THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 691 JR]

BETWEEN

G.J.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 20th February 2019

Introduction
1. This is the judicial review of a decision made on behalf of the Minister for Justice and Equality ('the Minister'), dated 15 September 2015 ('the decision'), under s. 18(3) of the Refugee Act 1996, as amended ('the Refugee Act'), to refuse permission to a child ('H.J.') to reside in the State as a family member - specifically, as the daughter - of the applicant, who is a refugee. Applications for such permission are widely referred to as family reunification applications.

Procedural history
2. The applicant's statement of grounds is dated 4 December 2015 and was filed three days later. It is accompanied by a verifying affidavit of the applicant, also sworn on 4 December 2015.

3. By order made on 21 December 2015, Mac Eochaidh J granted leave to the applicant to seek an order of *certiorari* quashing the Minister's decision; an order of *mandamus* directing the Minister to reconsider the family reunification application; and an injunction preventing the Minister from making any proposal to deport H.J. from the State, pending the result of that reconsideration.

4. The Minister filed a statement of opposition on 14 April 2016. It is supported by an affidavit of verification sworn on 26 April 2016 by Morgan McKnight, a higher executive officer in the Family Reunification Unit in the Minister's Department.

Reasons for each decision, grounds of challenge and grounds of opposition
5. H.J. was refused permission to reside in the State because the Minister is not satisfied that she is a member of the family of the applicant.

6. In summary, the applicant contends that the Minister's decision concerning H.J. is bad in law on the following grounds. First, the Minister failed in her statutory duty to decide the identity of the child or her relationship to the applicant, or both. Second, the Minister failed to adequately weigh the evidence of the relationship between the child and the applicant. Third, if the Minister was correct that H.J. was not the child of the applicant and - hence - not a 'member of the family' of the applicant within the meaning of that term under s. 18(3) of the Refugee Act, the Minister failed to comply with an obligation to consider whether H.J. was a ward of the applicant and - hence - a 'dependent member of the family of the applicant' within the meaning of that term under s. 18(4) of that Act. And fourth, in refusing the family reunification application under s. 18(3) or in failing to consider it under s. 18(4), or both, the Minister failed to have appropriate regard to the best interests of the child.

7. The Minister joins issue on all of the grounds the applicant has raised, before positively pleading that, once it was 'conclusively established' that the applicant was not the father of the child and that the child's identity had not been established for the purpose of of s. 18(3), it was 'not within the power of the Minister to consider whether [H.J.] was a ward of the applicant' under s. 18(4). On behalf of the Minister, Mr McKnight more specifically avers that as the applicant is not [H.J.'s] 'ward or guardian', the Minister is is not permitted by the provisions of s. 18(4) of the Refugee Act to consider an application under that subsection. In using the words 'ward or guardian', Mr McKnight is directly quoting the language of s. 18(4), which defines a 'dependent member of the family of the refugee' to include, amongst other persons, a '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'. H.J., a child, cannot be a guardian of the applicant. The pertinent issue is whether, as the applicant contends, the Minister was obliged to consider whether H.J. was the applicant's ward or, as the Minister argues, precluded from addressing that question in the circumstances of this case.

The family reunification application
8. The applicant is a 31 year old man, who arrived in Ireland from Guinea, West Africa, in 2003 as a teenager. In 2004, he obtained a declaration of refugee status. In the written legal submissions filed on his behalf it is asserted that he is now a naturalised Irish citizen; although the applicant did not directly aver to that fact, there is no reason to doubt it. The applicant married in July 2012. There is one child of that marriage. The applicant and his family reside at an address within the State.

9. Through his solicitor, the applicant applied on 14 May 2014 for family reunification with H.J., providing her name and date of birth (which was given as one in 2009) and asserting that she is his daughter.

10. Under cover of a letter dated 9 June 2014, the applicant's solicitor furnished the Office of the Refugee Applications Commissioner ('ORAC') with a completed questionnaire, prepared with the assistance and legal advice of that solicitor and signed by the applicant on the same date. As recited on its face, the particular form of questionnaire that the applicant selected to complete and, hence, the specific statutory entitlement that the applicant sought to invoke, was that of family reunification with a child of the applicant, under s. 18(3)(b)(iii) of the Refugee Act. Amongst the documents that a refugee invoking that provision was expressly required to supply was the original passport of the child concerned. In filling out that questionnaire, the applicant provided the following information. H.J.'s mother was the applicant's girlfriend at the time of H.J.'s birth (now given as a date in 2008, rather than 2009). The applicant and H.J.'s mother share the same surname but are not related. They split up in 2010. H.J. had never lived with the applicant. She had lived with her mother in The Gambia until approximately seven months prior to the application, when her mother married. Her mother's spouse did not want H.J. to live with them and she was now being cared for by an uncle in Conakry, Guinea. A copy of H.J.'s birth certificate was being translated and would be provided as soon as that was done. The applicant was going to get a passport for her.

11. On 19 June 2014, the applicant's solicitor wrote to ORAC, enclosing a copy of what he described as an original Republic of Guinea birth certificate for H.J., issued in the French language, recording the birth of H.J. on 3 April 2008 and identifying the applicant and the woman concerned as the child's parents. A certified translation of that document was also enclosed, as were two passport photographs of H.J. The translation suggests that the document is an order made by 'The Court of First Instance Conakry II (Republic of Guinea)' on 3 June 2014, directing the amendment of the relevant entry in the register of births, marriages and deaths there by the substitution of the details given above for those originally recorded. The applicant's solicitors did not explain the circumstances in which that had occured, nor did they disclose the details of H.J.'s birth as originally recorded. ORAC acknowledged receipt of that material on 24 June 2014.

12. On 3 October 2014, ORAC wrote again with a series of requests for further information and documentation, one of which was that the applicant confirm when he expected to receive H.J.'s passport and forward it to ORAC. The applicant's solicitor replied on 13 October 2014 as follows. H.J. had been cared for by her mother from birth. The uncle now caring for her was a maternal uncle. The applicant had instructed his solicitor that it was not then possible to obtain an individual Guinean passport for a minor who must instead travel on the passport of an accompanying adult. In response to the specific request for a letter of authorisation for the child to enter and reside in Ireland with the applicant from both her present carer (her maternal uncle) and her natural mother, an English language document, entitled 'Affidavit of Parental Consent' but in the form of a statutory declaration made by H.J.'s mother in The Gambia on 12 June 2014, was enclosed. In it, H.J.'s mother declares, amongst other things, that H.J. had been under her care from birth; that the applicant had always maintained a strong parental relationship with H.J.; and that he had been the main source of her financial support.

13. ORAC wrote requesting further information and documentation on 17 October 2014. The applicant's solicitor responded on the applicant's behalf on 11 November 2014 broadly as follows. The applicant met and commenced a relationship with H.J.'s mother in The Gambia in 2007. The applicant reiterated that he could not obtain a separate passport for H.J. for the reason already given and that he had no other identification documentation for her.

14. In response to a specific request, a certificate from the director general of a particular school in Guinea was provided, dated 30 October 2014, reciting that H.J. has been enrolled in the infant class in that school in 2013/2014 and was due to enter the senior infant class in 2014/2015. That certificate is in the French language but was accompanied by an English translation.

15. A purported 'acte de consentement' or 'deed of consent' in the French language executed by H.J.'s maternal uncle on 29 October 2014 was also provided, together with a certified translation. In it, H.J.'s uncle consented to H.J. joining the applicant in Ireland.

16. Copies of what the applicant's solicitor described as 'money transfer receipts' were also enclosed with the letter of 11 November 2014. As is more often the case than not in immigration and asylum cases, no attempt was made on behalf of the applicant to summarise or contextualise those documents, the evident implication being that they spoke for themselves and that ORAC could prepare its own summary or analysis of their contents. Viewing the relevant exhibits, they appear to comprise receipts for twelve separate monthly money transfers of €100 each from the applicant in Ireland to the man who is claimed to be H.J.'s maternal uncle in Conakry, Guinea, covering the period from November 2013 to October 2014 inclusive.

17. ORAC acknowledged receipt of that information and documentation on 13 November 2014, before writing again the following day to confirm that its investigation was complete and that it had forwarded the application documentation and its investigation report to the Minister on that date. A copy of the investigation report was enclosed with that letter. The final section of that report, states:

> 'Findings:
>
> • Extract from the Register of Births, Marriages and Deaths - Birth Certificate in respect of [H.J.] naming the applicant as the father thus establishing the relationship between them
>
> • Passport or Identity Document has not been submitted to attest to the subject's identity, the identification of the subject cannot therefore be established
>
> • Notarised letter from the uncle as the current carer of the subject was submitted
>
> • Original statement of parental authorisation granting permission for the child to travel from Ireland from the natural parent, if she will not be travelling to Ireland with the child, and giving permission for her child to enter and remain in Ireland was submitted
>
> • The applicant submitted an affidavit (dated 12/06/2014) from the subject's mother which stated that the subject was under her care since she was born and did not mention any other carer
>
> • Evidence of financial support was submitted
>
> • The subject has never lived with the applicant as he has been in Ireland since August 2003, and there is therefore no parental bond between the applicant and his daughter.
>
> • He submitted 12 money transfer receipts dated from 07/11/2013 to 18/10/2014.'

H.J. given temporary permission to enter the State

18. On 19 January 2015, the Irish Naturalisation and Immigration Service ('INIS') wrote on behalf of the Minister to the applicant's solicitor as follows:

> 'I am directed by the [Minister] to refer to your client's application for Family Reunification for his daughter.
>
> Following the examination of your client's file, the Minister considers that this may be an appropriate application in which to exercise her discretion, however based on the documentary evidence provided it is not possible to verify the identity of the subject of the application and the relationship between the subject of the application and your client, therefore DNA evidence will be required to prove that they are members of the same family as alleged.
>
> Due to the current situation with regard to Ebola in Guinea, our service supplier is unable to complete DNA sampling in

Guinea and that (sic) arrangements will be made to have the testing completed on arrival in the State.--- *Details on the French Embassy in Conakry website states that as of the 9 December 2014 reports of 95 new cases from 3-7 December with 56 newly recorded deaths. New cases in Conakry (14) with total cases of 285 and total deaths of 115.*

To facilitate this I am prepared to provide a temporary permission for 3 months, however before the temporary permission issues a current date medical certificate will be required from a competent authority in Guinea confirming that the subject of the application is Ebola free and in a position to travel. This medical certificate is required to allay any risk of the spread of Ebola.

Any decision in relation to the granting of family reunification will be deferred until such time as the DNA report is received.

If it transpires that the subject of the application is not the daughter of the applicant then no further permission will issue and she will be required to leave the State.

Please respond within 28 days of this letter. If the requested documentation/information is not received within 28 days from the date of this letter, a decision in relation to your client's application for family reunification will be made based on the evidence submitted to date.'

(emphasis in original)

19. The applicant's solicitor replied by letter dated 13 February 2015, enclosing the medical certificate requested in the French language with a certified English language translation attached. Two other documents were enclosed with that letter. The first is a purported statutory declaration made by H.J.'s mother on 22 January 2015, stating, among other things, that the applicant maintained a strong parental association with H.J.; that he was the main source of her financial support, and that he came to the Gambia yearly to visit H.J. and her mother until her mother's remarriage. The second is another purported statutory declaration (although entitled 'Affidavit of Family Remittance') made by H.J.'s mother on the same date, stating, among other things, that the applicant rented a house in the Gambia for H.J. and her mother from January 2008 to July 2013 and that the applicant remitted €150 monthly for their maintenance. The INIS acknowledged receipt of that documentation on 20 February 2015.

20. On 11 March 2015, the INIS wrote to both the applicant and his solicitor, to confirm that, upon application, H.J. would be granted a single entry visa permitting her to enter the State and remain in it for three months to facilitate the conduct of the required DNA testing. The applicant was specifically asked to note that this was not a family reunification permission.

21. On 19 March 2015, the applicant's solicitor wrote to the INIS to reiterate once again the applicant's instructions that Guinea would not issue a passport to H.J. as a minor and to request some unspecified assistance from the State in that regard. The INIS wrote a lengthy reply on 29 April 2015, noting that it had received separate inquiries on the applicant's behalf about the possibility of the State issuing a travel document for H.J. That letter stated:

'The whole purpose of a national passport is to establish a person's citizenship and identity so that international travel and residence may be facilitated. Permission to reside takes the physical form of some type of passport endorsement such as a visa sticker, a residence permit sticker or, as in the Irish case, a residence stamp. Given the importance of ensuring an immigration permission to be availed of only by the person for whom it is intended, it has become a fundamental requirement in immigration regimes around the world that foreign national visitors or residents must be in possession of a valid passport so that the appropriate immigration permission may be placed within it. While I am aware that people can encounter difficulties in this area, the conditions under which a national passport is issued or renewed is essentially a matter between the citizen and their national government.

The onus rests entirely with the person concerned to secure their own national passport or equivalent internationally recognised travel document (UNHCR, International Red Cross, *etc*) to allow for the insertion of a valid entry visa to facilitate their travel needs up to and including entry to Ireland. The other option is for the sponsor to travel to the person concerned which appears to have been rejected for health and financial reasons.'

22. Despite the repeated assertions made on behalf of the applicant that it simply was not possible to obtain a Guinean passport for a child and in circumstances the applicant has never explained, it appears that a Guinean passport issued to H.J. on 6 May 2015. The copy of that passport later exhibited in these proceedings on behalf of the Minister is stamped with an Irish visa, issued on 11 June 2015 and valid for the period between 1 July and 1 October 2015. Another stamp on that passport suggests that H.J. entered the State on 15 July 2015. There is no suggestion that the applicant presented that passport either to ORAC or to the INIS in connection with his family reunification application.

The DNA test

23. The applicant and H.J. each provided a DNA sample at a medical centre in Dublin on 11 August 2015. Through his solicitor, the applicant received a DNA test report dated 28 August 2015 from a company named Orchid Cellmark Limited ('the Cellmark report'). In summary, it concludes that the DNA evidence does not support the claimed relationship of father and child between the applicant and H.J. In material part, it states:

'[The applicant] and [H.J.]

Most likely relationship - Uncle and Niece or Grandfather and Grandchild.

The DNA results exclude paternity. [The applicant] cannot be the biological father of [H.J.] because he lacks the genetic markers that have been inherited by [H.J.].... However, the DNA results are 100 times more likely if [the applicant] is related to [H.J.] as an uncle or grandfather than if they were unrelated.'

(emphasis in original)

24. The applicant's solicitor sent an email to Cellmark on 10 September 2015, which he does not exhibit. He does exhibit Cellmark's reply of the same date, which states:

'In each STR DNA test performed up to two DNA markers are observed in an individual's DNA profile. One marker will have been inherited from the mother and the other marker will have been inherited from the father. The child's DNA profile is

compared to the father's DNA profile. If the tested man were the biological father of the child then he would be expected to have at least one marker that matches with the child's DNA profile in each STR DNA test performed.

In this case 17 STR DNA tests have been performed. In four of the seventeen tests there is no matching paternal marker between [the applicant] and [H.J.]. This DNA test fully excludes [the applicant] from the paternity of [H.J.] In cases where the father has been excluded from paternity, the samples are reprocessed through the laboratory as part of our quality procedures. This retest is performed prior to issuing the report. I can confirm that this retest was performed and the DNA result obtained was identical to the original result.

However, the DNA test did detect the presence of a more distant biological relationship between [the applicant] and [H.J.]. Whilst this DNA result indicates that a close relative such as [the applicant's] brother or father could be the biological father of [H.J.] it does not exclude that [H.J.'s] father could be a more distant relative to [the applicant] such as a cousin. A statistical figure of 100 for an avuncular relationship would be on the high side if [H.J.'s] biological father is a cousin or more distantly related to [the applicant]. However, if the individuals originate from a small community where it is common to marry cousins and this has occurred for generations then a DNA test can detect a relationship that is closer than the true biological relationship. In addition, as [H.J.'s] mother was not included in the DNA test it is possible that some of the matching markers between [the applicant] and [H.J.] are actually maternal markers which would then change the statistical result obtained for the avuncular index.'

The decision

25. On 15 September 2015, the INIS wrote to the applicant, referring to his application for family reunification pursuant to s. 18(3) of the Refugee Act 1996, as amended, and stating that, after due consideration, the Minister had decided not to grant it. The applicant was informed that no further permission would be given to H.J. to remain in the State and was asked to advise the INIS on the arrangements he proposed to make for her departure.

26. A copy of the INIS report, dated 14 September 2015, on which the Minister's decision was based was included with that letter. It concluded that the applicant had failed to establish the identity of H.J. and had failed to satisfactorily establish his relationship with her, such that the Minister could not be satisfied that H.J. is a 'member of the family' of the applicant, within the definition of that term under s. 18(3) of the Refugee Act.

The letter before action

27. The applicant's solicitor wrote to the INIS on 12 November 2015 to inform the Minister that the applicant was shocked by the result of the DNA test; doubtful about it accuracy; and 'felt that he had no other practicable course than to seek judicial review of the decision reached.' There was no suggestion that the applicant wished to adduce conflicting DNA evidence or conflicting evidence concerning the accuracy or reliability of the DNA test that had been conducted.

28. Relying primarily on assertion rather than evidence or authority, the letter continued:

> 'The context is one in which in seeking the removal of the child from the State, the Minister would be sending an unaccompanied 6 year old minor to Guinea in circumstances where she is not to be raised by her mother, and [the applicant], who is ready, willing and able to care for her in this State, is legally speaking her legal guardian, in the sense that a DNA test cannot necessarily in and of itself undo the legal reality established by the Guinean State - which is that [the applicant] is legally speaking entitled to be regarded as the child's father.'

29. Despite using the adjective 'legal' and the adverb 'legally' twice each in the same sentence, the applicant's solicitor made no attempt to identify any authority in the law of this State for the proposition that the applicant is to be regarded as H.J.'s father, nor to prove any relevant law of the Republic of Guinea as a matter of fact; see the Supreme Court decision of *MacNamara v Owners of The S.S. Hatteras* [1933] IR 675 (*per* FitzGibbon J at 698).

30. The applicant's solicitor then pointed to, what he suggested was, the paradox whereby the Minister had required DNA evidence of the relationship between the applicant and H.J., at least in part because she could not produce a passport, yet had gone ahead with DNA testing after H.J. had obtained a passport and used it to enter the State for that purpose of that testing. The applicant's solicitor did not explain how H.J. had obtained a passport in May 2015, although he had written to ORAC on 13 October 2014, 11 November 2014 and 19 March 2015 to assert that she could not do so. Nor did he explain why that passport had never been submitted to either ORAC or the INIS.

31. The letter continued by expressing concern that the Minister had carried out no analysis of whether H.J. could be regarded as the applicant's ward under s. 18(4), in circumstances where, it was asserted, the applicant was acting as her guardian at that time.

32. In conclusion, the letter requested that the Minister undertake not to propose the deportation of H.J. and threatening an application for judicial review if no such undertaking was provided immediately.

The Minister's response

33. In response that that letter, Mr McKnight of the department telephoned the applicant's solicitor, most probably on 17 November 2015. Mr McKnight avers that, in the course of that phone call he explained the Minister's position as follows. First, as the results of the DNA test 'proved conclusively' that the applicant was not H.J.'s biological father, the Minister was constrained under the terms of s. 18(3) of the Refugee Act to refuse the application for family reunification under that sub-section. Second, as the applicant was not the guardian of H.J., no application for family reunification under s. 18(4) of the Refugee Act could be processed. In that respect, Mr McKnight avers that he suggested that the applicant should contact the Adoption Authority of Ireland to seek advice on guardianship, wardship or adoption. Third, the conditions upon which the child had been permitted to enter the State had to be met, with the result that arrangements had to be made for the child's departure. Rather weakly, Mr McKnight avers that since the deportation process is not dealt with by the Family Reunification Unit in the department, he could not give the applicant's solicitor the undertaking requested. Mr McKnight does not explain why his unit could not confer with the unit within the same department that does deal with the deportation process.

34. Mr McKnight avers that he agreed to write to the applicant's solicitor setting out the issues discussed during their conversation and the procedures available to the applicant, and that he asked the applicant's solicitor to give him some time to examine those options first. The applicant wrote a reminder letter to the INIS on 26 November 2015. Mr McKnight goes on to aver that, before he could do as he had indicated, he was informed that the court has granted the applicant leave to seek judicial review of the Minister's

decision, with the result that no further correspondence issued on behalf of the Minister.

The application for leave
35. On 10 December 2015, the applicant's legal representatives made an application *ex parte* to Mac Eochaidh J in this Court for leave to seek judicial review and for an interim injunction restraining the Minister from issuing a proposal to deport H.J. Having first adjourned the matter, Mac Eochaidh J made an Order granting both leave to seek judicial review on the grounds put forward and an interim injunction in the terms sought on 21 December 2019. Although I have not seen the order, I am given to understand that, on or after the return of the applicant's motion, the applicant applied for, and was granted, an interlocutory injunction to replace the interim one, unopposed by the Minister.

36. As already described, the Minister filed a statement of opposition dated 14 April 2016, supported by an affidavit of verification sworn by Mr McKnight on 26 April 2016.

Application to amend the statement of grounds
37. On 1 June 2016, the applicant issued a motion seeking both an order permitting him to amend his statement of grounds and an order striking out the Minister's statement of opposition, in whole or in part. That interlocutory application is grounded on an affidavit sworn by the applicant's solicitor on 17 May 2016.

38. The additional ground upon which the applicant seeks to rely is the following:

> *'The decision of [the Minister] is based upon an opinion of the evidence by a third party which did not have appropriate regard to the possibility of a false negative result caused by a naturally occurring genetic anomaly.'*

39. The applicant's solicitor avers that it had become necessary to apply for this amendment because of the Minister's plea, in the statement of opposition, that it had been 'conclusively established' that the applicant was not the father of H.J. The applicant's solicitor goes on to aver that, in circumstances he does not describe or explain, the applicant's legal advisers only became aware after the issue of proceedings of 'the scientific possibility that the parent of a child may return a DNA test which indicates that they are the child's uncle or aunt.' The applicant's solicitor exhibits certain material he has found published on the internet that contains statements to that effect. Specifically, in reliance on those statements, which have no evidential value whatsoever, the applicant contends that it is possible that he is a chimeric human, or human chimera, whose body contains two or more populations of genetically distinct cells originating from different zygotes.

40. While the applicant's solicitor avers to his belief that the possibility of a false negative test was not within the contemplation of Cellmark in the preparation of its report, there is no suggestion that the applicant ever sought to raise the issue with that company or with the Minister prior to seeking, and obtaining, leave to bring these proceedings. Nor is there any suggestion that the applicant proposes even now to adduce any admissible evidence in that regard.

41. At the conclusion of the trial of the application for judicial review, on an *ex tempore* basis I refused the application for an order striking out the Minister's statement of opposition and acceded to the application to amend the statement of grounds.

Death of H.J.'s mother
42. The applicant's solicitor swore a further affidavit on 17 May 2016 for two purposes. The first was to express the view that the result of the DNA test in this case is implausible because there is material on the internet that suggests false negative test results can and do occur, so that the Minister should simply disregard that test result and conclude instead that the applicant is H.J.'s father.

43. The second purpose of that affidavit was to aver to the applicant's instructions that, on an unspecified date in unspecified circumstances, the applicant had been informed by the husband of H.J.'s mother that she (H.J.'s mother) had died in a road traffic accident that occurred in The Gambia on 7 January 2016. Copies of a purported death certificate and extract from a police report to that effect were exhibited to that affidavit.

Application to join Tusla
44. On 19 July 2016, the Minister issued a motion seeking an order joining the Child and Family Agency (known as 'Tusla') as a notice party to the proceedings.

45. That application is grounded on an affidavit sworn by Mr McKnight on 18 July 2016. Mr McKnight avers that the INIS wrote to Tusla on behalf of the Minister on 11 April 2016 to apprise it of the situation so that it might take any action it considered appropriate. At the time when Mr McKnight swore that affidavit, Tusla was seeking to make arrangements to have a social worker meet the applicant's family and interview H.J., although that had not yet occurred.

46. Mr McKnight swore a supplemental affidavit on 9 February 2017 in which he avers to three separate matters. The first is the accreditation issued to Orchid Cellmark Limited by the British Accreditation Service (although I do not think any question has been raised in that regard). The second is that the Chief State Solicitor, on behalf of the Minister, received a copy of H.J.'s passport from the applicant's solicitor under cover of a letter dated 28 October 2016.

47. The third matter is that a senior social worker with Tusla visited the applicant and his family at their home on 25 July 2016 and prepared a report on that visit of the same date, which Mr McKnight exhibits. In that report, the social worker notes, among other things, the following. The applicant met his wife in Gambia in 2010 and they married in 2012. They had a baby daughter of their own on 10 January 2015, six months before H.J. entered the State and began living with them. H.J. now attends school in Ireland and was going into second class in September 2016.

48. Having interviewed the family, the social worker met with H.J. alone in her bedroom in the family home. The report concludes:

> '[H.J.] has her own bedroom and there was ample evidence of clothes and belongings in the in the home for [H.J.] I observed a close and comfortable relationship between [H.J.] and [the applicant his wife]. [H.J.] expressed that she is very happy living with her "father and mother" and that she does not wish to return to live in Guinea. [H.J.] is eight years old and has experienced abuse, upheaval and uncertainty in her short life. [H.J.] said that she is happiest now in her father's care and that this what she has always wanted.
>
> [H.J.] presents as a content, well stimulated and bright child. The home was noted to be appropriate, clean and well kept. There were no child protection concerns evidenced in relation to [H.J.] in the care of [the applicant and his wife.]'

49. Mr McKnight swore a further supplementary affidavit on 15 February 2017, to which he exhibited a further report from another social worker on behalf of Tusla, this one dated 13 February 2017, which describes a social work visit to the applicant's family that took place on that date and which concludes:

> 'There were no child protection concerns present for [H.J.] in the care of [the applicant and his wife]. [H.J.] appeared happy, safe and well-cared for and expressed her wish to remain living with [the] family.'

50. Counsel for Tusla opposed the application to join it as a notice party on the basis that it had no conceivable role to play in these judicial review proceedings. Counsel for the Minister indicated that, while the Minister was not withdrawing the application, his position was that whether to join Tusla as a notice party to the proceedings or not was essentially a matter for the court. Counsel for the applicant submitted that the applicant had no particular view on the merits of the application but insisted on the entitlement to open the applicant's case rather than have counsel for the Minister ventilate aspects of the evidence for the purpose of moving the application to join Tusla. This left the court with no option but to defer ruling on whether Tusla should be joined.

51. At the conclusion of the trial of the judicial review proceedings, I struck out the application against Tusla because, in my judgment, the submission made by counsel on its behalf was correct. The Child Care Act 1991, as amended, provides the definitive legal structure designed to allow the Child and Family Agency (known as 'Tusla') to take a range of steps to best promote the welfare of children; see Shannon, Child Law, 2nd edn (Dublin, 2010) (at pp. 225-6). In view of the result of the DNA test, the Minister - in my view, very properly - wrote to Tusla to notify it of the situation in April 2016. After some correspondence with the applicant's solicitor to establish the address at which the applicant and his family, together with H.J., were then living, the two social worker visits already described occurred, confirming that everything appeared to be very satisfactory and that no child protection concerns were evident in the level of care that the applicant and his wife were providing for H.J. Had those visits given rise to any such concern, that would have been a matter for Tusla to address in the discharge of its statutory remit under the Act of 1991, as amended, rather than as a notice party to the present application for judicial review.

52. For my part, I do not understand why, having notified Tusla of the situation in April 2017, thereby enabling it to discharge its statutory functions in the usual way, the Minister felt it appropriate to issue a motion in July 2017, seeking an order joining Tusla as a notice party to these proceedings. There is no obvious connection between any steps that Tusla may feel it appropriate to take concerning the welfare of H.J. in the discharge of its statutory functions, on the one hand, and the lawfulness of the Minister's decision of 5 September 2015 to refuse permission to H.J. to reside in the State, on the other. I conclude that the Minister's application to join Tusla was misconceived from the outset.

Proposal that an independent solicitor should represent [H.J.]

53. Mr McKnight has exhibited to his affidavit sworn on 9 February 2017 an exchange of correspondence that occurred between the parties' legal representatives in January 2017. In short summary, the State wrote to the applicant's solicitor on 6 January 2017, proposing that 'to safeguard against any potential conflict of interest between the applicant and [H.J.] and to ensure [H.J.'s] best interests are protected', the applicant should nominate an independent solicitor to act on H.J.'s behalf in both her dealings with the Minister concerning her immigration status and in these proceedings. The applicant's solicitor replied on 11 January 2017 that he did not believe that this was a matter for the applicant or his legal representatives and that the Minister should raise it directly with the court. The State wrote again on 20 January 2017 confirming that the Minister would take the issue up with the court. The issue was not pursued at the trial of the proceedings.

The law

54. Section 18 of the Refugee Act states:

> '(1) Subject to *section* 17(2) , a refugee in relation to whom a declaration is in force may apply to the Minister for permission to be granted to a member of his or her family to enter and to reside in the State and the Minister shall cause such an application to be referred to the Commissioner and a notification thereof to be given to the High Commissioner.
>
> (2) Where an application is referred to the Commissioner under *subsection* (1), it shall be the function of the Commissioner to investigate the application and to submit a report in writing to the Minister and such report shall set out the relationship between the refugee concerned and the person the subject of the application and the domestic circumstances of the person.
>
> (3) (a) Subject to *subsection (5),* if, after consideration of a report of the Commissioner submitted to the Minister under *subsection (2),* the Minister is satisfied that the person the subject of the application is a member of the family [or the civil partner within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010] of the refugee, the Minister shall grant permission in writing to the person to enter and reside in the State and the person shall be entitled to the rights and privileges specified in *section 3* for such period as the refugee is entitled to remain in the State.
>
> *(b) In paragraph (a),* " member of the family", in relation to a refugee, means—
>
> (i) in case the refugee is married, his or her spouse (provided that the marriage is subsisting on the date of the refugee's application pursuant to *subsection (1)*),
>
> (ii) in case the refugee is, on the date of his or her application pursuant to *subsection (1),* under the age of 18 years and is not married, his or her parents, or
>
> (iii) a child of the refugee who, on the date of the refugee's application pursuant to *subsection (1)*, is under the age of 18 years and is not married.
>
> (4) (*a*) The Minister may, at his or her discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State and such member shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State.
>
> *(b) In paragraph (a),* " dependent member of the family", in relation to a refugee, means 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.

(5) The Minister may refuse to grant permission to enter and reside in the State to a person referred to in *subsection (3)* or *(4)*or revoke any permission granted to such a person in the interest of national security or public policy (" *ordre public*").

(6) The Minister may, on application in writing in that behalf and on payment to the Minister of such fee (if any) as may be prescribed with the consent of the Minister for Finance, issue to a person in respect of whom a permission granted under *subsection (3)* or *(4)* is in force a travel document identifying the holder thereof as such a person.'

Analysis

i. the production of what purports to be a foreign birth certificate or court order does not establish the 'legal position' on the parentage of the person concerned, nor does it establish the 'legal identity' of that person.

55. In the applicant's statement of grounds and in the written submissions filed on his behalf, it is variously and repeatedly suggested that the 'legal identity' of H.J. as the applicant's daughter; the relationship between them 'in the legal sense'; or the 'legal position' concerning their relationship is established by her purported Guinean birth certificate. In opening the case, counsel for the applicant bluntly asserted that 'the position in law is that my client is the father of the child.' No authority was ever produced in support of these various assertions, although vague reference was repeatedly made in submissions to the presumption of legitimacy and the presumption of parentage.

56. I am left to infer this was an allusion to s. 46(3) of the Status of Children Act 1987, as amended, which provides that, where the birth of a child is registered under the Civil Registration Act 2004 and the name of a person as the father of the child is entered on the register, that person shall be presumed to be the father of the child unless the contrary is proved. As this is not a case involving the registration of a birth under the 2004 Act, that presumption cannot apply here.

57. Nor is there any basis in logic or in law for the suggestion floated on behalf of the applicant that a similar presumption might be applied by analogy to the purported registration of a birth in another jurisdiction. If the Oireachtas had intended such a presumption to apply to any registry of births anywhere in the world, it would have said so; *expressio unius est exclusio alterius*.

58. Moreover, the reasons for limiting the application of the presumption to any register maintained under the Act of 2004 Act are clear. Under that Act, the Oireachtas has stipulated, among other things, the administrative machinery for the registration of births, marriages and deaths within the State (in Part 2) and, more particularly, the requirements for the registration of a person as the father of a child where the parents of that child are not married (in s. 22 in Part 3). It is in those circumstances that, under s. 13(4) of that Act, evidence of an entry in the register and of the facts stated in it may be given by the production of a copy of the entry certified by the appropriate official, which in turn allows the presumption of paternity under s. 46(3) of the Act of 1987 to operate effectively. The Oireachtas can neither dictate nor control the process for the registration of births in any other state. A document purporting to be a copy of an entry in a foreign registry of births or of a foreign court order may or may not be authentic. The details recorded in any such document, even if it is authentic, may or may not be factually accurate.

59. At the hearing of the application, though not in the applicant's written legal submissions, counsel for the applicant ardently and repeatedly invoked 'Article 16 of the Hague Convention' as the basis for arguing that either the purported birth certificate or passport of H.J., or both, operated to establish 'the legal position', whereby the 'legal status' of the applicant is that of the father of H.J. That submission does not withstand mild scrutiny. Article 16 of the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* ('the Hague Convention on Parental Responsibility and Protection of Children' or, for present purposes 'the Convention'), provides in Article 16(1) that the attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the the law of the State of the habitual residence of the child. The implicit argument appears to be that the place of habitual residence of H.J. is Guinea and that the attribution of parental responsibility for H.J. to the applicant by Guinean law is evidenced by the court order in respect of H.J.'s birth certificate and by her passport. While every element of that argument is highly questionable in itself, there is more fundamental problem with it.

60. Under s. 2 of the Protection of Children (Hague Convention) Act 2000, the Convention is given the force of law in the State and judicial notice is to be taken of it. The Act of 2000 came into operation in the State on 1 January 2011 pursuant to the Protection of Children (Hague Convention) Act 2000 (Commencement) Order 2010 (S.I. No. 650 of 2010). The fundamental problem the applicant faces is that, as Article 1 makes clear, the Convention deals with questions of parental responsibility not parentage. Article 4 of the Convention removes any doubt in that regard by stating that it does not apply to, among other matters, 'the establishment or testing of parent-child relationship (*sic*)'. Nor, for that matter, does it deal with 'decisions on the right of asylum and or immigration.' For that reason, its provisions could not avail the applicant, even if he could establish that Guinea is the place of habitual residence of H.J.; that the law of Guinea attributes parental responsibility to the unmarried father of such a child as recorded in a register of births there; that the court order amending that register that he has produced to the Minister is authentic; and that the details recorded in that register as amended by that order are correct.

61. The applicant argues that the statement, described as a 'finding' in the ORAC report, that the purported Guinean birth certificate of H.J. names the applicant as her father 'thus establishing the relationship between them', represents a conclusion about the actual effect of that document rather than a description of its intended purpose and, moreover, that it is a conclusion that somehow binds the Minister to accept both the authenticity of that document and the accuracy of the information set out in it, regardless of both the Minister's own views and any evidence to the contrary. I am not aware of any basis in law for that proposition, which does not seem to me to be correct.

62. I conclude that the document purporting to be H.J.'s Guinean birth certificate does not establish the 'legal identity' of H.J. as the daughter of the applicant, either presumptively or at all, as a matter of the law of the State. Nor does it establish, presumptively or at all, the 'legal position' in that regard. For the purpose of the discharge of the Minister's function under s. 18(3) of the Refugee Act, that document is no more than one of the pieces of evidence that the Minister has to consider and it is for the Minister to decide what weight to give to it.

63. On a separate though related point, although the applicant was legally represented in his family reunification application at all material times, none of the three purported statutory declarations made for the specific purpose of that application by H.J.'s mother (one executed with a fingerprint on 12 June 2014 and the other two executed with a signature on 22 January 2015) is in the form prescribed under the Schedule to the Statutory Declarations Act 1938, as substituted by s. 52 of the Civil Law (Miscellaneous

Provisions) Act 2008. The requirements for making a valid statutory declaration in a place outside the State are clearly set out under s. 3A of the Act of 1938, as inserted by s. 50 of the Act of 2008. Perhaps surprisingly, neither ORAC nor the INIS seem to have given any consideration to the formal requirements contained in that legislation when considering those documents.

ii. failure to provide adequate reasons for the decision

64. The reasons given for the Minister's decision of 15 September 2015 in the report on which it was based were that 'the applicant has failed to satisfactorily establish the identity of [H.J.] and has failed to satisfactorily establish his relationship to her.'

65. Addressing the first of those reasons, the applicant contends that H.J.'s identity is, and was at the material time, readily capable of being established by her passport. The ORAC questionnaire that the applicant submitted on 9 June 2014 in applying for family reunification with H.J. under s. 18(3) of the Refugee Act specifically requested the submission of her passport. In his completed questionnaire, the applicant stated that he would obtain one for her. When ORAC repeated that request on 3 October 2014, the applicant's solicitors responded on 13 October 2014 that the applicant's instructions were that it was not possible to obtain an individual Guinean passport for a minor who must instead travel on the passport of an accompanying adult. The applicant's solicitor reiterated that assertion on the applicant's behalf on 11 November 2014 and 19 March 2015. In circumstances that remain unexplained, a Guinean passport issued to H.J. on 6 May 2015. For reasons that the applicant has never given, he did not submit it to either ORAC or the INIS. It was not until 28 October 2016 that the applicant's solicitors provided a colour photocopy of H.J.'s passport to the Minister's legal representatives, over a year after the Minister's decision and more than ten months after the applicant first applied for leave to seek judicial review of the Minister's decision.

66. In those circumstances, I am entirely unpersuaded by the applicant's argument that the presentation of H.J.'s passport at an Irish embassy or consulate abroad on 11 June 2015 to have her temporary visa placed in it , or to an immigration officer when she entered the State on 15 July 2015, or for identification purposes at the clinic where she gave a DNA sample on 11 August 2015, meant that the Minister had been provided with her passport as requested, thus establishing H.J.'s identity for the purpose of the applicant's family reunification application.

67 Even if the Minister was in error in concluding that the applicant had failed to establish the identity of H.J. for the purpose of his family reunification application, which I do not accept, I am satisfied that the finding concerned is in any event completely severable from the second, separate and free-standing one that the applicant had failed to satisfactorily establish his relationship with her; see *I.G. v Refugee Appeals Tribunal* [2014] IEHC 207 (Unreported, High Court (Mac Eochaidh J), 11 April, 2014) (at para. 29).

68. As the underlying report confirms, that second reason is, of course, based on the conclusion that 'the DNA evidence does not support the claimed relationship between [the applicant] and [H.J.].' That, in turn, is a weak reformulation of the conclusion in the Cellmark report that 'the DNA results exclude paternity', albeit subject to the qualification that the results obtained suggest that it is 100 times more likely that the applicant is related to H.J. in the same degree as an uncle, grandfather or perhaps cousin, than that they are completely unrelated. Very clearly, the Minister had weighed the evidence comprising all of the documentation submitted, together with the result of the DNA test, before concluding that the applicant had failed to establish that H.J. is his child and, hence, a 'member of the family' of the applicant as that term is defined under s. 18(3)(b)(iii) of the Refugee Act.

69. In oral argument, though not in the applicant's written legal submissions, counsel for the applicant submitted that the crucial issue in this case is whether the requirement to provide reasons for an administrative decision, identified by the Supreme Court (per Fennelly J; Denham CJ and Murray, O'Donnell and McKechnie JJ concurring) as an aspect of the entitlement to fair procedures in *Mallak v Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297 at 322, had been observed. Indeed, counsel quoted at length from the the entire train of modern jurisprudence on the point from *State (Sweeney) v. Minister for Environment* [1979] I.L.R.M. 35, through *Meadows v. Minister for Justice* [2010] IESC 3 , [2010] 2 I.R. 701 ; *Christian v. Dublin City Council* [2012] IEHC 163 , [2012] 2 I.R. 506 ; *Rawson v. Minister for Defence* [2012] IESC 26 , (Unreported, Supreme Court, 1st May, 2012) and *Mallak*, to *EMI Records (Ireland) Ltd v Data Protection Commissioner* [2013] 2 IR 669.

70. Without rehearsing the relevant dicta at oppressive length, suffice it to say that I am satisfied: first, that the Minister's decision provided ample information to enable the applicant and the court to assess whether it was lawful; second, that the process that led to it was fair, open and transparent; and third, that the applicant was enabled to respond to the concerns of the decision-maker.

71. It follows that the argument that the Minister failed to provide adequate reasons for the decision to refuse the application under s. 18(3) of the Refugee Act must fail..

iii. unlawful delegation of Minister's decision to Cellmark

72. The applicant contends that the Minister unlawfully delegated the decision whether to grant the applicant family reunification with H.J. as his child under s. 18(3) of the Refugee Act to to the company that carried out the DNA testing of them. In advancing that argument, the applicant relies on a passage from the judgment of Cooke J in *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC 427 (Unreported, High Court, 25 November, 2010). In that case it was argued that the Minister had required an applicant for family reunification with his asserted spouse under s. 18(3)(b) of the Refugee Act to obtain a declaration from the Circuit Court under s. 29 of the Family Law Act 1995 recognising the validity of the foreign marriage concerned as a precondition to deciding that application. Cooke J found that no such precondition had been imposed. Then, in a passage later approved on appeal by the Supreme Court, he continued (at para. 15):

> 'Although that ground is thus disposed of in this case, the Court would indicate, for the avoidance of doubt in other cases that, in its judgment, it would not in any event be competent or appropriate for the Minister to require the obtaining of such a declaration as a condition for the making of a decision on a family reunification application under s. 18. In that section, the Oireachtas has designated the Minister as the sole authority to decide whether permission should be granted or refused under subsection (3). It is to the Minister that the application for permission is made under subsection (1) and it is the Minister alone who must be satisfied that "the person the subject of the application is a member of the family of the refugee" under subsection (3) (a). It is envisaged by the provision that he will do so on the basis of the report furnished by the Office of the RAC under subs. (2) which has "set out the relationship between the refugee concerned and the person the subject matter of the application". The Minister cannot delegate to any third party, therefore, (including a Circuit Judge) the decision he is required to make under subs. (3)(a), namely, that the person comes within the definition of a family member or, in a case such as the present, that the person concerned and the refugee are parties to a subsisting marriage.'

73. The applicant argues that the Minister unlawfully delegated the decision on whether H.J. comes within the definition of a member

of the family of the applicant under s. 18(3)(a) to Cellmark Orchid Ltd. I do not accept that argument. The Minister provided the applicant with an opportunity to present DNA evidence when, in the Minister's view set out in a letter to the applicant's solicitors, it was not possible to verify the identity of H.J. or the relationship between the applicant and H.J. on the basis of the evidence submitted up to that point. It was never suggested that the applicant was obliged to undergo that testing as a precondition to the determination of his application by the Minister (or that HJ was). There is no suggestion in this case that the Minister was unwilling to consider any other evidence that the applicant wished to submit, including evidence contradicting or undermining the evidence represented by the Cellmark report. That report was sent to the applicant's solicitors on 28 August 2015 and the Minister's decision was sent to the applicant on 15 September 2015. While the unchallenged report constitutes compelling - the Minister argues 'conclusive' - evidence that the applicant is not the father of H.J., that is not to say that the Minister ever agreed or resolved to be bound by it, regardless of its contents or of the circumstances.

74. It is useful to note that, under s. 38 of the Status of Children Act 1987, as amended by the Children and Family Relationships Act 2015, in any civil proceedings where parentage is in issue, a court may direct the use of DNA tests to assist it in determining whether a person is or is not the parent of a person whose parentage is in issue in those proceedings. That could hardly be considered an impermissible delegation of the court's judicial function.

75. Thus, I reject the argument that the Minister unlawfully delegated the duty to make a decision under s. 18(3) of the Refugee Act by requesting the provision of DNA test evidence.

iv. failure to consider family reunification under s. 18(4) of the Refugee Act

76. The applicant makes the case that, having refused his application for family reunification under s. 18(3) of the Refugee Act on the basis that the applicant had failed to prove that H.J. was his daughter, the Minister breached an obligation to consider on her own initiative whether the applicant was entitled to family reunification under s. 18(4) of that Act with H.J. as his ward.

77. As the original questionnaire completed by the applicant recites on its face and as the applicant confirmed in filling it out, he sought permission for H.J. to enter and reside in the State as his statutory entitlement under s. 18(3)(b)(iii) of the Refugee Act on the basis that she is his unmarried minor dependent child. He did not ask the Minister to exercise the discretion under s. 18(4) to allow H.J. to enter and reside in the State, should that claim fail. He did not advance the alternative claim that, if H.J. was not his daughter, she was instead a dependent member of his family as his ward. Nonetheless, the applicant contends that the Minister erred in law in failing to go on to consider his application on that basis.

78. In putting forward that argument, the applicant relies on the decision of Clark J in *Ducale & Anor v Minister for Justice, Equality and Law Reform & Anor* [2013] IEHC 25 (Unreported, High Court, 22 January, 2013). That case concerned a refugee who, having achieved family reunification with her husband and two biological children, then applied for family reunification with her orphaned nephew and niece, to whom she claimed to be *in loco parentis*. The Minister refused that application under s. 18(4) on the ground that the applicant had failed to establish that her niece and nephew were dependent upon her. Ms Ducale challenged that decision on two grounds: first, that the Minister should have considered the application under s. 18(3) by giving the word 'child' in that subsection a broad purposive interpretation; and second, that the Minister had adopted an unduly narrow conception of the term 'dependent member of the family' in s. 18(4).

79. Clark J concluded that the Minister erred in law on the second ground advanced, that is to say in the assessment both of the relevant family relationship and of the presence or absence of dependence for the purpose of s. 18(4). The applicant points to the finding of Clark J (at para. 45) that the term 'ward' in that subsection must be interpreted as sufficiently flexible to encompass a situation of *de facto* care and dependence where, because of the realities of war and persecution in a particular country, legal adoption or fostering is not an available option.

80. A more significant portion of that judgment for the purpose of the issues I have to decide can be found in the preceding paragraph where Clark J states (at para. 44):

> '[It] should be noted that the Court accepts the respondents' contention that the Minister was not specifically requested to consider [the niece and nephew] as the *de facto* adopted children of the refugee and hence her "children" for the purposes of s. 18(3). The [family reunification] application was undoubtedly brought under s. 18(4) and not under s. 18(3). This was effectively accepted by the applicants' counsel at the hearing of the application for judicial review. In the view of the Court, it follows that the question of whether the Minister erred in law in the manner in which he interpreted the term "child" does not strictly arise in this case and the Court will offer no opinion on that issue.'

81. Although, in this case, the applicant's counsel did not accept that the applicant had sought family reunification solely under s. 18(3) and not under s. 18(4), the evidence before me admits of no other interpretation. Thus, I am satisfied that there was no obligation on the Minister to consider the position of the applicant and H.J. under the latter subsection.

82. Even if that were not so, it is not clear how the Minister could have purported to consider the exercise of the s. 18(4) discretion in the circumstances presented here. In *Ducale*, the applicant expressly made the case that the children concerned, then living in Ethiopia, were her wards for the purpose of s. 18(4) in circumstances where legal adoption of fostering was simply not an available option, and the political realities of war and persecution in Somalia did no allow for the formal recognition of guardian/ward relationship. That was the basis upon which Clark J concluded (at para. 45) that the term 'ward' had to be interpreted as sufficiently flexible to encompass a relationship of *de facto* care and dependence in the particular circumstances of that case.

83. There was no evidence before the Minister in this case that legal adoption, fostering or guardianship was not an available option either in Guinea or in Ireland (where H.J. was present at the time of the application). In the course of argument, counsel for the applicant asserted, without reference to any authority, that no application could be brought in this jurisdiction for a declaration of guardianship under, say, s. 6C, s. 6D or s.11E of the Guardianship of Infants Act 1964, as amended, because Ireland was not the place of habitual residence of H.J. Leaving aside for one moment the potentially vexed question of where H.J. was, or was not, then habitually resident, the applicant appears to be ignoring a venerable line of authority, exemplified by the decision of Porter MR in the case of *In re Magees, Infants* 31 L.R. (Ir.) 513 (1892), that the guardianship jurisdiction can be exercised for the 'benefit and protection' of an alien infant present in the State; see Binchy, *Irish Conflicts of Law* (Dublin, 1988) (at 326-7). Not that it is necessary to consider, much less decide, the point for the purpose of the present judgment. Suffice it say, that it cannot have been incumbent on the Minister to consider evidence that was not adduced and arguments that were not advanced, in the context of an application under s. 18(4) that the applicant did not make.

84. It may or may not have been in that context that the Minister pleads that it was not within his power to consider whether H.J.

was the applicant's ward. Equally, it may or may not have been the absence of any evidence or argument concerning the unavailability of legal adoption, fostering or guardianship in Guinea or Ireland that prompted Mr McKnight to advise the applicant's solicitor in November 2016 that an application for family reunification pursuant to s. 18(4) could not be processed because the applicant was not the 'ward or guardian' of H.J. I do not know. But, for the reasons I have already given, none of this is material to the lawfulness of the Minister's decision of 15 September 2015 that the applicant was not entitled to family reunification with H.J. under s. 18(3) because she is not his child.

85. Counsel for the Minister has drawn to the court's attention an order made by Mac Eochaidh J in *Ducale* on 26 May 2014 on consent between the parties, setting aside the earlier judgment and order of Clark J in that case on the ground that they were obtained by fraud. While that order quite rightly deprives the earlier judgment and order of all effect between the parties concerned, it does not seem to me to undermine the analysis of the applicable legal principles that the judgment of Clark J contains.

86. Counsel for the applicant sought to bolster the assertion that the Minister was obliged to consider the application under s. 18(4) with an argument from consequences, pointing out that s. 18 of the Refugee Act was repealed under s. 6 of the International Protection Act 2015 with effect from 31 December 2016 by operation of the International Protection Act (Commencement) (No. 3) Order 2016 (S.I. No. 663 of 2016) and that s. 56 of the Act of 2015, which now deals with refugee family reunification applications, no longer extends the definition of 'member of the family' to include a dependent ward. Ignoring the logical fallacy innate in such arguments, I can see no reason to conclude that an application under s. 56 of the Act of 2015 is the only basis upon which H.J. can seek permission to reside in the State. Section 4 of the Immigration Act 2004 contains the general power conferred on an immigration officer on behalf of the Minister to authorise a non-national to land or be in the State or to refuse permission to that non-national to do so. There is no reason to suppose that, in dealing with any application for permission to land and reside in the State that H.J. might make under s. 4 of the Act of 2004, the Minister would do so without appropriate regard to the relationship between H.J. and the applicant; the position of the applicant as a refugee; the policies on refugee family reunification promoted by the UNHCR and the European Union; and the requirements of Article 41 of the Constitution of Ireland, Article 8 of the ECHR, and Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, insofar as they are applicable to whatever evidence H.J. may present.

v. the best interests of the child

87. The applicant separately argued that the Minister's decision was made without reference to H.J.'s best interests and, hence, in disregard of the obligation in principle to have regard to the best interests of the child. However, it is only where the Minister is exercising a discretion, such as that under s. 18(4) of the Refugee Act or s. 4 of the Act of 2004, that the obligation to consider the best interests of the child arises. There is no reason to suppose that the Minister will not comply with that obligation if required to consider the exercise of any such discretion in the case of H.J.

vi. the additional ground

88. On a strict view of the facts of this case, I doubt the applicant could meet the exceptional circumstances test for permission to amend his grounds posited by Costello P in *McCormack v Garda Síochána Complaints Board* [1997] 2 IR 489. He seeks to rely on the assertion in the Minister's statement of opposition that it was 'conclusively established' that H.J. was not the applicant's child as constituting a new fact about the Minister's decision, or the basis for that decision, that he could not have known when he first obtained leave. In view of the clear and unequivocal statement in the Cellmark report that 'the DNA results exclude paternity' there is an air of unreality to the applicant's suggestion that he could not have known, or reasonably anticipated, that this was the Minister's position.

89. Nonetheless, having heard submissions on the merits of the additional ground in the course of the hearing of the application, I permitted the amendment sought in an *ex tempore* ruling at the conclusion of that hearing. I did so out of a concern to minimise the risk of injustice to the applicant in the particular circumstance of this case and because I had come to the view that the ground concerned is entirely without merit.

90. The Minister reached a decision, as she was obliged to do, on the evidence before her. The material from the internet now exhibited on behalf of the applicant does nothing more, at the high water mark, than suggest the existence of other evidence, which if properly adduced, would imply the possibility (rather than likelihood or probability) of scientific error in the main conclusion of the Cellmark report. It was open to the applicant at all material times between receipt of the DNA report sent to his solicitors on 28 August 2015 and 15 September 2015, when the Minister made her decision, to indicate a desire to submit: (a) scientific evidence of the existence and implications of the human chimera phenomenon; (b) scientific evidence that the applicant is a chimeric human or human chimera; (c) scientific or forensic evidence that the DNA testing conducted was flawed; (d) further or other scientific or forensic evidence that the applicant is the father of H.J.; or (d) any combination of such evidence, by reference to whatever case he wished to make. He did not do so. There is no principle of law whereby an administrative decision is invalidated for failure to consider the possible existence and effect of evidence beyond that properly before the decision-maker.

Conclusion

91. The application for judicial review is refused.