THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 996JR]

BETWEEN

HALYNA RATUSHNYAK

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 16th August 2019

Introduction

1. This is the judicial review of a decision, made by the Minister for Justice and Equality ('the Minister') on 25 October 2017, to refuse the appeal of Oksana Ratushnyak, a citizen and resident of the Ukraine, born on 13 October 2000, against the refusal to grant her a visa to enter and reside in Ireland ('the review decision').

2. The applicant is the aunt and sponsor of the unsuccessful appellant, who – for ease of reference - I will refer to as 'the niece' for the remainder of this judgment.

3. The applicant is also a citizen of the Ukraine, born in 1973, who entered Ireland in 2002 and became a naturalised Irish citizen in 2012.

Background

4. Through her solicitors, the applicant applied online for a 'long stay visa' for her niece on 4 May 2016, before forwarding a signed application form and supporting documentation to the Irish Consulate in Kiev, under cover of a letter, dated 18 May 2016, which contained extensive submissions. The niece was then 15 years old.

5. The applicant sought that visa for the niece on, essentially, the following basis.

6. The applicant's sister, who was the niece's mother, died in 2009. The niece's father had abandoned the family in 2003 and was later declared a missing person.

7. Since their mother's death, the niece and her sister have lived with and been cared for by their grandmother, the applicant's mother, to whom their guardianship had passed under Ukrainian law. The niece's sister has a physical disability. The applicant's mother was then 65 years old and felt unable to continue looking after two teenage grandchildren, although she was prepared to look after one.

8. The applicant has travelled to Ukraine many times since 2002 to spend time with her family, including her niece. The applicant's mother and the niece travelled to visit the applicant in Ireland in 2014 or 2015 – there was some confusion on the point, though nothing turns on it. In recent times, the applicant has provided some financial support to her mother for her niece's care and maintenance. The applicant is in regular video contact with the niece over the internet.

9. The applicant married a Ukrainian man in Ireland in 2007. They have one child born in that year. They separated in February 2015. The applicant lives and works in Ireland, where she is employed as a payroll administrator.

10. In consultation with her family, in 2015 the applicant decided to take over parental responsibility for the niece and, on 11 February 2016, successfully applied to a court in the Ukraine to be appointed the niece's guardian. Because the Ukraine is not a signatory to the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ('the Hague Adoption Convention'), that adoption is not recognised by Ireland.

11. Nonetheless, the applicant initially sought a long term visa for the niece to enter and reside in Ireland as both the applicant's legally adopted daughter in the Ukraine (an adoption that the applicant submitted Ireland was obliged to recognise in deference to the lex loci, *i.e.* the law of the Ukraine, despite the inapplicability of the Hague Adoption Convention to an adoption in that state), and as the proposed subject of an adoption application by the applicant in Ireland in due course. The niece was then 15 years old.

12. On behalf of the Minister, the Irish Naturalisation and Immigration Service ('INIS') wrote to the niece on14 October 2016 to inform her that her visa application had been refused. The reason given was that insufficient documentation had been submitted in support of it. More specifically, the letter stated that, since the Ukraine is not a signatory to the Hague Adoption Convention, the applicant's adoption of the niece in the Ukraine could not be recognised under Irish law. The letter went on to state that the applicant had been unable to submit to the Minister a copy of the appropriate 'Certificate of Eligibility and Suitability', required by the Adoption Authority of Ireland. The letter continued that the Minister had separately concluded that there were no 'extenuating circumstances' attending the application because there was no reason why the niece's living arrangements in the Ukraine could not continue as they were. The meaning or significance of the term 'extenuating circumstances' as it appears in that letter has not been made clear but nor has any issue been raised on the point.

13. Through new legal representatives, the applicant wrote to the Irish Embassy in Moscow to appeal that decision on 18 November 2016, making submissions and enclosing additional documentation in support of that appeal. The niece was then 16 years old. In essence, the applicant now sought a visa for her niece not as her adopted daughter, but as her dependent niece and godchild, who she hoped to adopt in Ireland in due course, although she continued to argue – perhaps, in the alternative - that Ireland was obliged to recognise the Ukrainian adoption in deference to the lex loci The applicant's legal representatives forwarded yet more documentation in support of that appeal under cover of a letter, dated 12 June 2017, by which time the niece was 16 years old.

The review decision

14. On 25 October 2017, the INIS wrote to the niece to inform her that her appeal against the refusal of her visa application had not been successful and that the original decision to refuse the application had been upheld. The reason given was that the application did not meet the qualifying criteria. The letter continued:

> 'The applicant has provided a Certificate of Adoption from Ukraine to support her application. At this time, however, Ukraine's adoption laws are incompatible with Irish adoption law and as such, inter-country adoptions from Ukraine are not currently recognised by the Adoption Authority of Ireland.'

15. An eight-page 'consideration of visa application' by an official in the Irish Embassy in Moscow ('the consideration document'), also dated 25 October 2017, was enclosed with the INIS letter.

Procedural history

16. By Order made on 18 December 2017, Humphreys J granted the applicant leave to apply for judicial review of the Minister's decision. The applicant was permitted to seek each of the reliefs claimed in her statement of grounds, dated 15 December 2017, on the grounds set forth in it. That statement is supported by an affidavit of the applicant, sworn on the same date. The Minister filed a statement of opposition on 10 April 2017, grounded on a short *pro forma* affidavit of verification of Emma Peppard, a higher executive officer in the INIS, sworn on the same date.

17. The proceedings were transferred to the list to fix dates on 16 April 2018 and were heard on 9 May 2018. By then, the niece was 17 years of age.

18. I pause to note that, under s. 3 of the Adoption Act 2010, as amended ('the Act of 2010'), 'child' means any person who is under the age of 18 years. Under s. 23 of the Act of 2010, the Adoption Authority of Ireland shall not make an adoption order in respect of a child unless the child resides in the State and is, at the date of the making of the adoption order, less than 18 years of age. Having regard to the procedure for domestic adoptions provided under Part 4 and Part 5 of the Act of 2010, even had it been possible to give judgment *ex tempore* on the wide range of issues raised by the applicant; had that judgment resulted in an order quashing the review decision; and had a long term visa subsequently been granted for the niece to enter and reside in the State, it does not seem remotely realistic to imagine that an adoption order could have been made prior to the niece's eighteenth birthday on 13 October 2018, in particular given the requirements of ss. 20(4) and 37 of that Act, considered in light of the decision of the Supreme Court in *McC and McD v Eastern Health Board* [1997] 1 I.L.R.M. 349.

The law

19. While regulated to a limited extent by statute in a manner not relevant here, the power to grant a visa derives from the executive authority of the State: *Bode (a minor) v Minister for Justice* [2008] 3 IR 663; *RMR v Minister for Justice, Equality and Law Reform* [2009] IEHC 279 (Unreported, High Court (Clark J), 11 June 2009); *Olakunori v Minister for Justice and Equality* [2016] IEHC 473, (Unreported, High Court (Humphreys J), 29 July 2016).

20. As a general rule, the Courts will only exercise a supervisory jurisdiction to intervene in the exercise of a power of the Executive if it can be established that it has been done in a capricious, arbitrary or unjust way: *Murray v Ireland* [1991] ILRM 465 (*per* Finlay CJ at 473).

21. Where family rights are engaged under either the Constitution of Ireland or the European Convention on Human Rights ('ECHR'), or both, a visa decision is justiciable on the basis of the necessary respect for those rights: see, for example, *E (a minor) v Minister for Justice and Equality* [2017] IEHC 81, (Unreported, High Court (O'Regan J), 16 February 2017).

22. On behalf of the Minister, the INIS published a '*Policy Document on Non-EEA Family Reunification'* on 31 December 2013. It was revised in December 2016 to reflect the commencement of the International Protection Act 2015. It is common case that both the first instance refusal decision and the Minister's review were governed by the policy set out in the latter document, which I will refer to as 'the policy document' for ease of reference for the remainder of this judgment.

23. As the policy document explains (at para. 1.6), its purpose

> '...is not to circumscribe Ministerial discretion, which will of course remain but rather to locate it in the overall framework where the elected Government of the day determines immigration policy and then sets out how that policy might apply in individual cases. In other words, the Minister's discretion will be largely exercised through setting down overall policies and parameters with some margin of appreciation retained by decision makers in exercising their professional judgment on the Minister's behalf.'

24. In view of the arguments advanced on behalf of the applicant in these proceedings, it is worth setting out the full text of section 2 of the policy document, headed 'A Balancing of Rights':

> '2.1 The European Convention on Human Rights Act 2003 requires all State authorities to perform their functions in a manner compatible with the Convention. The right to respect for family life within the meaning of Article 8 of the European Convention on Human Rights and Fundamental Freedoms places both positively and negatively stated obligations on the State. The right to live with one's close family may result in negatively stated Convention obligations when, for example, the deportation of a family member would breach the family's rights, or may be positive when the family member ought to be allowed to enter and reside in the State. The policy set out in this document addresses the latter element insofar as the family members are seeking to enter and reside in Ireland.
>
> 2.2 It is important not to confuse rights to family life with rights to family reunification. The Convention does not give an automatic right to a foreign national to enter or reside in a particular country. This has been confirmed repeatedly by the European Court of Human Rights and, further, the Court has said the State must strike a fair balance between the sometimes competing interests of the individual and of the community as a whole (this issue is revisited further on in this paper in relation to the economic aspects of family reunification). In this the State enjoys a wide margin of appreciation. The Court has also stated that Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory.
>
> 2.3 In similar manner, the status of the family enshrined in Article 41 of the Irish Constitution bears on immigration decisions. Once again, however, this Article does not stand alone and cannot be construed as predetermining the outcome of individual cases.'

The grounds of challenge
25. The applicant set out eleven separate grounds of challenge to the review decision in her statement of grounds. They were helpfully condensed into three broad issues in the applicant's written and oral submissions. I will deal with each of those issues in turn.

i. Art. 40.3.1 or 41 of the Constitution and Art. 8 of the ECHR

26. The relationship at issue in this case is that between an Irish citizen aunt and her non-national niece. It is a second-degree kinship relationship (connecting the applicant, through the applicant's sister, to the niece, as the daughter of the applicant's sister) or a third-degree common ancestor relationship (moving one degree up from the applicant and two degrees up from the niece to the applicant's parents as their common ancestors). To that extent and for what it is worth, the relationship is not quite as proximate as that between a grandparent and grandchild (which is both a second-degree kinship relationship and a second-degree common ancestor relationship).

27. In the course of the hearing before me, the applicant advanced the novel argument that the rights available to the niece are more extensive than they might otherwise be because the applicant is married. Thus, the argument went, the niece is entitled to invoke the family rights enshrined in Arts. 41 and 42 of the Constitution in respect of their relationship. That argument, which implies that those articles of the Constitution protect the relationship between a child and a married aunt but not the relationship between a child and a maiden aunt, seems to me to be misconceived. For the purpose of those articles, the relevant marital relationship – *i.e.* the one on which the niece's family is founded under Art. 41.3.1° of the Constitution – is that of the niece's parents. It is not in dispute in this case that the niece was born within her own parents' marriage. Thus, I can see no issue on the potential – although it must be stressed, potential – application of those articles.

28. In any event, under Art. 40.3 of the Constitution, a child born outside marriage has unenumerated rights broadly, if not directly, equivalent to the family rights available to a child born within marriage under Arts. 41 and 42; *G v An Bord Uchtála* [1980] IR 32 (*per* Walsh J at 69); *K.I. (a minor) v Minister for Justice, Equality and Law Reform* [2014] IEHC 83, (Unreported, High Court (McDermott J), 21 February 2014).

29. But all of that is some way off the point. More relevant is the question of the nature and extent of the family rights available to the applicant and her niece under Arts. 41 and 42 of the Constitution and, just as significantly, that of whether the Minister failed to take those rights properly into consideration in the review decision.

30. There is no doubt that the family contemplated under Art. 41 of the Constitution is potentially capable of extending beyond the 'nuclear family' (*i.e.* that represented by the relationship between spouses; or between parents and children; or between siblings) to encompass wider family relationships (*e.g.* those between grandparents and grandchildren or between uncles or aunts and nieces or nephews); *O'Leary v Minister for Justice* [2012] IEHC 80, (Unreported, High Court (Cooke J), 24 February 2012).

31. Even so, in *O.O. (an infant) & Ors v Minister for Justice* [2015] IESC 26, (Unreported, Supreme Court (Clarke, Laffoy and Charleton JJ), 19 March 2015), having observed that it has long been recognised that, even in the case of a foreign national who is married to an Irish spouse, rights of the family based on marriage may need to yield to the entitlement of the State to legitimately provide for a rational and considered immigration policy, Charleton J went on to state (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 are 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.'

32. Reflecting this analysis of the law, the policy document states in material part, under the heading 'Nature of family':

> '4.1 ...
>
> Not all categories of family member are covered by this policy. However, it is important to bear in mind that any person is potentially free to make an application to the Minister for permission to reside in Ireland in their own right and also to adduce *inter alia* in their application any relationships of blood or otherwise with an Irish national or resident.
>
> 4.2 At the same time, and while the term "family member" may be capable of being read very broadly, not all family members have the same standing. This is long established in many spheres including succession, marriage and immigration (including matters relating to the Free Movement of Persons within the EU). It follows that in any analysis of how a person might expect to fare in an immigration determination, and without prejudice to a detailed consideration of individual circumstances arising in the particular case, there must be deemed to exist a sliding scale of relationships with those having the closest connection generally having the greatest call on a positive outcome to an immigration determination, all other things being equal. It is also entirely reasonable in public policy terms to "set the bar" for family reunification much higher where more distant relationships are involved to the point that the prospects of success in certain cases must be regarded as remote unless very exceptional circumstances exist.'

33. The applicant criticises the review on the basis that it does not expressly refer to Art. 41 of the Constitution and submits that the absence of an express reference to that article compels the inference that the Minister failed to have regard to the applicant's constitutional family rights. I do not think that such criticism is fair or that the inference is warranted.

34. The criticism is not fair because the applicant did not raise Art. 41 of the Constitution in the extensive written submissions contained in her letter of 18 November 2016 in support of her application for review. The applicant did expressly invoke Art. 42A of the Constitution in those submissions, and the consideration document expressly addressed that point.

35. In *Jahangir v Minister for Justice and Equality* [2018] IEHC 37, (Unreported, High Court, 1 February 2018, Humphreys J deprecated in vivid terms the practice of making arguments on judicial review that were not made to the relevant decision maker (at para. 7):

> 'On a number of previous occasions, I have made it clear that it is not open to an applicant to condemn a decision on the basis of a point that has occurred to him or her later, and that was not put to the decision-maker. Indeed, sometimes a completely different point was put, a practice I have described as gaslighting of the decision-maker (see *J.M.N. (a minor) v. Refugee Appeals Tribunal* [2017] IEHC 115 [2017] 2 JIC 2710 (Unreported, High Court, 27th February, 2017), *Igbosonu v Minister for Justice and Equality (No. 2)* [2017] IEHC 748 [2017] 12 JIC 0503 (Unreported, High Court, 5th December, 2017), *H.E. (Egypt) v Minister for Justice and Equality (No. 3)* [2017] IEHC 810 [2017] 12 JIC 1304 (Unreported, High Court, 13th December, 2017) and *I.S.O.F. v. Minister for Justice Equality and Law Reform* [2010] IEHC 457 (Unreported, Cooke J., 17th December, 2010). The only mention of constitutional rights in the submission made to the Minister is in the context of the duration of the deportation order, a point addressed by the Minister in a discrete finding that is not specifically challenged. The points now being made were not put, and thus cannot be the basis of a challenge.'

36. The applicant's invocation of the decision of the Court of Appeal in *Gorry v Minister for Justice and Equality* [2017] IECA 282, (Unreported, Court of Appeal (Finlay Geoghegan, Irvine and Hogan JJ) entails the same unfairness. In that case, Finlay Geoghegan J reiterated (at para. 56) that in considering an immigration decision engaging family rights, the Minister should first consider the rights of the applicant, and the obligations of the State, under the Constitution, before going on to consider, to the extent necessary, the applicant's Art. 8 ECHR rights. The applicant submits that the express reference in the decision to Art. 8 ECHR, in the absence of an equivalent express reference to Art. 41 of the Constitution, establishes that the Minister adopted the wrong approach. Once again, that ignores the fact that applicant had expressly raised Art. 8 ECHR (in addition to Art. 42A of the Constitution), but not Art. 41 of the Constitution, in her written submission to the Minister in support of her application for review. Accordingly, I do not accept that it is implicit in the terms of the consideration document that the Minister had wrongly neglected to consider the applicant's constitutional rights before considering his obligation under the European Convention on Human Rights Act 2003 to exercise his executive power to grant a visa in a manner compatible with the applicant's rights under Art. 8 of the ECHR.

37. Further, I do not accept that, in considering at length and in detail the nature and extent of the family relationship contended for between the applicant and the niece, the Minister should be taken to have ignored its limited significance under Art. 41 of the Constitution, simply because the consideration document does not expressly refer to that article of the Constitution.

38. The conclusion is not warranted because the applicant can point to nothing in the consideration document that suggests that any aspect of her family relationship with her niece was disregarded or overlooked by the Minister in the context of the review that was conducted.

39. The applicant's remaining point under this head is that the Minister failed to have proper regard to the applicant's rights and those of the niece to respect for their private and family life under Art. 8 ECHR.

40. As with the equivalent – though not necessarily co-extensive - rights under Arts. 40.3 and 41 of the Constitution, there is no doubt that private and family life under Art. 8 of the ECHR may potentially extend to family members outside the traditional nuclear family; *FS v Minister for Justice, Equality and Law Reform* [2010] IEHC 433, (Unreported, High Court (Cooke J), 7 December 2010).

41. In particular, in *Boyle v United Kingdom* (Application No. 16580/90), (1995) 19 EHRR 179 at 181, the European Court of Human Rights noted the finding of the European Commission on Human Rights in that case that the relationship between Mr Boyle and his nephew fell within the scope of the concept of 'family life' under Art. 8. In reaching that conclusion, the Commission noted that cohabitation, though often an important factor, is not an essential one in determining whether 'family life' exists, before finding that, while Mr Boyle and his nephew did not share the same household, they did live in close proximity and the nephew often made 'weekend stays' at Mr Boyle's home. Further, the Commission recalled that Mr Boyle had frequent contact with the nephew from the nephew's birth and spent considerable time with him. The issue in *Boyle* was whether the ineligibility of a non-parental relative to apply to court for access to a child in care, prior to the entry into force of the UK Children Act 1991, was a disproportionate interference with family life under Art. 8.

42. But as with the question of the applicant's family rights under the Constitution, the real issue here concerns the nature and extent of the right to respect for family and private life available to the applicant and her niece in this case and, just as significantly, whether the Minister failed to take those rights into consideration in the review decision.

43. In that context, as Cooke J explained in *FS* (at para. 27):

> 'What clearly emerges from this case law however is the fact that where the protection of family life under Article 8 is invoked in respect of a relationship which is wider than those of the marital tie (in-laws for example,) and the blood tie between parent and child (grandparents, uncles, aunts for example,) the existence of "family life" and the extent to which a contested measure or action may be claimed to amount to an unlawful infringement is dependent on a careful consideration on a case by case basis of the specific characteristics of the tie asserted. A series of questions will be relevant. How are parties connected: how did the relationship come about: how long has it been established: do they live in the same household: what is the nature, quality or degree of intimacy of the bond between them: what are their ages and what element of emotional or practical dependency exists between them? The more remote the tie or connection and the lower the level of personal bond or dependency, the less likely it will be that a measure of state intervention which disrupts the lives concerned will amount to an unlawful interference which infringes Article 8.'

44. And, where Art. 8 rights are found to be engaged, it remains necessary to consider whether an interference with them (represented here by the refusal of a long stay visa) can be justified under Art. 8(2) as in accordance with the law and necessary in a democratic society in the interest of the economic well-being of the country or for the protection of the rights and freedoms of others. As Humphreys J summarised the position in *A.B.M. & Anor v Minister for Justice and Equality* [2016] IEHC 489, (Unreported, High Court, 29 July 2016) (at para. 26):

> 'It has been a constant refrain of the European Court of Human Rights that there is no automatic obligation on a State to respect the choice of place of residence decided upon by a particular family: see *Jeunesse v Netherlands* (Application no. 12738/10, Grand Chamber of the European Court of Human Rights, 3rd October, 2014) at para. 103. The State, in such situations has to be afforded a certain margin of appreciation: see *Jeunesse*, para. 106; *Tuquabo-Tekle v Netherlands* (Application no. 60665/00, European Court of Human Rights, 1st December, 2005) at para. 42; and also *Ahmut v Netherlands* (Application no. 21702/93, European Court of Human Rights, 28th November 1996), at para. 63.'

45. In *K.A. (Nigeria) v Refugee Appeals Tribunal & Ors* [2012] IEHC 109, (Unreported High Court (Cooke J), 12 March 2012), the applicant was a non-national woman who had entered the State unaccompanied at the age of 15, ostensibly as an orphan, and joined the household of her aunt who was already residing here. The applicant applied unsuccessfully for asylum and then sought leave to

remain on the basis of her family rights under Art. 41 of the Constitution and Art. 8 ECHR as a member of her aunt's family who had lived with that family for approximately four years. Having surveyed the relevant jurisprudence under the ECHR, Cooke J identified the test the applicant had to meet to establish an arguable claim to 'family life' entitled to respect under Art. 8 ECHR (at para. 19) as:

> 'a settled way of life in a close, established family group, in which ties of mutual reliance have subsisted which might be described as going beyond the normal emotional ties that would exist between a young woman aged between 15 and 18 years and her aunt and younger cousins.'

Cooke J concluded that, on the facts presented, the applicant could make no stateable case for the existence of 'family life'.

46. The applicable principles were addressed by the European Court of Human Rights, perhaps most recently, in *Nazarenko v Russia* (Application 39438/13) (2019) 69 EHRR 6 (at para. 56):

> 'The Court reiterates that the notion of "family life" under art. 8 of the Convention is not confined to marriage-based relationship and may encompass other de facto "family" ties. The existence or non-existence of "family life" for the purposes of art. 8 is essentially a question of fact depending on the real existence in practice of close personal ties. Although, as a rule, cohabitation may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto "family ties".'

47. I can find nothing in the review in this case to suggest that the Minister failed to apply the proper test to the assessment of the nature and extent of the applicant's 'family life' with her niece for the purpose of Art. 8 ECHR.

48. Thus, the applicant has failed to persuade me that there Minister's review decision was reached in breach of her family rights under the Constitution of Ireland or the ECHR.

ii. errors of law or fact

49. The applicant argues that the Minister made seven separate errors of fact or law in the review and, hence, in reaching the review decision. In short summary, those asserted errors were:

> (i) that the applicant had not demonstrated close personal ties with the niece;
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> (ii) that the applicant had not established that the niece was socially dependent upon her;
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> (iii) that the applicant had not established ties with the niece beyond normal emotional ties;
>
> (iv) that the applicant had not established special circumstances that would warrant the grant of a long-term residence visa to the niece as an exceptional measure;
>
> (v) that the applicant could continue to support the niece in the Ukraine;
>
> (vi) that the niece was applying for a visa solely as the adopted daughter of the applicant and not solely, or alternatively, as her niece.
>
> (vii) that it was unnecessary to consider the best interests of the niece as a child in considering the application.

50. In advancing this argument, the applicant does not directly engage with the terms of the review decision or more significantly, the consideration document on which it was based, but, instead, addresses in a more general way the developing jurisprudence on unsustainable or material errors of fact and the more established jurisprudence on reviewable errors of law that go to jurisdiction, as though the nature and existence of the errors contended for is obvious and incontrovertible and the only issue to be considered is the effect of those errors on the validity of the review decision as a matter of law.

51. The applicant appears to have identified most of the 'errors' for which she contends through the simple expedient of characterising each of the conclusions in the Minister's consideration document as one. Under the heading 'Conclusions in relation to assessment under the Policy Document', the consideration document states:

> 'The onus rests with the applicants to demonstrate to the satisfaction of the appeals officer that the visa sought should be granted.
>
> There is not sufficient evidence to demonstrate social dependency [of] the applicant on her aunt in Ireland.
>
> Insufficient information has been provided to demonstrate a level of dependency between the applicant and her aunt which is considered more than "normal emotional ties" No reasons have been submitted preventing [the aunt] travelling to the Ukraine to visit [the niece] or continuing to maintain the relationship as it developed *i.e.* by visits and telephone calls/Skype if so desired.
>
> Therefore, on the basis of the information provided, it is not accepted that [the niece] is precluded from completely normal living such that she is socially or financially dependent on her aunt, to such an extent that there is no viable alternative to her coming to the State.
>
> I have considered whether there are any exceptional circumstances that may give rise to an exception being made in this instance. Having regard to the foregoing, no special circumstances have been established that would warrant the granting of the visa sought as an exceptional measure.
>
> In conclusion, the application is refused on the basis that it fails to meet the requirements set out in [the policy document]. In particular that it fails to meet the required level of dependency or to establish any special circumstances that would warrant an exception.'

52. Addressing each of the errors contended for by the applicant briefly in turn, the first is that the applicant had not demonstrated close personal ties with the niece. The term 'close personal ties' is one that derives from the jurisprudence of the European Court of Human Rights, considered above. The Minister's conclusion in that regard was plainly one that was reasonably open to him on the

facts presented. The niece, who was approaching her majority at the material time and has since attained it, has lived all her life in the Ukraine with her mother and, later, her grandmother but never the applicant. There is no suggestion that the Minister failed to consider the material the applicant submitted concerning her adoption of her niece in the Ukraine in 2016, her frequent visits to the Ukraine, her financial payments to the grandmother for the niece's support, the niece's visit to Ireland in 2014 or 2015, and their frequent communication over the internet.

53. The second asserted error is that the applicant had not established that the niece is socially dependent on her. 'Social dependency' is a component element of the meaning of the term 'dependency' under the policy document, in conjunction with financial dependency. The test prescribed under the policy document is that it must be established that the social support provided to the family member in the home country must have been pre-existing and sustained and that independent living in the person's home country would have been impossible without it. Once again, there is no suggestion that the Minister failed to consider any of the material submitted by the applicant in coming to a view on that point, nor that the conclusion that the Minister reached was not one that was reasonably open to him.

54. The third error asserted is that the applicant had failed to establish ties with her niece beyond normal emotional ties. The necessity to establish ties beyond normal emotional ties in family relationships also derives from the jurisprudence of the European Court of Human Rights on what is necessary to establish 'family life' for the purpose of Art. 8; see, for example, *S v United Kindgom* [1984] 40 DR 196. I can see nothing to establish any error or irrationality on the part of the Minister in that regard.

55. The fourth error asserted is that the applicant had not established special circumstances that would warrant the grant of a long term residence visa as an exceptional measure. The policy document states (at para. 1.12):

> 'While this document sets down guidelines for the processing of cases, it is intended that decision makers will retain the discretion to grant family reunification in cases that on the face of it do not appear to meet the requirements of the policy. This is to allow the system to deal with those rare cases that present an exceptional set of circumstances, normally humanitarian, that would suggest that the appropriate and proportionate decision should be reached.'

56. The determination of whether there are exceptional circumstances that would allow a visa to be granted to a person not otherwise entitled to one under the terms of the policy document is quintessentially a matter for the exercise of the Minister's discretion, subject only to review on grounds of reasonableness or proportionality.

57. The fifth error for which the applicant contends is that the applicant could continue to support the niece in the Ukraine. That assertion of error appears to be based on the applicant's contention that the grandmother was no longer capable of providing the necessary or appropriate care there for the 15-year-old niece, as well as another grandchild, because the grandmother was then 65 years old and had been diagnosed with type 2 diabetes of average severity, with associated retinopathy and angiopathy. The extent to which those circumstances did, or did not, unequivocally prevent the niece from continuing to live in the Ukraine with the applicant's support, or merely made it preferable for the family that the niece should be permitted to migrate to Ireland to reside with the applicant, was a matter for the Minister to decide, within a margin of appreciation, subject only to reasonableness or proportionality review. The refusal of family reunification where the circumstances of 'family life' in the home state are unenviable, rather than untenable, is not a breach of the right to respect for family life under Art. 8 of the ECHR: *I.A.A. and Ors v. United Kingdom* (Application No. 25960/13), (2016) 62 EHRR. SE19 (at para. 46).

58. In this context, paragraph 6.1 of the policy document is also apposite. It states:

> 'In some cases, for economic or other reasons, a family may remain separate for a long time, in some instances for many years. One member may go abroad to work and to continue to support the family in their home country via remittances. Ireland's fairly short history as a county of immigration destination has also evidenced significant levels of migration where one individual comes to Ireland, leaving family behind, and seeks to secure leave to remain, in some cases following a lengthy legal process. It is legitimate in such cases, without undermining the validity of the residence of the migrant who may have ultimately become naturalised or impugning their actions, to take account of the fact that the family has elected to separate. Moreover, the longer the elective separation, the weaker must be the claim to reconstitution of the family in Ireland. It is not intended to be prescriptive in respect of this issue but rather to highlight it as a relevant consideration in any case processing.'

59. The sixth error of the Minister for which the applicant contends is treating the visa application as one made by the niece solely as the adopted daughter of the applicant under Ukrainian law, and not also as the applicant's niece. I am not satisfied that the applicant has established the existence of any such error. Indeed, I am satisfied that no such error was made. The assessment under the policy document in the consideration document is quite clearly directed towards whether the niece has been able to establish her status as an extended family member, rather than as the adopted daughter, of the applicant. The consideration document commences by reciting that the niece 'has applied for a "join family" visa to join her aunt in Ireland'. The conclusions on the assessment under the policy, already cited, are more obviously addressed to the position of someone in the category of 'other family member' than that of someone within the category of 'immediate family member' as those categories are set out at paragraph 13.2 of the policy document.

60. The final error of the Minister asserted by the applicant is a failure to conduct an appropriate analysis of the best interests of the niece, then a child. I do not accept that the Minister made that error. The Minister's review expressly quotes the statement in paragraph 13.3 of the policy document that: 'In cases involving a child, the best interests of that child will be a key consideration in any decision made.'

61. The issue of the best interests of the niece are directly addressed in the second section of the consideration document, which is headed 'Consideration of the case'. It includes the following paragraph:

> 'It is accepted that [the applicant] has legally adopted her niece in Ukraine but as Ukraine is not a signatory to [the Hague Adoption Convention] the adoption of [the niece] is not legally recognised under Irish law. It may be the applicant's belief in the "best interests of the child" for [the niece] to come and live with her in Ireland where she states that she will commence the adoption process once her niece is legally resident in Ireland. However, the Adoption Authority of Ireland who are the regulatory body for adoption matters state that only residents of Ireland may be assessed as to their eligibility and suitability to adopt. [The niece] has been a resident of Ukraine all her life and has been in the care of her grandmother since her mother died in 2009. It follows that [the niece] will have strong links with the linguistic and cultural environment in Ukraine. [The niece and the applicant] have not outlined how a move to Ireland may potentially affect [the niece's] only sibling being left behind in Ukraine if a visa was granted. [The applicant] in this case has not demonstrated close personal ties overs the years existed with [the niece] to the point that [the applicant] was

> acting in a parental role to [the niece]; see judgment delivered by the European Court of Human Rights delivered on 18 February 1994 in *Boyle v United Kingdom* (1995) EHRR 179 94/9. This would involve the provision of ongoing and frequent care to the child. It is difficult to see how this is possible when [the applicant] has been living in Ireland since 2002.'

62. In *I.A.A. v United Kingdom*, already cited, the European Court of Human Rights considered a claim brought by five Somali citizens, who were siblings and who had been refused entry clearance to join their mother in the UK, that the refusal amounted to a breach of their right to respect for family life under Art. 8 ECHR. The European Court of Human Rights quoted the following passage from the decision of the United Kingdom Upper Tribunal on the applicant's appeal against the refusal of entry clearance (at para. 17 of the ECtHR judgment):

> 'The circumstances in which the appellants were living together in Addis Ababa at the date of the respondent's decision, and in which they are still living now, are undoubtedly harsh, to put it at its lowest. Indeed, they may fairly be characterised as harsh. But sadly they are conditions in which vast numbers of other individuals are compelled to live throughout the unhappier regions of the world. The United Kingdom does not have either the room or the resources to provide for all of them. There is no reason in logic why the appellants should be viewed differently from the vast numbers of other unfortunate individuals who would jump at the opportunity of a new and better life in the United Kingdom, but who cannot fulfil the requirements for entry laid down by the Secretary of State in the Immigration Rules and are therefore unable to avail themselves of that opportunity. On the facts of the appellants' case as presented before me, I am not persuaded that they have shown why they should be treated differently from the generality of foreign nationals in the same or similar position. In short, whilst I accept that their exclusion from the United Kingdom would constitute an interference with their Article 8 rights and those of the third parties affected by their exclusion, nevertheless that would not constitute a disproportionate interference when balanced against the larger public interest to which I have referred. Their appeals therefore fall to be dismissed.'

63. In concluding that the application was manifestly ill-founded, the European Court of Human Rights concluded its judgment as follows:

> '46 The domestic courts accepted that it would be in the applicants' best interests to be allowed to join their mother in the United Kingdom. However, while the Court has held that the best interests of the child is a "paramount" consideration, it cannot be a "trump card" which requires the admission of all children who would be better off living in a Contracting State (see, for example, Berisha (948/12) 30 July 2013 , in which the Court found no violation of art.8 even though the domestic courts accepted that it would be in the children's best interests to remain in Switzerland). The present applicants' current situation is certainly "unenviable", as the domestic courts found. However, they are no longer young children (they are currently 21, 20, 19, 14 and 13 years old) and the Court has previously rejected cases involving failed applications for family reunification and complaints under art.8 where the children concerned have in the meantime reached an age where they were presumably not as much in need of care as young children and are increasingly able to fend for themselves (Berisha (948/12) 30 July 2013 at [56]). All of the applicants have grown up in the cultural or linguistic environment of their country of origin, and for the last nine years they have lived together as a family unit in Ethiopia with the older children caring for their younger siblings. None of the applicants has ever been to the United Kingdom, and they have not lived together with their mother for more than 11 years.
>
> 47 The foregoing considerations are sufficient to enable the Court to conclude that in refusing their application for entry clearance the domestic authorities cannot be regarded either as having failed to strike a fair balance between the interests of the applicants and the interest of the State in controlling immigration, or as having exceeded the margin of appreciation available to them under the Convention in the domain of immigration.'

64. Applying the same principles, I can find no breach of the Minister's obligation to consider the best interests of the child in this case. Differently put, borrowing the language of Humphreys J in *Olakunori*, already cited (at para. 56), I am satisfied that the Minister applied the correct test 'in fact and in substance'.

iii. proportionality

65. Finally, the applicant submits that the Minister's decision in this case exhibits the same infirmity as that in the family reunification refusal decision that was at issue in O'Leary, already cited. Cooke J described the fact-specific problem with that decision in the following way (at para. 23):

> 'The Court has set out the content of the refusal decision almost in full because, while the individual answers and observations expressed by the decision maker might separately be considered pertinent and not obviously unreasonable, the Court finds it difficult to avoid the impression given by the cumulative effect of the reasons as stated, that the decision maker was more concerned with finding and articulating grounds which would support a refusal rather than seeking to give an overall assessment of the merits of the application in a balanced and objective manner. In particular, the Court is struck by the manner in which the decision-maker appears inclined to rely upon two facets attributed to the application namely, the absence of a relevant legislative provision or administrative procedure and of any absolute right on the part of the applicants to obtain the permission they seek; and secondly, an element of bad faith which, on the face, of it would appear to be at variance with the openness of the candid pleas made to the Department in the very extensive correspondence that was exchanged.'

66. The applicant has not carried out any analysis of the contents of the consideration document, much less one as detailed as that of the refusal decision conducted by Cooke J in *O'Leary*. Instead, I am simply invited to draw the inference that, if such an analysis were carried out, it would inexorably lead to the same result. In my judgment, there is no basis for any such inference or conclusion here.

67. Instead, I find myself again echoing the words of Humphreys J in *Olakunori*, already cited (at para. 62). The constitutional and ECHR rights of the applicant and of her niece were considered and weighed. The applicant is unhappy with the result but has not shown that the decision was disproportionate, particularly given that her niece was not at a very dependent age at the material time.

Conclusion

68. The application is refused.