THE HIGH COURT

2018 No. 555 JR

Between:

X

APPLICANT

– and –

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 3rd May, 2019.

1. In June 2014, Mr X was granted subsidiary protection. He then made application for family unification with a 14-year old boy and 13-year old girl. In February 2016, the Minister asked if Mr X would undergo a DNA test to establish his parentage of the children. Mr X initially agreed, then declined. His change of mind arose, he says, from a fear that his possible wife may have been unfaithful, that his children may not biologically be his, and (an understandable position) that he does not want the pain of discovering that his fears are true. Mr X's initial application was unsuccessful. Thereafter, following various events that do not require description, fresh application was made on 20.03.2017 for reunification. This application was made under s.56 of the International Protection Act 2015. That the application was so made was agreed between the parties and cannot now be resiled from; there was no parallel application under the EU (Subsidiary Protection) Regulations 2013. (Nor does the court accept that Mr X had a vested right under the 2013 Regulations to seek family reunification; he had but a right to apply for same and did not do so; see *VB v. Minister for Justice* [2019] IEHC 55, paras.47-49, 52). By letter of 29.05.2018, Mr X's later application was refused by way of the 'Impugned Decision'. Mr X now seeks an order of *certiorari* quashing same. Three key issues arise for consideration; the text of the issues presenting is as drafted by counsel for the Minister.

> ***[1] "Does the Applicant have locus standi to challenge the impugned decision…where by letter dated…5th February, 2018, his solicitors said that his application was* 'based upon the fact that he is the sole legal guardian' *of the children, and where he was informed by* [the Minister]…*that s.56(9) of the Act of 2015 did not define 'child' of an applicant to include a 'ward', and where the Applicant has never taken a DNA test to* [establish his natural parentage of the children]"?** Section 56(1) of the 2015 Act provides that a reunification application may be made regarding "*a member of the family of the sponsor*". Section 56(9) provides that the phrase "*member of the family*" includes "*(d) a child of the sponsor who, on the date of the application…is under the age of 18 years and is not married"*. The term "*child*" is not defined. Assuming for a moment that the two children to whom Mr X's application refers are the biological children of another man, albeit that Mr X views them as his, can each of them properly be described as a "*child*" of Mr X for the purposes of s.56(9) of the Act of 2015? The short answer is 'yes'. There is a wide diversity of familial structures and the relationship of father/child is not confined (presumably deliberately not confined) by the 2015 Act to a biological father. It is not unknown for a child to grow up addressing and thinking of a man who is not their biological father as 'Dad'; and it is not unknown for such non-biological fathers to be as devoted to such children as if they were their biological children. A 'cookie cutter' definition of children as embracing only biological children would doubtless be easier for the State to police, not least given the availability of DNA testing. But that is not what the Act of 2015 provides, perhaps because of an understanding that in a diverse society defining who is a child of someone is not always straightforward, as this application shows. (In passing, the court does not accept that because the 2013 Regulations, repealed by the 2015 Act, entitled the Minister to grant permission to a dependent to enter the State, it follows that the absence of such a provision in the 2015 Act points to an intention to exclude dependents. It could just as well be argued that the absence of reference to dependents in s.56(9) points to an understanding that the term "*child*" is wide enough, and intended, to embrace dependents. However, this line of argument/discussion is something of a 'red herring'. The issue is not whether the term "*child*" in s.56(9) embraces a dependent but whether it bears a wider meaning than a biological child. For the reasons stated, it does).

2. **[2] "[D]*oes the Applicant derive any rights from the* [since replaced] *Qualification Directive (Directive 2004/83/EC) to family reunification with his asserted children who are residing in* [Country X]"?** The short answer is 'no'. The said directive only extended, thanks to the definition of "*family members*" in Art.2, to family members "*who are present in the same Member State in relation to the application for international protection*". The just-quoted criterion is not satisfied in this case. (The same position now presents under Directive 2011/95/EU). So Mr X's application falls exclusively to be determined as a matter of domestic law.

3. **[3] "In circumstances where the Act of 2015 does not entitle guardians to apply for family reunification with their wards, was the first-named respondent obliged to grant the application for family reunification made by the Applicant in circumstances where the application was based upon the grant of guardianship to him by a…court [in Country X]…in respect of his two asserted children and where he has refused to submit DNA evidence of his alleged fatherhood of those children?***"* As will by now be clear, the court does not accept the introductory premise ("*In circumstances…wards*"). The term "*child*" in s.56(9) is not defined. For the reasons stated above it extends to non-biological children. The critical issue arising from s.56(9)(d) is whether one is dealing with an unmarried minor who is the "*child*" (biological or non-biological) of the sponsor.

4. There was reference at hearing to a DNA test being required by the Minister. Inviting someone to undertake a DNA test is not the same as requiring one. Neither, the court observes, does failing to provide a DNA sample necessarily and in all instances amount to a failure by a sponsor to "*cooperate fully*", as required by s.56(3) of the 2015 Act. Instances can arise where a man might for good reason prefer not to know that children whom he has treated as his children are not his biological children. In this regard the court recalls the observation of Clark J. in *NzN v. MJE* [2014] IEHC 31, para.41, that the appellant's refusal there to undertake "*DNA testing was telling and her reasons unacceptable"*. Implicit in that observation is that acceptable reasons could be provided for such a refusal. If a sponsor is the natural parent of a child then one is clearly dealing with a child for the purposes of s.56(9)(d) of the 2015 Act. Where the Minister erred was in proceeding on the basis that s.56(9)(d) requires that a sponsor be the natural parent of a child (and he clearly so proceeds; see the last paragraph on p.4 and the first two paragraphs on p.5 of the Impugned Decision). For the reasons stated above this is not legally correct. As the Minister proceeded on a mistaken basis, the court will grant the order of *certiorari* sought and remit Mr X's application for fresh consideration.