THE COURT OF APPEAL

No redactions needed

Record Number: 2023/013

High Court Record Number: 2022/125 JR

Donnelly J. **Neutral Citation Number [2024] IECA 114**

Ní Raifeartaigh J.

Butler J.

BETWEEN/

L.T.E. and K.A.U.

APPELLANTS

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 17th day of May 2024

Nature of the Case

1. This is an appeal from a decision of the High Court in judicial review proceedings. It concerns an application by an Ethiopian national (the second appellant) for a Long Stay Join Family Visa (hereinafter "visa") in circumstances where he wishes to join and live with his Irish citizen wife (the first appellant) in the State. The legal framework within which Ministerial discretion is exercised in such cases is contained in a Policy Document on Non-EEA Family Reunification (some provisions of which are set out in further detail in the relatively recent decision of this Court in *B.B. v. Minister for Justice Equality and Law Reform* [2024] IECA 36, hereinafter '*B.B.*').

2. The first appellant is a naturalised Irish citizen, originally from Ethiopia, who came to Ireland in 2014 as an adult. She married the second appellant, an Ethiopian national, in Ethiopia in 2019. The second appellant made the visa application in 2021. The visa was refused at first instance, and the refusal was upheld by decision of 17th November 2021 ("the impugned decision"). The appellants brought judicial review proceedings in respect of the refusal and were unsuccessful in the High Court (see judgment of Heslin J., neutral citation [2022] IEHC 504). This is an appeal from that decision.

3. The issues which are raised encompass the analysis of the decision-maker and the High Court review thereof in relation to: (1) the evidence submitted and the conclusions reached in relation thereto; (2) the analysis of Article 41 Bunreacht na hÉireann and *Gorry v Minister for Justice and Equality and A.B.M. & B.A. v Minister for Justice and Equality* [2020] IESC 55 (hereinafter "*Gorry*") and its application to the facts of the case; (3) the analysis of Article 8 of the European Convention on Human Rights (hereinafter "the Convention" or "ECHR") and s.3 of the European Convention on Human Rights Act 2003 (hereinafter "the 2003 Act").

Preliminary observation about the standard of appellate review in a case such as this

4. The instant case is one of a number of similar cases which have come before this Court in recent times in which the challenge to the Minister's refusal of a visa under the Policy Document is essentially three-fold: (a) that the factual findings and conclusions based on those findings were irrational, unreasonable and/or disproportionate; (b) that the Minister and the High Court misunderstood and misapplied the Supreme Court decision in *Gorry* concerning the constitutional rights of an Irish citizen who is married to a non-EEA national; and (c) that the Minister and then the High Court misunderstood and misapplied European Convention on Human Rights caselaw relating to Article 8 and the rights of a married couple.

5. In *B.B.* (in which I delivered a judgment with which Whelan J and Haughton J agreed), the judgment contains at paras 56-58 a discussion of the standard of appellate review in a case such as this and I do not propose to repeat those remarks save to say that this Court must have the relevant parameters firmly in view when conducting an analysis of the High Court judgment which itself was assessing the Ministerial decision according to standards of judicial review.

Some relevant provisions within the Policy Document

6. As the issue of the first appellant's financial situation was a significant issue in this appeal, it may be helpful to set out certain relevant provisions of the Policy Document:

> "Where Sponsor is Irish Citizen

17.2 An Irish citizen, in order to sponsor an immediate family member, must not have been totally or predominantly reliant on benefits from the Irish State for a continuous period in excess of 2 years immediately prior to the application and must over the three year period prior to application have earned a cumulative gross income over and above any State benefits of not less than €40k.

…..

17.5 Declared and verified savings by the applicant or sponsor may be taken into account in assessing cases which fall short of the income thresholds set out above. (A suggested approach would be to annualise the savings as income spread over a 5-10 year period). Alternatively, a nominal income may be determined based on the amounts involved."

7. The Executive Summary also contains the following:

"Family reunification must be seen in a wider context of public policy. Immigration control is the right and responsibility of the elected Government of the day and it may set down immigration policy in the public interest. The State must strike a fair balance between the sometimes competing interests of the individual and of the community as a whole. Applications for family reunification will be refused where a party to an application is a threat to public security, public policy or public health. In addition to ensuring that there is no threat to public policy, public security or public health, family reunification should not be an undue burden on the public purse.

Economic considerations are thus a very necessary part of family reunification policy. While it is not proposed that family reunification determinations should

become purely financial assessments the State cannot be regarded as having an obligation to subsidise the family concerned and the sponsor must be seen to fulfil their responsibility to provide for his/her family members if they are to be permitted to come to Ireland."

8. It is also important to note that para 1.12 of the Policy Document provides for exceptional circumstances in which a departure from the guidelines may be appropriate:

"

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 positive." (emphasis added)

Chronology of Events

9. The first appellant is an Ethiopian national who was born in 1993. She came to the State in 2014 as a family member of a recognised refugee, at which point she was approximately 21 years old. She held 'Stamp 4' permission to reside here up to November 2021 and was naturalised as an Irish citizen on 13th September 2021. The fact of her naturalisation was drawn to the attention of the Minister during the visa appeal process.

10. In her Grounding Affidavit for the judicial review proceedings, the first appellant describes the circumstances of their marriage as follows:

"...I have known the [second appellant] since we were very young children, as our families were neighbours and good friends. As children, we had quite a good and close

relationship and he was always a very positive force and influence in my life until I left Ethiopia. ....

Given the closeness of our families, it was agreed that we should marry. I was absolutely delighted by this proposal, as he had been such a good and close friend as children, how close our families were, and the high regard I held him in.

It was on this basis that, in line with Ethiopian Islamic tradition, we agreed to marry. As I was residing in Ireland, on 2 March 2019, we held a traditional Nikah marriage ceremony over video call with our respective immediate families. Following this, I then travelled with my family members to Ethiopia and, on 5 April 2019, we held a traditional blessing day with the Second Named Applicant's family. On 13 April 2019, we had our wedding day in Dire Dawa with approximately 120 attendees. We then had a week-long honeymoon at the MA Hotel in Dire Dawa.

Following this, I returned to Ireland. ..."

11. As appears from the above, the appellants were married over a video-call on 2nd March 2019 and the appellant visited Ethiopia for a traditional blessing day/'white wedding' in-person in April 2019. The validity and genuineness of the marriage is not and never was in dispute.

12. The second appellant was born in 1985 and is therefore eight years older than the first appellant. He completed an online application form for the visa on the 15th March 2021 and this was followed by an application with a cover letter and attachments from the appellants' solicitors on the 23rd March 2021. The attachments included the original marriage certificate, some documents related to the financial and employment situation of the sponsor, some documents concerning her education, a "call log showing contact between the sponsor and

applicant", documents described as "itineraries and boarding passes as evidence of the sponsor's travel to visit the applicant', a 3-page document described as "relationship history document", photographs of the applicant and sponsor, a news article about Ethiopia, and photographs described as "photographs of the applicant following his attack".

13. With regard to the latter item, the solicitor's letter stated that the applicant

> "has recently been the victim of a violent attack which he instructs was inflicted by soldiers of the Ethiopian government. The attack took place on 29 June 2020 following a demonstration against the arrest of a number of Oromo political leaders. We enclose photos of his injuries. In view of the ongoing state of unrest in the Oromo region (see enclosed Today News Africa article) our client has reasonable fears that he may be subject to further abuse at the hands of government soldiers or supporters".

14. The three photographs showed significant bruising, in particular to the shoulder of what appears to be a male. However, the photographs do not show the person's face in full; the one photograph which shows the face to any extent shows the person from the mouth downwards.

15. The letter containing submissions from the appellants' solicitor accepted that the first appellant did not meet the financial criteria set out in the Policy Document but submitted that exceptional circumstances existed such that the visa should be granted.

The refusal at first instance

16. The decision maker at first instance refused the application on the 25th May 2021 on the basis that, *inter alia*, the first appellant as sponsor had failed to meet the financial criteria set out in the policy document and that there was a reasonable concern that the granting of

the visa may result in a cost to public funds and/or resources, and there was insufficient evidence of the stated relationship. At one point the decision referred to s.15.6 of the Policy Document on "proxy marriages" and said that "the parties must be able to show that they have met each other in person prior to the marriage" but that this had not been addressed in the application. At another point it observed that the first appellant had not provided an explanation as to why she was not in Ethiopia at the time of the marriage. It also noted the photographs of the alleged injuries suffered by the second applicant and observed that no medical report had been submitted. Under the heading of inconsistencies or contradictions it referred to "details surrounding relationship history" and said that the parties were said to have been childhood friends and that their marriage was arranged but that nothing submitted suggested they had met prior to her coming to the state in 2014. Under the heading "relationship history" it said that they had not provided sufficient evidence of the relationship and that "in general, for immigration purposes, a relationship must include a number of face-to-face meetings (excluding WebCam) between the parties" and that although the marriage was stated to be arranged, insufficient documentary evidence had been provided in that regard.

17. Under the heading "insufficient documentation submitted in support of the application", perhaps the longest paragraph of the decision, the cumulative effect of all these matters were essentially summarised as follows:

> "Documentation submitted does not show that the application meets the qualifying criteria as set out in the Policy Document on Non-EEA Family Reunification Section 15.6.

Documentation submitted does not show that the application meets the qualifying criteria as set out in the policy document on non-EEA family reunification section 17.6

Insufficient information has been submitted to show the extent to which family life exists between the sponsor and the applicant.

Full documentary account of relationship history between applicant and sponsor not submitted

Evidence of ongoing routine communication between applicant and sponsor both prior to and since marriage not submitted. As per evidence of communication submitted Visa Officer notes the name [two names mentioned] however the applicant's name is [three names mentioned only the first of which is identical to the previous names].

Evidence of applicant and sponsor meeting face-to-face prior to marriage not submitted.

Information provided regarding marriage would indicate it was done by proxy. Evidence of supporting documentation regarding same has not been submitted.

Evidence of sponsor having visited applicant in home country since marriage not submitted.

Evidence of sponsor financially supporting applicant via remittances not submitted.

Sponsor has failed to submit sufficient evidence of finances over previous two years.

Sponsor has failed to submit copy of previous Ethiopian passport."

The Appeal to a visa appeals officer

18. The appellants appealed this decision on the 1st June 2021 by way of a letter from their solicitors. The letter again accepted that the financial criteria in the Policy Document had not been met ("*The application was made expressly on the basis that… our client did not meet the financial criteria….")* but requested the Minister to exercise her discretion in the particular circumstances of the case. It notified the Minister that the first appellant had been naturalised as an Irish citizen and enclosed a copy of her certificate. It disputed the characterisation in the first instance decision of the marriage as a "proxy marriage" and said that although the Nikah ceremony took place over a video call, the wedding itself took place on 13th April 2019 with both parties present, and referred to wedding photos submitted and proof of the first appellant's travel, and that the marriage was registered on the same date. It said that the first appellant instructed that she was not able to be present for both "due to the long period of time this would require her to be absent from the State". It may be noted that no explanation was given as to why this was so.

19. The letter went on to refer to the absence of a medical report in respect of the assault described, and said that the second appellant did not seek medical treatment because he was afraid that this would lead to him being further targeted as an opponent of the regime. It submitted that it was unfair and irrational to discount this element of his application solely because a medical report was not obtained in circumstances where he had submitted photographs of his injuries. Again, it may be noted that it did not address the issue that the photographs did not identify the appellant by face.

20. The letter referred to the three-page statement by the first appellant outlining her relationship history and expressed itself to be "at a loss to understand why it is not deemed a full account".

21. It provided an explanation for the second appellant's name discrepancy on the official documentation and provided an entry concerning Ethiopian names and submitted a screenshot from his Facebook page to clear up any misunderstanding.

22. As regards the comment that there was no evidence of the sponsor having visited the applicant in the home country since the marriage, the letter stated that this was "very clearly untrue, having regard to the flight tickets and passport stamps submitted with the application". It also said it would be unfair to find against them where international travel has been 'all but impossible' for more than half the period since the marriage (presumably referring to the Covid pandemic). With regard to the comment that there was no evidence of the first appellant financially supporting the second appellant, it pointed out that this was not a requirement under the Policy. It also said there was no requirement that a sponsor submit copies of expired passports and in any event this was entirely irrelevant now that the first appellant was an Irish citizen. It contended that no inconsistencies or contradictions had been identified despite a heading to this effect in the decision.

23. With regard to the reference to the cost to public funds or resources, it was submitted that the Minister could not lawfully refuse a visa application for the spouse of an Irish citizen "on the basis of a blanket application of an arbitrary financial threshold", referring to a passage in *Gorry* where O'Donnell J said that if the parties could add to the fact of marriage evidence of an enduring relationship and the State were to refuse entry to the state for no good reason, this would constitute a failure to respect the institution of marriage. Reference was also made to *AMS v. Minister for Justice and Equality* [2014] IESC 65 ('*AMS*') in this regard.

24. With reference to the relationship history, it was noted that a number of wedding photos, a relationship history statement, and evidence of ongoing contact over the last year

had been submitted. All such evidence had been disregarded, it was said, and a blanket rule applied that documentary evidence must be provided of face-to-face meetings prior to the wedding or of how the wedding was arranged. Instead of creating "a tick box list" of evidence that must be presented, the Minister was required to consider the weight of all the evidence and reach a decision on the ordinary civil standard of proof.

25. This letter attached the following additional supporting documentation:

- a copy of the first appellant's certificate of naturalisation,
- an 'entry word on Ethiopian names'
- a screenshot of the Facebook cover photo of '[two names]' (who is said to be the second appellant by an alternative second name) showing an image matching the wedding photos submitted in support of the original application

26. By decision dated 17th November 2021, the appeal was refused. This is the decision under review in these proceedings (hereinafter the 'impugned decision').

The impugned decision

27. The impugned decision comprised a cover letter (4 pages long) accompanied by a more detailed "consideration document" (a 13-page document). The cover letter set out the reasons for refusal which included that the finances shown had been deemed insufficient, the grant of a visa might result in a cost to public funds, and that there was insufficient documentation in respect of the family life between the two appellants.

28. The longer "consideration document", which elaborated upon the foregoing reasons in considerable detail, contained four sections (Background; Assessment under the Policy Document; Consideration under Article 41 of the Constitution; and Consideration under s.

3 of the European Convention on Human Rights Act 2003 having regard to Article 8 of the ECHR).

29. Further details of the decision will be set out later in this judgment. For the moment it suffices to say the following. It took into account that the first appellant did not meet the financial criteria set out in paragraphs 17.2 and 17.5 of the Policy Document and considered that her low level of income may result in a reliance on public funds, and that insufficient evidence had been provided with regard to the relationship history/ongoing contact. It noted that the relationship had been almost entirely long-distance in nature and they had never resided together as a family unit. It commented that "It is a relationship that is capable of being sustained in the same manner in which it was developed, whether by way of visits, or telephonic and electronic means of communication, without the grant of a visa to the applicant". No exceptional/humanitarian circumstances had been demonstrated. Article 41 of the Constitution and the decision in *Gorry* were considered but a decision reached that a refusal of a visa would not violate this constitutional Article and that insufficient documentation had been produced to show that "it is more difficult or may be extremely burdensome for the applicant and sponsor to reside together anywhere else". It considered Article 8 of the European Convention on Human Rights and some of the caselaw of the European Court of Human Rights ("ECtHR"), and concluded that a refusal of visa would not breach Article 8.

The grounds on which judicial review proceedings were brought

30. The primary relief sought by the appellants was *certiorari* of the impugned decision. Essentially the appellant's complaints were that the Minister's decision was irrational and/or unreasonable and/or disproportionate; that she failed to have regard to relevant matters; that she applied 'blanket rules' inflexibly and/or fettered her discretion; that the decision was

unlawful and disproportionate to the applicants' rights as a lawfully married couple under Article 41 of the Constitution; and that the decision was unlawful and disproportionate in light of Article 8 of the European Convention on Human Rights, and the European Convention on Human Rights Act, 2003.

31. The statement of grounds listed specific findings in the impugned decision which were said to be irrational, unreasonable or disproportionate in light of the evidence submitted: (a) that insufficient evidence of family life prior to marriage had been submitted; (b) that insufficient documentary evidence had been provided to show the extent to which family life was sustained since the appellants were married and routine ongoing communication and contact; (c) that the first appellant was "predominantly" reliant on social welfare; (d) that the second appellant would be an "immediate" reliance (sic) on public funds/resources; (e) that it had not been established that the appellants had contact with each other on the occasions when the first appellant was in Ethiopia and/or that they were required to show that they had contact on "all" of her visits to Ethiopia.

32. It was also pleaded that the respondent acted unreasonably, irrationally or disproportionately in refusing the applications without having regard to relevant matters, in particular: (a) that both appellants are Muslim and contracted their marriage in accordance with the religious and cultural mores of their faith and that they reside in different countries; (b) that the first appellant had been in gainful full-time employment for over a year in advance of the application and had not had recourse to public funds since then; (c) the second appellant's individual prospects of finding employment in the State.

33. It may be noted that nowhere in the statement of grounds was it specifically raised that the impugned decision had erred in the manner in which it had approached the photographs of injuries submitted by the appellants, or the factual issue of risk of physical harm or

persecution of either/both of the appellants in Ethiopia more generally (e.g. the News Africa article, the first appellant's history of having come to this jurisdiction as a relative of a refugee).

34. The respondent lodged a short two-line statement of opposition, which simply traversed matters *seriatim* and opposed the relief sought.

35. In their written submissions before the High Court, the appellants raised a preliminary objection that the statement of opposition failed to sufficiently particularise the respondent's case. They did not, however, bring a motion to strike out the statement of opposition.

The High Court judgment

36. The High Court judge considered but rejected the preliminary application in respect of the statement of opposition on the basis that while succinct, its content was adequate because it consisted merely of a denial of each element of the appellants' case, and that the appellants had not in any way been prejudiced by its brevity.

37. The High Court in a lengthy and comprehensive judgment examined each of the issues raised in some detail. We will examine below some of this detail but again, for the moment, it suffices to see that the High Court judge was not persuaded that the Minister's conclusions were irrational or unreasonable or disproportionate, or that *Gorry* had been misapplied, or that there had been any breach of Article 8 of the Convention.

The issues on appeal and the structure of this judgment

38. The notice of appeal contains 14 grounds of appeal, some of which are quite lengthy, and it would not be appropriate to set them out in full here. Grounds 1 and 2 are general grounds that the High Court erred in failing to determine that some of the Minister's

determinations were irrational and unreasonable, and failed properly to interrogate the Minister's conclusions with regard to finances and family life. Ground 3 contends that the High Court judge erred in failing to consider whether the "quality of family life" is a relevant matter at all. It also contends that the Minister should not review the content of marital communications at all because they are private to the married parties. Ground 4 contends that the High Court judge erred in accepting the statement in the impugned decision that all relevant materials had been considered. More particularly, reference is made to an alleged failure to take into account the fact that, in Muslim culture, the parties would not be permitted to have much contact prior to the marriage; that they lived in different countries; that the first appellant had been in full-time work for one year prior to the application; and the contention that the second appellant had "had a reasonable prospect of finding employment" within the State. The latter point is returned to in Ground 5. Ground 6 contends that the High Court erred in its approach to the standard of proof and that the decision-maker should have accepted or rejected matters on the balance of probabilities. Grounds 7, 8 and 9 relates to the alleged misapplication of the decision in *Gorry,* and Ground 10 relates to Article 8 of the European Convention on Human Rights. Ground 11 asserts that the High Court erred in failing to find that the decision-maker applied the Policy in a rigid or inflexible manner (with undue emphasis on the financial situation of the appellants). Grounds 12 and 13 concern particular findings of the High Court judge and will be set out in further detail below. Ground 14 concerns the High Court's dismissal of the preliminary objection concerning an alleged lack of specificity in the statement of opposition and the failure of the respondent to provide an affidavit in support of it.

39. It may be noted that none of the grounds of appeal contained any specific reference to the photographs of injuries submitted by the appellants or the issue of risk to them if they lived in Ethiopia.

40. Shortly before the hearing of the appeal, the appellants sought to file an additional affidavit. The respondent objected in correspondence. The Court had not ruled on the matter and it was not raised at the outset of the hearing. Counsel for the appellant did not refer to the new or "disputed" affidavit in his oral submissions. Counsel for the respondent at the outset of his submissions raised a query as to the status of the affidavit. After some discussion with counsel, the Court rose (with the agreement of the parties) in order to read the affidavit.

41. The affidavit essentially set out some up to date facts: (1) That the first appellant had travelled to Ethiopia for almost three months in 2023 (from February to June); (2) That the first appellant was four weeks pregnant; and (3) That the first appellant was now in receipt of social welfare (a full-time carers' allowance in respect of care she was providing to her mother).

42. This led to a relatively brief discussion as to whether the case was in fact moot and/or the factual scenario on which the application was based had now changed to such an extent that a decision from the Court would no longer be appropriate. The Court, having heard argument, ruled that it would continue to hear the case and deal with the matter in the judgment.

43. Given the number of issues raised and the overlap of some of them, I propose to group the Grounds of Appeal and structure the judgment in a manner that does not follow the chronological sequence of the Grounds of Appeal. Part 1 will cover the two procedural or preliminary issues; namely, the mootness issue and the adequacy of the statement of opposition. Part 2 will cover grounds of appeal related to the decision-maker's findings of fact and/or approach to fact-finding and the High Court's treatment of those. Part 3 relates to *Gorry* and Article 41 of the Convention; Article 8 of the ECHR; and proportionality in respect of each.

Part I – Preliminary Matters: Mootness and the Statement of Opposition

The Mootness Issue

44. The Court has decided to deal with the issues on the merits, although not without some reluctance, and wishes to make the following observations.

45. First, given the nature of judicial review proceedings concerning visa applications, namely that the reliefs sought invariably consist of certiorari and remittal for a further decision by the Minister, it is important that the Court be apprised of any factual developments which may be relevant to the question of remittal (and therefore the question of the possible mootness of the proceedings).

46. Second, the appropriate procedure in terms of putting additional affidavits before the Court should be followed. Leave should be sought from the Court in the ordinary way, on notice to the other side. Further, instructions should be taken and leave sought at an appropriate time. If the issue is left over to the day of the appeal, the parties should draw the attention of the Court at the outset of the hearing to the fact that there is an outstanding issue in this regard to be ruled on. In the present case, none of this took place as the appellant sought to file an affidavit without leave of the Court and very late in the day, the respondent objected on procedural grounds, the appellant did not raise the issue at the outset of the hearing nor refer to the affidavit during submissions, and the matter only arose at the outset of the respondent's submissions.

47. One of the issues upon which counsel for the appellant made submissions concerned the failure of the Minister to consider the alleged risk/danger to the appellants in Ethiopia and one would have thought that the fact that the first appellant had spent almost three months living there (a period which ended shortly before the appeal hearing) on what appears to have been a conjugal visit would be relevant to the question of whether remittal to the Minister on this ground would be appropriate. This new information was contained in the disputed affidavit.

48. Another issue was the submission that the Minister should have engaged in a "forward looking" assessment on the basis that the first appellant had finished her studies and was in full-time employment at the time of the visa application. Again, the fact that, according to the disputed affidavit, she was now in receipt of a carer's allowance might have been relevant to that issue in the context of remittal, although it is fair to say that she had full-time employment for a considerable period before receipt of that allowance.

49. If the first appellant, a naturalised Irish citizen resident in Ireland, gives birth to a child that child will also be an Irish citizen. The fact that the second appellant would then be the parent of an Irish citizen child would have a material bearing on his entitlement to enter and reside in this State.

50. Counsel for the appellant in essence submitted that there were two reasons that the case should be heard and the question of remittal was live. The first was that there was an adverse decision of the High Court and a costs order against the appellants. The second was that the case involved a challenge to the manner in which the decision-maker had approached

numerous factual matters and legal matters concerning the visa application and, if they were correct in their complaints, this would influence any future consideration of their application by the Minister and therefore the Court should rule on the issues raised.

51. Having regard to the last point in particular, I am of the view that the appeal continues to have some utility and that the Court should proceed to deal with the issues raised.

The adequacy of the statement of opposition

52. Ground 14 concerns the High Court's dismissal of the preliminary objection concerning an alleged lack of specificity in the statement of opposition (and failure to file affidavit in support of the statement of opposition). The appellants strongly pressed the argument in the High Court that the statement of opposition was flawed because it was unparticularised, contrary to Order 84, rule 22 (5) of the Rules of the Superior Court ("RSC"). The statement of opposition was a terse 2-paragraph document, carrying the heading "(As per Part 6 of Practice Direction HC81 – Asylum, Immigration and Citizenship List)" and providing as follows:

> "1. The Respondent denies the grounds upon which the relief is sought as if same were set out hereunder and *traversed seriatim* and the matters of fact and law relied on by the Applicants do not give rise to the legal grounds for the relief claimed.
>
> 2. Accordingly, the Applicants are not entitled to the relief claimed any relief." (italics original)

53. The High Court judge acknowledged the terms of both Order 84, rule 22 (5) and Practice Direction HC81. The latter provides at part 6 'Opposition papers generally':

"(4) The attention of Respondents is drawn to Order 84 rule 22 (5), which provides that it shall not be sufficient for a Respondent in a statement of opposition to deny generally the grounds alleged by the statement grounding the application, but the Respondent should state precisely each ground of opposition, giving particulars where appropriate, identifying in respect of each ground the facts or matters relied upon as supporting that ground, and deal specifically with each fact or matter relied upon in the statement grounding the application of which he does not admit the truth.

(5) In giving effect to the foregoing requirement it is however unnecessary for a statement of opposition to contain a denial of the allegations of fact or law in a statement of grounds individually, issue by issue or paragraph by paragraph, or to assert that the applicant is not entitled to relief for costs, or that the Respondent(s) are entitled to costs. It is sufficient for a statement of opposition to contain only the following:

a) a statement that the allegations of fact and law in the statement of grounds are denied, save (if applicable) that specified matters in the statement of grounds are admitted and or that the applicant is put on strict proof of specified matters, and/or a statement that the matters of fact relied on by the applicant do not give rise to legal grounds for the relief claimed; and

b) a statement of any specific matters of fact or law positively relied on by the Respondent(s), for example that specified facts or

circumstances preclude the grant of relief, that the proceedings are out of time or are an impermissible collateral challenge to a specified previous unchallenged decision, or that relief should be refused due to failure by the applicant to disclose specified facts or matters when obtaining leave, by reason of a specified alternative remedy, or in the discretion of the court having regard to specified facts and circumstances.

(6) Where contrary to the foregoing a statement of opposition contains excessively repetitive traverses or fails to specify with precision the positive matters relied on, without prejudice to any other course of action that the court may adopt, the costs of such statement of opposition may be disallowed by the court."

54. The High Court judge said that, although succinct, the statement of opposition made the respondents' position perfectly clear. The Minister was not relying on "any specific matters of fact or law positively relied on", such as, for example, that the application was 'out of time'; or that there had been a failure to exhaust 'alternative remedies'; or that the proceedings were a 'collateral challenge' to a prior binding decision. The appellants would not have been in a different position if the respondent had pleaded her opposition in a lengthy issue-by-issue traverse, he said. He also pointed out that no prejudice to the appellants had been identified as a result of the way in which the statement of opposition has been pleaded; there was no element of surprise in any of the respondent's submissions. The respondent's position as articulated during the trial was precisely that set out in the statement of opposition, namely that the matters of fact and law relied on by the appellants did not give

rise to an entitlement to any relief, "no more no less". The High Court judge also pointed out that no motion to strike out the statement of opposition had been brought.

55. At the oral hearing of the appeal, counsel on behalf of the appellant said that he accepted it was not going to form the basis for a successful appeal but suggested that it would be helpful for the Court to indicate its view given the importance of the issue for cases more generally.

56. I am in agreement with the High Court judge on this issue. The challenge by the appellants in this case was, as described at the outset of this judgment, three-fold: (a) that the factual findings and conclusions based on those findings were irrational, unreasonable and/or disproportionate; (b) that the Minister and then the High Court misunderstood and misapplied the Supreme Court decision in *Gorry* concerning the constitutional rights of an Irish citizen who is married to a non-EEA national; and (c) that the Minister and then the High Court misunderstood and misapplied European Convention on Human Rights caselaw relating to Article 8 concerning the rights of a married couple. The respondent's contention was simply that none of these propositions could be established by the appellants. In those particular circumstances, and where no particular prejudice has been asserted on behalf of the appellants, I consider that the succinct nature of the statement of opposition was appropriate and indeed helpful. In these days of wordy documents on all sides, (and I do spare the blushes of the judiciary including myself in this regard) brevity is to be welcomed if it can replace verbosity without loss of necessary content. As Einstein is reputed to have said: "Everything should be made as simple as possible, but not simpler."

57. I also agree with the High Court when he said the following with regard to the consequences as to any deficiency in the Minister's pleadings:

> "68. Even if this court were to take the view that the Respondent's statement of opposition failed to comply with HC 81 (and for the reasons set out above, this court does not take any such view) it seems to me that it would be inimical to justice to take the dramatic step of striking out the statement of opposition as opposed to engaging in an analysis as to whether a fair trial is still possible; making such orders as may be appropriate with respect to further and/or amended pleadings; and making appropriate orders with respect to costs.
>
> 69. Striking out the statement of opposition would certainly seem to me to be very much an option of last resort, where the interests of justice require it. This is in circumstances where it cannot be in dispute that striking out the statement of opposition would be to interfere with what would otherwise be the proper and fair result of the proceedings, based on a consideration by the court of the evidence and the law. I am fortified in this view by the contents of HC81 in that, whilst I accept entirely that the list of possible orders referred to at para. 20 of HC81 is non-exhaustive, the examples given all relate to questions of costs."

84. If in a given case an applicant is genuinely prejudiced by the succinct nature of the statement of opposition, it is appropriate to raise it in a procedurally appropriate way at an early stage in order to provide opportunity for less drastic remedies than striking out.

Part II - Grounds of appeal related to the decision-maker's findings of fact and/or approach to fact-finding and the High Court's treatment of those

(Grounds 1, 2, 4, 5, 6, 11, 12, 13)

Grounds 1, 2, 4 and 5

58. I consider it appropriate to consider these grounds of appeal together. Grounds 1 and 2 consist essentially of a complaint that the High Court erred in failing to determine that the Minister's conclusions with regard to finances and family life were irrational and unreasonable, and that he failed to interrogate them properly. Ground 4 contends that the High Court judge erred in accepting the statement in the impugned decision that all relevant materials had been considered. Reference is made to the fact that in Muslim culture, the parties would not be permitted to have much contact prior to the marriage; that they lived in different countries; that the first appellant had been in full-time work for one year prior to the application; and the contention that the second appellant had "had a reasonable prospect of finding employment" within the State. The latter point is returned to in Ground 5.

The financial position of the appellants

59. It had been accepted in the correspondence from the solicitor for the appellants at all times that the first appellant did not satisfy the financial criteria in the Policy Document and that the application was being advanced on the grounds that the Minister's discretion should be exercised in favour of the second appellant by reason of exceptional circumstances. Two

circumstances were advanced namely that the first appellant had finished her studies in mid-2020 (with the consequent, albeit unstated, inference that her earning capacity would improve thereafter) and that the second appellant had been the subject of an attack in Ethiopia in June 2020. The High Court judge set out a detailed list of the documents and information submitted by the appellants to the Minister. With regard to finances, employment and education, the following were the relevant items:

> Bank statements of the sponsor from 28th July 2020 to 26th January 2021 which showed the balance at end July 2020 at €30 approximately, and at end January 2021 as €760 approximately.
>
> Three payslips of the sponsor: (i) one dated 5th March 2021 and recording "Total Payments" for the "W/k Ending 28/02/2021" as being €504.00, with "Net Pay" after deductions (of €57.50) recorded as €446.50; (ii) one to the week ending 7th March 2021 and, again, recording net pay as €446.50; and (iii) one relating to the week ending 14th March and again recorded as €446.50.
>
> A letter dated 17th December 2020 stating that the sponsor was employed by ManpowerGroup from 29th July 2020 to the present as "an assembler" on their premises.
>
> A letter from Social Welfare Services Office dated 15th December 2020 indicating that the sponsor received Jobseekers' Allowance of approximately €5,000 during the period 09 March 2020 to 25 August 2020.

A one-page document from the Revenue's PAYE Services confirming that the sponsor's gross earnings for 2020 were approximately €10,000 and that she had worked with Manpower Group from 31st July 2020 to 18th December 2020 (the day after the letter from Manpower referred to above).

Educational Certificates: These comprise two "Component" Certificates in respect of "QQI Award - Further Education and Training Award", which are dated 14th June 2019 and 14th June 2020, respectively. Both refer to a number of "Level 4" and "Level 5" merits/passes and, cumulatively, the topics described are as follows: "Business Calculations"; "Care of the Older Person"; "Care Skills"; "Communications"; "Personal Effectiveness"; "Work Experience"; "Airline Studies"; and "Customer Service". In addition, a "CPD" certificate issued by the "International Academy of Travel", Waterford Airport, is furnished. This is stated to be with respect to the successful completion by the first applicant of "Initial Training in Dangerous Goods by Air" and records that the certificate is valid from 29th November 2019 to 28th November 2021.

60. The High Court judge made various comments in relation to the above documents, including that it was not clear why the bank statements submitted were limited to those described above; that the payslips submitted did not demonstrate a contract of employment or extent to which work would be guaranteed into the future; that the Departmental employment details showed that the first appellant had ceased to work with Manpower in December 2020; and that her educational certificates did not show whether the studies were full-time or part-time, when components were started or completed, or what hours of study

were required in total. These comments were factually correct and there was nothing objectionable about them.

61. With regard to their financial position, the primary complaint of the appellants is that a different conclusion could have been reached if the Minister had taken into account that the first appellant had been a student up to a particular date which impacted on her ability to work, and that she now had a full-time job, applying a 'forward looking analysis', rather than confining the analysis to her financial position to date.

62. The High Court judge pointed out that no such submission was made when the first instance decision was appealed. He also observed that the certificates submitted did not in fact show that she had been engaged in full-time study or that this prevented her from engaging in paid employment until mid-2020. He also pointed out that there had been no challenge to the Policy Document itself, which was the source of the financial criteria in question and the fact that they were based on a past track record. He pointed out that there must be many students who would be unable to comply with the financial criteria in question by reason of their full-time education and that this was an entirely "commonplace scenario" and not an exceptional one. He went on to reject the suggestion that the decision-maker should have looked into the future to assess what the first appellant's likely future earnings would be and described it as being based on a 'hope-factor'. In any event, he said, there was no evidence that she had a guaranteed income of a minimum of €26,000 per annum for the following three years. Accordingly he considered that there was nothing objectionable in the conclusions reached by the decision-maker.

63. I agree with the High Court judge in respect of all of the above points. In fact, having regard to the most recent affidavit filed, it transpires that the first appellant is currently in receipt of a social welfare allowance from the State, demonstrating the inherent

unpredictability of potential future earnings (as distinct from a past track record), at least when there is little or no evidence of a guarantee of future work and earnings. In any event, the Minister was not under any obligation to take a "different" or "forward-looking" approach. The Minister is obliged to consider financial criteria under the Policy, which was not under challenge, and there was nothing exceptional in the financial situation of the appellants. Further, the point now urged on the courts was not made to the second-instance decision-maker.

64. As to the assertion that the husband had a reasonable prospect of becoming employed in the State, little or no evidence was offered in support of this assertion and there was nothing unreasonable in the Minister concluding that there was insufficient evidence in this regard.

"Predominantly reliant on social welfare"

65. I would accept that insofar as the impugned decision referred to the first appellant having been "predominantly" reliant on social welfare during the relevant period, this was inaccurate as it was merely a period of some four or five months. However, the bigger point is that she was unable to show a source of income or savings coming anywhere close to the required thresholds during the totality of the relevant period and had not shown anything exceptional in her financial situation to warrant the exercise of discretion, and I do not think that this misdescription vitiates the overall conclusion in any way.

Evidence of contact and family life

66. In support of their application for a visa the appellants had submitted a 3-page document entitled "Relationship history statement". This set out information under

heading such as: “Our First Meeting”; “Before Wedding”; “Our Wedding”; “Our First Honeymoon”; and “After I left Ethiopia”.

67. It said that the first and second applicant were childhood friends; had lived in the same neighbourhood; played together from childhood until adulthood; that their families were very close; that they had lots of shared memories. There is no suggestion they met in-person in more recent years before the wedding.

68. Under the heading “Our Wedding day”, reference was made to the video-wedding followed by the in-person “white wedding” in Ethiopia in April 2019. It was said that the wedding was attended by 120 people. Six photographs were furnished. Four showed the bridge and groom, and two showed nine persons including the bride and groom.

69. With respect to the period from 28th April 2019 onwards, it is stated: “It was hard for both of us when I had to leave Ethiopia. I left Ethiopia on 28th April 2019 and from that day we keep contacts each other by phone, WhatsApp, Imo and text messaging. Every time [K] call me as I call him. We do video chat nearly every day.” One of the documents submitted in support of the application was a “call log” purporting to show calls between the two appellants consisted of 13 pages of entries. The High Court judge observed that the vast majority of calls recorded were missed calls; and that many of the missed calls related to the same day. Further, the period recorded was very limited and did not correspond with the first appellant’s own descriptions of their contact. (For a full description of the call log see para 14, item xvii of the High Court judgment).

70. The appellants submitted documentation relating to travel by the first appellant. This documentation identified the first applicant and referred inter-alia to Ethiopian Airlines flights by her from Dublin to Madrid (05 April 2019); from Madrid to Addis Ababa, Ethiopia

(06 April); from Addis Ababa to Dire Dawa, Ethiopia (06 April); from Dire Dawa to Addis Ababa (28 April); from Addis Ababa to Madrid (28 April); and from Madrid to Dublin (29 April).

71. The first instance refusal of the visa said that a full documentary account of the relationship had not been submitted. On appeal, the solicitors for the appellants expressed themselves to be at a loss to understand why this conclusion had been reached but did not furnish additional documentation to that which is set out above.

72. The High Court judge noted the nature of the call record log, saying that it related to a limited period and comprised mainly missed calls. It did not, he observed, support the first appellant's averment as to the regular nature of their contact. He noted that there was no record of calls in the run-up to their marriage, nor in the run-up to what she said was her first trip to see her husband in April 2019.

73. Regarding the expired passport, he said that this would have provided evidence as to whether she had been in Ethiopia as an adult prior to her marriage, but noted that she had declined to furnish this despite its absence having been commented on in the first instance decision.

74. He said there was no objective evidence to support the view that they had ever met prior the first appellant coming to Ireland in 2014. He considered that it was not unreasonable or irrational for the Minister to find that it had not been established that the appellants had contact with each other when the first appellant was in Ethiopia, as distinct from mere proof that she travelled to Ethiopia. He considered that a fair reading of the determination as a whole showed that the Minister was aware of their cultural mores and that the wedding had been conducted in accordance with their faith.

75. He concluded that it was open to the Minister to determine that insufficient evidence of "family life" had been submitted.

76. I fail to see any error in the manner in which the High Court judge approached these issues nor with his conclusions, having regard to the information before the Minister and the reasons given by the High Court judge. The High Court's comments with regard to the numerous missed calls and the "communications" evidence generally was accurate and fair. Likewise his comment that proof of travel to Ethiopia did not necessarily translate into proof of the two appellants spending time together was accurate and fair. The paucity of photographic evidence of the couple together since their marriage was also fairly commented upon.

Ground 6: Findings v. "insufficient evidence submitted"

77. Ground 6 contends that the High Court erred in its approach to the standard of proof and that instead of finding that the first appellant as sponsor had failed to demonstrate or that the evidence submitted was insufficient as regards certain matters, the decision-maker should have accepted or rejected particular matters on the balance of probabilities.

78. Counsel made a similar argument in *B.B.* and I wish to refer to a passage in the judgment in that case. By way of context it should be said that in *B.B.* a complaint had been made that the Minister had failed to reach a definite conclusion as to whether a child of one of the adult appellants had Autism Spectrum Disorder and whether this was related to her being home-schooled. The child was from a previous marriage and lived in the State. This in turn was relevant to whether there were significant difficulties in the male appellant moving to Algeria to live with his (second) spouse there. The Minister had concluded that there was insufficient evidence, in circumstances where the only evidence of the child's

condition and the home-schooling arrangement was a letter from the child's mother. The complaint that the Minister had failed to reach appropriate definitive conclusions was rejected and it was said:-

> "72. The appellant submits in the first instance that the decision maker wrongly engaged in a practice whereby a matter asserted was neither accepted nor rejected but was instead put to the side and not taken into consideration on the basis that insufficient evidence supporting it had been put forward. It is also said that the High Court judge wrongly failed to condemn this approach. I do not agree.
>
> 73. It was and is clear on the part of everyone involved (the parties, the Minister and the High Court) that the burden of proof in the first instance falls on an applicant to satisfy the Minister of various matters; which includes the factual matters underpinning an application for a visa. The burden is to produce sufficient evidence in support of those facts and to prove those on the balance of probabilities. If the Minister says that the applicant has produced "insufficient evidence" in support of the facts, that is in substance a finding that the fact has not been proved on the balance of probabilities. It seems to me to be essentially a question of semantics whether one expresses the conclusion in the language of "insufficient evidence" or in some other manner.
>
> 74. Indeed, I would have thought that, if anything, the language of "insufficient proof" is preferable; the Minister does not purport to make definitive pronouncements about states of affairs in the real world but rather confines herself to stating whether the evidence placed before her is sufficient to demonstrate a particular fact for the purpose of the exercise in which she is engaged. For example, it may well be that the child in this case does indeed have

> a diagnosis of ASD and it may well be that she is home-schooled for reasons related to that condition; but the Minister is entitled to say (if it be the case) that insufficient evidence has been placed before her to persuade her of that fact for the purpose of determining the application. It is surely preferable to express matters with that kind of language than to make categorical-sounding statements such as "On the balance of probabilities, I find that the child does not have ASD" or even less appropriately, "I conclude the child does not have ASD". Such statements are not only unnecessary but might well be offensive if the reality is to the contrary. For my part, I consider that it is entirely appropriate and within the proper parameters of the exercise for a decision-maker such as the Minister to say that there was insufficient evidence to prove a particular factual issue without adding the entirely obvious byline: "You have failed to reach the burden of proof on this issue". Accordingly, I do not consider there to be any substance to this first complaint in respect of the impugned decision, namely that the Minister failed to reach conclusions at all in respect of certain matters."

79. I do not consider it necessary to add to the above save to confirm that, in my view, the same applies in the present case concerning factual matters in respect of which the decision-maker concluded that there was insufficient evidence of the fact asserted.

Ground 11: Rigid application of the Policy

80. Ground 11 asserts that the High Court erred in failing to find that the decision-maker applied the Policy in a rigid or inflexible manner (by placing undue emphasis on the financial situation of the appellants).

81. For the reasons set out earlier in this judgment, I am also in agreement with High Court judge when he said that the Minister had plainly not applied a rigid, inflexible policy and instead had examined not only the financial circumstances of the appellant's but the evidence they had submitted more generally and in particular concerning the nature of their relationship. The Minister took each of the matters submitted into account, and the High Court "stress-tested" the Minister's approach to each of them. I do not accept that it is a fair characterisation of the Minister's decision that the financial aspects of the Policy were applied in a rigid or inflexible manner. The problem which arose was not due to the rigid application of financial criteria but due to the fact that the appellants had failed to submit sufficient evidence to warrant the Minister considering that it was one of the "rare" cases where for "exceptional" reasons, discretion should be exercised to grant the visa notwithstanding the failure of the first appellant to satisfy the financial criteria.

Grounds 12 and 13: Miscellaneous complaints about the High Court's approach to fact-finding

82. Ground 12 of the Notice of Appeal asserts that some of the High Court's findings went "beyond" the findings of the Minister's decision and "found no basis within it", giving the example of certain paragraphs of the judgment. The paragraphs enumerated in this respect are: 14, 25, 26, 38, 39, 41, 81 and 138-9. Ground 13 of the Notice of Appeal asserts that the High Court judge erred in having regard to a number of irrelevant matters, and references a number of paragraphs, namely 38, 24-5, 35 and 146, and 40. Thus, the full list of paragraphs about which one or both of these complaints is made is: 14, 24-26 inclusive, 35, 38, 39, 40, 41, 81, 138-9 and 146.

Paragraph 14

83. Paragraph 14 of the High Court judgment is a lengthy paragraph containing a description of all 22 documents accompanying the original application together with the High Court judge's observations thereon. I am of the view that the complaint about this paragraph is too general to add anything to the more specific complaints which follow or the matters dealt with under Grounds 1, 2, 4 and 5 above.

Paragraphs 24, 25 and 26: studies and finance

84. Paragraphs 24-26 inclusive state as follows

> "24. During the course of skilled submissions made on behalf of the Applicants, Mr. O'Dwyer SC asserted that the "fundamental problem" for the first named applicant is that, because she was a student and her studies did not finish until mid–2020, she had been unable to earn prior to that period and it rendered it impossible for her to meet the financial criteria in the Policy. With regard to the foregoing submission, it seems entirely fair to say that this was not a case made on behalf of the first named applicant by means of submissions or evidence tendered with the 1 June 2021 appeal.
>
> 25. Furthermore, earlier in this judgment, I looked at what the evidence discloses in objective terms. Item 14 of the 23 March 2021 letter from Messrs Abbey Law concerned "Educational certificates of the sponsor". They are, as a matter of fact, entirely silent as to when the applicant commenced her studies. They say nothing about how many hours the applicant was required to devote to each component. The

> certificates do not indicate when each component course ended. A date is given for when each certificate issued, but this says nothing about whether the relevant courses were 'full–time' or 'part–time', 'on-line' or 'in person'. In objective terms, the evidence which was submitted on behalf of the fist named applicant does not, in my view, establish that, by reason of commitments to full–time study, the first named applicant, was unable to engage in paid employment until mid–2020. Nor is a claim in these terms made in the 23 March 2021 letter from Messrs Abbey Law (concerning the initial application) or in the 1 June 2021 letter (comprising the appeal).
>
> **At college**
>
> 26. Thus, regardless of the skill and sophistication with which submissions are made by the first applicant's counsel that she "was at college for a large part of the three years" and that this "should have been credited to her" by way of the Minister exercising discretion in favour of granting the visa, those submissions do not appear to me to be sufficiently underpinned by the evidence which was before the Minister."

85. The complaint now made is that this "went beyond" what the decision maker said and/or that the decision maker took into account irrelevant matters. I am not persuaded by this. It is an entirely objective description of the contents of the documents submitted and arises in a context where the High Court judge is reviewing whether the findings of the decision-maker were irrational and unreasonable having regard to the evidence submitted, having stated at numerous points in his judgment that he was not purporting to step into the

shoes of the decision-maker as such but merely reviewing the connection between the evidence submitted and the conclusions reached by the Minister.

86. Insofar as it is suggested that the High Court judge was factually incorrect when he said that it had not been part of the initial application that the first appellant's studies were part of the reason she had not met the financial thresholds, it is necessary to examine the initial application and the solicitor's letter of 23rd March 2021. There is an express acceptance that the financial criteria of the Policy Document have not been met, then a reference to para 1.12 of the document (which refers to "exceptional set of circumstances, normally humanitarian"), and then a reference to two factors; the first, that *the first appellant only completed her studies in mid-2020*; and secondly (described as "more significantly") that the second appellant had been subjected to a violent attack (with reference to the photos). The reference to her studies is therefore somewhat fleeting. It did not articulate what became the much more detailed submission, advanced in the judicial review proceedings, namely that her studies had prevented her from taking up full-time employment prior their completion, that she had a stable employment which would last into the future, and that the Minister should consider this as an exceptional circumstance which would justify a departure from the rigours of the Policy criteria. I find the appellant's criticism of the High Court unwarranted in this regard.

Paragraphs 35 and 146: notice of the deficiencies of evidence regarding the nature of the married relationship

87. The appellant submits that the High Court judge erred in finding that the appellants were "on notice" of the deficiencies concerning the evidence of their relationship from the terms of the refusal at first instance.

88. I would observe that the first instance decision (under the heading of relationship history) stated that as per section 5.3 of the Policy Document the onus of proof as to the genuineness of the family relationship rested squarely with the applicant and sponsor and said that this had not been sufficiently addressed in the application. It said that they had not provided sufficient evidence of the stated relationship and that in general, for immigration purposes, a relationship must include a number of face-to-face meetings (excluding Webcam) between the parties. It noted that the marriage was stated to be an arranged marriage and said that insufficient documentary evidence had been provided in that regard. It reiterated that the onus rests with the applicant to demonstrate that the relationship is *bona fide* and sufficient for immigration purposes. It also noted (earlier in the same document) that no evidence had been submitted that they had met prior to the first appellant coming to the State in 2014. At a different point, it said that insufficient documentation had been shown to establish there was family life between them and that there was no evidence of "*ongoing routine communication*" between them nor had a full documentary account of their relationship been submitted.

89. Having regard to the above, I fail to see any merit to the appellants' contention that the first instance decision did not give them sufficient notice that the decision maker had taken the view that there was insufficient documentation or information concerning their

relationship history and its current state. Similarly, I am not persuaded that the High Court judge erred in how he dealt with this point.

Paragraph 38

90. It is said that the trial judge had regard to an irrelevant matter at para 38 of his judgment, namely that the first appellant had failed to furnish her first passport which would have shown whether she had returned to Ethiopia as an adult prior to her marriage to the second appellant. The High Court judge said:

> "38. Whereas the first instance refusal noted that the sponsor had failed to submit her previous Ethiopian passport, the Applicants' solicitors made clear that, in the context of the appeal, the first applicant/sponsor declined to furnish her previous passport. The submission was made that ". . . as the Sponsor is now an Irish citizen . . .her expired Ethiopian passport is wholly irrelevant". It seems uncontroversial to say that the first applicant's expired Ethiopian passport would, for example, evidence whether she had been to Ethiopia as an adult prior to her marriage to the second applicant. If she had - and bearing in mind her averment at para. 5 of her 16 February 2022 affidavit that "Following my move to the State, we maintained a friendly relationship, insofar as would be permitted by our Islamic cultural Mores" - whether the first and second Applicants met in the context of this friendship on an prior trip to Ethiopia would certainly seem to be prima facie of some relevance. In any event, the first applicant declined to furnish her prior passport."

91. The context was one in which the decision-maker had found that there was insufficient evidence of the appellant's relationship in general, both before and after their marriage. The observation of the High Court judge is entirely apt in that context as an example of the type of document that might have assisted the appellants in their application as it might have shown numerous trips to Ethiopia and therefore opportunities for her to meet the second appellant. Further, the appellants had contended that the absence of the passport was entirely irrelevant because she was now an Irish citizen, and the High Court was (quite rightly) simply pointing out why it *could have been* potentially relevant.

Paragraph 39

92. I fail to see any difficulty with paragraph 39 of the High Court judgment of which complaint is also made. It simply records that the appellants accepted that they had not met as adults before their marriage, and notes that there was no documentary evidence of their having met prior to her coming to the State in 2014. It notes also, immediately prior to that, that the first instance decision had found there to be inconsistencies in the evidence in this area, but that the impugned decision found no inconsistencies. The issue of "inconsistencies" had therefore faded from view.

Paragraph 40; financial support

93. The appellant submits that the High Court judge erred in noting that there was no evidence of financial support by way of remittances in circumstances where the appellants had never asserted financial dependency and it was not a requirement under the Policy Document.

94. I am not persuaded that this amounted to an error of law in the High Court's decision. On any fair reading of the judgment as a whole it is clear that the judge was in no doubt as to the basis on which the application had been made and refused, which concerned

factors other than financial support. The absence of any such support was merely a background factor which pushed the other factors into the foreground and it seems likely he mentioned it only for that reason. It certainly did not assume a sufficient prominence in his reasoning to warrant it being considered an error of law.

Paragraph 41

95. The next paragraph in respect of which complaint is made is paragraph 41 of the High Court decision. Here, the judge referred to the appellants' submission that, by reason of the decision in *Gorry,* the Minister could not refuse the visa application "on the basis of a blanket application of an arbitrary financial threshold". He set out and analysed the documentation submitted with regard to finances at first instance, and added:

> "Against the foregoing backdrop, the first instance refusal afforded the opportunity for the first named applicant to submit such *additional* evidence, touching on the question of finances, as she wished. None was provided in respect of the first applicant. Similarly, no documentation or evidence was provided with respect to the second applicant's qualifications, earnings or earning potential." (emphasis original)

96. I fail to see what is objectionable or inaccurate about this paragraph.

Paragraph 81

97. Complaint is made about paragraph 81 of the judgment which says:

> "81. The Minister also referred to the photographs which accompanied the application and were before her in the context of the appeal. As the Minister accurately noted, the evidence of the couple's communication commences

> some nine months after they were married. It is unnecessary to repeat at this juncture the observations I made earlier in this judgment with respect to what this evidence discloses, in objective terms. I made those comments, not purporting to act as decision-maker, to see what was, and was not, before the Minister on foot of which she made her decision. There was nothing irrational, unreasonable or disproportionate about these findings by the Minister."

Again I fail to see anything objectionable or inaccurate about this paragraph.

Paragraphs 138-9

98. Paragraphs 138-9 concern the first appellant's travel at the time of the wedding. The judge points out that the travel documents submitted were not precisely consistent with the averments made by the first appellant. He then adds:-

> "I want to emphasise, however, that these observations have played no part in the outcome of the present proceedings, in circumstances where it does not appear that the decision-maker noted any such inconsistency in explicit terms. Nor does it matter in the least what this Court would have decided, were it the decision-maker. The fundamentally important point is that this Court is *not* making any decision, but reviewing the lawfulness of the decision made. For the reasons set out, I am entirely satisfied that he decision challenged was made lawfully." (emphasis original)

It is difficult to imagine how the High Court judge could have been any plainer as to the fact that the observations in question played no role in his decision. The complaint is therefore without merit.

Not Pleaded: Danger/risk to the appellants if they were to live together in Ethiopia

99. It was noted earlier in this judgment that although the issue of danger or risk to the appellants in Ethiopia (including the photographs of bruising) had been a matter upon which reliance was placed at first instance, it did not feature strongly in the appeal, and was not pleaded at all in the statement of grounds. It was not addressed in the written submissions of the appellant.

100. However, in oral submissions, when making his Article 8 argument, counsel referred several times to some matters related to the danger/risk issue. He referred back to the first appellant's statement in her "Relationship history document" that she would be "in danger" in Ethiopia, observed that she was a family member of a refugee, mentioned that Ethiopia in 2020/2021 was very dangerous, and referred to the photographs of bruising which had been submitted with the application along with the description of the second appellant having been beaten or tortured for taking part in a political demonstration. He described these as "the exceptional circumstances that she's raising". He submitted that it was not reasonable to expect her to go and cohabit with her husband in Ethiopia "because [she was] working, because it's dangerous, …and it's dangerous both for [her] and also he is at risk over there and because of his ethnic origin", adding "That's the exceptionality. She can't go and cohabit in Ethiopia with him". He said there was no evidence they could cohabit in any other country. He said that all of this had to be counterbalanced against the fact that she did

not meet the income threshold "and a proportionate decision has to be made on that basis". He then added that the difficulty was that "there's no proportionality assessment at all" because the view was taken that they can sustain family life by visits.

101. Counsel on behalf of the respondent in oral submissions submitted that the question of the photos of the bruising were simply not within the parameters of the judicial review proceedings. He said there had been no challenge to the failure of the respondent to consider those photographs when considering exceptional circumstances. He also contended that, in any event, the most recent affidavit which included the information that the first appellant had recently spent three months in Ethiopia demonstrated that there was no harm or fear on her part relating to living in or spending time in that country.

102. As we have seen, it was at the appeal hearing that the appellant's counsel for the first time made clear that he was relying, in the context of his proportionality argument, on a number of factual matters which feed into the question of risk/danger (namely the fact that the first appellant was the daughter of a refugee; the dangerous political situation in Ethiopia at particular time; and the photographs of the bruising and allegation that the second appellant had been beaten or tortured). The respondent submitted that these matters were simply not within the case, as there had never been a challenge to how the decision-maker had dealt with these factual matters. There is considerable force in the respondent's submissions when one traces the history of the issue from the initial application to the judicial review proceedings and the Notice of Appeal, which I now propose to do.

103. The document "Relationship history" which had been submitted with the initial application had described the situation in Ethiopia as "very dangerous" and said that the second appellant had been "tortured heavily". It will be recalled that three photographs had been submitted which showed significant bruising, in particular, to the shoulder of a male,

without showing the person's face in full. The application also attached an article from "News Africa" which talked about an unfolding crisis in the Tigray region of northern Ethiopia and tensions between the Oromo people and the Ethiopian government. It referred to the imprisonment for eight months of a prominent Oromo political activist, having been arrested in June 2020. It is therefore clear that the issue of risk or danger to the appellants in Ethiopia had thereby been raised with the first instance decision-maker, at least to some extent.

104. It will be recalled that the first instance decision referred to the photographs of the alleged injuries suffered by the second applicant and observed that no medical report had been submitted. The solicitor's letter in support of the appellant's internal appeal said that the second appellant did not seek medical treatment because he was afraid that this would lead to him being further targeted as an opponent of the regime and submitted that it was unfair and irrational to discount this element of his application solely because a medical report was not obtained. The letter relied on the fact that photographs had been submitted but did not address the problem that the photos did not render an identification of the male possible.

105. The impugned decision in its narrative section noted the News Africa report and the submission in the solicitor's letter that the second appellant was attacked by government soldiers on the 29th June 2020 following a demonstration against the arrest of a number of Oromo political leaders. It did not refer to the photographs. Nor did it refer to either the photographs or the general political situation in Ethiopia (or that of the Oromo people) under the heading of "Any special circumstances". In its decision section, it stated expressly that it has not been demonstrated that there were any exceptional/humanitarian circumstances which would warrant the granting of a visa. This may have been an implicit determination

that what had been submitted in terms of the photographs or general political situation was not sufficient to underpin any such conclusion. Alternatively, one might take the view that this issue had been overlooked by the decision-maker.

106. What is interesting in that context is that the statement of grounds did not refer to this issue at all. In para 1, which lists various ground in support of the contention that the decision was irrational, unreasonable or disproportionate, reference is made to the finding that insufficient *evidence of family life* prior to, and since, the marriage; the finding that the first appellant was predominantly reliant on *social welfare*; the finding that the second appellant would be immediately *reliant on public funds*; and that it had not been established that they were in *contact with each other* when she was visiting Ethiopia. Paragraph 2 lists further matters including that *they are Muslim and contracted their marriage in accordance with the religious and cultural mores of their faith,* and that *they reside in different countries,* that the first appellant had been in *gainful full-time employment for over a year before the application,* and the *second appellant's prospects of finding employment in the State*. Paragraph 3, which deals with Article 41, criticises the decision for determining that the integrity and well-being of the State required the refusal of the visa, "*particularly in circumstances where the [first appellant] is in full time gainful employmen*t". Paragraph 4 which concerns Article 8 of the Convention, again criticises the decision for determining that the integrity and well-being of the State required the refusal of the visa, "*particularly in circumstances where the [first appellant] is in full time gainful employment*". Paragraph 5 complains that the respondent applied a fixed, inflexible policy and refers to the financial requirements in the Policy having been applied in a fixed manner.

107. It is difficult to resist the conclusion that the omission of any reference to the danger/risk and/or the bruising photographs issue was a deliberate one. The statement of

grounds, taken in its entirety, was complaining about the determinations in respect of two broad matters: (1) the financial position of the appellants; and (2) the nature of their married relationship (contact before and after marriage). The issue of the second appellant being persecuted or at risk of ill-treatment in Ethiopia was not mentioned at all. Nor was there any suggestion in the statement of grounds that the decision had wrongly failed to consider the risk and danger to the couple were they to try to establish a married life living together in Ethiopia.

108. Further, there is no explicit reference to these matters in the Notice of Appeal. Having examined it again for present purposes, the closest one the appellants come to potentially encompassing this issue is where they say at Ground 10, in their Article 8 complaint, that there was no adequate or proper analysis of the situation of the appellants and whether it was reasonable to expect the first named appellant to move to Ethiopia to enjoy marital family life with her husband and/or whether there are any insurmountable obstacles to such a move. However, it is notable that while they challenge a number of specific findings of the High Court with regard to factual matters in Grounds of Appeal 12 and 13 (as discussed elsewhere in this judgment), the particular issue of danger/risk is not among them.

109. Further, in the entirety of the written submissions in this appeal, there is no reference anywhere to the photographs of the bruising, the political situation in Ethiopia, or the risk to either or both of the appellants were they to try to establish a married life together in Ethiopia. It was only at the oral hearing of the appeal that references were made to the risk/danger issue for the first time.

110. As it happens, it seems to me that ultimately it probably does not matter whether one considers the danger/risk issue to be within the parameters of the judicial review or not. In my view, the evidence on the issue was unpersuasive. First, one takes the photographs. There

were indeed photographs of a male who had been beaten, but it was not even possible to establish who that male was, even on the face of the photographs, as the full face was not shown in the photographs. This is the most minimal evidence one might expect. One cannot criticise a decision-maker for failing to be convinced by photographs of bruising of an unidentified male. There was no independent evidence, such as a medical report, indicating that the second appellant had been beaten, or when this had occurred, or what its context was. The statement of the first appellant cannot in this context be considered to be independent evidence, particularly as she was not even in Ethiopia at the time. Secondly, one takes the News Africa article. In the context of an application seeking to establish that the political situation in Ethiopia was such that there were significant or indeed insurmountable obstacles to the couple living together in Ethiopia, one might reasonably have expected something more than a single news article. Thirdly, reference was made by counsel to the fact that the first appellant arrived in Ireland as the relative of a recognised refugee. That is indeed so but she arrived in Ireland in 2014, 7 years before the visa application of the second appellant. Political instability in a jurisdiction may wax and wane over time and again, if the situation was as dangerous and precarious as was asserted by counsel, one would reasonably expect more evidence to that effect. All in all, the evidence presented by the appellants on the issue of danger/risk was spartan. An implicit acknowledgement of this fact may well explain the reason it did not feature in the statement of grounds, the grounds of appeal or the written submissions on appeal.

Part III: Article 41/Gorry; Article 8 ECHR; and proportionality (Grounds 3 ,7, 8, 9, and 10)

Ground 3: *Gorry* and the question of qualitative assessments of marriages

111. Ground 3 contends that the High Court judge erred in failing to consider whether the "quality of family life" is a relevant matter at all. Counsel submits that *Gorry* does not permit or require a "qualitative" assessment of the nature of the marriage as this would fail to respect the institution of marriage and tend to discriminate between different marriages even when they are accepted as being genuine and valid. Counsel also contends that the Minister should not review the content of private marital communications at all because they are private to the married parties.

112. Similar arguments were made by counsel in *M.A. & Y.B. v Minister for Justice* [2024] IECA 26, where this Court (judgment delivered by Meenan J with myself and Power J concurring) responded by saying:

> "23. Secondly, it is clear that there is no absolute right to marital privacy. It is difficult to see how there could be such a right where the respondents are asking the appellant to make a qualitative assessment of their relationship in support of an application for a Visa. Such a qualitative assessment of a relationship between spouses was described in the Supreme Court decision in *Gorry v Minister for Justice* [2020] IESC 55. The question raised in these proceedings concerned the approach the appellant must take when she is invited to revoke a deportation order made against a non-national who has

become married to an Irish citizen, thereby creating a family. [He then quoted from paragraphs of the judgment of O'Donnell J in *Gorry* and continued]

24. *The above passage makes it clear that a qualitative assessment as to the nature of the relationship is required in this context. If the parties wish to rely on electronic communications to prove to the Minister the nature of their relationship (bearing in mind that the burden of proof is on them to satisfy the Minister as to the matters necessary to ground their application for a Visa), it is obvious that the Minister should be able to read the content of those messages*, which may in some cases require a translation, as it did in the present one. This obvious point is reflected in the Policy Document and applicants for Visas ignore it at their peril."

(Emphasis added)

113. I consider that this is sufficient to dispose of this ground of appeal. The nature of the marriage and not merely the fact of the marriage is indeed a relevant matter for the consideration of the Minister, and if parties wish to rely on social media or other communications to demonstrate the nature of their relationship, the Minister is entitled to read them.

Grounds 7, 8 and 9: Application of *Gorry*

114. Ground 7 asserts that the High Court erred in concluding that the respondent properly considered the appellants' rights under Article 41 consistent with the principles set out in *Gorry*. It asserts that the decision was unreasonable and disproportionate to their rights under Article 41 and/or their financial circumstances when the decision was made. Ground 8 complains that the respondent failed to have proper regard to the cohabitation of spouses as a normal incident of marriage having a constitutional value (citing the judgment of

O'Donnell J in *Gorry*). Ground 9 alleges that the High Court judge erred in interpreting "enduring relationship" as something distinct from marriage and insofar as he held that an enduring relationship prior to marriage required to be evidenced.

115. I would summarise the information before the decision maker as follows:

- The first appellant was a naturalised Irish citizen, having arrived in Ireland in 2014 as the daughter of an Ethiopian parent who obtained refugee status. She was 21 at the time of her arrival in Ireland from Ethiopia.

- The two appellants had contracted a valid marriage April 2019, some two years before the application for a visa in March 2021. At the time the marriage was entered into, it was known by both of them that the second appellant would not necessarily obtain a visa to live in Ireland. They did not have any children at the time of the application.

- At the time of the application for a visa in respect of the second appellant, the first appellant clearly did not satisfy the minimum financial criteria set out in the Minister's Policy for sponsors of non-EEA nationals.

- She had been working for one year at the time of the application for a visa but there was no evidence before the decision-maker that this would be a long-term permanent position.

- There was evidence that she had engaged in some studies which had resulted in some certificates. It was not clear whether this study was full-time or part-time. The assertion that full-time studies had

prevented her from working full-time before their completion was not sufficiently substantiated.

- There was little or no evidence of the second appellant's ability to work in this jurisdiction.

- There was a statement from the first appellant that she had known and been very friendly with the second appellant from when they were children, although there was an 8-year age gap between them. There was no evidence of pre-marital contact between them after she came to Ireland in 2014.

- The marriage was arranged in accordance with their Muslim religion and mores and this would have limited the extent to which they would have been permitted to have pre-marital contact in any event.

- There was an online wedding ceremony and then an in-person ceremony for which the first appellant travelled to Ethiopia.

- Although the first appellant's statement (Relationship history) said that they were in regular electronic communication with each other since the marriage, the call log submitted to the decision-maker did not provide objective support for this statement.

- The photographic evidence from the wedding was limited and there was no other photographic evidence of them spending time together.

- While there was proof that the first appellant had travelled to Ethiopia in 2019, there was no objective proof that they had spent time together there.

- Photographs of a man with bruising to his arm had been submitted in support of a submission that the second appellant had been beaten or tortured in Ethiopia by reason of having taken part in a political demonstration, but the man's identity was not ascertainable as there was no full-face photograph. No medical evidence was submitted.

- The only information about potential risks in Ethiopia for either/both of the appellants more generally at the time of the application consisted of a News Africa article submitted with the application and the assertions in her "Relationship history" document that it was a very dangerous place and that her husband had been beaten/tortured.

116. With regard to the last two items, even if it were considered that these judicial review proceedings do include an implicit challenge to how they were dealt with by the decision-maker (and there are doubts about that: see paragraphs 98-109 above), for the reasons already set out I would not consider the items to carry much weight in establishing danger/risk. The fact remains that the person with bruising in the photographs is not identifiable from the photographs or from any other objective source of evidence such as a medical report. The fact that the appellant came to this jurisdiction in 2014 as a relative of a recognised refugee does not speak to the specific possibility of the two appellants living together in Ethiopia from 2021 onwards (the time of the visa application). The News Africa article is fine as far as it goes, but it does not go very far in terms of establishing a serious and ongoing threat to the safety of this particular couple.

117. The High Court judge deals with the *Gorry* issue primarily at paragraphs 96-125 of his judgement which quotes extensively from the Supreme Court decision. I cannot find any error in his understanding of the principles emerging from *Gorry.* Again, similar issues were raised in *B.B.*, and I have set out at para 100 of my judgment in that case in some detail my understanding of the principles emerging from the judgment of O'Donnell J in *Gorry* and I do not see anything in the High Court judgment which conflicts with those principles.

118. Nor can I find any error in the High Court judge's conclusion that the Minister's decision was "a rational decision, rooted in the evidence, and one which explicitly took appropriate account of the couple's rights" (para 99). I agree with the judge when he said at paragraphs 111 and 143 that the decision-maker was entitled to explore all aspects of whether there was an enduring relationship which included their relationship (if any) *before* the marriage; and when he said at paragraph 113-116 that the first instance refusal plainly gave an opportunity for the furnishing of information about their relationship *after* the marriage.

119. I do not accept that the decision-maker had failed to take account of the fact that this was a Muslim marriage and the particular cultural implications of that fact. It is clear that the decision-maker knew this was a Muslim marriage and it is simply an objective fact that there was no evidence of contact between them before their marriage other than her assertion that they were best friends as children (despite their significant age difference). The High Court judge pointed out that the first appellant had said in her "Relationship history" statement that *since* their marriage they were in constant contact and communicated daily by phone, WhatsApp, Imo and text messaging and that they video chatted almost every day. However, evidence of constant and daily communication from the date of the marriage was not furnished. The judge fairly characterised the situation at paragraph 120 when he said that

the appellants had neither added to the fact of their marriage any evidence to establish an enduring relationship, nor had they established that the decision to refuse a visa was because it was simply a State prerogative to do so. Moreover, as the judge pointed out at para 144, the decision had taken account of cohabitation as an important incidence of marriage and did not wholly disregard it, as had been submitted. The Minister was entitled to, and did, take into account the manner in which the marriage had been conducted to date (at the time of the application) which was that they had not lived together as a married couple.

120. Further, I do not think, having regard to the information submitted to the Minister and as summarised above, that the decision to uphold the visa refusal was disproportionate. The decision-maker's view was that there was nothing in their personal circumstances to outweigh the legitimate State interests in controlling immigration and avoiding undue burdens on public resources. This is so, even taking account of the fact that she was an Irish citizen, that she was working at the time of the visa application and the (limited) evidence submitted on the issue of danger/risk to the appellants.

121. Incidentally, and as counsel for the respondent pointed out, the up-to-date affidavit furnished shortly before the appeal hearing indicated that the first appellant had visited the second respondent in Ethiopia for three months and that she was now pregnant. If anything, this tends to re-enforce the point that the evidence with regard to danger/risk was insufficient to tip the balance in favour of the appellants.

122. Of course, the first appellant being an Irish citizen who has lived here since 2014 are understandable reasons for her preference to establish a married life here. But nothing in *Gorry* transforms this desire into an automatic right for her spouse to live in the State even taking into account that cohabitation is a normal incidence of married life. I do not consider

that the decision-maker erred in the application of *Gorry* to the facts of the case or that the High Court judge erred in his analysis on the issue.

123. Again, as in *B.B.*, the factual circumstances of the couple were entirely different from those in *Khan v. Minister for Justice* [2021] IEHC 789 ('*Khan*'), where the couple had been married for thirty years and had three children over 18 (the youngest of whom was born in Ireland). They had decided to live in different countries (Pakistan and Ireland) from 2005. The husband unsuccessfully sought visas to join his wife and children in 2006 and 2011. The husband had a Master's degree in mathematics, said he lectured for 30 years at MAO Lahore college, and the evidence showed that he had lectured on a part time basis at Lahore college since 2005 and had been a grinds tutor. The wife had worked as a part time mathematics teacher in this jurisdiction and the children had excelled academically in their studies within the State. The wife and three children had travelled to Pakistan to visit the husband in June 2009, June 2010, June 2012, June 2014, July 2016, August 2017 and August 2018. The family had stayed in contact throughout speaking on Skype on a daily basis. The wife's brother, a doctor resident within this jurisdiction, had pledged financial support and demonstrated significant savings in his bank account. The High Court held that the respondent had failed to take into account that, even though they were currently in straitened financial circumstances, the husband had impressive qualifications and work experience and might not transpire to be a burden on the State's finances. Nor was the fact that the mother had undertaken educational courses with distinction and wished to work more hours taken into account. They had managed to pay for their children to attend a leading private school and they had the financial support of the wife's brother, who was a man of means within the jurisdiction. Importantly, the High Court (Burns J.) held that the decision-maker had failed to give sufficient weight to the length and enduring nature of the marriage. This may have been because the focus had been primarily on their children to the detriment of a

consideration of the nature of the marriage itself. To suggest that a direct comparison can be made between the facts in the present case and those in *Khan* verges on the absurd.

Ground 10: Article 8 of the European Convention on Human Rights

124. The caselaw of the ECtHR includes the leading cases of *Abdulaziz, Cabales & Balkandali v. United Kingdom* (1985) 7 EHRR 471 (app. nos. 9214/80; 9473/81; 9474/81, 28th May 1985); *Nunez v. Norway* (app. no. 55597/09, 28th June 2011)*; Jeunesse v. Netherlands* (app. no. 12738/10, 3rd October 2014)*;* and *MA v. Denmark* (app. no. 6697/18, 9th July 2021). This caselaw has in turn been the subject of detailed treatment by the Supreme Court in leading cases such as *MK (Albania) v Minister for Justice* [2022] IESC 48 and *Middlekamp v Minister for Justice & IHREC* [2023] IESC 2.

125. The ECtHR caselaw establishes that there is no general obligation on a State under Article 8 to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country. The extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general public interest. Article 8 requires an individualised assessment, taking into account a number of factors. In this this regard, it is important to note that the court has said that the position of a settled migrant and that of an alien seeking admission to a host country are not the same, and that criteria developed by the Court for assessing whether the withdrawal of a residence permit of a settled migrant is compatible with Article 8 "cannot be transposed automatically" to the situation of an alien seeking admission (see para 107, *Jeunesse*). Even in the removal context, it is only in exceptional circumstances that the removal of a non-national family

member will violate Article 8 if family "was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be more precarious" (see para 108 of *Jeunesse* and the authorities referred to therein). This applies *a fortiori* to a situation where the non-national was not even in the State when the family life was created.

126. A recent summary of the factors relevant to an individualised Article 8 assessment was helpfully provided by the ECtHR in *MA v. Denmark* as follows (case citations removed):

> "134. In general, in line with the above-mentioned principles, the Court has been reluctant to find that there was a positive obligation on the part of the member State to grant family reunification when one or several of the following circumstances, not all of which are relevant to the present case, were present.
>
> > (i) Family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. In such a situation, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8.
> >
> > (ii) The person requesting family reunification had limited ties to the host country, which by implication was usually the case, when he or she had only stayed there for a short time, or stayed there illegally … To date there have been no cases in which the Court has found an obligation on the part of the member State to grant family reunification to an alien, who had only been

granted a short-term residence or temporary residence permit, with a family member who had not entered the host country.

(iii) There were no insurmountable obstacles in the way of the family living in the country of origin of the person requesting family reunification.

(iv) The person requesting family reunification (the sponsor) could not demonstrate that he or she had sufficient independent and lasting income, other than welfare benefits, to provide for the basic cost of subsistence of his or her family members.

135. On the other hand, the Court has generally been prepared to find that there was a positive obligation on the part of the member State to grant family reunification when several of the following circumstances, not all of which are relevant to the present case, were cumulatively present.

(i) The person requesting family reunification had achieved settled status in the host country or had strong ties with that country.

(ii) Family life had already been created when the requesting person achieved settled status in the host country.

(iii) Both the person requesting family reunification and the family member concerned were already staying in the host country.

(iv) Children were involved, since their interests must be afforded significant weight.

(v) There were insurmountable or major obstacles in the way of the family living in the country of origin of the person requesting family reunification."

127. I propose to deal briefly with an issue which arose in connection with the structure of an Article 8 analysis and the decision in *MK (Albania).* Those familiar with this area of law will know that the Supreme Court in the latter case considered that the decision of the House of Lords in *R (Razgar) v. Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368 was not entirely accurate as to when Article 8 rights would be deemed to be engaged. In *MK (Albania),* McMenamin J contrasted the correct and incorrect approaches as follows:-

"148. … in its consideration of individual cases, the ECtHR applies a relatively low threshold as to when Article 8(1) is actually "engaged". The questions of minimum gravity or effect on physical and moral integrity do not arise in answering the question of whether the rights exist, but fall for consideration in the assessment of whether there is likely to be an impact of sufficient gravity to require the decision maker to weigh the factors for and against granting the application.

149. One of the difficulties in the argument for which the State contends is the fact that only a small number of applications to remain by unsettled migrants are likely to succeed. This occurs in what have been called "exceptional cases". But this does not mean that before a person is entitled to have the application dealt with in accordance with the legal principles in the authorities, and the requirements of s.49, that the circumstances of the individual must, in themselves, be "exceptional". This fact is noted in Hogan J.'s judgment and commented upon in a great number of the

authorities. However, the latter is an observation regarding the "result" of the decision-making process, and not the method to be engaged.

150. It is not that exceptionality has to be shown before the decision-maker should embark upon a consideration of whether Article 8 rights exist, or are likely to be breached, but, rather, that the test, involving, as it does, a requirement to reconcile the right of the individual with that of the State to control its borders, imposes a high bar which is met "in its application" in relatively few cases. It is important, therefore, not to conflate the results of the process with the test that is applied, and the decision of the High Court relies on an analysis of binding authorities which do precisely that…"

128. Having regard to the all of the judgments in *MK (Albania)*, and those of the majority in *Middlekamp* (Dunne and Hogan JJ), on this particular issue, namely the relatively low threshold for the engagement of Article 8, I am happy to accept that although the present case did not involve the rupturing of a family already living in the jurisdiction by deportation of one of its members, Article 8(1) of the Convention *was engaged* by a decision refusing the sought-for visa which meant that this married couple could not live together in this jurisdiction. The different and important question of significance was and is whether the visa refusal *was justified* having regard to Article 8(2) of the Convention and the ECtHR's caselaw and it is to that question which I now turn.

129. As to the question of when a restriction may be justified, the following passages from the judgment of O'Donnell CJ in *MK (Albania)* set the scene for the analysis in the present case:-

"25. It must be remembered that it has been consistently stated that Article 8 does not give any right to choose the country in which you wish to live. The private life an individual establishes necessarily involves pursuing that life in circumstances

most of which are not within the control of the individual. An individual may wish to live in a certain country or in a certain area, and may wish to become friends and associate with other individuals, but cannot compel that outcome. The choice and desires of an individual in this respect are themselves important and have a value as part of a person's development and therefore, their private life. However, it is now well established that their choices and desires, unless accompanied by something more, can never outweigh the State's interest in maintaining an orderly immigration system.

26. These weights and their relative relationship are, as it were, preloaded. Where on one side of the balance there is the State's interest in maintaining an orderly immigration system, and on the other side there are the social ties established by the fact of residence. But where that residence is precarious, then the State's interest prevails, and will always justify the interference with private life that a refusal of leave to remain in the country, or indeed, deportation, necessarily involves, unless, adopting the language of MacEochaidh J., there is something more. *The case law establishes the type of thing which may be something more, and which may have the capacity to tip the balance. This may be because of circumstances relating to the health of the individual, whether physical or mental, or the impact upon the individual by reason of their sexual identity, or orientation, or perhaps because of the manner in which they came to the country and their awareness or lack of it of the precarious nature of their residence, or the depth, length and intensity of the relationships they have established, and the particular circumstances of the persons involved in the nature of those relationships*. I would not like to try to set out a definitive list of such circumstances. It is sufficient that without something more, that the State interest in maintaining the integrity of the immigration system will

justify interference with private life when all that can be asserted is that a life has been lived in a country where that residence is and is known to be precarious." (emphasis added)

The Article 8 analysis in the impugned decision

130. The manner in which the impugned decision addressed Article 8 of the Convention was as follows. It recited Article 8 itself and, noting the marriage certificate which was submitted, stated that it was accepted that "family life exists between the sponsor and the applicant within the meaning of Article 8 of the European Convention on Human Rights". It then set out and discussed general principles as stated in *Abdulaziz,* and *Nunez.* It addressed the appellants' application in the following terms:-

"I have considered the particular circumstances in this instance. It appears reasonable to state that at the time of marriage the applicant and the sponsor would have been aware of the financial shortcomings as outlined in Section 1 part F – Financial situation of the sponsor with regard to their particular circumstances. As outlined in that Section, the sponsor has a low level of income that could mean they are potentially reliant on social welfare to support the applicant upon arrival. Having considered the aforementioned, reasonable concerns arise that the granting of the visa sought may result in a burden on public funds or public resources.

The applicant has lived apart from the sponsor for the entirety of their relationship. The applicant is a citizen of Ethiopia and has lived in Ethiopia for all of their life, it follows that they will have strong links with the linguistic and cultural environment of Ethiopia. In addition, in considering whether family life could be established elsewhere, insufficient reasons have been submitted preventing the sponsor, from

continuing to travel to Ethiopia to visit the applicant and develop the relationship in the manner in which it has and continues to exist or whether there are any unreasonable restrictions to establishing family life in the applicant's country of origin or elsewhere, or whether an obstacle exists that could not be realistically or reasonably overcome.

While it may be the applicants' and sponsors' preference to develop their relationship in this State, there is no general obligation on the State to respect their choice in this regard given the State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.

Conclusion:

Having regard to all of the above factors, it is submitted that in refusing the visa applications in respect of applicant, that there is no lack of respect for the family life under Article 8.1 and therefore no breach of Article 8."

131. It may be noted that the term 'proportionality' is nowhere used in the above passages nor is any reference made to any obstacle facing the appellants in terms of a married life in Ethiopia.

The precise scope of the appellant's proportionality argument under Article 8

132. An issue has arisen as to whether the appellants were limiting their argument to the contention that the decision itself was disproportionate having regard to their rights under Article 8, or whether they were also arguing there the decision-maker should have explicitly engaged in a proportionality assessment (and failed to do so).

133. The statement of grounds pleaded that the respondent's refusal of the application "was unlawful and disproportionate to the applicants' rights having regard to s.3 of the ECHRA 2003 and Article 8 ECHR", in determining that the economic well-being of the State required the refusal of the second appellant's application particularly, in circumstances where the first appellant is in full time gainful employment. This appears to be a plea that the decision was disproportionate.

134. Ground 10 of the Notice of Appeal contends that the High Court judge erred in concluding that the appellants had failed to establish unlawfulness with respect to s.3 of the Convention and Article 8 of the ECHR. It says that the refusal of the visa application "was unlawful and disproportionate to their rights" with regard to these provisions, in determining that the economic well-being of the State required the refusal, "particularly in the particular circumstances of the [first appellant]". It says that the High Court judge did not examine in any detail or provide any reasons as to "why their Article 8 rights had been respected" and that there was no proper analysis of their situation "and whether it was reasonable to expect the first appellant to move to Ethiopia to enjoy marital family life with her husband and/or whether there are any insurmountable obstacles to such a move (as well as her citizenship of this State)". Again, this seems to be a complaint that the decision itself was disproportionate.

135. The written submissions on behalf of the appellant in respect of this ground are very short and submit that the refusal of the visa "was unlawful and disproportionate" to their rights under Article 8 in determining that the economic well-being of the State required the refusal of the application "particularly in the circumstances of the First Named Appellant". They said that the High Court judge did not provide any reasons for his decision and simply stated that the respondent had set out all relevant factors and that there was no general

obligation to respect the choice of residence of a family. They said that there was no adequate or proper analysis of the situation of the appellants and whether it was reasonable to expect the first appellant to move to Ethiopia to enjoy marital family life with her husband or whether there were any insurmountable obstacles to such a move (as well as her citizenship of the State). There was no clarification as to what specific matters were being relied on when it was said that their circumstances, "particularly the circumstances of the First Named Appellant" were being relied on in this regard. Indeed, the written submissions provided little detail over and above what was already contained in the Notice of Appeal on this ground. Again, all of this seems to be a complaint that the decision was disproportionate.

136. However, in oral submissions, when counsel for the appellant referred, in the context of his Article 8 argument, to evidence of danger/risk to the appellants in Ethiopia, he said that all of this had to be counterbalanced against the fact that she did not meet the income threshold "and a proportionate decision has to be made on that basis", and then added that the difficulty was that "there's no proportionality assessment at all" because the view was taken that they can sustain family life by visits. It was therefore somewhat open to interpretation whether counsel was submitting (i) that the decision itself was disproportionate; and/or (ii) there should have been an explicit proportionality assessment by the decision-maker.

137. Counsel on behalf of the respondent submitted that there was no plea in the statement of grounds that there was a procedural requirement to carry out a proportionality assessment and that the plea had been confined to the decision itself being disproportionate. He said that in *MK (Albania)*, the majority had found that the decision itself was proportionate, same approach should be adopted by the Court in the present case, namely to stand back and consider whether the decision itself was proportionate. In doing so, he said, the Court should

take into account the ECtHR jurisprudence, which rarely found a breach of Article 8 in immigration cases and only did so in exceptional circumstances.

138. In reply, counsel for the appellant submitted that *MK (Albania)* was authority for the proposition that a proportionality assessment was necessary in respect of Article 8.

139. In my view, until the very last minute (being the oral submissions on appeal), the appellant's case did not encompass a plea or argument that the decision-maker should have explicitly carried out a proportionality assessment. The terms in which the Article 8 plea was formulated in the statement of grounds, and the relevant ground in the Notice of Appeal, was that the decision itself was disproportionate. Moreover, the written submissions on appeal did not address any such argument and the first time the argument was advanced that there was a procedural requirement to expressly conduct a proportionality assessment was during the oral hearing of the appeal, when counsel was discussing *MK (Albania)*, at which point there may have been an element of inadvertent conflation of the two separate issues; whether the decision was proportionate, and whether an explicit proportionality assessment was required, respectively.

140. In any event, whether it was advertent or not, the pleadings did not advance the case that an explicit proportionality assessment should have been carried out by the decision-maker and I am of the view that in those circumstances the Court may, and should, confine itself to the question of whether the decision was in fact proportionate. It is important to say that much of this judgment has addressed the challenges raised by the appellant to how the decision-maker, and in turn the High Court, addressed various factual issues. None of them

have been successful. This is not a case, therefore, which requires a remittal to the decision-maker to revisit the implications of certain factual findings which have been called into question by the judicial review proceedings. Nor is it a case where the Court has found that any error of law infected the decision-maker's understanding of Article 8. In the circumstances, it seems to me that the Court would be entitled to review whether the decision was proportionate and therefore justifiable within the meaning of Article 8(2) of the Convention. A similar exercise was carried out by the Supreme Court in *MK(Albania)* (although they split 3:2 on the outcome of that exercise) and a majority in *Middlekamp* (Dunne and Hogan JJ; Charleton J decided that Article 8 rights were not engaged in the first place).

141. In an earlier section of this judgment I have dealt with the proportionality of the decision having regard to the evidence submitted by the appellants to the decision-maker and having regard to the constitutional principles as explained in *Gorry*. I consider the same evidence (and my remarks in relation to it) to apply in this context also. Taking into account the caselaw of the ECtHR as described above, and the factors enumerated in *MA v. Denmark*, I am of the view that the decision was also proportionate in light of Article 8 of the Convention. The marriage was created at a time when the appellants were aware that the immigration status of one of them was precarious. The second appellant has no ties to this jurisdiction other than through the first appellant. The evidence did not demonstrate "insurmountable obstacles" in the way of the family living in Ethiopia: I say that, even taking into account the photographs submitted, the News Africa article, and the assertions in the "Relationship history" document. The first appellant did not demonstrate that she had sufficient independent and lasting income. No children were involved. There were no particular physical or mental health difficulties. There were no issues relating to sexual

identity or orientation. The length of the marriage was relatively short at the time of the Minister's decision. The "depth and intensity" (to use the language of O'Donnell CJ in *MK (Albania)*) had not been demonstrated in any particular way, although I hasten to add that this is not to call into question the validity or genuineness of the marriage in any way.

142. Having regard to all of the above, I am of the view that the decision-maker's decision to uphold the refusal was not disproportionate having regard to the rights of the appellants under Article 8 (as set out in the caselaw of the ECtHR) and the interests of the State respectively. To use the language of the Chief Justice (quoted above at paragraph 116), the decision-maker was entitled to arrive at the conclusion that the circumstances lacked the "something more" that was required to tip the balance in favour of the visa and outweigh the interests of the State.

Conclusion

143. I return to the point made earlier in this judgment that this appeal was one in respect of a High Court decision which itself was reviewing the Ministerial fact-finding within the parameters of the tests applicable in judicial review proceedings, and that it is important to maintain the distinction between fact-finding by the Court, and a judicial review of facts found by the Minister both at first instance and on appeal. Having regard to the information submitted by the appellants to the Minister during the visa application process, the content of the impugned decision, and the careful and considered basis upon which the High Court addressed all issues raised, I can find no error in the High Court judgment warranting the allowing of the appeal.

144. I should add that there is no reason why the appellants cannot make a fresh application for a visa in view of their updated circumstances whatever they may be. No adverse findings

were made to date that would prejudice any future application. In a case where the problem identified by the Minister is primarily one of "insufficient evidence", the obvious solution in any fresh application is to provide more evidence of the matters asserted.

145. As the respondent has been entirely successful in this appeal, my provisional view is that the costs should be awarded to the respondent. The appellants are entitled to seek a short hearing on costs to contend otherwise if they so wish (and such indication should be given to the Registrar within fourteen days of this judgment being delivered).

146. As this judgment is bring delivered electronically, I wish to record the agreement of my colleagues Donnelly J. and Butler J. with it.