THE COURT OF APPEAL - UNAPPROVED

Court of Appeal Record Number: 2023/5
Neutral Citation Number: [2024] IECA 145

Whelan J.
Ní Raifeartaigh J.
Binchy J.

BETWEEN/

S.M. AND M.T.A.

APPLICANTS/
APPELLANTS

- AND -

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 14th day of June 2024

1. In these proceedings, the appellants seek orders by way of judicial review quashing a decision of the respondent of 12th October 2021 whereby she refused an application for the issue of a "D" type visa to permit entry into the State by the second appellant. This application was made by the second appellant on the basis that he and the first appellant were married in Jigjiga, Ethiopia, in June 2018. In a decision delivered on 4th November 2022, the High Court (Phelan J.) dismissed the proceedings, from which decision the appellants now appeal. The judge made no order as to costs, and the respondent has cross appealed that part of the decision of the High Court.

Background

2. The first appellant is a dual national of Ireland and Somalia. She is now thirty years of age, and arrived in the State when she was three years old. She was granted Irish

citizenship in 2001 and subsequently obtained a degree in social care from the Institute of Technology, Carlow (in 2017) and thereafter, in 2019, obtained a Master of Social Work degree from Trinity College Dublin. She is employed as a full-time social worker.

3. The second appellant is an Ethiopian national living in the city of Jigjiga, which is near the border between Ethiopia and Somalia. He has qualifications in procurement and works on behalf of NGOs in logistics.

4. The appellants say they met online in the year 2017. They are from the same tribe and both their mothers are from Jigjiga. They claim that a relationship between them developed online and that in May 2018, they agreed to marry. The appellants are of the Muslim faith. They agreed that their wedding ceremony – or *Nikkah* – would take place in Jigjiga on 24th June 2018. In her letter to the respondent of 9th December 2020, in support of the second appellant's application for a visa, the first appellant explains that she was unable to attend the *Nikkah* ceremony because at the time she was in the first year of her master's degree and was on a placement, and so she arranged for her mother – who was in Jigjiga at the time – to be her representative at the ceremony. The first appellant later explains (when appealing from the decision of the respondent to refuse the application) that under Islamic law it is not necessary for both spouses to be present in the same location when the marriage ceremony is taking place, and, provided that the wife consents to the marriage, the wife's *father* (my emphasis) can give consent to the judge.

5. The appellants say that they then made arrangements to have a traditional "white" wedding after the first appellant had completed her Master of Social Work degree in June 2019. They say that the wedding was held on 5th August 2019, and that they met in person, for the first time, on 1st July 2019. They say that the first appellant stayed in Jigjiga until December 2019, when she returned to the State because she was unable to find employment in Jigjiga.

6. In December 2020, the second appellant applied for a visa seeking permission to enter the State in order to reside with the first named appellant, who joined in the application as his sponsor. The application was rejected by the respondent on 15th March 2021 (the "First Decision"). The appellants appealed the First Decision to the visa appeals officer by letter from the first appellant dated 11th May 2021. This is a detailed letter, to which is attached additional supporting documentation intended to address the reasons for the refusal as provided by the First Decision. A decision rejecting the appeal was handed down on 12th October 2021. It is that latter decision that is impugned by these proceedings (the "Impugned Decision").

7. Included in the materials submitted to the appeals officer was a slightly modified version of the letter submitted by the first appellant to the respondent on 9th December 2020. In attaching this letter to her appeal, the first appellant states "*I also enclose a copy of the sponsor's statement in respect of her relationship history with the applicant, which was previously provided*". Unfortunately, however, it is not identical to the previous document. While at first glance it looks the same (although the title to the letter is modified from "*Letter of Application: S.M.*" to "*Letter of Application & Relationship: S.M.*", and it is re-dated 11th May 2021), the text of the letter is slightly modified in a number of places, and the amendments were not drawn to the attention of the appeals officer. On the contrary, it is stated that it is the same document as that previously provided. The main relevance of this is that in the amended document the first appellant mentions, for the first time, and in the middle of a long paragraph, that "*…it is no longer possible to travel to Ethiopia as it is now on Ireland's Red list for travel* ". This issue forms the basis of one of the appellants' grounds of appeal.

8. The first appellant also enclosed a USB stick which she stated contains photographs of the *Nikkah*, wedding photos, chat history and supportive Facebook messages.

The Decision of 15th March 2021 – the First Decision

9. The reasons given for the refusal of the visa application in the First Decision were as follows:

(i) Under the heading "*ID:- Quality of Documents*" the respondent states that the marriage certificate provided with the application states that the marriage took place in Ethiopia on 24th June 2018, identifying the first appellant by the name "SIM". The following year on 15th March 2019, she changed her name by deed poll, in which it stated that she is changing her name from "ZM" (not SIM) to "SIAM".

(ii) Under the heading "*ID:- Insufficient documentation submitted in support of the application*" it is stated that the documentation submitted was considered to be insufficient and not meeting the qualifying criteria set out in the Policy Document of the respondent on Non-EEA Family Reunification (the "Policy") and specifically s. 15(6) thereof. The following deficiencies were identified:

(a) the first appellant was not in the home country of the second appellant at the time of the marriage;

(b) insufficient information was submitted to show the extent of family life between the appellants;

(c) there was insufficient evidence of ongoing communications between the appellants before and after the marriage;

(d) evidence of face-to-face meetings between the appellants prior to the marriage was not submitted;

(e) there was insufficient evidence of the first appellant having visited the second appellant in Ethiopia prior to and subsequent to the marriage;

(f) the first appellant had failed to submit a full copy of her current Irish passport;

(g) there was insufficient documentation submitted to support a marriage by proxy and to explain why the first appellant did not travel to Ethiopia for the marriage ceremony;

(h) there was insufficient evidence submitted relating to the accommodation of the first appellant in the State;

(i) nothing was submitted to demonstrate the presence of the first appellant's mother in Ethiopia at the time of the *Nikkah* ceremony;

(j) there were inconsistencies in the documentation submitted – the birth certificate of the second appellant was not registered until 16th March 2020, the same date upon which the marriage was registered, even though he was born almost 29 years previously;

(k) the appellants failed to provide sufficient evidence of their relationship, and in particular failed provide evidence that they had met face-to-face prior to the first appellant travelling to Ethiopia on 30th June 2019.

(iii) Under the heading "*RH:- Relationship History*" it is stated that the appellants have not provided sufficient evidence of the "*stated relationship*". It is stated: "*The onus rests with the applicant to demonstrate that the relationship is bona-fide and sufficient for immigration purposes. There is nothing submitted to suggest applicant and sponsor met face to face prior to sponsor travelling to Ethiopia on the 30/06/2019*".

Letter of Appeal and Documents Submitted in Support of Appeal

10. As mentioned above, the first appellant submitted an appeal and supporting documentation by letter dated 11th May 2021. In this letter, the first appellant addresses each of the reasons given under each of the headings in the First Decision.

11. In reply to the heading "*ID*" the first appellant explains that, throughout her lifetime, up to 15th March 2019, when she changed her name by deed poll, she had been known by either of the names "SM" or "ZM", and that this was owing to a spelling error upon the registration of her birth. This occurred because in Somalia, her first name can be spelt beginning either with an "S" or a "Z". She says that the discrepancy between her name on the marriage certificate provided with the application and the date of change of name by deed poll was due to the delay in registering the marriage, which was done on 16th March 2020. She provides a further marriage certificate, dated 22nd April 2022, which is described as a "*Confirmation of Nikkah*". On this document the first appellant is identified as "ZM", although by this time her name had been changed by deed poll to "SIAM".

12. In response to the insufficiency of documentation "*ID*" the first appellant provides the following documents:

(i) A letter from Trinity College, Dublin, to explain why she could not travel to the *Nikkah* ceremony in June, 2018;

(ii) Two letters from the Islamic Foundation of Ireland. The first, dated 30th April 2021 states that, according to Islamic law, any premarital relationship between a man and a woman is prohibited, and that during a period of courtship the couple should not meet in private except in the presence of some family members. (In her covering letter the first appellant put this somewhat further by saying that "*spouses cannot partake in courtship prior to the marriage taking place and same can only occur post-marriage*" and later in the same letter she goes even

further, claiming that this letter demonstrates that "*spouses are not allowed to meet face to face prior to the marriage*");

(iii) The second letter from the Islamic Foundation of Ireland, dated 8th May 2021, states that according to Islamic law and tradition, the bride is married to the groom through the agency of her father who gives her away in marriage to the groom. The letter goes on to say that if the father is unavailable, then another designated person is appointed. However, the bride's prior consent to the marriage must be sought. This letter further states that the bride may be present at the time of marriage or represented by her father, or by another person if the father is unavailable;

(iv) A letter/certificate from the Somali Regional State of Ethiopia Fafan Sharia High Court of 22nd April 2022, confirming that the *Nikkah* took place on 24th June 2018, that the first appellant's father gave his consent to the marriage and gave his proxy to the judge presiding over the ceremony. The letter states that the first appellant was not present for the ceremony but, as per custom, it took place with her father's consent. The letter further confirms the taking place of the "*white wedding ceremony*" on 5th August 2019;

(v) A copy of flight tickets in the name of the first named appellant to Ethiopia following upon the "white" marriage ceremony, and photographs of the marriage celebrations as well as vouching documentation in respect of the cost of the same;

(vi) Copies of text messages and social media correspondence between the first appellant and the second appellant as proof of family life and relationship history;

(vii) A copy of the first appellant's passport. While the letter states that it is copy of her full passport, she in fact only attached a copy of the pages containing bio data, and two pages going back to 2017 showing a visa and stamp endorsed by the Ethiopian authorities;

(viii) Copies of bank statements;

(ix) The first appellant then explains that marriage and birth certificates do not need to be registered in Ethiopia until such time as proof of the same is required, and that this explains the delay in registering the marriage, as the marriage certificate was not required until the second appellant made application for a visa to enter the State;

(x) A copy of a letter from an entity known as the Somali Regional State Vital Events Registration Agency which confirms the second appellant's birth certificate and the marriage certificate are valid, although these are not attached to the same letter;

(xi) A wedding booking invoice dated 20th July 2018, indicating a wedding date of 5th August 2018 (not 2019), issued in the name of a client named as Mohammad Tahir;

(xii) A USB stick which the letter states contains four files, including wedding photographs, photographs of the *Nikkah* ceremony, social media chat history and Facebook posts and congratulatory messages;

(xiii) Birth certificate from Karamara Hospital in respect of second appellant;

(xiv) A copy of the first appellant's statement in respect of her relationship history which she states was previously provided. Although there are differences, this is almost a replica of the letter of application of the first appellant of 9th December 2020, save in one material respect (see para. 7 above).

Reasons for Impugned Decision

13. There was a substantial overlap between the reasons given for refusal in the Impugned Decision and the reasons given for refusal in the First Decision. However, there was one very significant additional reason given in the Impugned Decision. This was that the Appeals Officer considered that the granting of a visa to the second appellant could result in costs to the State. This conclusion, and all other conclusions reached by the respondent, are explained in a document attached to the Impugned Decision comprising a detailed analysis (of over 16 pages) of all of the information and documentation received from the appellants and the matters taken into account in reaching each conclusion relied upon in the Impugned Decision.

14. A further reason for refusal not referred to in the First Decision appears under the heading "*ID*" *(Insufficient Documentation)* where it is stated that the marriage certificate provided in support of the application is unattested.

15. The remaining deficiencies identified and relied upon by the respondent under the heading "*ID*" are, broadly speaking, the same as those identified and relied upon in the First Decision, including that the first appellant has failed to submit a full copy of her current Irish passport, even though this deficiency in her application had been drawn to her attention at the time of the First Decision.

16. Under the heading "*INCO*" i.e. *Inconsistencies*, a new item appears, that being that the unattested marriage certificate submitted on appeal gives the name of the first appellant "ZM" whereas the marriage certificate submitted at first instance gives the name of the first appellant as "SIM". Other reasons given for refusal under this heading are broadly the same as in the First Decision.

17. Under the heading "*PF/PR*" i.e. *Public Funds and/or Resources*, it is repeated that the visa officer has reasonable concerns that the granting of a visa to the second appellant to reside in the State could result in costs to the State.

18. Under the heading "*RH*" i.e. *Relationship History*, as per section 5.3 of the Policy, it is stated that the appellants have not provided sufficient evidence of their relationship being in existence prior to and since the marriage, and that a full account of the relationship history between the appellants has not been submitted.

19. In the detailed consideration of the appeal attached to the Impugned Decision, it is stated that the USB stick provided by the appellants could not be accepted, for security reasons, and it is pointed out that this is made clear on the INIS (Irish Naturalisation and Immigration Services) website. In this document, there is also detailed consideration of the appellants' rights under Article 41 of the Constitution, as interpreted by the Supreme Court in *Gorry v. Minister for Justice and Equality* [2020] IESC 55, as well as the appellants' rights under article 8 of the European Convention on Human Rights (the "Convention") and relevant ECHR authorities.

The Proceedings

20. On 16th December 2021, the appellants sought leave, *ex parte*, to issue judicial review proceedings seeking (a) an order of *certiorari*, quashing the Impugned Decision and (b) an order of *mandamus*, compelling the respondent to give consideration to a fresh appeal by the appellants. On 17th January 2022, leave was granted on the grounds set forth at paragraph [e] of the statement of grounds.

21. The following grounds for the reliefs sought are relied upon in the statement of grounds:-

(i) The respondent has acted in breach of the rights of the appellants as a married couple and a family unit, contrary to Article 41 of the Constitution and article 8 of the Convention.

(ii) The respondent erred in her proportionality assessment and weighting of the first appellant's right to live in Ireland and/or the European Union as against the respondent's countervailing concerns.

(iii) The respondent erred in her determination that there are no unreasonable restrictions preventing the appellants establishing family life in Ethiopia in circumstances where the Irish Department of Foreign Affairs has recently declared Ethiopia a "*no travel zone*".

(iv) The respondent erred in her proportionality assessment and failed to identify the legitimate countervailing interests of the State that outweigh those of the appellants.

(v) The respondent erred in concluding that the appellants had failed to meet the financial requirements of the respondent's Family Reunification Policy. Furthermore, in breach of fair procedures, this issue was not raised at first instance with the appellants and the finding that the admission of the second appellant to the State could result in costs to the State is made without reasonable foundation.

(vi) The respondent erred in law in her interpretation and application of *Gorry v. Minister for Justice and Equality*.

(vii) The respondent has taken an unreasonably rigid approach in her consideration of supporting documentation provided by the appellants and has failed to take into account explanations given by the appellants. Further, the respondent has failed to seek further information before making adverse findings that were determinative of the appeal.

(viii) The respondent took an unreasonably rigid approach in her consideration of the circumstances of the appellants' relationship and marriage, and failed to take into account explanations given by the appellants for, for example, not having met in person before being married.

(ix) The respondent appears to find that the appellants' marriage is not genuine and "*loosely*" finds that the appellants married in order to achieve an immigration benefit, but failed to reasonably ground that finding.

(x) The respondent unlawfully disregarded the appellants' right as a married couple and family unit to intended family life.

(xi) The respondent has acted *ultra vires* s. 3 of the European Convention of Human Rights Act, 2003 by failing to perform her functions in a manner compatible with the obligations of the State under the Convention.

Statement of Opposition

22. In her statement of opposition, the respondent pleads:

(i) In circumstances where the Impugned Decision is based on a number of independent grounds, each capable of supporting the result, it should not be quashed because one or more of them will stand unaffected by an alleged ground upon which relief is sought (and which are otherwise denied). Even allowing the appellants the broadest possible interpretation of the statement of grounds, they do not challenge other independent grounds which support the visa refusal, such as:

(a) In relation to "*Insufficient Documentation Submitted*":

(i) The appellants' marriage certificate was unattested;

(ii) The appellants failed to submit supporting information regarding the fact that their marriage was done by proxy;

(iii) The first appellant provided no information regarding her current residence such as a rental agreement or a mortgage;

(iv) The first appellant failed to submit a full copy of her current Irish passport.

(b) In relation to "*Inconsistencies*":

(v) The unattested marriage certificate cites the name of the first appellant at the time of the marriage as being "SIM", but she changed her name from "ZM" to "SIAM" on 15th March 2019, after the marriage;

(vi) There was nothing submitted to demonstrate that the first appellant's mother was in Ethiopia at the time of the *Nikkah* ceremony; and

(vii) No explanation was provided as to why the birth of the second appellant was not registered until 16th March 2020, 29 years after his birth.

(c) In relation to "*Relationship History*":

(viii) There was insufficient evidence of the relationship being in existence prior to and since the alleged marriage.

It is pleaded that all of the above, with the exception of (a)(i) were cited as reasons for refusing the visa application in the First Decision, and were not addressed adequately or at all on appeal.

(ii) Insofar as the appellants now assert that Ethiopia is unsafe, this proposition was never put to the respondent in the visa application. On the contrary, the appellants endeavoured to submit proof that they and their family had travelled to and from Ethiopia, and indeed that they had lived there together as husband and wife.

Decision of the High Court

23. Phelan J. conducted a comprehensive review of the evidence. Having done so, she arrived at the following conclusions. Firstly, in regard to the conclusion of the respondent that the second appellant could become a financial burden on the State, if the visa application is granted, Phelan J. was of the view that this conclusion was arrived at in circumstances where the appellants were not on notice of any concerns under this heading and were not given an opportunity to address the same. The judge held:-

> *"43. In circumstances where the first applicant's demonstrated earnings well exceeded the minimum specified in the respondent's policy and the second applicant has an established work record, it seems to me that any adverse conclusions as to whether the applicants meet the respondent's financial eligibility requirements would require to be carefully reasoned following consideration of such material as the applicants might present once put on notice of those concerns."*

24. The judge went on to say that if financial considerations had been the only basis for the decision or had she been satisfied that they were pivotal to the decision, then the decision to refuse the visa could not be allowed to stand and would probably be amenable to an order of *certiorari*. I do not understand the respondent to disagree with the analysis and conclusion of the judge under this heading.

25. Secondly, Phelan J. concluded that the respondent appeared to ignore other evidence provided by the appellants in response to the First Decision. Specifically, she noted that the respondents had provided an explanation as to why the second appellant's birth was not registered until 16th March 2020, the same date as the registration of the proxy marriage. That explanation was to the effect that, until recent times, registration of births in Ethiopia was not compulsory and usually occurred when an application for registration was made. While that procedure has been changed in recent years, evidence was provided that the system of registration across Ethiopia varied, and that it remains the case that in some parts

of Ethiopia, registration only occurs when an application is made. Phelan J. found that this explanation was not considered by the respondent who appeared to be under the impression that no explanation had been provided.

26. A further issue which the judge considered had been raised by the first appellant (for the first time) in an enclosure to her letter of appeal of 11th May 2021, concerned whether or not it was safe to travel to Ethiopia in circumstances where there had been a significant outbreak of violence and Ethiopia had been placed on the Department of Foreign Affairs' "red list". This issue was not addressed at all by the respondent in the Impugned Decision. At para. 50 of her judgment, the trial judge stated:-

> *"This failure would, in my view, be a serious omission and would be fatal to the refusal of the application but for the fact that only a very passing reference is made to the existence of a travel alert affecting Ethiopia and no proper or real submission was made in this regard in support of the application. On the contrary, the evidence presented to the respondent was that the applicant had travelled to Ethiopia and lived there for several months without any reference to a security concern for her during that period. Furthermore, it seems that from an evidential perspective, the applicants contend that the situation in Ethiopia has deteriorated since the application was made."*

27. Having thus addressed what might be described as vulnerabilities in the Impugned Decision, Phelan J. then proceeded to address what she considered were significant shortcomings in the information and documentation provided by the appellants, notwithstanding that in some instances the respondent had drawn the issue to the attention of the appellants in the First Decision. Specifically, the judge referred to the failure of the first appellant to submit a full copy of her current Irish passport. She referred also to her failure to submit information or documentation to prove that her mother had been present in

Ethiopia for the purpose of representing her at a proxy marriage, as the first appellant had claimed. The judge noted that the explanation provided for the latter was that the first appellant had submitted a USB stick with photographs and recordings of the *Nikkah* ceremony. However, the judge noted, the INIS website makes it clear that USB sticks were not acceptable for security reasons.

28. Another problem arose by reason of the fact that different versions of marriage certificates were submitted in the first instance application and in the appeal (the first appellant's name was not the same on each certificate). Furthermore, the copy marriage certificates provided were not attested, as required. Phelan J. noted that while the appellants maintain that they were not asked to provide an attested copy of their marriage certificate, nonetheless they were clearly on notice of the requirement through the INIS website, where, under the heading "Guide to Supporting Documentation" it is stated:-

> *"Any State issued official documents, such as Birth Certificates, Marriage Certificates, Death Certificates, Divorce Certificates that were issued by a State outside of the EEA or Switzerland, must be attested/apostilled as genuine by the Ministry of Foreign Affairs in the State that issued the document, in order that it can be accepted as evidence for Irish visa purposes. Such documents are required to be translated into English or Irish, if necessary."*

29. Phelan J. noted that in submissions to the court, counsel suggested that an attested copy marriage certificate had in fact been submitted by the appellants, but then at para. 58 she held:-

> *"58. Irrespective of the controversy as to whether an attested marriage certificate was submitted or not which only arose during the hearing and is not dealt with on affidavit and regardless of the discrepancies in the first applicant's name as between the two marriage certificates separately submitted at first instance and on appeal which has*

not been satisfactorily addressed, it is manifestly clear that the applicants failed to provide sufficient evidence to the respondent to allow her to be satisfied in relation to important matters including the first applicant's travel in and out of Ethiopia (due to the absence of the full passport which she had been expressly requested to provide) and her mother's attendance in Ethiopia as proxy for the marriage ceremony in the summer of 2018 (despite the fact that this was raised as an issue in the first instance decision). These difficulties with the application are not tangential or minor difficulties in my view and they are not unreasonably relied upon to ground a refusal of the reunification application in this case. In all the circumstances, it was open to and proper for the respondent to conclude that the state of the documentary evidence presented was inadequate and to refuse on this basis, even in view of the explanation provided for late registration and the change of the first applicant's name by deed poll which appears to have been overlooked."

30. At para. 61 the judge continued in a similar vein:-

"61. In this case, the evidential gaps identified in other grounds of refusal advanced by the respondent were such that I am driven to conclude that it was almost inevitable that the decision to refuse would have been made on the standalone grounds relating to documentation, even if there were no concerns in relation to finances and full regard to the explanations given were had."

31. Having so concluded, the trial judge then proceeded to consider an argument advanced on behalf on the appellants that the Impugned Decision should nonetheless be quashed having regard to the shortcomings on the part of the respondent therein contained, because of the potential adverse impact upon the appellants in future visa applications, whether in Ireland or elsewhere, on account of incorrect or improperly drawn conclusions on the part of the respondent in the Impugned Decision. In this regard, the judge considered the decision

of this Court in *Mukovska v. Minister for Justice and Equality* [2021] IECA 340. The judge noted that in *Mukovska*, this Court reflected upon the potentially lasting significance of a refused application and the potential for future prejudice to an unsuccessful applicant where reasons for refusal are not expressed accurately, clearly and cogently, or where the underlying decision is irrational or unreasonable. The judge addressed this at para. 65 as follows:-

> *"65. ... This factor has been considered by me in deciding whether the requirements of justice and fairness support the grant of relief in this case because of the identified frailty with the financial conclusions drawn and a concern in relation to overlooked explanations. I have concluded that given the separate stand-alone reasons advanced to ground the refusal, which I am satisfied independently support and adequately ground the decision to refuse, and in the light of the particular manner in which financial concerns are identified in this case and the refusal is couched, that no separate real potential future adverse consequences flow from a refusal which includes those financial concerns together with the other, unassailable grounds. I do not consider that the financial concerns raised can be read as findings touching on the character of the applicants which might have ongoing adverse implications. Their financial position should be capable of being objectively verified and is not static, such that a finding in 2021 on financial grounds, perhaps in the absence of full information, is unlikely to have any bearing on an assessment which is informed by better facts.*
>
> *66. Similarly, insofar as findings made may fail to reflect explanations offered, I do not consider that it is demonstrated that a prejudice flows from the failure to reflect the explanations offered which would warrant me quashing a decision which is otherwise properly grounded."*

32. The trial judge then proceeded to consider in some detail arguments advanced regarding the interpretation and application by the respondent of the decision of the Supreme Court of *Gorry v. Minister for Justice and Equality* [2020] IESC 55. For reasons that I later explain, it is unnecessary to engage with this part of the judgment.

33. Finally, the trial judge expressed the view in her conclusions that the most appropriate course of action for the appellants is to re-submit their application with further up to date supporting documentation, addressing the identified deficiencies in their application.

Grounds of Appeal

34. There are fourteen grounds of appeal. They may be summarised as follows:

(i) The trial judge erred in denying the appellants the reliefs sought in circumstances where she concluded that the respondent arrived at her conclusion that the appellants did not satisfy the financial criteria provided for in the Policy in breach of fair procedures, and that that part of the Impugned Decision was fundamentally flawed; and having further decided, as a consequence, not to award the respondent her costs on the grounds that it was reasonable for the appellants to issue the within proceedings;

(ii) Having found as she did that the conclusions of the respondent as regards the finances of the appellants, it was not appropriate to sever that conclusion from the Impugned Decision, because it cannot be known how the respondent would have determined the application had she been satisfied as to the first appellant's finances. It is contended that the financial/income criteria reason for refusal was at least one of the primary reasons for refusal, and while the judge found that the respondent's determination on the issue was flawed, she excused it insofar as she did not quash the Impugned Decision.

(iii) Most of the other reasons unconnected to finances could easily have been addressed by the appellants had they been informed of the issues, rather than visiting the serious consequences of refusal on the appellants.

(iv) The judge excused failures on the part of the respondent to have regard to other matters which the respondent lists as being determinative even though the negative findings of the respondent (arrived at without regard to evidence provided) must have affected the proportionality assessment conducted by the respondent.

(v) The judge erred in holding that the respondent was correct to find that no evidence had been provided of the first appellant's mother attending the *Nikkah* wedding, when the appellants had provided the respondent with a USB stick. While it is accepted that the respondent's website states that USB sticks will not be accepted, it is evident that the appellants were not aware of this, and having regard to the serious consequences for the appellants of refusing the visa on the one hand, and how easy it would have been for the respondent to clarify this issue to the appellants on the other, the judge erred in finding that this issue alone could be determinative of a fair refusal or that it was not disproportionate or in breach of fair procedures for the respondent not to communicate this to the appellants so that they could remedy it.

(vi) The judge erred in determining that the marriage certificates provided were unattested in circumstances where all of the certificates were stamped by relevant officials. The judge further erred in finding that the issue of the marriage certificate being unattested was raised at first instance – it was not. Furthermore, there could not reasonably have been any uncertainty or confusion about the identity of the first appellant as provided on the marriage certificates. In order to satisfy the respondent's dissatisfaction with the change of name on the first marriage certificate, they had

provided a second marriage certificate with the first appellant's first name spelled as "S".

(vii) The judge erred in her approach to the assessment of evidence insofar as complaints about the documentation provided are only relevant to a conclusion i.e. the respondent was required to make a decision on the balance of probabilities as to whether or not the appellants are a married couple, and she did not do so.

(viii) The judge erred in finding that the appellants had not raised the safety of the first appellant as a real issue of concern if she were to return to Ethiopia. Furthermore, the judge erred in failing to have regard to the fact that the first appellant is an Irish and Somali citizen, and not an Ethiopian citizen.

(ix) There was no proper proportionality assessment of the appellant's rights under article 8 of the Convention, having regard to the difficulties that the appellants would have living together in Ethiopia. It is stated that the respondent has acted *ultra vires* s. 3 of the European Convention on Human Rights Act, 2003. No reference to the judge is made under this heading but it is to be presumed that it is intended to state that the judge erred in failing to so find.

(x) The judge erred in finding that the respondent's visa appeal decision was in compliance with the principles set out by the Supreme Court in *Gorry v. Minister for Justice and Equality.*

(xi) The judge erred in finding that a visa refusal (on appeal) would not have an adverse effect on the second appellant's future visa applications and erred in not raising this issue with the appellants so it could be addressed by them.

Respondent's Notice

35. The respondent contends that the judge erred in failing to award her costs, in circumstances where she (the respondent) was successful in resisting the reliefs sought in the court below.

36. The respondent denies that the findings of the respondent relating to finances constituted a "primary" finding that carried any more weight that the other multitude of reasons provided for refusing the visa. The judge was correct to recognise that there were other free standing reasons to refuse the visa and that relief in judicial review should be refused.

37. It is denied that the respondent's view of the application would have been significantly different if the concern over finances had been addressed properly. If the respondent addressed the finance issues properly, that would not have resolved the respondent's other concerns such as those relating to the attested copy of the marriage certificate, the lack of evidence that the marriage was conducted by a proxy and the failure on the part of the first appellant to submit her Irish passport. Furthermore, it was drawn to the attention of the appellants in the First Decision, that the first appellant had failed to submit a full copy of her current Irish passport.

38. The respondent contends that the trial judge **e**rred in finding that the respondent had failed to have regard to the explanation provided by the appellants as to why their marriage had not been registered until 16th March 2020. The Impugned Decision expressly notes that the appellants' explanation on the issue was purportedly substantiated by the "Vital Events Registration Agency" which did not meet the conditions set out on the INIS website and was thus not accepted as a proof.

39. The appellants never contended in their statement of grounds that the respondent made any error in relation to determining that their marriage certificate is unattested. The respondent, at ground 1(a)(i) of the statement of opposition contends that the failure to

provide an attested marriage certificate amounts to an independent ground of refusal which has not been challenged by the appellants. Moreover, in the first appellant's affidavit, at para. 17 she refers to the change in her name from the "*unattested marriage certificate*", thereby acknowledging that it was not attested.

40. The INIS website makes it clear that such certificates and any translation documents must be attested/apostilled as genuine by the Ministry for Foreign Affairs in the State that issues the same.

41. There is no dispute that the first appellant attempted to explain the differences in her name as appearing on the two marriage certificates provided. However, the fact is that neither of the marriage certificates submitted bear her name at the time that the marriage took place.

42. It is denied that the judge erred in her approach to the assessment of evidence as contended. The respondent is not reaching determinative findings as to whether the appellants are married or not. In this case, the respondent was not satisfied that the appellants had established the fact of their marriage by way of the required supporting evidence. In light of the Impugned Decision, the appropriate manner for the appellants to have proceeded was to lodge a further fresh application for a visa.

43. All grounds of appeal related to safety issues in Ethiopia are rejected. The first appellant had made no more than a passing reference to this in her appeal application (and not at all in the original application). The evidence before the respondent was that the appellants had travelled to see one another, without any safety concerns, in Ethiopia, and that the first appellant had travelled to meet the second appellant in Ethiopia even though the Department of Foreign Affairs had declared Ethiopia a no travel zone. Therefore, the respondent's assessment under article 8 of the Convention was correct.

44. The respondent denies the remaining grounds of appeal.

Submissions

Submissions of Appellants

45. The appellants submit that it is necessary for the court to determine three questions. These may be paraphrased as follows:

(i) Having found that the respondent arrived at the conclusion that the second appellant could become a financial burden upon the state (if the visa application were granted) in breach of fair procedures, was it open to the respondent to refuse the visa application on other grounds?

(ii) Was the High Court correct in finding that the other reasons relied upon to refuse the visa application were reasonable and proportionate?

(iii) Should the appellants be precluded from appealing the decision of the High Court because they can re-apply for D visa for the second appellant?

46. The appellants contend that the erroneous conclusion that the second appellant would be a cost burden to the State if his visa application were granted was clearly a primary basis for the refusal of the visa and it was not therefore appropriate to sever this conclusion from the remainder of the Impugned Decision. Furthermore, the appellants contend that it cannot be known at this remove how the respondent would have determined the application if she had been satisfied as to the first appellant's finances or if she had applied fair procedures in respect of the finding that the first appellant had inadequate savings such as to avoid the second appellant becoming a burden on the State.

47. Moreover, this negative conclusion, if allowed to stand, could have negative implications in the future for the appellants. The appellants rely upon the decision of this Court in *Mukovska* as authority to quash the impugned decision on this ground.

48. The appellants argue that the trial judge erred in her assessment of the evidence. While the appellants accept that they bear the burden of proof to establish the relationship of

marriage upon which they rely for the purposes of the application, it is submitted that this burden is one to be discharged on the balance of probabilities. While the judge was critical about issues such as the veracity of the marriage certificates and the proof of the presence of the first appellant's mother at the *Nikkah*, she does not actually conclude that the appellants' marriage was not genuine, and the analysis of rights under Article 41 of the Constitution and article 8 of the Convention and the decision in *Gorry* suggest that both the judge and the respondent accepted the validity of the marriage.

49. The appellants also submit that insofar as the judge relied upon the failure of the first appellant to produce the full copy of passport, this occurred simply because the first appellant misunderstood the requirement and this omission could easily have been corrected had the respondent clarified the precise requirement. In this regard the appellants rely upon the decisions of the High Court (McDermott J.) in *T.A.R. v. Minister for Justice, Equality and Defence* [2014] IEHC 385 and Owens J. in *M.A. and Y.B. v. Minister for Justice* [2023] IEHC 291.

50. Likewise, had the appellant known that she should not have submitted evidence by way of USB stick, she would have submitted at evidence by way of printed copies. It was disproportionate of the respondent not to afford the appellants the opportunity to correct these matters, which could easily have been corrected, and the judge erred in failing to so hold.

51. It was also submitted that the appellants were not asked to provide an attested copy of their marriage certificate either at first instance or subsequently and the judge erred in placing reliance on this omission. However, it was acknowledged that this was not a ground upon which leave was granted. Furthermore, it was submitted that the marriage certificate that was first provided bears seals evidencing its authenticity, and the marriage certificate that

was secondly provided is on the headed paper of the Somali Regional State of Ethiopia Fafan Sharia High Court.

52. So far as the first appellant's name is concerned, the marriage certificate originally produced by the first appellant is dated 16th March 2020, just over a year after the appellant changed her name by deed poll, and it is submitted that this explains why the marriage certificate identifies the first appellant by a name that she subsequently adopted by deed poll, and not her name as of the date of the marriage, even though the names on the marriage certificate firstly provided and on the deed poll are not exactly the same – the marriage certificate identifies the first appellant as "SIM" while the name she adopted by deed poll is "SIAM".

53. The appellants further submitted that the judge erred in failing to attach sufficient weight to errors made by the respondent in her failure to take into account explanations offered by the appellants as regards matters such as the date of the birth certificate of the second appellant and the date of registration of the marriage. Although the trial judge identified these matters and considered the respondent to have erred in failing to have regard to the explanations offered, she appears to have excused these matters insofar as she did not quash the Impugned Decision.

54. The appellants further submit that the respondent erred in failing to take into account the submission of the first appellant that it is no longer possible for her to travel to Ethiopia because it is now on Ireland's "red list" for travel. They submit that the trial judge erred in concluding as she did at para. 50 of her judgment that "*This failure would, in my view, be a serious omission and would be fatal to the refusal of the application but for the fact that only a very passing reference is made to the existence of the travel alert affecting Ethiopia and no proper real submission was made in this regard in support of the application*." It was submitted that the submission made by the first appellant could not be more clear and, in any

event, the first appellant has no right to travel or reside there as she is not a citizen of Ethiopia. Accordingly, it was submitted that the finding made by the respondent and upheld by the High Court that the visa refusal would not be an infringement of article 8 of the Convention because article 8 is not "engaged" is incorrect.

55. Finally, and more generally, it was submitted that there was very little more that the appellants could produce in support of their application, other than to provide a complete copy of the first appellant's passport. It was submitted that they produced large volumes of material by way of evidence of their relationship and their marriage including official documents from third parties such as the Somali Region State 03 Kebele Administration Office, the Somali Regional State of Ethiopia Fafan Sharia High Court, each of which evidence the marriage, a deed poll evidencing the first appellant's change of name, a letter from Trinity College to explain why the first appellant could not attend the *Nikkah*, a letter from the Islamic Foundation of Ireland regarding the requirements for a proxy marriage and a letter from the Somali regional state vital events registration agency stating that proxy marriages are a "*much practiced norm in our Somali and Islamic culture and traditions*." The appellants had also produced other documents evidencing the relationship such as copies of airline tickets, boarding passes, hotel bookings, and social media communications between them.

56. The appellants submitted that the fact that the second appellant could re-apply for a D visa is not a reason to refuse the relief sought, because the refusal of a visa application can have adverse consequences for an applicant. In this regard the appellants rely upon the decision of this Court in *Mukovska*. It was submitted that the trial judge erred in concluding that the refusal would not have an adverse effect on future applications and further erred in not raising this issue with the appellants at the hearing in the court below so that they would have an opportunity to address the court on this issue.

57. In the course of making his submissions, counsel for the appellants acknowledged that the proportionality analysis contemplated by *Gorry* only arises in the event that the relationship relied upon, in this case marriage, is found to exist. However, for that same reason, it was submitted that the very fact that the respondent conducted such an analysis indicates that she was satisfied that the appellants are married, notwithstanding complaints about the supporting documentation.

Submissions of Respondent

58. The respondent identifies four questions for determination in the appeal, the first three of which are broadly the same as those identified by the appellant, and the fourth of which relates to the cross-appeal on costs. As regards the latter, however, there was no argument at the hearing of the appeal and counsel for the respondent submitted that this issue should be left over for submissions to be made after delivery of this judgment.

59. The Minister submits that notwithstanding the acknowledged defect in the decision-making process regarding the finances of the appellants, she was entitled to refuse the application on the other grounds relied upon, and the argument that there is any uncertainty as to how the application would have been decided in the absence of the flawed conclusion regarding finances does not withstand scrutiny. That this is so is apparent from the fact that the visa application was refused at first instance on unchallenged grounds despite the fact that at first instance it had been determined that the first appellant had the requisite finances to support the second appellant. Therefore, it is apparent that the decision would have been just the same on appeal regardless as to the flawed conclusion regarding the finances of the appellants.

60. The respondent relies upon the decision of the High Court, Humphreys J., in *Olakunori v. Minister for Justice and Equality* [2016] IEHC 473, in which he held, at para. 64 (xiii) that "*where a decision is based on a number of independent grounds each capable of*

supporting the result, the decision will not be quashed if any one or more grounds stand unaffected by any error in any impugned grounds."

61. The respondent also relies on the first instance decision of Barrett J. in *Mukovska*, wherein he stated, at para. 2:-

> *"Administrative decisions do not fall to be parsed like statute law. By reason [1] the court understands the decision maker to mean that, viewed in the round, the decision maker considers that the applicant's need to undertake the desired course has not been demonstrated/warranted to the decision makers satisfaction. That may seem to Ms. Mukovska to be a harsh or unexpected conclusion. However, it is a conclusion that the decision maker was entitled to reach on the evidence at hand. Entry to the State is a privilege governed by ministerial discretion; the onus rests on applicants at all times to satisfy the relevant minister of the day that s/he should grant the visa sought. Here the decision maker is not so satisfied on the evidence before him. Even if either or both of reasons [2]/[3] are flawed, absent some deficiency in the decision-making process (and the court sees none) the Minister's decision can stand on reason [1] alone)."*

62. The respondent submitted that there were multiple "*free standing*" reasons for refusal of the application relied upon by the respondent both at first instance and on appeal, and that the error introduced into the decision making process on appeal does not disturb all of the other independent findings already present in the first instance decision which resulted in the application being refused at that juncture. Moreover, those findings are not, for the most part, disputed by the appellants and are not challenged in the statement of grounds. These include, *inter alia*, the failure on the part of the first appellant to submit a full copy of her current Irish passport, her failure to submit supporting information regarding the presence of her mother at the *Nikkah* ceremony, her failure to provide any information regarding her

current residence and her failure to provide an attested copy of her marriage certificate. As regards the latter, while the appellants protest that this was not a reason given for refusal in the First Decision, this was not a ground upon which leave was granted and it is submitted by the respondent that in her own affidavit the first appellant acknowledges that the marriage certificate was not attested as required.

63. Moreover, the first appellant's name is differently stated on the two marriage certificates provided. It is submitted that the marriage certificate should have stated the name of the appellant at the time of the marriage, and not the name she subsequently adopted by deed poll. Furthermore, the "first" marriage certificate gives no indication that this was a wedding where the bride's consent was given through her father, acting as her proxy. While these matters are addressed in the "*Confirmation of Nikkah*", it is submitted that this document is of limited probative value. Furthermore, the first appellant has, at different stages in the process, relied on both her mother and her father as being her representative at the *Nikkah*, but there is no proof of the presence of either, other than the whatever may be the contents of the USB stick, which it was clear was not acceptable and could not be opened for security reasons.

64. The respondent submits that the onus is on the appellants to satisfy the respondent that they meet the requirements for the granting of the visa, and in this case that requires the appellants to satisfy the respondent not just that they are married but that they satisfy the requirements set out in the Policy as regards marriages by proxy. It is submitted that there is no obligation on the respondent to express a definitive conclusion as to whether or not the appellants are married as contended; rather the onus is on the appellants to satisfy the respondent that this is so, and it is clear from the Impugned Decision that the appellants have failed to meet the evidential requirements to satisfy the respondent in this regard.

65. Counsel for the respondent relied upon the decision of Charleton J. in the Supreme Court in *O.O. v Minister for Justice and Law Reform* [2015] IESC 26. This was a case involving a challenge to a refusal on the part of the respondent to revoke a deportation order. Solicitors acting on behalf of the applicant had made submissions to the decision maker regarding the possible psychological impact upon the applicant's grandchildren if she were deported and had offered to procure an expert report if that were considered necessary. At para. 22, Charleton J. held that: "*... the obligation is on the applicant seeking that the deportation order be overturned to put whatever relevant material exists before the Minister. There is no obligation on the Minister to engage in correspondence. The onus at this point in the process is on the person seeking to overturn the order to make their best case there and then*."

66. In this case, the respondent submits, it was highlighted to the appellants that a full copy of the first appellant's passport was required, and that in failing to produce this at first instance and again on appeal, the appellants have failed to put relevant material before the respondent, and that the respondent had no obligation to engage in further correspondence on the issue.

67. Finally, the respondent submitted that it is open to the appellants to lodge a fresh application addressing all the deficiencies that have been identified. The respondent claims that in response to this submission in the court below, the appellants submitted that such a course would not address the prejudice caused to them by the Impugned Decision, in any future visa applications, in so far as it was grounded upon a flawed conclusion as regards financial matters. The respondent submitted that the submission of the appellants that the trial judge erred in arriving at a conclusion as regards the issue of prejudice because she did not afford the appellants an opportunity to address this issue in the court below is incorrect. The respondent submits that the appellants were afforded such an opportunity in oral

submissions and that if the appellants wished to suggest otherwise, then they should have applied for a copy of the transcript of the proceedings in the court below in order to advance this argument. The respondent submits that the trial judge was entitled to arrive at the conclusion that she did that it is highly unlikely that the appellants would be prejudiced in the future by reason of the refusal of a visa application based on historic financial records which do not touch in any way on the character of the appellants.

Discussion and Decision

68. At the outset, it is necessary to bear in mind at all times that the second appellant, sponsored by the first appellant, has applied for a particular type of visa, being one grounded upon family reunification. At para. 4.1 of the Policy, the immigration services make it plain that:-

> *"This document does not attempt to establish a rigid definition of what constitutes a family …. What the paper will do however is set out how the system should generally deal with certain categories of people who are seeking migration to Ireland based on their relationship with some other person already entitled to be here."*

69. The second appellant has applied for a visa on the basis that he and the first appellant are married. It is contended by the appellants that they were married at a ceremony that took place in Jigjiga, Ethiopia, which ceremony is known in the Islamic community as a "*Nikkah*", on 24th June 2018. Islam permits such ceremonies to take place in the absence of the bride, provided that her consent has been given and that certain other conditions are met, including that she is represented by her father at the ceremony, or by some other person if her father is unavailable. Such marriages are expressly provided for in the Policy, but it is made plain that: "*The immigration authorities will inquire into the circumstances of the marriage and must be satisfied that it is genuine and freely entered into by both parties, and not a device aimed predominantly at securing an immigration advantage*" (para. 15.6). Earlier, at para.

13.4, it is stated that: "*The onus will be on the applicants for family reunification to satisfy the immigration authorities that the familial relationship is as claimed*".

70. It is readily apparent that the starting point for any non-EEA family member who applies for a visa on the basis of a marriage to an Irish citizen is to satisfy the respondent that the parties are validly married. There are two elements to this, firstly the fact that a marriage has taken place between the two parties in question, and secondly the authenticity of any such marriage. If the parties fail to satisfy the respondent of these matters, then other matters that would otherwise be relevant to the application, cease to be of any relevance.

71. Moreover, in deciding upon the visa application, it is not necessary for the respondent to make a determination as to the validity of the marriage relied upon. There is a difference between the respondent not being satisfied as to the validity of a marriage on the one hand, and forming a definitive conclusion that it is invalid on the other. The respondent may not be satisfied on the basis of the evidence produced at first instance that a valid marriage has been contracted, but may be so satisfied following the production of further evidence on appeal; and likewise she may still not be satisfied on appeal, but may be so satisfied by evidence brought forward in a fresh application. It follows that the respondent must be entitled to refuse an application on the basis that she has not been satisfied that a valid marriage has taken place, and that she is not obliged to arrive at a definite conclusion on the issue. The appellants' arguments to the contrary (as put forward in the context of ground of appeal no. 7 above) must therefore be rejected. In the context of these proceedings, there can be no doubt that the respondent was not satisfied as to the formal requirements of the marriage of the appellants, even if this is not stated expressly in the Impugned Decision; it lends itself to no other conclusion under this heading.

72. The extract from the Policy cited above makes it clear that the respondent will conduct a full inquiry into the circumstances of the marriage, and this includes consideration of

compliance with the applicable formalities as well as an examination of the relationship history of the parties leading up to and subsequent to the marriage. It is not in dispute that the respondent is at large and enjoys a wide discretion in the conduct of such inquiries and in the adjudication of such applications per Humphreys J. in *Olakunori*.

73. If the obvious starting point in the respondent's consideration of such applications is an inquiry into the fact of and the authenticity of the marriage relied upon, then the obvious starting point to consideration of those issues is the documentation evidencing the occurrence of the marriage, and in particular the marriage certificate. That seemingly straightforward issue has been beset with problems in this case. Firstly, neither of the two certificates produced are attested or apostilled as required by the respondent and as notified to applicants on the website of the respondent. The appellants claim this issue was not identified in the First Decision, and that is correct. But it is also correct to say that that is not a ground in respect of which leave was granted, and it is not disputed that the requirement was clearly identified on the website of the respondent at the time of the application.

74. The appellants contended for the first time at the hearing in the court below that the certificates are attested/"apostilled". As I understand it, this assertion is advanced on the basis that the certificates provided bear stamps. But the mere endorsement of stamps, which in this instance are difficult to read and have been endorsed by persons unknown can hardly constitute attestation. Moreover, as already mentioned, the first appellant herself referred to the certificates being "*unattested*" at para. 17 of her grounding affidavit.

75. Then there are the problems with the identity of the first appellant as appearing on the face of both certificates. Neither certificate gives the first name of the first appellant as it was on the date of the *Nikkah,* which was "Z". In fairness to the first appellant she has provided an explanation for this, and while the trial judge expressed the view that the explanation was unsatisfactory, she also stated that regardless of this issue, it was

"*manifestly clear*" that the appellant had failed to provide sufficient evidence to the respondent to allow her to be satisfied in relation to [other] important matters. For the reason that follow, I agree.

76. Finally, as far as the marriage certificates are concerned, the first certificate provided could not possibly be accepted as evidence of compliance with the requirements of a ceremony at which the bride was represented by her proxy, because there is nothing on the face of this certificate to give any indication that this was such a marriage. Having regard to the evidence provided through the Islamic Foundation of Ireland, one would expect the certificate to state clearly by whom the bride was represented, and, separately, that the bride's father had given his consent as required by Islamic law. In the detailed reasons accompanying the Impugned Decision, the respondent identifies other deficiencies in this certificate, including (amongst others) the absence any reference to witnesses, fathers' names and the marital status of the bride and groom. These deficiencies are also present in the certificate presented on appeal. While the second certificate does indicate that the first appellant was not present at the *Nikkah* ceremony, and that her father gave his consent (and in turn, because he was not present, he gave his proxy to the judge who carried out the ceremony) it does not actually state who represented the first appellant and who gave *her* consent to the marriage, which is a clear requirement for such ceremonies. Moreover, this certificate is, as the respondent stated in the detailed reasons, of poor quality. It is stated that it is not in keeping with marriage documents normally submitted. The respondent further observed that no contact details are on the certificate or letters provided, and this is a requirement of the respondent as signalled on the INIS website which states that "*[a]ll letters from a business, company or other organisation should be on official headed paper and give full contact details so that they can be verified*".

77. The most significant documentary omission on the part of the first appellant was her failure to provide a full copy of her passport. This omission would, in my view, be sufficient in and of itself to refuse the application. The relevance of the document is obvious, it being a cornerstone of the inquiry into the relationship history of the parties that the respondent undertakes in such applications. A full copy of the passport, and in particular visas and entry and exit stamps, will assist the respondent in determining whether the parties have met in person as often as they claim, and whether the frequency of such meetings is supportive of the relationship relied upon. Any doubts about the need to produce a full copy of the passport would have been eliminated by the First Decision which expressly highlighted the requirement.

78. Other matters relied upon by the judge in reaching her conclusions were also of a substantive character, and were not, as the trial judge observed, tangential or minor. The first appellant herself had, in her application, put her mother forward as her representative at the *Nikkah* ceremony. She clearly understood the significance of this, and attempted to address it by providing a USB stick. However, the INIS website makes it plain that USB sticks are not acceptable for security reasons, and in the First Decision it is stated that "*there is nothing submitted to suggest that the sponsor's mother was in Ethiopia at this time*". And so the first appellant was on notice that the USB Stick was not acceptable to the respondent, even if the First Decision did not expressly say so.

79. Furthermore, the approach of the first appellant to this important issue was somewhat confusing. In her letter of application of 9th December 2020, the first appellant stated that her mother was present and represented her at the *Nikkah*. In the First Decision, the respondent noted that there was nothing submitted to suggest that the first appellant's mother was in Ethiopia at the time. In the amended version of her letter of application submitted with the appeal, the text stating that her mother represented the first appellant is deleted and

replaced with a statement that she gave her consent to her father who then designated the judge to carry put the ceremony. In any case, however, whoever was representing the first appellant at the ceremony, the proof of the required representation was inadequate.

80. The appellants submitted that it was unreasonable and disproportionate of the respondent not to afford them a further opportunity to correct deficiencies in their application, and in this regard relied upon the decisions of McDermott J. in *T.A.R and I.H. v. Minister for Justice, Equality and Defence* [2014] IEHC 385, and the more recent decision of Owens J. in *M.A. and Y.B. v. Minister for Justice* [2023] IEHC 291. In *T.A.R.*, McDermott J. granted an order of *certiorari* because of the inadequacy of the reasons provided for the decision in that case. However, he also observed that a letter, phone call or email from the decision maker to clarify the deficiencies in documentation might have resolved the respondent's concerns and avoided the proceedings. It is clear however, that this comment was *obiter*, and in any case was made before the decision of Charleton J. in *O.O. v. Minister for Justice*.

81. In *M.A. and Y.B.*, Owens J. specifically considered the duties of decision-makers in public administration when material is presented for consideration in a form which may require clarification or further explanation. In that case, as in this case, the second applicant had made an application for a long stay visa to enter the State to join his wife, the first applicant. This was the third such application made by the applicants, all of which had been refused. In support of their application, the applicants had submitted sample records of communications (WhatsApp calls and messages) the vast majority of which were in a foreign language. Owens J. noted that the material was presented in a manner which made it difficult to evaluate. At paras. 2 and 3 of his judgment, Owens J. said, *inter-alia*:-

> *"2. … A decision-maker must work within what is provided and is not obliged to seek out what has been omitted or inadequately explained.*

3. However, decision-makers must act fairly. If a decision-maker needs clarification or further explanation of material provided, the provider should be given an opportunity to comment… .”

At para. 28, he held:-

“28. However, officials are not obliged to assist applicants in the sense of reminding them of what documents are necessary or in the sense of advising them on how to present their application. Guidance provided by the Minister sets out what must be produced. A decision-maker may reject or refuse an application where the essential proof stipulated in the guidance is absent. A decision-maker may also proceed to determine an application by disregarding material which is not provided in the manner stipulated in the guidance.”

82. In the case at hand, Owens J. considered that even though the communications had been presented in a foreign language, they could still be of use in demonstrating the duration and frequency of communications, and he considered that the decision-maker erred in discounting the material completely. He said that if issues relating to identification of participants in the communications required clarification, then the solicitors for the applicants, who had been in communication with the Minister, should have been given an opportunity to address those issues. Since this had not been done, Owens J. determined that the decision to reject the application was invalid on what he described as this “*narrow ground.*”

83. While there is no reference in the judgment of Owens J. to the judgment of Charleton J. in *O.O. v. Minister for Justice*, the general principles identified by Owens J. are consistent with the observation of Charleton J. in *O.O.* that applicants are under an obligation to make the best case that they can and that the Minister has no obligation to enter into correspondence. More fundamentally, however, the decision in *M.A. v. Y.B.* was reversed

in a decision of this Court handed down subsequent to the hearing of this appeal (see *M.A. v. Y.B. v. the Minister for Justice* [2024] IECA 26). In a judgment handed down on 2nd February 2024, Meenan J. held that, firstly, it was a matter for the parties to satisfy the Minister as to the identity of the parties whose text messages had been provided in support of the application, and, secondly, that "*[i]f 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*." While the judgment does not expressly overrule the determination of Owens J. that applicants should be afforded the opportunity to provide clarifications or explanations of materials provided by them in support of their application, it does so inferentially.

84. In any case, unlike in *M.A. and Y.B.*, there were multiple deficiencies in the documentation and information provided by the appellants, and the respondent would have been entitled to reject the application for the very reasons discussed by Owens J. in para. 28 of his judgment. In my view it cannot be said in this case that the respondent acted unfairly or disproportionately in rejecting the application on the grounds of deficiencies in requirements that are identified in the Policy and the INIS the website and in respect of which requirements the appellants were reminded by the First Decision, with the exception of the requirement for attested copies of certificates. I would therefore reject this ground of appeal also.

85. While the appellants argued that it was inappropriate for the trial judge to "sever" the flawed conclusion regarding the potential of the second appellant to be a costs burden to the

State, and further argued that it cannot be known how the respondent would have decided the appeal had she not arrived at this flawed conclusion, in my view these arguments should be rejected. Firstly, such authorities as there are on the issue make it clear that it is open to the Court to refuse an order of certiorari even though a reason for an administrative decision has been struck down, where there are other valid reasons supporting that decision see the passages quoted from the decisions of Humphreys J. in *Olakunori* and Barrett. J. in *Mukovska* at paras. 59 and 60 above. While these are both decisions of the High Court, and are not binding on this Court, the views expressed by Humphreys J. and Barrett J. on this issue appear to me to be correct in principle. Secondly, I agree with the arguments advanced by the respondent that, having regard to the other identified problems with the appeal and to the First Decision so far as concerned it those very same problems, it is inconceivable that the decision of the respondent would have been any different, even in the absence of the flawed conclusion regarding the finances of the appellants.

86. While the appellant argued that the possibility of a fresh application may not afford the appellants an appropriate remedy because they may well be prejudiced in future visa applications by the flawed and inaccurate determination of the respondent as regards financial matters, and in this regard the appellants relied upon the decision of this court in *Mukovska*, the appellants did not engage with the rationale of the trial judge on this issue which in my view is unimpeachable. The financial standing of any applicant – whether it is accurately assessed or not – is a snapshot in time that is unlikely to have any bearing upon future applications, not least because it does not in any case speak to the character of an applicant.

87. For all of the foregoing reasons, I am satisfied that the trial judge was entirely correct in the conclusions that she reached regarding deficiencies in the application of the appellants, and her resulting conclusion that those deficiencies were such as to entitle the respondent to

refuse their application. As I have already stated above, the Impugned Decision can only be interpreted as meaning that the respondent was not satisfied as to the marital status of the appellants. While it was argued on behalf of the appellants that the trial judge erred in concluding that the respondent had correctly identified and applied the ratio of the Supreme Court in *Gorry*, nonetheless counsel for the appellants very fairly acknowledged that this point falls away, as does the argument grounded upon article 8 of the Convention, if this Court concludes, as I have done, that the respondent was entitled to reject the appellants' application on the basis that she was not satisfied as to their marital status.

88. The same may be said of the argument that it is not safe for the first appellant to travel to Ethiopia to live with the second appellant. This argument also depends upon the respondent being satisfied that the appellants are validly married, and accordingly it must also be rejected.

89. For all of the foregoing reasons I would dismiss this appeal. As to the cross-appeal, which relates to the decision of the trial judge to refuse an order for costs in favour of the respondent, the respondent asked that the court defer consideration of this issue pending the delivery of this decision. Accordingly, the parties should exchange submissions in relation to costs incurred both in the court below and in this appeal within seven days from the date of delivery of this judgment. The parties shall simultaneously provide the Court with a copy of the submissions, and the proceedings shall be listed for a hearing on costs at 9.30 on 25th June.

90. As this judgment is being delivered remotely, Whelan J. and Ní Raifeartaigh J. have authorised me to indicate their agreement with it on their behalf.