THE HIGH COURT

[2023] IEHC 339
Record No. 2022/442 JR

BETWEEN:-

N.I. (A MINOR SUING BY HER AUNT AND NEXT FRIEND NURA ALI HASSAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on the 23rd day of June, 2023.

Introduction.

1. The applicant is a Somali citizen. She is the niece of her next friend, Ms. Nura Ali Hassan (hereafter "the sponsor", as she is referred to as such in the impugned decision), who is a dual citizen of both Somalia and Ireland.

2. The applicant is an orphan, her mother having died on 3rd July, 2014 and her father having died on 14th August, 2015.

3. In this application, the applicant seeks an order of *certiorari* quashing the decision of the Minister to refuse the applicant's visa appeal, taken on 28th February, 2022.

4. The applicant has argued that in refusing her visa appeal, the Minister acted unreasonably in concluding that there were no exceptional circumstances in the applicant's case which warranted departure from the financial thresholds set in the Policy Document on Non-EEA Family Reunification (hereinafter "the policy"). Further, the applicant argued that the Minister acted in breach of fair procedures and failed to have due regard to the fact that the applicant is an orphan and an unaccompanied minor. Finally, the applicant argued that the Minister, in refusing the appeal, failed to recognise the applicant's right to family unity and the rights of the child as found in Articles 40.3 and/or 40.1 of the Constitution and Article 8 of the ECHR.

5. To properly understand the applicant's case and the rationale for the respondent's decision, it is necessary to set out the background to this matter in some detail.

Background.

6. The applicant was born in late 2007, in Awdheegle Afgoye, Somalia. The applicant's mother, Ms. Saado Ali Hassan, died on 3rd July, 2014, as a result of a car explosion in Mogadishu, Somalia. The applicant's father, Mr. Ibrahin Isse, died on 14th August, 2013, as a result of an illness. When

the applicant was orphaned, her paternal grandaunt, Ms. Halimo Hirsi Dahir (hereafter "Ms. Dahir"), was granted guardianship over the applicant.

7. The sponsor was born on 10th June, 1983. She is the sister of the applicant's late mother. She entered the State in 2005. She was granted refugee status in 2006 and, subsequently, became a naturalised Irish citizen in 2009. She has been resident in the State since 2005. On or about 24th May, 2012, she was granted family reunification with respect to her two brothers and one sister, who subsequently entered the State.

8. At the time when Ms. Dahir was granted guardianship over the applicant, the sponsor had not had contact with her other two sisters, Ms. Jijo Ali Hassan (hereafter "Jijo") and Ms. Diidi Ali Hassan (hereafter "Diidi"), in 12 years.

9. In 2015, Ms. Dahir and the applicant met Jijo in Mogadishu, Somalia. Ms. Dahir informed the sponsor of this meeting and attempted to put the sponsor in contact with her sisters.

10. On 5th October, 2015, Ms. Dahir applied to Hamarweine District Court to transfer custody and guardianship of the applicant to the sponsor, as Ms. Dahir was an elderly woman who was not capable of caring for the applicant. The sponsor was granted custody and guardianship of the applicant. A certificate verifying the transfer of guardianship was exhibited to the affidavit sworn by the sponsor, it is signed by two witnesses and by a Judge of the District Court in Hamarweine, Somalia.

11. The applicant remained with Ms. Dahir until the sponsor located her sisters, who were then in Ethiopia, having fled the war in Somalia. Sometime in 2016, Ms. Dahir's friends brought the applicant to Ethiopia, to reside with her aunts, Jijo and Diidi.

12. The sponsor averred that during the time the applicant was residing with her aunts in Ethiopia, she would frequently contact her through WhatsApp, via her aunts' mobile phones (as the applicant did not have a mobile phone of her own). She exhibited call logs to that effect in her affidavit. She also outlined that she was financially supporting the applicant and her sisters, and exhibited cash payment slips, which showed her having sent money to Jijo.

13. In December 2016, the sponsor applied for family reunification of Jijo, Diidi and the applicant. By letter dated 5th January, 2017, the sponsor was informed that the application on behalf of the applicant could not proceed, as nieces were not eligible for family reunification. The applications with respect to Jijo and Diidi were approved on 26th April, 2021, following a challenge by way of judicial review (bearing record number 2018/129 JR).

14. On 11th August, 2021, the applicant applied for a long stay visa to join the sponsor and travel to Ireland with Jijo and Diidi, both of whom had visas to enter the State. On 2nd November, 2021, that application was refused by the Minister.

15. Jijo and Diidi travelled to the State in November 2021. Their visas permitted their travel to the State between 18th June, 2021 and 17th December, 2021. The applicant began to reside with a neighbour in Ethiopia, Ms. Roda Said Ismail, on a temporary basis, pending the outcome of her visa appeal.

16. The sponsor averred that she had been sending Ms. Ismail money to look after the applicant. The sponsor exhibited to her affidavit, evidence that she had sent a cash payment to Ms. Ismail. The sponsor also averred that she had been contacting the applicant through Ms. Ismail, and exhibited call logs with Ms. Ismail's phone number to that effect.

17. By letter dated 22nd December, 2021, the applicant submitted an appeal against the first instance refusal. That appeal was refused by letter dated 28th February, 2022. It is this appeal decision which is challenged in the within proceedings.

The Minister's Decision.

18. The Minister's decision to refuse the applicant's visa appeal outlined various reasons why the appeal was refused. It is necessary to go through these findings in some detail, as they are pertinent to the applicant's case.

19. First, the Minister outlined that the finances shown by the sponsor in support of the applicant's application, were insufficient; such that the Minister was concerned that the granting of a visa to the applicant would result in financial cost to the State.

20. The Minister stated that the applicant had failed to provide evidence of any familial link between the applicant and the sponsor. Further, the Minister stated that the applicant had not demonstrated that she is, or ever had been, socially or financially dependent on the sponsor.

21. The Minister outlined that the applicant had failed to provide sufficient documentation as to the following: the extent to which family life exits between the applicant and the sponsor; whether the sponsor and the applicant had ever actually met; the social or financial dependence of the applicant on the sponsor; the extent of ongoing routine contact between the applicant and the sponsor.

22. The Minister also took issue with the quality of documentation provided by the applicant. She held that the certificate of guardianship did not state that the sponsor had permission to remove

the applicant from the country of origin. The Minister also took issue with a discrepancy in the spelling of the applicant's surname on that document.

23. Finally, the Minister pointed to an inconsistency in the applicant's narrative, whereby it appeared that her birth certificate was issued on 17th March, 2021 at the request of a parent, at which time the applicant's parents were both deceased. The Minister also noted that the applicant's birth certificate and her parents' death certificates were not attested.

24. The Minister noted that the applicant and the sponsor had not provided details of any other immediate family members based in Ireland or Somalia, and no documentation as to a clear familial link between the applicant and the sponsor.

25. The Minister was not satisfied of the veracity of the cash payment slips the applicant had submitted as proof that the sponsor was supporting her for several years, by sending money to both Jijo and Ms. Ismail; as there did not appear to be corresponding transactions on the sponsor's bank statements, which were also submitted.

26. The Minister was not satisfied that the sponsor was in a position to support the applicant financially, or to house the applicant at her current address.

27. The Minister found that insufficient documentary evidence had been provided that any legal guardianship/adoption had taken place, such as would be recognised in this State. The Minister noted that this was the necessary threshold, given that Somalia was not a party to the Hague Convention and there was no bilateral treaty between Ireland and Somalia recognising adoptions. Therefore, the Minister considered that the adoption must be one that was capable of recognition under Irish law.

28. In that regard, the Minister found that there was no evidence that the sponsor was properly vetted by the Irish Authorities to adopt the applicant. The Minister stated that decisions involving minors must be in line with the child's best interests and well-being, the Minister found that the inconsistencies and errors in the question of guardianship/adoption were sufficient to warrant the refusal of the appeal.

29. The Minister was not satisfied that the applicant had demonstrated close personal ties with the sponsor, as this would involve the provision of ongoing and frequent care to the child.

30. The Minister was not satisfied that the applicant had shown sufficient dependence, either socially or financially, on the sponsor such to warrant the granting of a visa. The Minister stated that there was insufficient evidence to show that the applicant and the sponsor were actually aunt and

niece. Finally, the Minister stated that the applicant had failed to establish any special circumstances which would warrant an exception being made in the applicant's circumstances.

31. The Minister held that Article 41 of the Constitution, which protects family life, did not apply to the applicant and the sponsor, who were not recognised as family members.

32. The Minister held that Article 8 of the ECHR, being the protection of family life, was not engaged, in circumstances where she was not satisfied that the applicant had demonstrated that she and the sponsor had been acting in a parental/guardianship role in Somalia. Further, the Minister relied on the fact that she was not satisfied that there was sufficient evidence to conclude a familial link between the applicant and the sponsor.

Subsequent Developments.

33. By letter dated 29th April, 2022, which was after the date of the impugned decision, the applicant's solicitors contacted the Minister and indicated that the applicant had obtained DNA evidence to confirm the relationship of aunt and niece between the applicant and the sponsor. Enclosed with that letter was a Test Report of DNA Analysis from Ormand Quay Paternity Services, dated 28th April, 2022, which stated that there was 'strong support' for the proposition that the applicant and the sponsor were aunt and niece. The letter requested that the Minister withdraw the decision of 28th February, 2022, and reconsider the applicant's appeal in light of the strong DNA evidence.

34. By letter dated 5th May, 2022, the Minister responded to the applicant's request of reconsideration and indicated that there was only one appeal allowed per application, and that it was open to the applicant to issue a fresh application.

Submissions on behalf of the Applicant.

35. Mr. Michael Lynn SC, on behalf of the applicant, submitted that the Minister's finding that the applicant had failed to prove a familial link with the sponsor was not supported by the evidence provided by the applicant, which included her birth certificate, the sponsor's "birth affidavit", and the court order transferring guardianship of the applicant to the sponsor. It was submitted that this finding by the respondent, was irrational and/or in breach of the applicant's right to fair procedures. It was submitted that the Minister should have sought DNA evidence to prove the existence of a biological relationship between the applicant and the sponsor, if she was unsure about the veracity of the documentary evidence provided. It was submitted that it had been open to the Minister to seek such DNA evidence, as set out in both the policy document and in *X v. Minister for Justice and Equality* [2021] 1 ILRM 411.

36. Further, it was submitted that if the applicant were to issue a fresh application, on foot of this new DNA evidence, as suggested by the Minister in her reply to the applicant's request to reopen the matter dated 5th May, 2022, the applicant would be prejudiced by the decision of a visa refusal having already been taken against her. Counsel relied on the decision of *Mukovska v. Minister for Justice & Anor* [2021] IECA 340, in that regard.

37. It was submitted that the Minister's finding that the applicant had not provided details of any other immediate family members based in Ireland, or in any other State, was an unreasonable one, when one had regard to the extensive evidence submitted by the applicant relating to the residence of six of her aunts and uncles in Ireland (who had been the subject of family reunification with the sponsor).

38. It was submitted that the Minister's extensive findings in relation to the adoption of the applicant by the sponsor were in error, as the basis for the applicant's visa application was that the sponsor was the legal guardian of the applicant/that there was no other adult available to care for the applicant, as her parents had died. It was submitted that the applicant had never made the case that the applicant was adopted by the sponsor, and that the Minister's extensive consideration of the adoption issue was unreasonable. It was submitted that, as a result of this, the Minister failed to assess whether family reunification should be granted on the broader grounds of dependency. Counsel relied on the decision of *Ducale v. Minister for Justice* [2013] IEHC 25 in that regard (para. 45).

39. Counsel submitted that the Minister's focus on the adoption issue meant that issues of the applicant's vulnerability had been left to the wayside. It was submitted that the Minister had not placed sufficient weight on the applicant's position as a vulnerable, orphaned child (see *Tanda-Muzinga v. France* (ECtHR, Application no. 2260/10)).

40. Counsel relied on the decision of *Odum v. Minister for Justice* [2021] IEHC 747, wherein Burns J. had held that children who are not Irish citizens and are not members of a family based on marriage protected by Article 41 of the Constitution, nonetheless have constitutional rights as children arising from the inherent characteristics of the human personality. It was submitted that, therefore, the Minister fell into error in only assessing the applicant's constitutional rights with regard to Article 41, and failed to address her rights pursuant to Articles 40.1 and 40.3 of the Constitution.

41. It was submitted that although the Minister purported to engage in an analysis of the applicant's best interests, she failed to have due regard to the applicant's position as a 14-year-old orphan, residing without familial support outside her country of origin, and the consequences of a

visa refusal thereon. Therefore, it was submitted that the Minister failed to conduct an adequate assessment of the applicant's best interests.

42. It was submitted that the Minister had erred in holding that Article 8 of the ECHR was not engaged when the ECtHR 'Guide on Article 8 of the European Convention on Human Rights' indicated that the existence of family life is a question of fact depending upon the real existence of close personal ties. The Guide also indicates that family life has been found between uncles and aunts and nieces and nephews (see *Boyle v. The United Kingdom* (ECtHR Application No. 16580/90)).

43. It was submitted that the respondent failed to properly assess whether exceptional circumstances existed in the applicant's appeal to justify departure from the terms of the Policy Document. Counsel relied on the decision of *Pfakacha v. Minister for Justice* [2017] IEHC 620, wherein an order of *certiorari* was granted in the absence of any meaningful consideration of the humanitarian considerations in the applicants' case, such as might warrant departure from the strict terms of the policy.

44. Counsel submitted that the Minister had failed to consider the severe consequences for a 14-year-old orphan residing without familial connection, and had acted irrationally and/or disproportionately in holding that there were no exceptional reasons to depart from the policy.

Submissions on behalf of the Respondent.

45. Mr. Peter Leonard BL, on behalf the respondent, submitted that the Minister had comprehensively considered all aspects of the applicant's application, both initially and upon appeal, in accordance with both the policy and fair procedures. It was submitted that all of the information submitted to the Minister had been considered, and that the Minister had correctly engaged in a balancing exercise of the evidence before her when reaching her decision.

46. Counsel highlighted the discretionary power afforded to the Minister in making her decision. It was submitted that once the Minister considered all the information available to her, it was for the Minister alone to engage in a balancing exercise of that information in coming to that decision, and that it may only be struck down, where it is found to be unreasonable, irrational and/or in breach of fair procedures (see *K v. Minister for Justice* [2022] IEHC 582 and *ISOF v. Minister for Justice* [2010] IEHC 386).

47. It was submitted that the Minister's decision must be considered as a whole, and not subjected to microscopic analysis on a word-by-word basis, in order to assess its lawfulness. Further, it was submitted that there was a presumption that material had been considered where the decision said that it had been so considered. The Minister had indicated in her letter to the applicant of 22nd

February, 2022, that all of the information submitted had been considered. In regards to both of those points, counsel relied on the decision of *LTE & KAU v. Minister for Justice* [2022] IEHC 504.

48. Counsel submitted that the Minister could not be challenged on the basis of information that was not before her at the time the decision was made, being the DNA evidence which was submitted after the decision of 22nd February, 2022 (see *MK (Albania) v. Minister for Justice* [2022] IESC 28 at para. 33 and *The Board of Management of a Special School v. The Secretary General of the Department of Education* [2021] IEHC 392).

49. Counsel highlighted the applicant's right to issue a fresh application for a visa on the basis of the new evidence, which would be considered totally afresh by the Minister on its own merits. In that regard, counsel relied on the decision of Clarke C.J. in *P v. Minister for Justice and Equality* [2019] IESC 47 (see para. 4.11).

50. Counsel referred to the affidavit of Ms. Melissa Brennan, where it was averred at para. 3, that the Minister's practice is to only request DNA evidence where the applicant and the sponsor have met all of the necessary criteria and that it is intended, subject to confirmation of a familial link via DNA evidence, to grant the application.

51. Counsel highlighted that the Minister must be satisfied of a range of other matters, beyond merely the existence of a familial link between the applicant and the sponsor, including financial and social dependency, in order to be satisfied that an application for a long stay visa should be granted.

52. It was submitted that the Minister was entitled to question the authenticity of those documents which were not attested, being the birth certificate of the applicant and the death certificates of her parents, on the basis that there were *dicta* to the effect that the veracity of documents issued in Somalia may be of dubious origin (see *Ducale v. Minister for Justice* [2013] IEHC 25 at para. 38). Counsel submitted that the authenticity of the death certificates was particularly uncertain, in circumstances where the applicant's birth certificate was purportedly issued to a parent of the applicant in 2021, notwithstanding any explanations proffered by the applicant for that inconsistency. Counsel also pointed to the inconsistency on the spelling of the applicant's name and her father's name on the certificate of guardianship.

53. It was submitted that the Minister was entitled to reach the finding that the applicant was not financially or socially dependent on the sponsor, on the basis of the evidence submitted by the applicant; being the cash payment slips exhibiting monies sent to Jijo and Ms. Ismail; counsel submitted that it was for the Minister to make a decision on the basis of the evidence provided. It was not for the court to interfere with that decision on the basis that the court might disagree with

those findings. Where the Minister had considered the evidence, it was submitted, the decision should stand.

54. Counsel accepted that the Minister had fallen into error in considering this application under the rubric of the law of adoption, when it was never submitted by the applicant that the sponsor had adopted the applicant. However, it was submitted that in the circumstances the decision contained a sufficiently comprehensive consideration of the evidence submitted, in any event, and therefore should be upheld by this court.

Conclusions.

55. Before considering the issues that arise in this case, it is worth keeping in mind the following *dicta* from the authorities, which must guide the court in its consideration of this application. In *Ducale v. Minister for Justice & Equality & The Attorney General*, Harding Clark J. made the following comments in relation to the plight of Somali refugees.

> "*Somali refugees also tend to have extended families arising from laudable cultural obligations to raise the children of deceased family members as their own and to care for elderly parents. The civil war of more than 30 years' duration, the persecution of minority tribes and famine have all created a catastrophic humanitarian disaster with many orphans and separated families and millions of displaced persons living in abject poverty in neighbouring countries. The total breakdown of civil society and the rule of law and the absence of a normal and functioning civil service or legal institutions outside small areas of Mogadishu render it extremely difficult for refugees, or indeed the Refugee Applications Commissioner or the respondent Minister, to establish the legitimacy of claimed extended family ties.*"

56. In that decision, the judge also alluded to the difficulties faced by refugees and other applicants in obtaining reliable documents from the authorities in Somalia:

> "*The Court is aware from previous family reunification (FRU) applications that the Somali Embassy in Addis Ababa has in the past issued certificates of birth, marriage and death on the mere say-so of an applicant. Not surprisingly, these certificates are of no evidential value although desperate refugees have spent scarce and valuable resources in obtaining such documents in a fruitless attempt to appease the authorities in the Minister's FRU Section.*"

57. Later in the judgment, the court considered the term "ward" as used in s.18(4) of the Refugee Act 1996. The court stated that this term indicated that the section was to have a wide interpretation in relation to what would constitute family members:

> "*The term "ward" as used in the list of wider family members must surely be interpreted as sufficiently flexible to encompass such a relationship of dependency. It seems to the Court that the inclusion of the relationship of "ward" or "guardian" in s. 18(4) must to a great extent be recognition by the legislature of the breakdown of normal nuclear family relationships in time of conflict when children's very survival depends on the compassion and altruism of adults who are not their parents.*"

58. The importance of the issue of family reunification for refugees was recognised by the Supreme Court in *A, S and I v. Minister for Justice & Equality* [2020] IESC 70. Delivering the judgment of the court, Dunne J. referred to the following dicta of the ECHR in *Tanda-Muzinga v. France* (2260/2010) where it was stated as follows at para. 75:

> "*The Court reiterates that the family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life…It further reiterates that it has held that obtaining such international protection constitutes evidence of the vulnerability of the parties concerned (see Hirsi Jamaa and Others v. Italy [GC] No. 27765/09, 155, ECHR 2012). In this connection, it notes that there exists a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens, as evidenced by the remit and the activities of the UNHCR and the standards set out in Directive 2003/86 EC of the European Union . . .*"

59. At para. 99 of the judgment, Dunne J. noted that the passage quoted from the decision in *Tanda-Muzinga* neatly encapsulated the importance of allowing those who had fled persecution, to resume normal life with family members. That case recognised the fact that there was a consensus on the need for refugees to benefit from a family reunification procedure that was more favourable than that foreseen for others. The legislature in this jurisdiction, had sought to give effect to that consensus by means of the provisions of s.56 of the International Protection Act 2015.

60. At para. 112, Dunne J. referred to Art. 10.1 of the UN Convention on the Rights of the Child, to which Ireland is a signatory, which provides as follows:

> *In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.*

61. Having referred to the UN HCR Guidelines on Reunification of Refugee Families (July 1983) and to the conclusions of the UN HCR's Governing Executive Committee in its conclusions adopted in 1981, Dunne J. concluded as follows:

> "*It is the case that as a general proposition such international instruments make it clear that reunification particularly in the case of children should be dealt with positively and expeditiously. The Minister acknowledges in his submissions that it is clear that the United Nations encourages contracting states to ensure that there are measures or procedures in place which facilitate family reunification in appropriate cases and also recognises the particular vulnerability of certain persons such as children. […]*"

62. In *O v. Minister for Justice* [2022] IEHC 617 it was recognised that whilst economic considerations were described as a very necessary part of family reunification under the policy, para. 1.12 thereof also recognised that each case had to be considered on its own merits (see para. 17).

63. Turning to the impugned decision in this case, I have reached the conclusion that the decision must be set aside on a number of grounds.

64. First, the finding that there was no evidence of a familial relationship between the applicant and the sponsor, ignored the fact that the sponsor had successfully applied for family reunification in respect of her sisters, Jijo and Diidi. The fact that they had been looking after the applicant since 2015, while not strong evidence of a familial relationship between the sponsor and the applicant, it supports the conclusion that the applicant is the sponsor's niece. Furthermore, the decision maker seems to have given very little weight to the guardianship order that was made by the court in Somalia on 15th October, 2015. The effective part of that court order provided as follows:

> *"The Hamarweyne District Court, having seen and conceived with the transfer of responsibility stated by Ms. Halimo Hirsi Dahir, having listened to the two below mentioned witnesses, having considered the future of the little girl, the court decided that from the date of this decision of responsibility conferral, the girl will be handed over to her aunt, Mrs Nura Ali Hassan, who will be fully responsible for the life, education and health of the little girl."*

65. The document was signed by two named witnesses and the document further provided that the court certified that the document was true and correct and was signed before the court on 5th October, 2015. It was signed by a judge of the District Court. It also had a stamp over the judge's signature. While the sponsor was not present in court, she stated that she had been in telephone contact with the court when the order was made.

66. That court order was an important document. It recorded that the applicant's maternal grandaunt had renounced her right to guardianship of the applicant. It recognised that the person to whom the guardianship order was made, being the sponsor, was the aunt of the applicant.

67. The document stated that guardianship of the applicant was transferred to the sponsor, as aunt of the applicant. In such circumstances, the court is of the opinion that the visa appeals officer was wrong to have concluded that there was no documentary evidence of familial relationship between the applicant and the sponsor.

68. The applicant submitted that the appeal decision was vitiated due to the fact that the appeals officer had not requested the applicant to take a DNA test, as provided for under Appendix A to the policy. The applicant submitted that because such request had not been addressed to the applicant or the sponsor, the finding of a lack of documentary evidence of a familial link between them, had to be regarded as being unsound. I do not regard the applicant's submission in this regard to have substance. I accept the submissions of the respondent on this aspect.

69. The onus rests on an applicant to put all material evidence before the decision maker. The lack of documentary evidence to establish a familial link between the applicant and the sponsor had been highlighted in the first instance decision. The applicant had been legally represented all along. If she or the sponsor had wanted a DNA test, they could have obtained one. It was not the fault of the respondent that such evidence was not put before the appeals officer.

70. The fact that the applicant subsequently obtained a positive DNA test, that established a familial link between her and the sponsor, cannot be used to vitiate the decision of the appeals officer. It is well established when examining the legality of a decision, the reviewing court can only have regard to the evidence that was before the decision maker. He or she cannot be faulted for not having regard to evidence that only came into existence subsequent to the date of their decision: see *Khan v. Minister for Justice & Law Reform* [2017] IEHC 800; *MK (Albania) v. Minister for Justice* [2022] IESC 28; *R v. Westminster City Council, ex parte Ermakov* [1996] 2 AER 302.

71. In *Board of Management of a Special School v. The Secretary General of the Department of Education* [2021] IEHC 392, this Court stated as follows: -

> "*The next question is whether the appeal committee acted within jurisdiction and rationally in its examination of this issue. In this regard, the court must look at the evidence that was before the appeal committee at its hearing on 9th December, 2020. The court must disregard the affidavits filed subsequent to that hearing, which seek to elaborate upon, or question the evidence which was put before the appeal committee and upon which it reached its decision. It is well settled that when a court is reviewing the decision of a decision maker, it can only have regard to the material that was before the decision maker at the time that he or she made his decision: see R. v. Westminster City Council, ex parte Ermakov [1996] 2 All ER 302*."

72. Accordingly, the court holds that the absence of a DNA test and the subsequent such test obtained by the applicant, are irrelevant to the issues which the court has to consider on this application.

73. The second ground on which the court is satisfied that the decision must be set aside, is due to the fact that the decision maker at the appeal stage focussed a considerable amount of attention on the issue of adoption. That had not been part of the applicant's case; nor had it been raised in the decision at first instance.

74. In the appeal decision, the decision maker dealt in some detail with the issue of adoption; the recognition of foreign adoptions and The Hague Convention. The decision maker looked at the issue of foreign adoptions at p.306 and reached the following conclusion at p.307:

> *"Insufficient documentary evidence has been provided that any legal guardianship/adoption has taken place that would be recognised in this State. No documentary evidence of communication with the Adoption Authority of Ireland has been provided and no evidence that an adoption of the applicants [sic] has taken place or of a proposed adoption through the Authority has been provided."*

75. The decision maker returned to the issue of adoption at p. 311, where she held that there were only two types of adoptions recognised in the State. She noted that no information had been provided that the sponsor had made contact with the Adoption Authority of Ireland prior to the stated guardianship of the applicant, particularly given that Somalia was not a signatory to The Hague Convention. Due to this omission the decision maker concluded that it could not be determined whether the applicant's stated guardianship was recognisable under Irish law. The decision maker returned to the issue of adoption at p. 316 where she again noted the two types of adoptions that were recognised in the State and held that as Somalia was not a signatory to The

Hague Convention, nor had it ratified that Convention, the guardianship type, as noted above, being where an adoption was effected in accordance with the terms and conditions of The Hague Convention, was not applicable in the present case. Thus, it is clear that the issue of adoption loomed large in the mind of the decision maker when reaching her decision in this case.

76. To hold against an applicant on the basis of an argument that was never put forward by the applicant, nor was put to her for comment, is in breach of the principles of fair procedures. In argument at the bar, counsel for the respondent submitted that the references in the decision to adoption was an error, but was not of such of magnitude as to vitiate the entire decision. I cannot agree. The issue of adoption was a significant part of the reasoning in the decision. As it cannot stand, the decision is fatally flawed.

77. Thirdly, the decision maker erred in her decision on the limitation on the ambit of the guardianship awarded to the sponsor under the court order. She held that because it did not specifically state that the sponsor had the power to bring the applicant out of Somalia, it had to be interpreted that she did not have the power to do so. The court is satisfied that where the court order states that the sponsor would be "fully responsible for the life, education and health of the little girl", that is wide enough in its terms to give her the legal authority to remove the child from that state. Accordingly, the court is satisfied that the decision maker was wrong to have interpreted the order in such a restrictive manner.

78. Fourthly, while the appeals officer made some reference to the best interests of the child, she did not appear to have considered the extremely adverse consequences for a child, who was 14 years old at the time of the impugned decision, who was an orphan, to be left in Ethiopia in the care of a neighbour, without any familial support whatsoever. To have held that these did not constitute exceptional circumstances of a humanitarian character, which would have justified a departure from the financial requirements of the policy, is difficult to understand. The court is satisfied that the failure to consider the dire situation in which the child applicant would find herself, as a result of a refusal of her visa application, is a further ground on which the decision must be set aside.

79. Fifthly, the finding that there was no documentary evidence of financial dependency, ignores the fact that the sponsor had already been found to have been providing financial support for her two sisters, who had been providing for the applicant. In such circumstances, where the applicant did not have any other means of support, it is difficult to understand how it could be held that she was not financially dependent on the sponsor.

80. As further evidence of financial support, there was documentary evidence of the payment of €887.07 in the period 4th August, 2017 to 13th December, 2021, to the applicant's aunt Jijo and one payment to the neighbour, who was looking after her in Ethiopia, Ms. Ismail. These payments represent a significant contribution towards the upkeep of the applicant. While the decision maker found that there was no documentary evidence that any sums were used to support the applicant, it is difficult to see on what other basis the sums would have been paid by the sponsor to both her sister and Ms. Ismail, particularly as such payments commenced after the date of the guardianship order in 2015.

81. At the end of the day, the court is of opinion that for the decision maker to have held that an orphaned girl, who was 14 years of age; without any family support in a very unstable country, was not in an extremely vulnerable position, such that it constituted exceptional circumstances, which would justify the issuance of a visa to enable her to be reunited with her aunts and other family relations and therefore to come within the provisions of para. 1.12 of the policy, must been seen as being irrational.

82. In these circumstances, as the court is satisfied that the appeal decision dated 28th February, 2022, must be set aside, it is not necessary for the court to consider the constitutional issues, or the issues raised under the European Convention on Human Rights.

83. Having regard to the terms of the judgment herein, the court would propose to make a final order in accordance with the terms of para. 1 of the applicant's notice of motion; being an order of *certiorari* quashing the decision dated 28th February, 2022 to refuse the applicant's visa appeal.

84. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

85. The matter will be listed for mention at 10.30 hours on 12th July, 2023 for the purpose of making final orders.