THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 749 JR]

BETWEEN

F.B.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 2)

JUDGMENT of Mr Justice David Keane delivered on the 13th December 2018

Introduction
1. This is the judicial review of a decision by the Minister for Justice and Equality ('the Minister'), dated 5 September 2017 ('the decision'), under s. 18(4) of the Refugee Act 1996, as amended ('the Refugee Act'), to refuse permission to two children ('E.L.' and 'E.S.') to enter and reside in the State as dependent family members - specifically, as granddaughters - of the applicant, who is a refugee. An application by a refugee, under s. 18(1) of the Refugee Act, for such permission is colloquially known as a family reunification application or, in the administrative shorthand of the Department of Justice and Equality ('the department'), an FRU application.

2. This is the second set of proceedings between the applicant and the Minister about this family reunification application. In *F.B. v Minister for Justice and Equality* [2014] IEHC 427 (Unreported, High Court, 5th September, 2014) McDermott J quashed an earlier decision by the Minister, dated 4 April 2013, to refuse the permission sought.

Procedural history
3. The applicant's statement of grounds is dated 3 October 2017 and was filed on the same day. It is accompanied by a short verifying affidavit of the applicant, sworn on 2 October 2017 but is grounded on an affidavit sworn by the applicant's solicitor on 29 September 2017.

4. By order made on 9 October 2017, Humphreys J granted leave to the applicant to seek orders of certiorari separately quashing the Minister's decision in respect of each child. The appropriate notice of motion then issued on 17 November 2017, returnable for 27 November 2017. The Minister filed a statement of opposition on 22 January 2018. It is supported by an affidavit of verification sworn on 19 January 2018 by Declan Crowe, an assistant principal in the Minister's Department. The proceedings came on for hearing before me on 11 May 2018.

Reasons for each decision, grounds of challenge and grounds of opposition
5. E.L. was refused permission to enter and reside in the State because the Minister is not satisfied that it is in that child's best interests to do so. E.S. was refused that permission because the Minister is not satisfied that she is a member of the family of the applicant.

6. The applicant contends that the Minister's decision concerning both children is bad in law on each of two grounds: first, because the Minister failed to address certain submissions made on their behalf; and second, because the Minister disregarded the requirements of both Article 41 of the Constitution of Ireland and Article 8 of the European Convention on Human Rights, in reaching it. The applicant also contends that the Minister's decision concerning E.L. is invalid on each of three additional grounds: first, because the reason given for it is impermissibly opaque and inadequate; second, because it is irrational or unreasonable, or both; and third, because it is capricious.

7. The Minister denies each of the grounds on which the applicant asserts that the decision is invalid but also pleads that the applicant had demonstrated a clear lack of candour that would, in any event, disentitle her to any relief on two specified grounds that will shortly become evident.

Background
8. The applicant's personal circumstances and the history of her refugee status and family reunification applications are described in the judgment of McDermott J.

9. To recapitulate briefly, the applicant is a 75-year-old widow, who arrived in Ireland in 2005 from Nigeria. In 2008, she obtained a declaration of refugee status and, in December 2012, she became a naturalised Irish citizen. The applicant had a serious pre-existing illness that was diagnosed after her arrival in the State and for which she received extensive medical treatment here. Although that treatment was successful, she remains in poor health. The applicant is in receipt of the State old-age pension as her sole source of income and receives welfare assistance in the form of rent allowance.

10. The applicant first applied for family reunification with E.L. and E.S. on 22 February 2011. That application was refused on 14 December of that year.

11. On 29 August 2012, through her solicitor, the applicant wrote to the Minister's department to make a second family reunification application. According to the applicant, E.L. was then 12 years old (having been born on 6 June 2000) and E.S. was then 14 years old (having been born a little over two years earlier, on 13 April 1998).

12. The Minister refused that application on 3 April 2013 on the basis that the applicant had failed to establish that the children were dependent on her for the purposes of s. 18 of the Refugee Act because, in the Minister's view, the evidence presented was insufficient to establish their financial dependence upon her. In the judgment that he delivered on 5 September 2014, McDermott J quashed that decision for two separate reasons.

13 The first was that he was not satisfied that the Minister had applied the correct test of dependency under s. 18 of the Refugee Act, either by adopting the broad conception of that term envisaged under various instruments promulgated by the office of the United Nations High Commissioner for Refugees ('UNHCR') and necessary to effect a harmonious interpretation with the provisions of Council Directive 2003/86 on Family Reunification (albeit that Ireland has opted out of that EU legislation); see *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC 427, (Unreported, High Court (Cooke J), 25th November, 2010) and the judgments of Clark J in *Ducale v Minister for Justice and Equality & Anor* [2013] IEHC 25 (Unreported, High Court, 22nd January, 2013) and *A.A.M. (Somalia) v Minister for Justice and Equality* [2013] IEHC 68 (Unreported, High Court, 15 February, 2013) , or by correctly considering what amounts to financial dependency as just one manifestation of that broader conception of dependency; see *A.M.S. v Minister for Justice and Equality* [2014] IEHC 57 (Unreported, High Court (Mac Eochaidh J), 13 February, 2014).

14. The second was that the Minister had failed to have regard to the rights of the applicant and her granddaughters to respect for the family life under Article 8 of the European Convention on Human Rights or, more immediately and fundamentally under the legal order of the State, to their right to family life under Article 41 of the Constitution of Ireland; see *R.X. v Minister for Justice, Equality and Law Reform* [2010] IEHC 446 (Unreported, High Court (Hogan J), 10 December, 2010).

15. Following the judgment of McDermott J, the applicant wrote to the Minister on 23 September 2014 requesting a fresh decision on the family reunification application. After further exchanges of correspondence and at the request of the Office of the Refugee Applications Commissioner, which the Minister had tasked with conducting further investigations, the applicant submitted another completed questionnaire and supporting documentation under cover of a letter dated 11 December 2014.

16. While it is no part of this court's function to consider the merits of the applicant's family reunification application, to place the Minister's decision and the reasons given for it in context it is useful to describe certain aspects of the material on which it was based. First, as McDermott J noted in *F.B. (No. 1),* the applicant's position is as follows. Her daughter, the mother of E.L. and E.S., died in 2005. The girls' father had disappeared some time before that. At present, they are being looked after in Nigeria by a woman who is a family friend, and are supported by (necessarily, modest) remittances from the applicant and monies provided by a paternal uncle.

17. In the course of the asylum process in 2005, the applicant had asserted that her daughter was still living and that she had just one grandchild, E.L. In applying for family reunification in 2011, the applicant stated that her daughter died in December 2005, leaving behind two daughters, E.L. and E.S. In addressing that discrepancy, the applicant explained that she had only identified E.L., and not E.S., as her granddaughter in her asylum application because E.L., to whom she had a greater attachment, had been living with her in Nigeria before the applicant fled and E.S. was still then living with her own father there. The applicant asserts that she only became aware of the death of her daugher in 2006 and that her difficulty in coming to terms with that fact led her to claim before the Refugee Appeals Tribunal in 2007 that her daughter was still alive. The applicant's position, therefore, is that, aside from their father who has abandoned them, she is her granddaughters' closest living relative and is, thus, in loco parentis to them.

18. Another issue arose about a visit that the applicant made to the Irish embassy in Abuja, Nigeria, on 16 September 2009, to report lost travel documents, which led the Minister to write to formally warn her on 28 February 2011 that a declaration of refugee status can be revoked, under s. 21(1) of the Refugee Act, where the holder of that declaration had voluntarily re-availed herself of the protection of the country of her nationality. It is the applicant's position that she was visiting her granddaughters in neighbouring Benin at the time and was told to report to the Irish embassy in Abuja, Nigeria, to obtain replacement travel documents.

19. The family friend who was looking after E.L. and E.S. swore an affidavit in Nigeria on 20 July 2012, averring that she was no longer in a financial position to look after them.

20. The further supplemental questionnaire on her family reunification application, which the applicant completed and signed on 26 November 2014,was accompanied by a letter from a Methodist Minister confirming that the Methodist Church would provide some support for E.L. and E.S., if they were permitted to join the applicant in the State.

21. Returning to the train of events that culminated in the decision under challenge, precisely what happened next has not been described and is not evidenced by the documentation exhibited on either side. The applicant avers that - at some point after the decision of the High Court - she and the two children were required to attend at clinics in Ireland and Nigeria, respectively, to undertake DNA testing. On behalf of the Minister, Mr Crowe avers only to events that occurred after the results of that testing became available.

22. This much is clear. The applicant received a DNA test report dated 26 April 2016 from a company named Orchid Cellmark Limited ('the Cellmark report'). It notes the claimed relationship of grandmother and granddaughter between the applicant and each of the two young women, before stating that grandparent analysis is not as conclusive as testing both parents against the alleged child. It recites that a DNA sample was taken from the applicant on 19 January 2016 and from both E.L. and E.S. on 13 April 2016. It concludes that, from the DNA testing results, the following statements can be made about the claimed relationships between the persons concerned.

23. First, concerning the applicant and E.L., the Cellmark report concludes that the most likely relationship between them is that of 'aunt and niece or grandmother and grandchild', observing that the DNA results are 250 times more likely if the applicant is related to E.L. as an aunt or grandmother than if they are unrelated. In a preliminary summary, the report states: 'The DNA evidence supports the claimed relationship between [the applicant] and [E.L.].'

24. Second, concerning the applicant and E.S., the Cellmark report concludes 'no relationship determined', without explaining the import of that phrase and without providing any accompanying statistical analysis. Does the phrase mean that the test results confirm that, to an unspecified degree of likelihood or as a certainty, the applicant and E.S. are not biologically related? Or does it mean that whether or not they are biologically related is in some unspecified way fundamentally incapable of determination? Or does it perhaps mean that whether or not they are biologically related could not be determined by reference to a particular, though unspecified, problem or difficulty with the samples provided or the test conducted? The report states in its preliminary summary: 'The DNA evidence does not support the claimed relationship between [the applicant] and [E.S.].'

25. The Minister wrote to the applicant on 3 May 2016. That letter states, in material part:

> 'The DNA evidence received states that the claimed relationship between [the applicant] and [E.L.] is most likely that of *Aunt and Niece* or *Grandmother and Grandchild* and does not conclusively support the claimed relationship.
>
> The DNA evidence confirms that there is no relationship determined between [E.S.] and [the applicant].

As the claimed relationships have not been proven conclusively to the satisfaction of the Minister, the Minister has decided, in exercising her discretion, *not to grant* the application.'

(emphasis in original)

26. Through her solicitors, the applicant wrote to the Minister at some length on 27 May 2016, challenging the Minister's decision, requesting that the Minister reconsider it and threatening legal proceeding if the Minister did not. As will shortly become clear, the Minister later attributed particular significance to the following paragraph in that letter:

'Our efforts to extract a decision from the relevant persons in your department during this two-year period include forwarding a medical report, which listed the several serious medical complaints, which our client suffers. Certainly, the delay and the attitude being taken can only be contributing to worsening her health. Again, we invite you on reading the file to consider such report and thereby to better realise the humanitarian aspects of the situation. We would also observe that the presence of family carers for our client in the coming years, which are roles her grandchildren can undertake for her, would likely represent a significant saving in public funds.'

27. On 13 July 2016, the Minister wrote to the applicant, informing her that it had been suggested - by who is not clear - that the DNA samples of both children be tested against each other to establish whether or not the children are related as siblings, and seeking her consent to that test. The applicant and each of the two children subsequently consented to it.

The decision

28. On 5 September 2017, the Minister wrote to the applicant to notify her of the decision not to grant the family reunification application in respect of E.L. and E.S.. The reasons for that decision were set out in a document of the same date, entitled 'FRU Consideration', prepared by one of the Minister's officials.

29. After some preliminary recitals, the FRU Consideration addresses the position of E.L., in material part, as follows:

'DNA testing results - Grandparent/Grandchild testing

The results of the first set of DNA tests stated that the most likely relationship between the applicant and this subject was either that of *Aunt and Niece* or *Grandmother and Grandchild.* The DNA provider (*sic*) states in their report that the DNA evidence supports the claimed relationship between [the applicant] and [E.L.].

Therefore the applicant has established (i) the identity of [E.L.] and (ii) her relationship to same.

Dependency

It is noted that the applicant has sent some small financial remittances in respect of upkeep and care of the subject. The applicant has also asserted that there is an emotional bond between her and her grandchild. The issue of dependency is accepted.

Minister's discretion

While the applicant has established the identity of [E.L.] and her relationship to her, the Minister has considered whether or not a decision to approve the application is in the best interest of the minor child. In this case, there are concerns in relation to this subject as [the applicant's solicitors] state in their correspondence with the Department that [E.L.] would be able to "*provide care and companionship*" to the elderly applicant who has a number of medical issues. They go on to state "*We would also observe that the presence of family carers for our client, in the coming years, which are roles her grandchildren can undertake for her….*"

Decision in respect of [E.L.]

The Minister does not believe that it is in the best interest of the minor, [E.L.] to be reunited with the applicant. The Minister has therefore decided not to exercise his discretion in this case and the application in respect of [E.L.] is therefore *not granted.'*

(all emphasis in original)

31. The relevant part of the FRU Consideration addresses the position of E.S. in these terms:

'Relationship - Birth Certificate and DNA Testing

The applicant submitted a birth certificate which stated that [E.S.'s] … mother [was the applicant's daughter]. This document was forwarded to the Garda Technical Bureau for examination and while the report states that the document "appears to be a genuine Nigerian birth certificate" it goes on to say that "the document has limited security features" and the Bureau was unable to determine if it was genuinely issued.

Prior to the decision of May 2016, DNA testing was carried out to establish whether or not the relationship of Grandmother and Grandchild, as alleged by the applicant, existed between them.

DNA testing - Grandparent/Grandchild relationship

The results of the DNA testing state "*DNA evidence does not support the claimed relationship between [the applicant] and [E.S.]*". The report goes on to say "*No Relationship Determined.*"

Further DNA Testing - Sibling Testing

Following the original decision not to grant the application in respect of [E.S.], further DNA testing was carried out to establish whether or not the two subjects were in fact related as sisters as they were alleged to be children of the deceased daughter of the applicant.

The result of this testing showed "*weak support for a half sibling relationship between [E.L.] and [E.S.]"* and goes on to say that the "*most likely relationship is that of half sibling or more distantly related."*

Decision in respect of [E.S.]

While the applicant has established the identify of [E.S.], she has not established the relationship of Grandmother/Grandchild as alleged. The results of DNA testing clearly state "*No Relationship Determined*".

The applicant has failed to establish the relationship as alleged between her and [E.S.] pursuant to Section 18(4)(b) of the Refugee Act 1996 (as amended) and therefore the application in respect of her is *not granted*.'

Analysis
i. refugee family reunification

32. Section 18(4)(a) of the Refugee Act provides that the Minister may, at his discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State, with all of the same rights and privileges as a refugee, for as long as the refugee concerned is entitled to remain in the State.

33. Section 18(4)(b) defines a " dependent member of the family" of a refugee, for the purpose of sub-s. (4)(a) to mean any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully.

34. In *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC 427 (Unreported, High Court, 25 November, 2010), Cooke J observed:

'31. …. [I]t appears reasonable to assume that s. 18 has been incorporated into the Act in the interests of facilitating the reception of refugees and ensuring their personal wellbeing while in the State. The legislation is not enacted in discharge of any binding obligation of international law because family reunification, as such, is not provided for in the Geneva Convention of 1951 or the 1967 Protocol and Ireland has not opted into the European Union legislation in this area, namely, Council Directive 2003/86/EC of 22nd September, 2003, on the right to family reunification (O.J.L. 251/12 of 3rd October, 2003) (see Recital 17).

32. The UNHCR, however, has, in various instruments, over many years, encouraged the Contracting States to recognise and respect the "essential right" of refugee families to unity and has encouraged them to facilitate its achievement (see, for example, the *'UNHCR Resettlement Handbook (Geneva, November 2004)'* ; the *'UNHCR Guidelines on Reunification of Refugee Families 1983' and the 'Conclusions of the UNHCR Executive Committee on Family Reunification of 21st October, 1981)'* .

33. The rationale of family reunification as an objective in this area is well expressed in Recital (4) to the Council Directive:

> *"Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty."*

34. Notwithstanding the non-binding nature of these sources, it is desirable in the view of the Court, that the provisions of s. 18 should be construed and applied so far as statutory interpretation permits in a manner which is consistent with these policies and with the consensus apparent among the Member States of the Union in the objectives of the Council Directive.'

ii. constitutional family rights and the right to respect for family life under the ECHR

35. In the case of E.L., the Minister has accepted for the purpose of the decision given that she is the granddaughter of the applicant. In *R.X. v Minister for Justice, Equality and Law Reform* [2010] IEHC 446 (Unreported, High Court, 10 December, 2010), Hogan J pointed out that the grandparent/grandchild relationship is capable of attracting the protections of both Article 41.1 of the Constitution of Ireland and Article 8 of the European Convention on Human Rights. Having rejected the proposition that there is any a *priori* rule of constitutional interpretation by which grandparents are excluded from the scope of the family life envisaged by Article 41, Hogan J went on to explain (at para. 46):

'For such persons to come within the scope of the constitutional protection, it is, however, necessary to demonstrate that they have such ties of dependence and interaction with other family members that they would come within the rubric of that family and that the family itself is based on marriage. This normally pre-supposes that a person such as a grandparent would share the same house as the other family members in question and that they would have an active role in the comings and goings of the family in question. A grandparent could not, for example, be regarded as a family member simply by reason of ordinary social courtesies or even by reason of regular visits to the grandchildren's family home. While each case must turn on its own facts, something further than the ordinary interaction between a grandparent and a grandchild or other family member would generally be required. This, as it happens, is also the position

> of the European Court of Human Rights with regard to Article 8 ECHR: see, *e.g., Marckx v. Belgium* (1979) 2 EHRR 330, *Boughanemi v. France* (1996) 22 E.H.R.R. 228.'

36. In *F.B. (No. 1),* having noted that, on the facts of this case, there is an issue concerning whether the grandparent/grandchild relationship between the applicant and both E.L. and E.S. is one based upon any marriage of the applicant's daughter, their mother, McDermott J pointed out that, even if it is not, it is still one capable of attracting the protection of Article 8 of European Convention. In that earlier decision, McDermott J concluded (at para. 43) that it was clear that, in reaching the decision then under challenge, the Minister had not considered the application of Article 8, which failure amounted to an error of law.

37. There is no evidence in the decision now under challenge of any consideration of family rights in the application concerning E.L. The Minister argues that this is immaterial on the authority of the decision in *O.O. & Ors v Minister for Justice and Equality* [2015] IESC 26 (Unreported, Supreme Court (Charleton J; Clarke and Laffoy JJ concurring), 19 March, 2015) and, in particular, the following passage in it (at para. 26):

> 'It is clear that as one moves away from the nuclear family, to grandparents, to grandchildren, to uncles and aunts and thence to cousins of varying degrees, as a matter of moral imperative, the constitutional guarantee is either inapplicable or substantially recedes. The woman tending to her children within the home is the mother that is referred to in Article 41.2: the rights of grandmothers are not thereby constitutionally protected. The right to educate the child is guaranteed in the text to parents, but is not guaranteed to grandparents. While there is undoubtedly a natural affection and a desire to nurture, while passing on the wisdom of age and experience, between grandparents and their grandchildren, such guarantees as are given in the Constitution are to the mother and father and to their children.'

38. But, unlike the present one, *O.O.* was not a case involving a grandparent claiming to be *in loco parentis*. And while it is perfectly clear that the constitutional guarantee under Article 41.1 recedes from parent to grandparent, there is no suggestion that it disappears. Further, the tension at play in *O.O.* and many similar cases, as described by Charleton J (at para. 26 of his judgment in that case), is that between the State's entitlement to legitimately provide for a rational and considered immigration policy and the rights of the family based on marriage, most frequently in the context of the exercise of the deportation power. Charleton J was careful to distinguish between the balance of rights in such cases and the specific balance struck by the Oireachtas under s. 18 of the Refugee Act. Accordingly, there is no suggestion that the Supreme Court in *O.O.* was purporting to overrule *sub silentio* the decision of Hogan J in *R.X.* - if anything quite the contrary.

39. It is by now trite law that the family life that every person is entitled to have respected under Article 8 of the European Convention on Human Rights extends to relations between grandparents and grandchildren and makes no distinction between the marital and non-marital family; see *Marckx v Belgium* (1979-80) 2 E.H.R.R. 330; *Johnston v Ireland* (1987) 9 E.H.R.R. 203; and *Keegan v Ireland* (1994) 18 E.H.R.R. 342. Nonetheless, the Minister next argues that the right to family life under Article 8 of the European Convention on Human Rights could not have availed the applicant in this case, because the European Court of Human Rights has frequently reiterated, perhaps most recently in *Loudoudi & Ors v Belgium* (Application 52265/10, 16 December 2014), that '*de facto* family ties' characterise its applicability and, in the circumstances of the present case, 'the applicant plays a limited role in her two alleged grandchildren's lives.'

40. That argument misses the point in several ways. First, it begs the question - in the classic sense of assuming the truth of the proposition for which it contends - by asserting that the applicant is someone with no, or no significant '*de facto* family ties' to E.L. and E.S. despite her claims: to be their closest traceable relative; to be in constant communication with them; to have travelled to Benin to be briefly reunited with them; to be maintaining them as her dependants; and to be in all practical respects in *loco parentis* to them.

41. Second, it merely serves to emphasise that it was incumbent on the Minister to consider the concrete reality of the relationship between the persons concerned and the extent to which it was one of '*de facto* family ties', protected by the right to family life under Article 8 of the Convention. There is no evidence in the decision under challenge that the Minister ever embarked on any such consideration.

42. Third, even if the Minister had considered the concrete reality of the relationship between the applicant and each of the two children and had concluded that it did not amount to one of '*de facto* family ties' sufficient to engage the protections of Article 8 of the Convention, that reasoning should have been set out in the decision under challenge. It cannot simply be implied.

43. The written submissions filed on the Minister's behalf go on to quote extensively from the decisions of the European Court of Human Rights in *Chandra v The Netherlands*, Application No. 53102/99, 13 May, 2003; *Benamar v Netherlands*, Application No. 43786/04, 5 April, 2005; and *Knel v The Netherlands*, Application No. 39003/97, 5 September, 2000, confirming that the right to respect for family under Article 8 does not permit a family's preference to reside in a particular State to trump that State's right to control the entry of non-national family members into its territory, depending on the facts of each case. Once again, this misses the point by confusing the sovereign right of a State to exercise immigration and border control with the demonstration by a State of appropriate respect for what the UNHCR describes as the "essential right" of refugee families to reunification, accomplished in Ireland through the enactment of s. 18 of the Refugee Act. Unlike the applicants in those cases, the applicant in this case is a refugee who does not have the option of settling with her family members in her country of origin.

44. For those reasons, neither the decision of Costello J in *Pok Sun Shum v Ireland* [1986] ILRM 593 nor that of Ryan J in *Fitzpatrick v Minister for Justice* [2005] IEHC 9, (Unreported, High Court, 26 January, 2005) assists the Minister's case. Each of those cases was concerned with a challenge to an adverse immigration law decision, rather than to an adverse refugee family reunification one. In each of those cases, the High Court found that the Minister had implicitly considered the countervailing constitutional family rights of the applicant before coming down in favour of the competing public interest in immigration control, whereas in this case I cannot be satisfied that the Minister has considered the extent to which the family rights of the applicant militate in favour of the family reunification to which she claims she is entitled, pursuant to the right of refugee families to reunification, which the State recognises in its law through the provisions of s. 18 of the Refugee Act.

iii. the best interests of the child

45. As Humphreys J observed in in *O.O.A. v Minister for Justice and Equality* [2016] IEHC 468 (Unreported, High Court, 29 July, 2016) (at para. 31), the best interests of the child presumptively militate in favour of normal and reasonable access to grandparents, relatives, and persons, particularly those in *loco parentis*, with whom the child has developed a positive relationship.

46. The Minister acknowledges that in considering whether to grant E.L. permission to enter and reside in the State it was necessary

to have regard to her best interests as a child. Indeed, the Minister claims to have done so through the attribution of particular significance to a single phrase in a letter written by the applicant's solicitor on the applicant's behalf - a point to which I will return.

47. What does a consideration of the best interests of the child entail? Although it is not part of our domestic law, Ireland ratified the UN Convention on the Rights of the Child 1989 ('the CRC') without reservation on 28 September, 1992. Article 3 of the CRC provides that, in all actions concerning children undertaken by administrative bodies, the best interests of the child shall be the primary consideration. Article 12 requires State Parties to ensure that a child capable of forming his or her own views has the right to express those views freely in all matters affecting him or her, and to ensure that those views are given due weight in accordance with the age and maturity of the child, in particular by affording that child the opportunity to be heard in any administrative proceedings affecting him or her.

48. The same principle is now enshrined in the jurisprudence of the European Court of Human Rights on the application of the right to respect for family life under Article 8 of the European Convention on Human Rights. In *Jeunesse v. Netherlands* (Application no. 12738/10, 3rd October, 2014)[GC], the Court stated (at para 109):

> 'Where children are involved, their best interests must be taken into account (see *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 44, 1 December 2005; *mutatis mutandis, Popov v. France*, nos. 39472/07 and 39474/07, §§ 139-140, 19 January 2012; *Neulinger and Shuruk v. Switzerland*, cited above, § 135; and *X v. Latvia* [GC], no. 27853/09, § 96, ECHR 2013). On this particular point, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it.'

49. In our domestic law, since the enactment of the Thirty-First Amendment of the Constitution (Children) Act 2012 on 28 April 2015, Article 42A.4.1° of the Constitution requires provision to be made in law that, in the resolution of all proceedings concerning the guardianship or custody of any child, the best interests of the child shall be the paramount consideration. In consequence, s. 3 of the Guardianship of Infants Act 1964, as amended ('the 1964 Act'), now provides that where, in any proceedings before any court, the guardianship, custody or upbringing of a child is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.

50. Section 31 of the 1964 Act provides in material part:

> '(1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.
>
> (2) The factors and circumstances referred to in subsection (1) include:
>
> (a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;
>
> (b) the views of the child concerned that are ascertainable ...;
>
> (c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;
>
> (d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;
>
> (e) the child's religious, spiritual, cultural and linguistic upbringing and needs;
>
> (f) the child's social, intellectual and educational upbringing and needs;
>
> (g) the child's age and any special characteristics;
>
> (h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;
>
> (i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;
>
> (j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;
>
> (k) the capacity of each person in respect of whom an application is made under this Act—
>
> (i) to care for and meet the needs of the child,
>
> (ii) to communicate and co-operate on issues relating to the child, and
>
> (iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.
>
> ...

> (5) In any proceedings to which section 3(1)(a) applies, the court shall have regard to the general principle that unreasonable delay in determining the proceedings may be contrary to the best interests of the child.'

51. I have set out the relevant provisions of s. 31 of the 1964 Act at some length because they delineate the factors that need to be considered in the conduct of any proper inquiry into the best interests of the child. There is no evidence before me of any such inquiry in the case of E.L. Rather, the Minister simply expresses a concern about certain statements in correspondence from the applicant's solicitors about the care and companionship that the child, E.L, can provide to her grandmother, the applicant, if permitted to enter and reside in the State, before declaring the belief that it is not in the best interests of E.L. as a child to grant her that permission.

52. I conclude that the there was a fundamental error of law in the Minister's decision in the manner and basis upon which it purported to identify the best interests of the child E.L. such that it cannot stand.

53. Even if that were not so and I could somehow be persuaded that an inquiry into E.L.'s best interests of the sort envisaged under s. 31 of the 1964 Act had preceded the Minister's decision (a proposition for which I have no evidence), that decision would still be bad in law for failure to provide adequate reasons. The conclusion that it is not in E.L.'s best interests to be permitted to enter and reside in the State does not seem to me to flow from the premise that she would otherwise be expected to provide care and companionship for her grandmother (who, in common with very many elderly persons, has a number of medical issues), unless the inference could properly be drawn that the level of care and companionship expected from her is excessive and, hence, exploitative. I do not see the basis for any such inference. Thus, I find that the Minister's decision to refuse the permission sought for E.L. is couched in terms so vague and opaque that the rationale for it is neither patent nor capable of being inferred from its terms and context; see the dictum of Murray CJ in *Meadows v The Minister for Justice* [2010] 2 IR 701 at 732. The decision must be quashed on that basis also and on the basis that it fails the test of reasonableness embodied in the Keegan and *O'Keefe* principles that were reiterated in Meadows.

iv. biometric testing

54. As Shannon, *Child Law,* 2nd edn. (Dublin, 2010) explains (at para. 15-122):

> 'DNA testing can contribute to the protection of some children. It can provide accurate identification, facilitate family tracing, prevent as well as assist in discovering abuse or trafficking, prevent inappropriate use of the asylum determination system, assist in tracking and disappearances or help children who wish to exercise their right to identity and nationality. On the other hand, this practice raises a number of ethical issues. Families are not biological constructs. There is no universally recognised definition of "family". Test results may be extremely disruptive to the family unit. Moreover, not everyone will be able to provide DNA test results on request. Furthermore, requests for testing may be discriminatory, and immigration officials may start rejecting previously acceptable documentation. The [Separate Children in Europe Programme ('SCEP') *Position Paper on the Use of Biometric Data* (2006)] ('the SCEP position paper') describes how recognition should be given to a broad definition of "family". There is a danger that a narrow definition or concept of the family unit will be applied, which effectively refers only to parents and siblings. This would fail to appreciate the cultural importance within some communities of the extended family and the harsh realities of life for many separated children, some of whose parents may be dead, missing or imprisoned, and that hence a child's principal carer may not be a member of his or her immediate family.'

55. The SCEP position paper puts the matter very well (at p. 12):

> 'However, there is a danger that a narrow definition or concept of the family unit will be applied, which effectively refers only to parents and siblings. This would fail to appreciate the cultural importance within some communities of the extended family and the harsh realities of life for many separated children, some of whose parents may be dead, missing or imprisoned and hence a child's principal carer may not be a member of their immediate family. DNA tests may have limited use in situations of polygamy or where children have been born following rape or infidelity. In these situations the child may not have a biological link to their primary carer. Rather than resort to biometric testing a series of appropriate questions may be able to establish kinship links. A failure to consider a more flexible definition of family is likely to mean that the best interests of many separated children are ignored. Article 10 of the CRC relates to family reunification. Within the text of the article reference is made to States Parties dealing with applications for family reunification in a positive, humane and expeditious manner. Where this can be achieved without resort to biometric testing it would be arguably unnecessary to subject a child to the procedures. Biometric testing should be used to aid family reunification where there is doubt as to the identities of the parties, not as a routine procedure to gather information on a child with the aim of using this information in informing the decision on the application to remain within the EU.'

56. As already noted, s. 18(4)(b) extends the definition of " dependent member of the family" beyond a family member, such as a grandchild, to include a ward of the refugee.

57. In *Ducale v Minister for Justice for Justice*, already cited, Clark J stated (at para. 45):

> 'It is inconceivable that the relationship between a guardian and an unmarried, minor relative who is in his / her care and who is dependent upon him could in those circumstances be considered to fall outside of the Minister's discretion under s. 18(4). 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.'

58. In the case of E.S., the limited evidence before the Court of the results of the DNA tests concerning her does not seem to me to justify the summary refusal of permission for her to enter and reside in the State as a dependent family member of the applicant, particularly in light of the rationale of the objective of family reunification that underlies the enactment of s. 18 of the Refugee Act, which is to help create socio-cultural stability by facilitating the integration of third country nationals in the State, thereby also promoting economic and social cohesion.

59. It will be remembered that, concerning the applicant and E.S., the Cellmark report brusquely states the result of the relevant DNA test as 'no relationship determined', without providing any accompanying statistical analysis and without explaining the import of that phrase, beyond the summary that the DNA evidence does not support the claimed relationship. It will also be remembered that the report on the further DNA testing of E.L. and E.S. carried out at some unspecified time between July 2016 and September 2017 showed weak support for a half-sibling relationship, before concluding that the most likely relationship between them was that of half-siblings or persons more distantly related.

60. In brief summary then, the scientific evidence before the Minister is that the most likely relationship between the applicant and E.L. is that of grandmother and grandchild and that the most likely relationship between E.L. and E.S. is that of half-siblings.

61. As the SCEP position paper points out, families are not strictly biological constructs and there is a danger in applying a narrow definition or concept of the family unit of failing to appreciate the cultural importance within some communities of the extended family or of failing to allow for difficult personal circumstances such as the consequences of rape, infidelity or intra-familial deceit. As Clark J has pointed out in *Ducale v Minister for Justice*, already cited, s. 18(4)(b) of the Refugee Act addresses this problem by extending the definition of dependent family member to include a dependent ward.

62. For that reason, I cannot accept the Minister's argument that the DNA test results, whether alone or in conjunction with the discrepancies between the various accounts of her family circumstances provided by the applicant, are sufficient to establish a lack of candour on her part that would disentitle her to any relief in these proceedings.

63. In adopting a narrow view of the application for permission for E.L. to enter and reside in the State, i.e. that it must be considered solely by reference to the specific family relationship asserted, that of grandparent and dependent grandchild, instead of by reference to the broad terms of s. 18(4)(b), the Minister was ignoring the refugee family reunification policy underlying the relevant provision and, thus, fell into error.

Conclusion

64. The applicant is entitled to an order of certiorari to quash the Minister's decision to refuse permission to E.L. and E.S. to enter and reside in the State under s. 18(4) of the Refugee Act.