THE HIGH COURT

[2023] IEHC 545

JUDICIAL REVIEW

[Record No. 2022/589JR]

BETWEEN:

N.Z.,

S.M.R.

AND

M.U.S.R (A MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND, S.M.R.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 3rd day of October, 2023

INTRODUCTION

1. These proceedings comprise a challenge to a refusal of a join family visa application. At the date of the impugned decision the Third Named Applicant had what were described as "*prospective rights*" as a future Irish citizen being the son of the Second Applicant who is an Irish citizen, born abroad. While the visa refusal is challenged on multiple grounds, a central question arising on the case as urged on me is whether and the extent to which the constitutional rights of a child born abroad of an Irish citizen exercising rights of residence in the State require to be weighed in a decision on a visa application on behalf of the child and his mother to join his Irish citizen father in the State.

BACKGROUND

2. The Applicants are each Pakistani born nationals. The Second Named Applicant married an Irish citizen in or about 2004. He has resided in the State since 2005 and is a naturalised Irish citizen. There are two Irish citizen children of this marriage born in 2006 and 2007 respectively. The Second Named Applicant claims that this marriage was dissolved in or about 2011 in accordance with Pakistani law. An Order was made by the District Court pursuant to s.6A of Guardianship of Infants Acts 1964 to 1997 appointing the Second Named Applicant as guardian of the said children in 2016. The Second Named Applicant was naturalised as an Irish citizen on the 21st of April, 2017.

3. The First Named Applicant was born in Pakistan in 1989 and is a citizen of that country. She claims to be divorced in accordance with Pakistani law since September, 2017. There is a child of her first marriage, born in 2016, who is also a Pakistani citizen living in Pakistan. The Second Named Applicant married the First Named Applicant in December, 2017 in Pakistan. Following their marriage in Pakistan, the Second Named Applicant returned to the State. Subsequent to the Second Named Applicant's return to the State, the First Named Applicant sought a visa permitting her to join her husband in Ireland. This visa was refused in October, 2018 and an appeal was sought. A further refusal decision issued in June, 2019.

4. The Third Named Applicant is the child of the First and Second Named Applicants, born in April, 2020 in Pakistan. Both the First and Second Named Applicants are registered as his parents on his Pakistani birth certificate. Following his birth, a second family reunification visa application was made. During the consideration process on foot of this second application, a request for further information was made on behalf of the Respondent. This application was refused but was subject to appeal on behalf of the Applicants.

5. In January, 2022, the Visa Appeals Officer wrote to the First Applicant requesting additional information including, *inter alia*, a copy of the Second Named Applicant's P60/Employment Detail Summary for 2018, 2019 and 2020 and his final pay slip for 2021, a copy of the Second Named Applicant's marriage certificate to his Irish citizen wife and evidence of the Second Named Applicant's and his Irish citizen wife's domicile in Pakistan at the date of their divorce. An explanation was sought as to why the Divorce Certificate provided for the Second Named Applicant's previous marriage states the date of entry of

divorce as a date in February, 2011 and the date of notice of divorce as a date in November, 2011 with the result that the entry date of divorce is prior to the date of notice of divorce.

6. In March, 2022, the Applicants' solicitor wrote attaching a number of documents in response to this request for further information. It was explained that the divorce notice in Pakistan is when the divorce is actually registered as the process is informal hence the date of notice is after the Divorce. In relation to the documentary evidence sought in respect of the previous marriage to the Irish citizen it was indicated that the Second Named Applicant was not in a position to provide this evidence given the "*historic nature*" of the information and the fact that he was habitually resident in Ireland.

7. The second reunification application was refused, on appeal, on the 8th of April, 2022. The decision to refuse this application is the decision impugned in these proceedings. A copy of the considerations document was included with the decision letter.

CONSIDERATIONS GROUNDING REFUSAL OF VISA

8. In the considerations document which accompanied the refusal an issue was raised with regard to the Second Named Applicant's divorce from his Irish citizen wife whom he claimed to have married in July, 2004 in accordance with Muslim Hanfia law. A copy of a document executed by the Second Named Applicant with the title "*Divorce Deed*" had been provided but the point was made that the document did not state where the marriage took place. A Pakistani Divorce Registration Certificate issued by the Government of Punjab and attested by the Ministry of Foreign Affairs in Pakistan which had been submitted was referred to noting that the entry date of the divorce given was just over 12 months before the stated date of effectiveness of the divorce. The Appeals Officer did not consider there to have been a sufficient explanation for this inconsistency. It was also noted that the stamps on the Second Named Applicant's passport did not show him to have been in Pakistan either when the divorce proceedings were initiated or when the divorce certificate was obtained.

9. The consideration document referred to a Government of Punjab issued Marriage Registration Certificate attested by the Ministry of Foreign Affairs in Pakistan which had been provided in support of the application and which stated that the First and Second Applicants

were married in Pakistan on a date in December, 2017. It appeared that the marriage was registered the following day. A first Marriage Registration Certificate issued in December, 2017, described the First and Second Applicants' status as "*virgin*" notwithstanding that both already had children from earlier relationships. A second Marriage Registration Certificate issued on a date in August, 2019 stated instead that each of the Applicants were divorced. The two marriage certificates which were provided were thus considered by the Visa Appeals Officer to contain conflicting information in respect to the status of the First and Second Named Applicants.

10. The failure to provide a marriage certificate in respect of the Second Named Applicant's marriage to his previous Irish citizen wife either at first instance, on appeal or when requested by way of fair procedures letter was specifically remarked upon and the Visa Appeals Officer in the considerations document. The Visa Appeals Officer indicated an opinion that providing a marriage certificate for a previous marriage of the Second Named Applicant should not pose undue difficulty for the Second Named Applicant. As a result of the failure to provide a marriage certificate in respect of the Second Named Applicant's earlier marriage to an Irish citizen and the failure to advise where the marriage took place or offer any information on whether the marriage was registered in Pakistan or whether or not the Second Named Applicant or his Irish citizen wife were domiciled in Pakistan at the time of their divorce, difficulties were presented in establishing the lawfulness of the Second Named Applicant's purported divorce by talaq from his Irish citizen wife who is recited on the Pakistani Divorce Registration Certificate as having an address in Rawalpindi. The Appeals Officer laid emphasis on the fact that the recognition of foreign divorces is governed by the Domicile and Recognition of Foreign Divorces Act, 1986 which it is indicated provides that a foreign divorce will be recognised if either of the parties was domiciled in the state concerned at the date of the granting of the decree. The consideration document noted that the question of the recognition of foreign divorces in this State was addressed in *H v. H* [2015] IESC 7 a case in which the importance of domicile in the country in which a divorce is granted was reiterated (in non-EU cases).

11. As apparent from the considerations document the Appeals Officer reasoned that in the circumstances of this case it was likely that the Second Named Applicant had acquired a domicile of choice in Ireland. The circumstances considered to lead to this conclusion

identified by the Visa Appeals Officer included the fact that Second Named Applicant had resided in this State since 2005, had become an Irish citizen through naturalisation thereby demonstrating a positive intention of permanent residence in Ireland (one of the eligibility requirements for Irish citizenship being that one intended to continue to reside in Ireland), was employed in Ireland on a full time basis, paid his taxes in this State, was the father of two Irish citizen children and had sponsored an application for a join family visa for his stated spouse and child to permanently join him in this State to reside. The Visa Appeals Officer proceeded to find that the Minister was not able to conclude on the basis of the information available that either the Second Named Applicant or his Irish citizen wife had been domiciled in Pakistan when their divorce was obtained there and as the Minister is not in a position to recognise the validity of the *Divorce Registration Certificate* in respect of the Second Named Applicant's first marriage. It followed that the Second Named Applicant's capacity to enter a second marriage had not been established. Consequently, the First and Second Named Applicant's marriage could not be given recognition by the Respondent. It was concluded:

> *"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.*
>
> *Insufficient documentary evidence has been provided to show:*
>
> *i. That either [name of Irish citizen wife] or the sponsor were domiciled in Pakistan at the time the divorce proceedings were initiated or when the certificate was issued*
> *ii. That [name of Irish citizen wife] ever received notification of the divorce from the Union Council*
> *iii. That the Union Council ever received written notification from the sponsor*
> *iv. That the marriage of [name of Irish citizen wife] and the sponsor was ever legally registered in Pakistan*
> *v. That the divorce was conducted within the formalities of obtaining a legal divorce in Pakistan."*

12. As regards the status of the Third Named Applicant, the consideration document refers to the appeal letter dated the 2nd of November, 2021 wherein the Second Named Applicant states:

> "*Please note that during COVID19, the Irish Foreign Birth Register paused the registry process services on their portal – and no alternative registry option for the birth of my child that occurred within the COVID-19 period was available to us. This is the reason for not registering the birth of our son in the period in question."*

13. In addition to the conclusions reached regarding the failure to establish a valid marriage, the considerations document further records a consideration of the relationship history noting that the Second Applicant travelled to Pakistan in late 2017 (and was in Pakistan on the date of his marriage) and on four occasions since then. Some photographic and other records of social media communication are also referred to. Detailed consideration was given to the financial documentation submitted and payslips demonstrated cumulative (year to date) gross earnings of €32,306.61 together with the evidence and the Second Named Applicant was found to meet the financial thresholds set under the Policy. Regard was had, however, to the fact that the Policy Document on non-EEA Family Reunification (specifically paragraphs 13.2, 15.2, 17.2, 20.3 and 20.4 of the Policy Document) applied in respect of lawful marriages and partnerships as more fully set out and it had not been demonstrated that the marriage between the First and Second Named Applicants was recognisable in Irish law.

14. While it was accepted that the Second Named Applicant had provided some financial support to the First Named Applicant, gaps were identified in the documentation submitted. The Visa Appeals Officer also addressed the documentary evidence of social support since marriage which had been submitted and considered there to be insufficient evidence of an ongoing relationship in existence "*prior to marriage and the birth of the minor applicant*" and it was noted that the minor applicant has lived apart from his father since he was born.

15. The Visa Appeals Officer then further considered whether special circumstances existed in accordance with the Policy Document which would warrant the grant of a visa notwithstanding issues identified with the application. The position of the Third Named Applicant was identified as a consideration in this regard but no reference was made to his

rights as a child to the care and company of his father nor to his eligibility as the child of the Second Named Applicant for consideration for a join family visa even if his mother was not considered entitled to such a visa on the basis of her marriage.

16. Having so concluded, the Visa Appeals Officer then proceeded to consider the constitutional rights of the Applicants with broad reference to Articles 2, 40.3.1, 41.1 and 41.3.1 of the Constitution. In considering the rights of the Third Named Applicant, no reference was made to Article 42A of the Constitution and it was stated:

> *"Based on the documentary evidence provided, it is noted this is a child born outside of a marital relationship. Therefore, rights under Article 41 of the Constitution are not engaged in this case."*

17. Having concluded that the Constitution did not preclude a refusal of the visa, the Visa Appeals Officer then proceeded to consider the best interest of the child with reference to the caselaw of the European Court of Human Right before concluding:

> *"….the factors relating to the rights of the State are weightier than those factors relating to the rights of the child. It is submitted that the minor applicant's relationship with the sponsor is a relationship that is capable of being sustained in the same manner as it has been since the minor applicant's birth in Pakistan in 2020, whether by way of visits, and telephonic and electronic means of communication, without the grant of a visa to the applicant."*

18. The rights of the Second Named Applicant's Irish born citizen children with his Irish citizen wife were considered with particular regard to their rights to respect for family life arising under Article 7 of the Charter of Fundamental Rights of the European Union considered in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter. The Visa Appeals Officer concluded that the refusal of the visa in respect of the Applicants would not result in the EU citizen children of the Second

Named Applicant's earlier marriage to his Irish citizen wife inevitably having to leave the territory of the European Union and accordingly there was no indication that the refusal of a visa would be detrimental to the children's best interests (being the children of the earlier marriage) nor any indication that the children would be removed from the State/EU if the Applicants were denied visas in this instance.

19. Similarly, it was concluded on a consideration under Article 8 of the European Convention on Human Rights that while it may be the Applicants' preference to develop their relationship in this State, there was no general obligation on the State to respect their choice in this regard given that the State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.

20. In all of the circumstances the Visa Appeals Officer was satisfied the application should be refused. It is the decision to refuse a family reunification visa made in April, 2022 which is the subject of challenge in the within proceedings.

PROCEEDINGS

21. By *ex parte* order (Meenan J.) made on the 3rd day of October, 2022 the Applicants were given leave to apply for reliefs by way of judicial review as set forth in the Statement of Grounds filed on the 11th day of July, 2022 for an order of *certiorari* quashing the decision of the Respondent dated the 8th of April, 2022 refusing a visa to the First and Third Named Applicants and an extension of time pursuant to Order 84, Rule 21 of the Rules of the Superior Courts should same be required.

22. The Grounds upon which leave was granted as set out in the Statement of Grounds may be summarised as:

I. Reference to the marriage being a potentially (or actual) polygamous marriage is unreasonable;
II. In circumstances where the financial thresholds set out in the Minister's Policy Document of Family reunification are met it is no longer permissible for the

Minister to consider whether or not there has been sufficient evidence of financial and social support and any conclusion that there is a want of evidence of financial and social support is irrational on the evidence in this case;

III. The refusal on the basis of a want of evidence of their relationship prior to marriage despite the fact that the Applicants informed the respondent that theirs was an arranged marriage and, therefore, there was no pre-marriage relationship is irrational when arranged marriages are recognisable;

IV. A refusal on the basis of a want of evidence of their relationship subsequent to marriage is irrational on the evidence including the evidence of the First Named Applicant's pregnancy;

V. A refusal on the basis that the Applicants' marital relationship could be continued without the need to reside together owing to the fact that it commenced while they both lived in different countries is irrational as is the conclusion regarding the ongoing relationship between the second and third named Applicants;

VI. The decision was flawed because of a failure to carry out a full and proper consideration and assessment of the Applicants' rights as a family unit and there was insufficient engagement with the constitutional protections afforded to the family, as a unit, and the rights based on their marriage to another of the first and second named Applicants, having particular regard to the second Applicant's status as an Irish citizen.

23. Notably, no argument was advanced on the case as originally pleaded that the refusal was flawed by reason of a failure to consider the individual and personal rights of the Third Named Applicant as a child whose rights are protected under the Constitution.

24. In a Statement of Opposition filed an issue was raised as regards delay in circumstances where the decision sought to be impugned was made on the 8th of April, 2022 but leave to judicially review was obtained by Order dated the 3rd of October, 2022. The Respondent denied each ground of challenge advanced and further maintained that the refusal of the visa on grounds relating to the validity of the marriage was one which it was open to the decision maker to arrive at on the basis of the evidence available. It was also maintained that the Applicants' rights as a family had been fully and properly considered.

25. The proceedings were first listed for hearing before me on the 25th of April 2023 but on that date an application to amend the proceedings was moved on behalf of the Applicants who sought leave to challenge the decision to refuse the visa on the basis of a failure to consider the rights of the child protected under Articles 40 to 42A of the Constitution and a failure to consider the prospective rights of the Third Named Applicant as an Irish citizen. Reliance was placed on *B.W. v. Refugee Appeals Tribunal* (No. 1) [2015] IEHC 725 and *J.K. v. Minister for Justice and Equality* [2011] IEHC 473, cases in which leave to amend proceedings had been permitted at a late stage. In *B.W.*, Humphreys J. (applying the decision of the Supreme Court in *Keegan v Garda Siochana Ombudsman Commission* [2012] 2 I.R. 580; [2012] IESC 29) permitted leave to amend to include a new point on the basis that it was arguable, there was an explanation for the point not having been pleaded (lawyer mistake) and the other party was not unfairly or irremediably prejudiced. Further, in *J.K.* Hogan J. resumed the hearing of a case to raise an issue which had not been raised by the parties during the course of the first hearing and which came to his attention only in the course of preparing his judgment and concluded that O. 84, r. 20(3) of the Rules of the Superior Courts enabled this Court to formulate a new ground of its own motion where appropriate to exercise that jurisdiction.

26. Having regard to the issue sought to be raised which I considered to be arguable, the explanation offered by counsel for the lateness of the application and the fact that any prejudice to the Respondent could be addressed by an adjournment and orders in relation to costs, I considered that this was an appropriate case in which to exercise my jurisdiction to permit a late amendment of the Statement of Grounds, particularly having regard to the fact that the proposed amendment was directed to protecting the rights of the child party to the proceedings who was dependent entirely on others for the presentation of his case. I duly made an order giving leave to deliver an amended Statement of Grounds but adjourned the proceedings with an order for costs against the Applicants, subject to a stay pending the determination of the proceedings and directions regarding the filing of an affidavit explaining the late application, delivery of an amended Statement of Opposition and supplemental submissions addressed only to the new ground.

27. The Respondent opposes the newly pleaded additional ground on the basis that the Third Named Applicant was not at the time of the impugned decision an Irish citizen. Indeed, he was not an Irish citizen at the date of commencement of these proceedings nor on the date when he sought amendment thereto. It is therefore contended that any assertion of rights by

them premised upon Irish citizenship (or EU citizenship derivative thereon) of the Third Named Applicant, whether potential or prospective or future or otherwise, is too remote and any challenge to the impugned decision on grounds relevant to such claimed Irish citizenship is premature. The Respondents maintain as an application for a visa can be made at any time and repeatedly there is no impediment to a further application being made in reliance on changed circumstances which would arise were the Third Named Applicant to apply and/or be granted Irish citizenship.

DISCUSSION AND DECISION

Extension of time

28. As the proceedings are not captured by the time limits fixed pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000 (as amended), a three-month time limit applies. The impugned decision is dated the 8th of April, 2022 but was received by the Applicants on the 11th of April, 2022. Papers were filed on the 11th of July, 2022 and the proceedings were opened for the purposes of stopping time on the 25th of July, 2022. Leave was granted by this Honourable Court on the 3rd of October, 2022. Thereafter, Opposition papers were filed in December, 2022. An application for leave to introduce a new ground was made (orally) only on the date the action was originally listed for hearing on the 25th of April, 2023.

29. The Applicants maintain, in my view incorrectly, that proceedings filed within three months of the decision being received were commenced in time. Relying on *McCreesh v. An Bord Pleanala* [2016] IEHC 394 which treated the filing of papers as sufficient to stop time, they maintain that no extension of time is required. Since the decision of the Court of Appeal in *Heaney v. An Bord Pleanala* [2022] IECA 123, it is clear that the filing of papers alone does not operate to "*stop the clock*" in judicial review proceedings. As time runs from the date of the decision on the 8th of April, 2022 and the papers were only opened before the Court on the 25th of July, 2022, it is clear that an extension of time of some seventeen days is required.

30. In written submissions it was indicated on behalf of the Respondent that she was not formally opposing an extension of time having regard to the affidavit evidence filed on behalf of the Applicants since the filing of their opposition papers and the minimal delay involved.

31. In view of affidavit evidence to the effect that the judgment in *Heaney* was only published on the Court's website in October, 2022 together with the further explanation given in relation to delay which included the need to have an affidavit sworn in Pakistan where the First Applicant resides, I consider that a basis has been demonstrated on the facts and circumstances of this case to satisfy me both that good and sufficient reason exists to extend time and that the delay in commencing the proceedings was outside the control of the Applicants. I am satisfied that the circumstances of this case are such as justify the exercise by me of my discretion to extend time up to and including the 25th of July, 2022 when the leave application was opened before the High Court.

32. While an extension of time is required in respect of the initial delay in commencing proceedings, the Respondent further maintains that a grant of leave to amend a Statement of Grounds does not *per se* absolve an applicant from the need to adduce explanation for delay nor prevent a Respondent raising delay as a valid ground of opposition.

33. I accept that delay remains a consideration in deciding whether to grant leave to amend a Statement of Grounds and whether to subsequently grant relief on foot of a late amendment to a Statement of Grounds. Having regard to decisions in cases such as *B.W. v. Refugee Appeals Tribunal* (No. 1) [2015] IEHC 725 and *J.K. v. Minister for Justice and Equality* [2011] IEHC 473, referred to above and in view of the fact that I granted leave to amend the proceedings because of the substance of the argument and the reasons offered for failing to advance that argument earlier but also made an order adjourning proceedings with costs against the Applicants to address any question of unfairness or prejudice to the Respondents arising from the late amendment of the Statement of Grounds, it is my view that it would not be appropriate to refuse relief in this case on grounds of delay alone.

Refusal to Recognise Validity of Marriage and Related Grounds

34. With the exception of the treatment of constitutional protections affecting the child, I consider each of the grounds of challenge advanced in the judicial review proceedings as originally constituted to lack substantive merit. Without addressing each pleaded ground in turn, I am quite satisfied that the Respondent was entitled to find that the information provided in relation to the Second Applicant's divorce from his first wife was insufficient to confirm that it was one that would be recognised in Irish law. In this regard I note the proper reliance

placed on behalf of the Respondent on the decision of the Supreme Court in *H v. H* [2015] IESC 7 [2017] 1 I.R. 370 regarding the recognition of a foreign divorce and the treatment of potentially polygamous marriages.

35. In my view the Applicants were afforded ample opportunity to address the Respondent's evidential requirements in this regard and were treated fairly. They could not have been in any doubt as to the significance attached by the Respondent to the question of domicile in Pakistan at the time of the dissolution of the earlier marriage with the Irish national entered into in 2004. In view of the failure on the part of the Applicants to provide evidence to address these concerns, I am satisfied that the Respondent was entitled in light of the established position in law in this jurisdiction regarding the recognition of foreign divorces to proceed to find that there was insufficient information before her to confirm the validity of the marriage and to therefore treat Article 41 of the Constitution as inapplicable. In consequence of her findings regarding the validity of the marriage, the Respondent was also entitled to interrogate further the financial and social support as between the Applicants in accordance with the Respondent's Policy Document on Non-EEA Family Reunification.

36. While it is clear that the marriage of the First and Second Named Applicants was presented as an arranged marriage with the result that evidence of pre-marriage relationship has limited relevance and would not alone justify a view that the marriage should not be recognised, this does not appear to me to have been a central or important basis for the Respondent's refusal of the visa application. Nor has it been established that either the conclusion that there was insufficient evidence of relationship subsequent to marriage or that the relationship could be continued without the need to reside together was irrational. These findings were made in the light of the evidence put before the Respondent. The approach of the Respondent to this evidence is consistent with the approach endorsed in cases such as *S.M. & T.A. v. Minister for Justic*e [2022] IEHC 611 and *L.T.E. & Anor. v. Minister for Justice* [2022] IEHC 504. No error of law sufficient to ground relief in these proceedings has been identified on behalf of the Applicants.

37. While I find no infirmity in the approach taken to the validity of the marriage of the First and Second Named Applicants which in turn informed the approach of the Respondent to her consideration of the application in terms of the particular family relationship in question and the facts and circumstances of this case and her conclusions on the evidence, I consider the

position of the Third Named Applicant's rights warrants further scrutiny. The need for further scrutiny is particularly warranted where the consideration given to the rights of the child as a member of the family under Article 41 of the Constitution was impacted by the conclusion that the child had not been demonstrated to be the child of a lawful marriage and further that no application had been made to register the birth of the child as a foreign child entitled to Irish citizenship at the time of the decision.

Consideration of the Child's Rights as an Issue

38. It is clear from the considerations document that certain facts were seemingly accepted by the decision maker. First, it was accepted that the Second Applicant is an Irish citizen. Second, it was not disputed that the minor applicant is the son of the first two Applicants. As the child of the First Named Applicant who is a naturalised Irish citizen, the Third Named Applicant ostensibly meets the requirements for an entitlement to Irish citizenship under ss. 7 and 27 of the Irish Nationality and Citizenship Act 1956 (as amended) ("the 1956 Act"). Much is made on behalf of the Respondent, however, of the fact that whilst a claimed entitlement to Irish citizenship of the Third Named Applicant by way of registration on the Foreign Births Register ("FBR") was asserted in the initial visa application, an application had not been initiated by the Applicants at the time of the impugned decision. Indeed, an application on behalf of the Third Named Applicant was only initiated in July 2023 long after the institution of these proceedings and after the application for leave to amend the Statement of Grounds had been moved. The significance of this from the Respondent's perspective is that reliance is said to be improperly placed on a failure to consider an asserted prospective right to Irish citizenship (and European citizenship based on citizenship of Ireland) on the part of the Third Named Applicant in refusing the application.

39. I consider the Respondent's position that reliance on prospective rights is impermissible to be well founded insofar as a claim based on the Third Named Applicant's prospective right to Irish citizenship is concerned given that an application had not been pursued on his behalf at the time of the decision under challenge. As is evident from Affidavit evidence filed on behalf of the Respondent, not all applications are successful and it is a matter for the Applicants to satisfy the Minister for Foreign Affairs that the Third Named Applicant should be entered in the FBR in normal course. I am not persuaded by the Applicants' arguments in reliance on *IRM v Minister for Justice* [2018] I IR 417 concerning the prospective position of unborn child in a

deportation context nor on the *Zambrano* line of caselaw including the recent *Case C-459/20 X v. Staatssecretaris van Justitie en Veiligheid* (22nd of June, 2023) which it is argued suggests that a third-country parent of a dependent EU citizen child, who has never lived in the EU, has a right of residence provided that the child resides with her in the Member State of the child's nationality. Reliance on prospective rights of the kind asserted on behalf of the Third Named Applicant is too remote in my view given that no application had been made for Irish citizenship on behalf of the Third Named Applicant's at the material time. It would be neither fair nor appropriate for me to entertain a challenge on the basis of prospective rights which had not been invoked on the facts before the decision maker when the decision to refuse was made.

40. While I do not consider the refusal of a visa amenable to successful challenge on the basis of a failure to consider the prospective rights of the Third Named Applicant as an Irish or EU citizen, this is not determinative of the question of whether there has been a failure on the part of the Respondent to adequately consider and/or to give sufficient weight to the rights of the Third Named Applicant pursuant to Articles 40.3 to 42A of the Constitution. There is nothing in the terms of Article 42A1 of the Constitution which limits the natural and imprescriptible rights of the child thereby protected either to the child of a marriage or an Irish citizen child. Indeed, in *K.R.A. v Minister for Justice* [2017] IECA 284 Irvine J. found (at para. 41) that:

> *"41. … Even where applicants are non-nationals, the Irish State promises to recognise their family rights and to protect them given that these rights derive not from citizenship but from their nature as human beings."*

41. It is now established that children, who are not citizens of this State and who are not part of a family based on marriage protected by Article 41, nonetheless have constitutional rights as children, which arise from the inherent characteristics of the human personality and the nurturing relationship between parent and child. As Burns J. observed in *Odum v. Minister for Justice* [2021] IEHC 747 (para. 15):

"15. ....arising from the nurturing relationship between parent and child as identified by Denham J. in Oguekwe v. Minister for Justice, a child, regardless of her non-citizen and non-marital family status, has a constitutional right to the care and company of her parent. Similarly, a non-citizen and unmarried parent has a constitutional right to the company of her child."

42. In his judgment on behalf of the Court in *I.R.M. v. Minister for Justice and Equality* [2018] 1 IR 417, a case dealing with a citizen child and an unmarried father, Clarke CJ. stated (at para. 222) that the context in which Article 42A came to be inserted into the Constitution makes it clear that it had:

"everything to do with the rights of children and in particular the removal of a difference in treatment between marital and non-marital children".

43. The Supreme Court further observed (at para. 223):

"Article 42A is a composite provision recognizing the rights of children, making it clear that its provisions apply to all children regardless of the marital status of the parents, providing that the children's best interests will be the paramount consideration and providing for the voice of the child to be ascertained in proceedings concerning them."

44. Recent seemingly conflicting decisions of different judges of the High Court in *A v The Minister for Justice and Equality* [2022] IEHC 576 and *A.Z. v. Minister for Justice* [2022] IEHC 511 suggest that the position regarding the application of Article 42A of the Constitution is not yet settled. In *A.* Hyland J. observed that the decision of the Court of Appeal in *Dos Santos v Minister for Justice and Equality* [2015] 3 IR 411 has been applied to exclude the application of Article 42A to decisions regarding the deportation of parents as follows (at para. 37):

"37. This case does not involve the deportation of a child but does involve the deportation of a parent. Dos Santos has been consistently applied to exclude the operation of Article 42A to the deportation of parents (see e.g. O.O.A., and J.W. v. Minister for Justice [2020] IEHC 500). Therefore, I am satisfied that the existence of Article 42A does not extend the obligations of the respondent in this case and therefore does not require to be independently considered in my analysis."

45. On the other hand, in *A.Z. v. Minister for Justice* [2022] IEHC 511, I found, in part reliance on the decisions of the Supreme Court in *J.B. v. KB* [2019] 1 I.R. 270 and *In Re JJ* [2021] IESC 1, that the obligations on decision makers to consider the rights of the child as recalibrated in Article 42A require to be weighed in the decision-making process. In view of this apparent divergence in the jurisprudence of the High Court I granted leave to appeal in respect of a question of law arising from my judgment in *A.Z.* pursuant to s.5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000 (as amended) namely whether I had erred in law in finding that Article 42A.1 applies in deportation decisions. In its determination delivered on the 29th of June 2023 the Supreme Court granted leave to pursue a leap-frog appeal and indicated in its determination that it considered that a matter of general public importance arose regarding the effect of Article 42A on the decision-making process ([2023] IESCDET 87).

46. For reasons previously stated in my decision in *A.Z.* and regardless of whether rights arise under Article 40.3 or Article 42A, it seems to me to be clear that the Third Named Applicant enjoys rights under the Irish Constitution notwithstanding that he is neither an Irish citizen nor the child of a recognised marital family. It is also clear that those rights are not absolute and are limited by the common good and the State's legitimate interests. As referred to in *Oguekwe v. Minister for Justice* by Denham J., and emphasised by O'Donnell J. in *Gorry v. Minister for Justice* [2020] IESC 55, the starting position with respect to decisions of this nature is that the State has a right to determine whether a foreign national can enter and remain in the State but in so doing constitutional rights arising must be considered as well as the legitimate interests of the State. A balancing exercise must be engaged in to determine where the greater interest lies but this balancing exercise can only be lawfully conducted where the child's rights are properly identified, calibrated and assessed.

47. In *Odum v. Minister for Justice* [2021] IEHC 747, Burns J. similarly concluded that the non-citizen child enjoys constitutionally protected rights but refused relief on the facts and

circumstances of the case. In *Odum*, Burns J. was considering a deportation case in which the Applicant father had not been registered on the birth certificates of the children and where inadequate evidence of a relationship of father and child had been put before the Minister, despite request for same. In rejecting the claim for relief in those proceedings Burns J. observed that considerations regarding the impact of the interference with a child's constitutional right to the care and company of her parents are dependent on the underlying factual matrix and family history and that on the basis of the evidence put before the Minister there had been no failure of consideration in that case.

48. The facts and circumstances in this case are different to those in *Odum*. This is not a deportation case but a visa application in which no issue has been identified with the Second Named Applicant's parentage of the Third Named Applicant. Further, in contrast with the facts as set out in the judgment in *Odum* where constitutional rights were not referred to at all by the decision maker and had not been invoked during the decision-making process, it is singularly striking that certain constitutional rights were expressly considered in this case with notable exception. Thus, while the constitutional rights of the family were expressly referenced in the consideration document in this case (rejected because the marriage was not established to have been contracted following a recognisable divorce), there was no mention whatsoever of the constitutional rights of the Third Named Applicant in his capacity as a child of an Irish citizen who has rights of residence in the State. Analysis referring to the Constitution was carried out under Article 41 and in this context a passing reference (albeit without analysis) was made to Article. 40.3 of the Constitution. While Article 41 was treated as being inapplicable and although it was accepted that the family have rights under Article 8 of the ECHR, there was no analysis of the rights of the child under Article 40 and no reference to or analysis of his rights under Article 42A. While the best interests of the child were addressed, this was through the prism of the ECHR only and without reference to the Constitution and the constitutional protection of the rights of the child. Even the rights of the Irish citizen children of the Second Named Applicant's first marriage were considered, albeit primarily in the context of their rights under the Charter of Fundamental Rights of the European Union.

49. Against this background of detailed consideration of identified rights, it is concerning that no reference is made to the Third Named Applicant's constitutional rights as a child irrespective of the marital status of his parents. Given the express reference to Articles 40 and 41 of the Constitution and the decision that Article 41 had no application because of the failure

to establish a lawful marriage on foot of a recognisable divorce, the omission of any reference to Article 42A supports the conclusion either that the decision maker concluded that rights under that provision did not arise for consideration or failed to advert to those rights. In this regard, as graphically illustrated in *Gorry v. Minister for Justice and Equality* [2020] IESC 55, while constitutional and ECHR rights overlap, they are not synonymous and interchangeable and require to be separately considered. As O'Donnell J. sought to explain in *Gorry* in the context of protection of marriage under the Constitution, the fact that the Constitution and the ECHR together provide extensive overlapping protection for families and marriage does not mean that there is no requirement to separately consider these rights and it is necessary to recognise the different contexts.

50. Given the jurisprudence of the Supreme Court in cases such in *J.B. v. KB* [2019] 1 I.R. 270, *In Re JJ* [2021] IESC 1 and *I.R.M. v. Minister for Justice and Equality* [2018] 1 IR 417, I am satisfied that the rights of the child are protected under Article 42A of the Constitution in a manner which cannot be treated as automatically co-extensive with rights protected under the ECHR. The ECHR does not contain express protection for the rights of the child in a manner or terms which mirror Article 42A. As Hogan J. noted in *Middelkamp v. Minister for Justice & Ors.* [2023] IESC 2 while both instruments seek to achieve the same fundamental objective, they do so in somewhat different ways. He added (para. 19):

> *"the Constitution remains, however, the fundamental law of the State and as I put it in Costello v. Government of Ireland [2022] IESC 48 at [60], it is "after all, the ultimate repository of our sovereignty and democracy. It expresses in a profound way key aspects of our national identity in legal form."*

51. Accordingly, the fact that the Constitution and the ECHR together provide extensive overlapping protection for the rights of the child does not obviate the necessity for a separate consideration of both instruments insofar as the rights of the child are concerned. Such separate consideration did not happen in this case. While the State has a right to determine whether a foreign national can enter and remain in the State, it must do so following consideration of constitutional rights arising. A balancing exercise must be engaged in so as to determine where the greater interest lies. As the Third Named Applicant has rights *qua* child including a core constitutional right to the care and company of both parents pursuant to Articles 40 to 42A of the Constitution, but in this case the balancing exercise conducted was carried out without

reference to the constitutional rights of the child either under Article 40.3 or Article 42A, the balancing exercise conducted was not based on a proper acknowledgement of or reference to or apparent weighing of the constitutional rights of the child. In my view this failure is fatal to the sustainability of the decision to refuse a join family visa in this case.

CONCLUSION

52. For the reasons set out, I will make an order extending time for the bringing of the within proceedings up to and including the 25th of July, 2022. I will also make an order quashing the decision recorded on the 8th of April, 2022 to refuse the visa application presented on behalf of the First and Third Named Applicants due to the failure to properly consider the constitutional rights of the Third Named Applicant as a child of an Irish citizen exercising rights in the State in consequence of which failure I consider the decision to be fundamentally flawed.

53. If no agreement as to the form of order required on foot of the terms of this judgment is confirmed to the Registrar within fourteen days of electronic delivery of this judgment, this matter will be listed with a view to finalising same.