerations document regarding the marriage documentation were not previously raised by or on behalf of the Respondent but should have been in the facts and circumstances of this case.

50. In these proceedings it is not disputed on behalf of the Respondent that the decision maker was wrong in law and in fact in deciding that the marriage certificate was defective because the certificate did not recite the fact that the marriage was by proxy or name the Second Applicant's representative. Had the Applicants been alerted to the Respondent's specific concerns regarding the marriage certificate, then it would have been possible for the Applicants to address these concerns by producing further or better information including by way of expert evidence before a decision was made. It seems to me, in view of the nature of the error made and its central importance to the decision ultimately arrived at, that there was a want of fairness on the part of the Respondent in proceeding to make the decision to refuse without first affording the Applicant an opportunity to address this concern.

51. Not every issue of law or fact will be of such moment as to warrant being expressly raised with applicants before a decision is made. Similarly, not all errors will result in a court intervening by way of judicial review. The error must be sufficiently serious or fundamental as to deprive the decision maker of jurisdiction. Much depends on the impact the error had on the decision arrived at and whether it can be safely concluded that the same decision would have been arrived at notwithstanding the error made because of other standalone justifications for refusal which stand untainted by any flawed findings. Assessing the impact of the error in this case on the overall sustainability of the decision to refuse requires a consideration of how important the flawed findings were to the course of the decision. This leads to the question of the assessment of marital rights safeguarded under Article 41 of the Constitution.

Failure to Consider Article 41 Rights

52. In the decision under review the decision maker recorded (at p. 12) that:

"it is felt that the correct consideration of all factors relating to the position or rights of the family/couple, would be best addressed under section 3 of the European Convention on Human Rights Act 2003 having regard to Article 8 of the ECHR."

53. The constitutional position and protections (which had been expressly raised on behalf of the Applicants) were thereby subjugated within the Article 8 of the European Convention on Human Rights considerations. It is contended on behalf of the Applicants that there was therefore a failure on the part of the decision maker to uphold the Constitution having regard to the decision of the Supreme Court in *Gorry v Minister for Justice* [2020] IESC 55. It is clear from *Gorry* that even citizens do not have a constitutional right to be joined in the State by their spouse. Equally, however, the right to marry and the protection for the institution of Marriage under the Constitution which is recognised in *Gorry* is not confined to citizens. O'Donnell J. accepts (at para. 25 of his judgment reflecting the position of the majority) that a decision affecting the lives of a married couple in a fundamental way demands scrutiny and requires justification under the Constitution. He states (also at para. 25):

"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."

54. It was further noted that any decision to refuse to allow a non-national spouse to enter the country of residence of the other spouse necessarily impinges upon the marriage and the family created thereby. He added:

"Any such decision requires analysis by reference to any human rights instrument such as the Irish Constitution or the ECHR which, whether expressly or implicitly, protects a right to marriage, the institution of Marriage, and family life. However, I entirely agree that analysis under both instruments cannot be blended to provide a single homogenous approach. Furthermore, I agree that the Minister's decision in both cases, which appear to follow a standard template, appears to also treat the analysis by reference to the

constitutional rights as if it was identical to, and perhaps derivative of, the ECHR analysis."

55. While noting the similar ground covered by Article 41 of the Constitution and Article 8 of the European Convention on Human Rights, O'Donnell J. did not consider they should be treated as essentially interchangeable in circumstances albeit he considered the differences between the two provisions to be more complex than simply viewing the Convention as providing a lower but broader level of protection covering both married and unmarried families and the Constitution as providing higher but narrower level of protection limited to marital families. The complexity he identifies is addressed further in his judgment by his focus on the fact that marriage is one of the few examples of a status in law with legal consequences following from that status (at para. 65 of the judgment).

56. In his minority judgment in *Gorry*, in a manner which is not inconsistent with and entirely reconcilable with the primary decision of the Court, McKechnie J. acknowledges that Article 8 ECHR rights take precedence over constitutional rights in circumstances where a marriage has not been established in the following terms (para. 125):

"125. Article 41 and Article 8 ECHR are set out at paras. 13 and 14 above. One important differentiating feature, though one not relevant to this appeal, concerns the nature or type of families which may invoke the protections of each provision. Article 8 ECHR is broader in the sense that it may be invoked by non-marital families. It protects all forms of family life and so can be called in aid even by de facto families not based on marriage (see, for example, Keegan v. Ireland (1994) 18 EHRR 342). On the other hand, the decided cases to date have interpreted the protections of Article 41 of the Constitution as extending only to the family based on marriage (see, for example, W. O'R v E.H. (Guardianship) [1996] 2 I.R. 248). Both families in this appeal are married couples and so may rely on the constitutional provision."

57. In terms of the significance of the judgment in *Gorry* for the questions to be decided in this case, it seems to me that a clear finding of the Supreme Court in *Gorry*, in both the majority and minority decisions of the Court, is that Article 41 of the Constitution provides a special protection

for the marital family which is not interchangeable with Article 8 of the European Convention on Human Rights.

58. While reliance has been placed on behalf of the Respondent on the more recent decisions of the Supreme Court in *MK (Albania) v. Minister for Justice and Equality* [2022] IESC 48 where a failure to address constitutional rights separately and distinctly from rights arising under the European Convention on Human Rights, I do not read the separate judgments of the members of the Court in that case as in any way resiling from the special protection for the institution of marriage under Article 41 of the Constitution recognised in very clear terms in *Gorry*.

59. In *MK (Albania) v Minister for Justice and Equality*, O'Donnell CJ re-addressed the issue of the interplay of constitutional rights and Article 8 rights but in circumstances where the rights of the marital family under Article 41 did not arise for consideration. He stated that in circumstances where rights are protected by "*the extensive jurisprudence under Article 8 of the Convention"* it is not automatically necessary to consider protections available under the Constitution. He said (at para. 35):

> "*However, I do not think it is necessary, or perhaps advisable, to seek to address the question in this case, whether the Constitution can be said to protect exactly the same rights as the Convention does under Article 8, and in exactly the same way. That, I think, would be to address the interpretation of the Constitution almost in the abstract, and to interpret the rights which it protects, laterally by analogy with the Convention, rather than vertically from the ground up, and driven by the concrete circumstances of a case in which it is necessary to do so. In this case, it is argued that constitutional rights are affected but it is accepted, and in any event, I would conclude, that whatever rights the Constitution protects and however they are deduced, they could not, on the facts of this case, have any discernibly distinct impact on the outcome of this case than would be reached by the application of the extensive jurisprudence under Article 8 of the Convention. There may be cases where it is necessary to consider the precise nature of the constitutional protection in the area which is described as private life by the Convention. One such area may be if the validity of an enactment was challenged by reference to the Constitution. I think it is*

helpful to maintain the analysis of Convention and Constitution in separate channels, and to ensure that claims are analysed by reference to the distinct jurisprudence of each."

60. O'Malley J. was clear in her view that a consideration of rights protected under the Constitution in that case would add nothing to the Article 8 rights which had been considered. Notably, however, she lists the constitutional rights engaged. Rights protected under Article 41 of the Constitution are not captured by the terms of her decision. She expressly limits her *dicta* to constitutional rights protected under Articles 40.1, 40.3 and 40.6 of the Constitution as follows (at para. 4):

"An issue has been raised as to the potential role of Articles 40.1, 40.3 and 40.6 of the Constitution in the context of proposed deportations. Having regard to the particular circumstances in this appeal, I do not see that such considerations could add to the well-established principles relating to Article 8 of the European Convention on Human Rights in a way that would have any discernible impact on the appellant's case. I do not, therefore, consider it to be necessary to determine the inter-relationship between these provisions and prefer to reserve my position for a more appropriate case."

61. For his part, Hogan J. referred to the circumstances in which the Supreme Court had found in *Gorry* that constitutional rights had taken precedence over Article 8 rights noting in clear terms the distinguishing presence of Article 41 considerations in *Gorry*. He observed (at para. 28):

"*First, I do not think that there is any real difference of substance between the ambit of the various constitutional rights which are engaged here and the scope of Article 8 ECHR. It is true that in Gorry v. Minister for Justice [2020] IESC 55 this Court quashed ministerial orders of this kind because he had failed to conduct a proportionality assessment in respect of the constitutional rights of a married couple, one of whom was an Irish national. The reason, however, for that conclusion was that the ambit of the protection of marriage in Article 41 was more extensive that the corresponding guarantee in Article 8 ECHR. As both O'Donnell and McKechnie JJ. observed in their respective judgments, it does not at*

all follow that just because the variety of immigration orders were deemed by the Minister in that case to be proportionate by reference to Article 8 ECHR that the same could necessarily be said by reference to Article 41 of the Constitution had the appropriate proportionality exercise been equally carried out. It is, however, different so far as the privacy rights derived from Article 40.3 and associational rights contained in Article 40.6.1.iii are concerned: save possibly in some unusual or special case, it does not appear to me that a proportionality analysis by reference to these Article 40.3 privacy and Article 40.6 associational type rights is likely to yield any different result as compared with that conducted by reference to Article 8 ECHR."

62. Hogan J. then went on to say that in assessing privacy rights and maintaining the integrity of the immigration process assessment pursuant to Article 8 of the European Convention on Human Rights is entirely appropriate. It seems clear from the terms of his decision, however, that Hogan J. was of the view that while Article 8 rights were largely co-extensive with family and private rights protected under Article 40.3 and associational rights contained in Article 40.6.1.iii of the Constitution, the same could not be said of rights of the married family which enjoy superior protection under the Constitution, as found in *Gorry.* He concluded (at paras. 37 and 38):

"In summary, therefore, I am of the view that the applicant had constitutional rights to privacy in Article 40.3 and to associate protected by Article 40.6.1.iii in the manner I have just described. I further conclude that even as a non-national he was entitled to avail of these rights having regard to the decision of this Court in NHV. To that extent, therefore, I find myself in respectful disagreement with the conclusion of Finlay Geoghegan J. to the contrary in Dos Santos. While this means that, in strictness, the Minister ought to have conducted a proportionality analysis in respect of the impact which the proposed deportation would have on the applicant's constitutional rights of this nature, nothing turns on this — at least so far as the present case is concerned — given that these rights correspond in substance to the right to a private life protected by Article 8 ECHR.

Given the ubiquitous nature of these privacy and associational rights – in that they are acquired and exercised simply by reason of ordinary life in the State – they can but rarely prevail against the important interests of the State in controlling its frontiers and

preserving the integrity of the asylum system. While the applicant's constitutional rights in this respect would naturally be affected by his expulsion from the State, it cannot be said that the Minister did not properly consider or weigh these rights or that the proportionality exercise which she in substance conducted when reviewing the file for the purposes of the s. 49 decisions can be said to be unreasonable or disproportionate in the Meadows sense of that term. To that extent, therefore, the Minister's decision was also fully justifiable by reference to Article 8(2) ECHR, since maintaining the integrity and coherence of the immigration system is such an important consideration that, absent special or unusual facts, a decision of this kind can nearly always be justified by reference to Article 8(2) ECHR and will be regarded as proportionate in the circumstances. While I agree that the Minister erred in law in her analysis of the constitutional issue and in holding that the interference with the applicant's right to a private life did not attain the level of gravity such as would engage Article 8(1) ECHR, I nevertheless consider that her conclusions that the applicant had not advanced any special reasons or circumstances such as would outweigh the State's consistent interest in maintaining the integrity of the asylum system amounted in substance to the requisite Meadows-style proportionality analysis both for the purposes of Article 40.3 privacy rights and Article 40.6.1 associational rights and in respect of Article 8 ECHR rights, these legal errors notwithstanding."

63. I am satisfied that all three judgments of the majority in *MK (Albania)* were predicated on a finding that the Court was dealing in that case with constitutional protections which are more closely aligned in substance with Article 8 protections. This is not the case where Article 41 considerations arise given the special protection for the institution of marriage in the Irish Constitution which is not mirrored in the European Convention on Human Rights. It seems to me that the central *ratio* of the decision of the Supreme Court in *Gorry*, therefore, stands unaffected by the more recent decision in *MK (Albania)*. This is made abundantly clear by the decision of Hogan J. in *Middelkamp v. Minister for Justice* [2023] IESC 2, where he lamented (at para. 16) the failure to plead Article 41 in that case describing the practice of relying only on Article 8 as "*puzzling*" because the constitutional text with its reference to "*inalienable and imprescriptible rights*" seems to go somewhat further than "*the more modestly expressed guarantee in Article 8 of*

the European Convention on Human Rights". He considered this to have been "*graphically*" illustrated in *Gorry* referring to the Court in that case as having found that the Minister had been wrong to treat Article 41 of the Constitution and Article 8 Convention rights of the married couple as being simply synonymous and interchangeable.

64. Where it is clearly established by the authorities that rights of the married couple protected under Article 41 of the Constitution and Article 8 of the European Convention on Human Rights are not synonymous and interchangeable, it must follow that were a recognisable marriage established to the satisfaction of the Respondent in this case, then a proper consideration of the application would require the decision maker to conduct an assessment of the application under Article 41 of the Constitution, separate and distinct from Article 8. No such assessment occurred because the Respondent was not satisfied that a recognizable marriage existed based on what has since been accepted to be an error of law and fact regarding the marriage certificate submitted.

65. I can only conclude that the decision regarding the validity of the marriage based as it plainly was on what is now accepted to be an error of law and fact is tied inextricably to the approach then taken to the consideration of constitutional rights in the decision and in particular the decision not to treat the married family as entitled to protection under Article 41 of the Constitution in distinction from the rights of the family (married or not) protected under Article 8 of the European Convention on Human Rights. Given their impact on the course of the considerations, the errors which have been established by the Applicants cannot therefore be properly treated as discrete parts of a decision which is otherwise sustainable on standalone grounds. Instead, the errors are so fundamental to the consideration of the application that it would be unsafe to allow the decision to stand.

CONCLUSION

66. The identified errors in this case are serious and of fundamental importance because they affect the whole approach taken by the decision maker in addressing the Applicants' constitutional rights. The evidence adduced on behalf of the Applicants on affidavit from a Pakistani lawyer confirms that in Pakistan a marriage certificate for a proxy marriage is not any different in its form from any other marriage certificate. This evidence has not been contested. Accordingly, in the

absence of evidence to the contrary, I must conclude that the decision maker was simply wrong to draw the conclusions that she did, on the basis of what has been incorrectly asserted is normally contained in such certificates. Likewise, uncontested evidence establishes that the Respondent is incorrect about the question of inclusion of the name of the groom's representative/proxy on the certificate.

67. The Respondent's erroneous understanding of the position under Pakistani law and practice is inextricably bound up with the decision that the validity of the marriage has not been established. This is turn led the Respondent to the conclusion that there was no necessity for a separate Article 41 consideration in this case. In view of the decision of the Supreme Court in *Gorry v. Minister for Justice* [2020] IESC 55, this position is only tenable as a matter of law where it has been properly concluded that no recognisable marriage has been demonstrated to exist.

68. Given the central importance of the issue of marriage validity to the consideration of the application, it is impossible to characterise these mistakes as other than fundamental and going to the root of the decision. As apparent from the considerations document, the fact that the marriage certificate was not accepted as evidence of a genuine marriage had the result that such rights as the Applicants may have under Article 41 of the Constitution were not considered. Instead, the Respondent proceeded to deal with the application on the basis that there was no substantive difference between protections afforded under the Constitution (including Article 41) and Article 8 of the European Convention on Human Rights.

69. For the reasons aforesaid, I will grant an order of *certiorari* of the decision to refuse the join spouse visa communicated on the 25th of March, 2022. Unless the terms of a consent order are agreed between the parties and furnished to the Court within fourteen days of delivery of this judgment and it is agreed that there is no necessity for a court listing, this matter will be listed to hear the parties in respect of the form of the order and any consequential matters.