THE COURT OF APPEAL

Approved **Neutral Citation Number: [2024] IECA 36**

Record Number: 2022/271

High Court Record Number: 2021/904 JR

Whelan J.

Haughton J.

Ní Raifeartaigh J.

BETWEEN/

B.B., N.R., AND A.B. (A MINOR SUING THROUGH HER FATHER AND NEXT FRIEND, B.B.)

APPELLANTS

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 15th day of February 2024

Nature of the Case

1. This judgment arises in an appeal from a decision of the High Court in judicial review proceedings. It concerns an application by an Algerian national (the second appellant) for a Long Stay Join Family Visa in circumstances where she wishes to join and live with her Irish citizen husband (the first appellant) in the jurisdiction. The relevant framework for the exercise of Ministerial discretion in such cases is a combination of the Minister's Policy Document on Non-EEA Family Reunification (hereinafter "the Policy Document"); the usual principles governing judicial review of this type of Ministerial decision; the relevant constitutional principles (as recently clarified in *Gorry v Minister for Justice and Equality and ABM and BA v Minister for Justice and Equality* [2020] IESC 55 ("*Gorry*") and relevant principles concerning Article 8 of the European Convention on Human Rights ("the ECHR"). The visa application was refused at first instance and on appeal, the Minister upheld the refusal (the "impugned decision"). In judicial review proceedings brought by the appellants in respect of the impugned decision, the High Court (Heslin J.) refused the reliefs sought. This is an appeal by the three appellants in respect of that decision.

2. As noted, the first two appellants are husband and wife. The third appellant is the daughter of the first appellant from a previous marriage (now terminated by divorce). The child is an Irish citizen and lives in the jurisdiction with her mother, the former (or first) wife of the first appellant. The third appellant will be referred to in this judgment as "the child". Within the Minister's Policy document and impugned decision, the first two appellants are referred to "the sponsor " and "the applicant " respectively and this terminology will be reflected in certain passages from those documents which are reproduced in the judgment.

3. Although there were many grounds of appeal, I have for the purpose of this judgment grouped them under three headings. In respect of all three, the appeal of course concerns the High Court's treatment of the three issues. They are as follows:-

(1) The Minister's assessment of the evidence for the purpose of the visa decision contained in the impugned decision;

(2) The Minister's interpretation and application of the principles set out in *Gorry v Minister for Justice and Equality and ABM and BA v Minister for Justice and Equality* [2020] IESC 55 ("*Gorry*"); and

(3) The Minister's interpretation and application of Article 8 of the ECHR.

4. There is a substantial degree of interconnectedness between the three issues, particularly as the appellants contend that the Minister's flawed assessment of the evidence had a knock-on effect in terms of her application of the legal principles to the facts. It follows, conversely, that if the judgment reached conclusions adverse to the appellants' submissions on the first issue, this will undermine the appellants' arguments on the remaining two.

The Minister's Policy Document

5. In December, 2016 the Minister, by the Irish Naturalisation and Immigration Service, issued a Policy Document on Non-EEA Family Reunification. It contains guidelines within which the Ministerial discretion is exercised. The executive summary includes the following passage, which sets out the overall context within which such decisions are made:

"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 the community as a whole. …

In addition to ensuring that there is no threat to public security, public policy 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 determinisations 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.

It is intended however that family reunification with an Irish citizen or certain categories of non-EEA persons lawfully resident will be facilitated as far as possible where people meet the criteria set out in this policy although of course each case must be considered on its merits. …

The onus of proof as to the genuineness of the family relationship rests squarely with the applicant and the sponsor whether that person is an Irish national or a non-EEA national.

In facilitating family reunification due regard must also be had to the decisions which the family itself has made. If the family has elected to separate for many

years it does not follow that the Irish State is obliged to facilitate its reconstitution in Ireland."

6. These themes are returned to in paragraph 1.7 which includes the following:-

"1.7 It is also important to remember that family reunification must be seen in a wider context of public policy where there are often competing social and particularly economic interests. Thus the fact that it may be to the benefit of a family with non-EEA family members to reside together in Ireland does not necessarily mean that the correct public policy response is to facilitate this request. In considering applications from family members INIS must, of course, establish at the outset that there is a genuine family relationship in existence. In relation to considering the interests of the community as a whole INIS must ensure, as far as possible, that there is no threat to public policy, public security or public health, that there is no abuse of family reunification arrangements and that there is not an undue burden placed on the taxpayer by family members seeking to reside in the State..."

7. Paragraph 1.12 of the Policy Document makes it clear that the Minister's discretion permits exceptions to be made in appropriate cases:-

"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 an appropriate and proportionate decision would be positive."

8. Part 8 recognises that immigration can sometimes bring economic costs to the State in areas such as education, housing, healthcare and welfare arising, and although it makes it clear that family reunification assessments are not solely financial assessments:-

> "8.3 … Nevertheless, 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. …
>
> 8.4 It is a question of finding the correct balance between rights and responsibilities. All other things being equal however, a non-EEA resident of Ireland in active well paid employment will have a considerably greater opportunity of being joined by family members that a person who is subsisting on State supports. Indeed a person who is unable to support himself/herself cannot expect the State to assume the necessary financial obligations on his/her behalf."

9. Part 14 of the Policy Document sets out the guidelines for dependency which means that it must be shown that the family member (other than minors) must be (i) supported financially by the sponsor on a continuous basis and (ii) that there is evidence of social dependency between the two parties.

10. Paragraph 17.2 of the Policy provides:-

> "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."

Chronology of Events

11. A fuller chronology is set out in the High Court judgment and I will confine myself to a shorter summary. The first appellant is an Algerian national who came to Ireland in 1998 when he was in his thirties and unsuccessfully applied for asylum. On 7 March 2005 he married an Irish citizen and was granted permission to remain on the basis of this marriage. The couple had one child, the third appellant, who was born in 2005. In 2015, the first appellant became a naturalised Irish citizen. He and his (first) wife divorced on 28th March 2017, having been separated for seven years. The first appellant has a limited history of employment in the jurisdiction and was, at the time of the application, in receipt of Jobseekers Allowance. He was last employed in 2017.

12. The first appellant married the second appellant in Algeria on the 29th April 2017. In his grounding affidavit he said the following about the circumstances of their marriage:-

> *"We knew each other as children, and we were reintroduced as adults in November 2016, as our parents had agreed that we would be well suited as husband and wife and had arranged this meeting. We got on well during this time, and I returned to Algeria in April 2017 in order to marry the second Applicant. We were married on the 29th April 2017 in Algeria. We are in regular contact and have been hoping to be able to live together in Ireland. We have been doing everything we can to make this happen."*

13. On the 11th September 2017, the second appellant applied for a long-stay join-family visa through the embassy of Ireland in Abu Dhabi. On the 16th of November 2017 the visa application was refused. The reasons included: that the sponsor failed to meet the financial criteria set out in the Minister's Policy Document on Non-EEA Family Reunification; that

the grant of a visa could result in cost to public funds and resources; and that insufficient documentation had been submitted to show the existence of a substantive and continuous relationship. A fuller description of the first instance decision is set out in the High Court judgment. It may be noted that the application at first instance made no mention of the first appellant having a daughter within the State.

The appeal from the first instance visa decision

14. On the 12th January 2018, the appellants' solicitors submitted a letter of appeal. It said that the first appellant suffered from a chronic respiratory condition (asthma and bronchitis) which causes severe breathing problems and respiratory infections, and that this impacted on his capacity to work. It said that in the year 2017 he was dismissed from four separate jobs as a chef in different locations because he was required to take extended sick leave due to infections contracted shortly after commencing employment in each of those jobs. It stated that the first appellant had a strong wish to gain employment and continued to seek further work. He had never applied to have his fitness for work assessed for social welfare purposes although "*the factual evidence would suggest that he is not fit for work due to his medical condition and…. would qualify for a disability allowance if he were to apply for same*". As the impugned decision would later point out, this was incorrect; information from the Department of Social Protection showed that he had made such a claim and that it was disallowed in 2012.

15. This letter also referred (for the first time) to the fact that the appellant was the father of a child from his first marriage. It referred to a letter from his first wife, the contents of which are set out below. It was said that this information had not previously been provided because the application had been prepared without professional legal advice and the first

two appellants were not aware of its relevance. The rights of the child under Article 41 of the Constitution and Article 8 of the Convention were cited in support of the application.

16. It said that the first appellant was very anxious to enjoy a normal marital relationship with his wife but could not do so without visa approval. It said that he had not travelled to Algeria since his wedding in April 2017 because he was hoping that his wife's visa application would be approved and he could not spend lengthy periods of time away from Ireland because of his responsibilities to his young daughter. It was said that the first two appellants spoke to each other daily by phone and that she used international pre-paid call cards although this meant there were no documentary bills to show their phone communications. Since September 2017 they had been using Facebook messaging to keep in contact with each other. They also enclosed a photo of themselves in Algeria following their wedding.

17. The letter acknowledged that the first appellant was not in a financial position to support his spouse financially within the State, but said that the second appellant held third level qualifications in business administration. She was not formally employed in Algeria but was using her qualifications to teach students in her home and to mark exam papers, and it was envisaged that she could use these qualifications to find employment in Ireland.

The supporting documents submitted by the appellants to the Minister

18. In addition to formal identification documents, birth and marriage certificates, the following accompanying documents were submitted to the Minister in conjunction with the above and a later letter from the appellant's solicitor:

- A signed letter from the child's mother (the appellant's first wife) dated 8 January 2018;

- A copy of a letter from Tusla (Child and Family Agency) dated 12 January 2016;
- 28 messenger screenshots from 2017, in which many of the messages (in French) are very short such as “good night” or “I love you”;
- One photo of the first and second appellants together;
- Flight details in the first appellant’s name for flights between Ireland and Algeria in November 2016 (described as being “following his first face to face meeting with his wife in Algeria”);
- A very brief letter from a general medical practitioner;
- Two P45 forms from 2017 in respect of termination of employment at two of the four jobs mentioned in the letter;
- A contract of employment as a chef at a third job referred to above commencing 4/9/2017 signed 4/9/2017and unsigned by hotel representative;
- A copy of an advanced Vocational Diploma in Data Processing obtained by the second appellant in 1999;
- Copies of certificates of a Bachelor in Business Administration (Business Data Processing) obtained by the second appellant in 2008;
- A Certificate for engineer in business data processing awarded to the second appellant from the higher international management unit and the Paris Graduate School of Management (2009);
- A letter dated the 9th January 2018 from the father of the second appellant explaining the circumstances of the marriage of his daughter to the first appellant;
- A letter dated the 9th January 2018 from the mother of the first appellant explaining the circumstances of their marriage.

19. The limited content of some of the above documents is important. The **2016 letter from Tusla** refers to "*ongoing assessment of the education provided to the child which was carried out*" by a named person and states that under the legislation "*you are entitled to comment on the report and we are enclosing a copy of the ongoing monitoring review report*" and invites comments. This letter makes no mention of any particular diagnosis in relation to the child but instead merely mentions "*ongoing assessment of the education of the child*". No copy of any report, draft or otherwise, was furnished either with this letter or at any later stage.

20. The **letter from the child's mother** (the first wife of the first appellant) stated as follows:

> "I hereby confirm that my daughter… is homeschooled, due to extreme problems she encountered in the school environment caused by her having autism spectrum disorder (diagnosed by CAMHS). These issues at school eventually led to school refusal on her part, leaving me with no choice but to homeschool. Although I provide the main academic part of the homeschool, [the child's] father [the first appellant] does provide significant support for the process, primarily due to getting [the child] to meet ups, homeschooling events and extracurriculars, homeschool classes, and social activities. Unfortunately I am unable to drive, so this assistance is vital for us…. Another area of support that [the first appellant] provides to [the child]… is helping us with household chores and errands. He also looks after [the child] when I need to do things like the weekly shopping, which [the child's] condition makes it exceptionally difficult to do with her there with me. In addition to providing all of this practical support and assistance, [the first appellant] also has a good relationship with his daughter and visits

her here a few times a week, and takes her to places such as the cinema, restaurant or bowling."

21. The **letter signed by the general medical practitioner** dated 21 November 2017 says that *"[the first appellant] is attending here as a patient since 2006 and has been treated for conditions outlined below and has been unable to work at times due to respiratory problems: 1. Bronchiectasis; 2. Asthma; 3. Laparoscopic Appendicectomy"*. [The word "Bronchiectasis" had beside it the date 01/01/2006]. The phrase "*at times*" may be noted. I would endorse what the High Court judgment said about this letter at paras 17 and 18 of his judgment:

> "17. …Without for a moment purporting to step into the shoes of the decision maker, a number of comments can fairly be made as to what the letter from the first applicant's doctor says and does not say. It does not say that the first applicant suffers from a chronic respiratory condition. Although it certainly says that the first applicant has been "unable to work at times due to respiratory problems", it is entirely silent about the number, frequency and duration of those "times". In objective terms it goes no further than confirming that on occasions which are unspecified, the applicant has been unable to work due to respiratory problems. The letter is also silent about how serious or not these respiratory problems have been in the years (2006 – 2017) during which the first applicant has been a patient of the practice. No mention is made of what treatment was necessary and, to the extent provided, whether that treatment was or was not effective. The letter is also silent about whether, for example, certain types of employment, as opposed to others, would be possible notwithstanding the respiratory problems. The letter does not say that physical demands of work exacerbate the first applicant's condition. Nor does it say that these demands increase his exposure to the

risk of infection. The letter does not state that in 2017 the first applicant was dismissed from four separate jobs because he was required to take extended sick leave due to severe respiratory infections.

18. From an objective perspective it could not be said that the doctor's letter comprises medical evidence supporting all of the various submissions made by his solicitor as to what his solicitor describes as severe breathing problems and respiratory infections as well as the consequences of same."

22. The **letter from the second appellant's father** explained that the two families were from the same village and knew and respected each other. He said that the first appellant "*came to the country in November he stayed 10 days, which gave my daughter time to go out with him and to know him"* and that "*our two families have fixed the appointment of the wedding at the end of April which gives us time to make the wedding preparations".* He then describes the wedding ceremony itself.

23. The **letter from the first appellant's mother** says that the two families knew each other for a long time as they were neighbours, that the second appellant studied engineering, and that she (the mother) proposed to her son that he might remarry and create a family. Curiously the letter contains the following sentence: "*I am a mother who is worried about the well being of her son, who has been separated from his wife (your wife's name) (sic) for years…."* As the impugned decision would later point out, this seems to suggest that the letter's author was not aware of the first appellant's first wife's name and was leaving a blank for him to fill in (which was overlooked).

24. With regard to the documentation in respect of the second appellant's qualifications, I would again endorse what the High Court judge said:

"24. …..[a]gain, without for a moment purporting to usurp the role of decision - maker, it is entirely fair to say that no evidence was provided in respect of (i) any qualifications the second applicant gained after 2009; (ii) any income earned as a result of any formal employment in Algeria which the second applicant engaged in subsequent to obtaining her qualifications; or (iii) any evidence with regard to any earnings from informal employment of the type described in the submissions (namely offering "grinds" and marking exam papers)."

25. By a decision dated the 21st March 2018, the Minister upheld the refusal of the visa. A first set of judicial review proceedings were then issued but were settled, and pursuant to the terms of the settlement the Minister reconsidered the appeal. On the 18th February 2019 the appellants' solicitors wrote to inform the Minister that nothing in the application had changed. On the 7 May 2019 the Minister again upheld the decision to refuse the visa. A second set of judicial review proceedings were brought, and again these were settled, and again the Minister reconsidered the appeal pursuant to the terms of the settlement.

26. By letter dated 20th May 2021, the appellants updated their submissions for this appeal, adding the following documentation;

- Details of flight tickets between Ireland and Algeria in the first appellant's name in April to May 2019, and November 2018
- Scans of passport stamps on the first appellant's passport which accord with the dates on the flight tickets submitted
- Six images purporting to be screenshots of video calls between the first and second appellants, three of which appear to be taken on the same occasion
- Documentation showing a rental agreement concerning the appellant

27. By decision dated 20th August 2021 ("the impugned decision"), the Minister decided to refuse the appeal and uphold the refusal of the visa.

The content of the impugned decision

28. The Minister's decision of 20th August 2021 refusing the appeal from the first instance decision consisted of a cover letter accompanied by a 26-page document. After setting out the background to the application, it dealt with matters under various headings, including:

- Relationship History/Evidence of contact,
- Financial Situation of the applicant,
- Financial situation of the sponsor,
- Accommodation details of the sponsor,
- Other Information,
- Assessment under the Policy Document on Non-EEA Family Reunification,
- Consideration under Article 41 of the Constitution'
- Consideration under s3 of the European Convention on Human Rights Act 2003 having regard to Article 8 of the ECHR.

29. Under the first of those headings (Relationship History/Evidence of Contact), it referred to the various letters and affidavits and other evidence submitted. It noted that the first appellant had said that he had known his wife since 2014 and they decided to marry in April 2017, that they came from the same village in Algeria and were known to each other as children and were formally introduced to each other as adults in November 2016 with a

view to marriage. It noted that the second appellant's father said that he knew the first appellant's father since he was young and that the first appellant came to them in November 2017 and stayed for 10 days and the families fixed an appointment for the wedding at the end of April. It noted that they asserted that they speak daily by phone, that they used prepaid call cards, and that since September 2017 they were using Facebook messenger to contact each other. It referred to the 28 screenshots of messages on Facebook in November and December 2017 and on 31 December 2016, noting that the messages submitted were not in English and appeared to be brief. It then referred to the photographs submitted, commenting that the solicitor had stated that these were evidence of the sponsor's video chats with the second appellant, but observing that the photographs were undated and did not contain the usual additions that one would expect to see in such screenshots such as a Skype logo, or information bar from the top of a mobile phone. It also noted that three of the screenshots appeared to have been taken on the same occasion. It observed that the first instance visa officer had noted that some of the twelve photographs of the two appellants appeared to show them on their wedding day. It referred to the single photograph that was enclosed with the description in the solicitor's letter that this showed them "*enjoying a day out together in a local area of scenic beauty as evidence of the genuine nature of their marital relationship*". It then refers to matters such as the passport/ID documentation as well as the flight information/documentation.

30. The document then summarised the financial situation of each of the appellants, noting the qualifications of the second appellant but observing that no documentary evidence had been submitted to support the statement that the second appellant was teaching students and marking exam papers in Algeria. It set out details of the financial information submitted including bank transfers. It sets out the information submitted in relation to the first appellant's employment as well as information by way of a utility bill at his address and a

partial copy of the tenancy agreement showing a rent amount. It noted the information submitted in relation to his capacity to work and the letter of the general practitioner.

31. The document went on to describe the letter from the child's mother and the document from Tusla and noted the Tusla letter did not contain any diagnosis and that no other documentary evidence has been submitted in relation to the stated diagnosis.

Financial eligibility under the Policy

32. Having set out all of the above, the impugned decision turned to the Policy Document, starting with the eligibility of the sponsor. It referred to the employment history of the first appellant and noted that he stated that he wished to be in employment. Information had been obtained from the Department of Social Protection and from the Revenue which showed his earnings. It noted that as the first appellant was in receipt of Jobseekers Allowance and therefore could claim further assistance for a dependent spouse and as such, "*a cost to public funds and resources in all probability would arise as a result of a grant of a visa application*". It concluded that the first appellant did not meet the financial criteria to sponsor an immediate family member as set out in paragraphs 17.2 (income threshholds set out earlier) and 17.5 9 (the latter concerns savings) of the Policy Document, and in all probability the grant of the visa would result in immediate reliance on public funds and resources.

33. The document also considered the evidence submitted to demonstrate financial support by the first appellant of the second appellant and concludes that it was insufficient to show that the second appellant received those funds from the first appellant.

Social Support

34. Under the heading of social support, the document stated that insufficient documentary evidence had been provided to show evidence of a relationship in existence prior to marriage. It noted that there were inconsistencies in the statements concerning when they had been reintroduced to each other as adults (as between a letter from the first appellant submitted at first instance, the letter of appeal in January 2018 and the affidavits of the parties, and the letter of the first appellant's father). It commented, in relation to the letter from the first appellant's mother, that she referred to the second appellant as "*my beautiful daughter N*", and observed that it was unclear why she would refer to her son's wife as her daughter. It also noted that the did not use the name of his first wife in referring to her, and instead used the words "*your wife's name*" (i.e. as if the draft letter was requesting the first appellant to insert her name because it was not known to its author). The document commented that "*given that the sponsor married his first wife in 2005, … has a child with his first wife and that he is stated to be in regular contact with her, it would be unusual for his mother not to know her name*". This seems to me to be a fair point although only a very minor one in the overall mix.

35. The impugned decision went on to list the documents submitted in connection with trips to Algeria, photographs, messages and so on, and said that the evidence was deemed insufficient as evidence of relationship history/ongoing evidence of contact between the first two appellants. It observed that while the first appellant clearly travelled to Algeria on six occasions between November 2016 and December 2019, this was not sufficient as evidence of ongoing contact with the second appellant in circumstances where he himself was also a citizen of Algeria (as well as Ireland) and had family there. No evidence that he met with her on his four visits to Algeria in 2018 and 2019 had been submitted. It referred to the

Facebook messages, noting the dates, that they were not in English and appeared to be brief. The same comments in relation to the Facebook messages were repeated (as set out above). The impugned decision then states as follows:

> "The visa appeals officer is not satisfied that the applicant has provided sufficient evidence of ongoing contact prior and subsequent to their marriage. Insufficient evidence of for example but not limited to telephone calls, Skype communications, emails or cards sent for social occasions such as birthdays etc. between the applicant and the sponsor has been submitted".

36. It noted that the onus of proof as to the genuineness of the family relationship rested squarely with the applicant and sponsor. It referred to due regard being had to "*decisions which the family itself has made*", and observed that their contact appeared to have been almost entirely long-distance in nature. It again noted that there were inconsistencies as to when they met again as adults and that insufficient documentary evidence of ongoing contact between them have been submitted.

The child

37. In relation to the child, the impugned decision said that insufficient documentary evidence had been submitted to support the statements in the letter from the child's mother. It noted that the Tusla letter made no mention of the reason for her homeschooling and that no documentary evidence that she had been diagnosed with ASD had been provided nor had any documentary evidence to support the first appellant's involvement in her life been submitted. It said that it was not evident whether the child was aware of his marriage to the second appellant. No custody agreement had been submitted and it was unclear whether he had custody of his daughter.

Employability of the appellants

38. In relation to the first appellant's health and ability to find employment, the decision noted the general practitioner's letter and observed that it is not clear from the letter what was meant the first appellant has been unable to work "*at times*". It noted that two letters in relation to appointments at a medical clinic and a hospital in 2017 were furnished but that there was no further documentary evidence regarding the nature of those appointments.

39. It noted that the solicitor's letter had stated that the first appellant had not applied for disability allowance but that this was inconsistent with information from the Department of Social Protection which showed that he had such a claim which was disallowed in 2012. It also noted that he had been in receipt of Jobseekers Allowance since he ceased employment in September 2017, almost 4 years ago, despite his stated strong wish to be in employment.

40. As to the second appellant's employability within the State, it stated that insufficient documentary evidence had been provided in this regard. Her most recent qualification submitted was from 2009, and there was no documentary support for the statement that she was teaching students and marking exam papers. It was also noted that no documentary evidence had been submitted to show her competence in English.

41. The decision referred to a submission made by the solicitor for the first appellant that the cost of living in the rural part of the country in which he lived was much lower than Dublin and should be factored into the decision. However, it noted that the partial copy of the tenancy agreement submitted was approximately three and a half years old and there was no contemporaneous evidence showing that he continued to live at this address or what is

current rent was, nor any recent bank statement showing his outgoings such as rent paid. The decision went on to say the following:

> "While there is an obligation on the Minister to consider each case on its individual merits, she is entitled to take into account the consequences of allowing a particular applicant to enter and remain in the State where that would inevitably lead to similar decisions in other cases. It is noted that this particular relationship has been almost entirely long-distance in nature. Insufficient documentary evidence has been submitted to demonstrate that the applicant and the sponsor ever resided together as a family unit. It is a relationship that is capable of being sustained in the same manner in which it was developed, whether by way of visits, telephonic and electronic means of communication, without the grant of a visa to the applicant. Based on the foregoing, it is submitted that the circumstances in this case do not warrant an exception being made".

42. The reference to exceptionality was of course to the Minister's Policy Document and in a context where the first appellant did not meet the financial eligibility criteria. The conclusion in this section of the impugned decision was that the sponsor had failed to demonstrate that he met the financial criteria in the policy document on the granting of the visa; may result in an immediate cost to public funds and public resources; that insufficient documentary evidence of ongoing social or financial support between the applicant and sponsor had been provided; insufficient evidence of relationship prior or subsequent to the marriage; and that having considered all the information submitted with the visa application and the appeal, the second appellant had not demonstrated that the circumstances were sufficient to warrant the granting of the visa sought as an exceptional measure.

The Article 41 analysis

43. The next section of the impugned decision conducted an analysis pursuant to Article 41 of the Constitution. It referred to paragraphs 26, 28 and 69 of the Supreme Court decision in *Gorry* and commented:

> Consequently, while it is recognised that the sponsor in the within case, as an Irish citizen, has a right to live in Ireland and an individual right to marry and found a family, there is no separate unspecified right to cohabit protected by article 41, albeit that cohabitation is a normal incidence of marriage. In addition, as the applicant in the within case is a non-EEA national, they do not have the right to enter or reside in the State and do not acquire such a right to enter or reside in the state by dint of marriage to an Irish citizen.
>
> While cohabitation by a married couple in a committed and enduring relationship is something the State is required to have regard to in its decision-making and to respect, the State is not obliged by the requirement to protect the institution of marriage, to a court any automatic immigration status consequent on a marriage.
>
> Further, the State has the right to pursue immigration control, uphold immigration law, and prevent disorder or crime. In addition, the State has a right to ensure the economic well-being of the country. Consequently, the visa appeals officer must take into account that costs to public funds and public resources may, as a consequence, arise from a decision to grant an application, for instance in relation to, but potentially not limited to, so how a decision may lead to similar decisions in other cases.
>
> In the within application, all factors relating to the position and rights of the family/couple have been considered and these have been considered against the rights

of the State. In weighing these rights. It is submitted that the factors relating to the rights of the State are weightier than those factors relating to the rights of the family/couple.

44. The decision then proceeded for a second time to set out the relationship history as described above, together with the same observations as to the insufficiency of evidence in relation to particular matters. It commented that "*while it may be the case that the sponsor and the applicant would prefer to maintain and intensify their links in Ireland, the right to family life under the Constitution does not guarantee a right to choose the most suitable place to develop family life*". It referred again to the financial and employment situation and the position of the child and repeated the observations about the documentation furnished. It said at one point:

> In considering whether family life could be established elsewhere, insufficient information has been submitted demonstrating that the sponsor would be prevented from continuing to travel to Algeria to visit their spouse and maintain relationship in the manner in which it developed or that it is more difficult or maybe extremely burdensome for the applicant and sponsor to reside together anywhere else, be that in the applicant's home State or any other State of their choosing. I acknowledge the fact that the sponsor is the parent of an Irish child who was 15 years old; however, it is stated in the application of this child resides with her mother, her primary care giver. It has been stated the sponsor's daughter has been diagnosed with autism spectrum disorder; however, no documentation to substantiate this claim has been provided. No documentation has been submitted to substantiate the claims in [the mother's] letter that the sponsor plays an active role in this child's life. No documentation has been submitted to indicate that the child has met with or spoken with the applicant. No document has been submitted to indicate that this child is even aware that her father is

married to the applicant. The full rights of the sponsor's daughter as an Irish national and as a consequence an EU citizen will be dealt with in [a later section] below. It should also be noted that a decision to refuse a visa application, in respect of the applicant, after appropriate consideration of the facts, is not valid merrily because it affects spouses desire to cohabit in Ireland. All factors relating to the position and rights of the family/couple have been considered and these have been considered against the rights of the State. In weighing these rights, it is submitted that the factors relating to the rights of the state are weightier than those factors relating to the rights of couple. In weighing these rights, it is submitted that a decision to refuse the Visa application in respect of the applicant is not disproportionate as the State has the right to uphold the integrity of the State and to control the entry, presence, and exit of foreign nationals, subject to international agreements and to ensure the economic well-being of the country.

Analysis under EU law

45. The decision then turned to consider matters under Article 20 of the TFEU and Article 7 of the Charter of Fundamental Rights of the European Union and the obligation to take into consideration the child's best interests, recognised in Article 24 (2) of the Charter. It referred to the decision in *Zambrano* (Case C-34/09, 8th March 2011) and considered whether the decision to refuse the visa would force the child to leave the European Union and deprive her of the genuine enjoyment of the substance of her rights as an EU citizen. It noted that the child is currently residing with her mother as she has done since she was born. It referred to the decision in *Neulinger & Shuruk* (application number 41615/07, 8th January 2009) where the court referred to the international consensus that all decisions concerning children must have their best interests as the paramount consideration. The impugned

decision said that this was being taken into account, noted that she lives with her mother, that her father was said to visit her a few times a week, and that her father elected to travel to Algeria on six occasions between November 2016 and December 2019, and said that her relationship with the first appellant "*as it is known to this office*" did not demonstrate that the child would be without the care and company of her father. No custody arrangements had been provided nor any evidence that her father proposed to relocate to Algeria. Accordingly there was no evidence to suggest that the refusal of the visa would result in the child losing the care and company of one of her parents. Reference was made to the facts established and evidence that was not submitted (it is not necessary to repeat those) and reference was made to the decision in *Dereci* (Case C- 256/11, 15th November 2011). The decision-maker then concluded that, based on the information submitted, it was reasonable to conclude that the refusal of the visa would not result in the child inevitably having to leave the territory of the European Union or that the refusal of these that would be detrimental to the child's best interests.

Analysis under the ECHR

46. The next section of the impugned decision considered Article 8 of the ECHR. It accepted that family life existed between the first two appellants within the meaning of Article 8. Reference was made to *Abdulaziz* (1985) 7 EHRR 471 (application number 9214/80; 9473/81; 9474/81, 28th May 1985) which was said to establish certain principles (no general obligation on a State to respect the choice by married couples of the country of residence; wide margin of appreciation by States; relevance of obstacles to establishing the marital home elsewhere and whether there are any special reasons why they should not be expected to do so; and whether they were aware of the problems of entry and limited leave available at the time of marriage). It noted that nationals of Algeria are subject to an Irish

visa requirement and that the appellants had entered into a marriage at a time when the second appellant would have no expectation of any entitlement to enter into or reside in the State and that they would reasonably have been aware of this at the time they entered into the marriage.

47. It referred to the European Court's acceptance of the principle that a State has the right to control the entry of non-nationals into its territory, to pursue immigration control and to ensure the economic well-being of the country. It noted that consideration may be given to the impact of granting the visa application on the health and welfare system in the State and how a decision may impact on similar decisions in other cases. It said that there was no general obligation to authorise family reunion and that the facts of each case must be considered. Factors to be considered include whether the applicant coming to the State to reside with their sponsor constituted the best way of developing family life with the family as it exists.

48. The decision then referred to *Nunez v Norway* (application number 55597/09, 28th June 2011). It commented that the principles established in the caselaw had to be considered when determining whether family life can be established elsewhere, saying: *"in particular, to be considered when determining whether there are any unreasonable restrictions to establishing family life elsewhere is whether, where an obstacle exists, is it an obstacle which can be realistically or reasonably overcome*".

49. The decision then expressly took into consideration that the first appellant was the parent of a minor child and proceeded to traverse much of the ground described earlier in relation to the evidence. It concluded that: "*while it may be the applicants and sponsor's*

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". It concludes that in refusing the visa application, there was no lack of respect for family life under Article 8 and no breach thereof.

Reliefs sought in the Judicial Review proceedings

50. The primary reliefs sought by the appellants were an order of certiorari quashing the impugned decision and an order directing that the application be remitted to the respondent for full reconsideration.

51. The grounds relied on can be summarised as follows: (1) the Minister erred in law and acted in breach of the appellants' rights under Article 41 of the Constitution and applied an incorrect test in considering the rights of the first appellant to have his spouse live with him in the State: (2) the Minister failed to provide clear and persuasive justification as to why the application should be refused and instead relied upon generalised matters such as the right to pursue immigration control, uphold immigration law, and ensure the economic well-being of the country: (3) the Minister erred in taking the view that their married life could reasonably be sustained by way of visits, or telephone and electronic means of communication, and thereby acted in breach of their rights under Article 40.1, 40.3 and 41 of the Constitution, and/or Article 8 and/or 12 and 14 of the European Convention on Human Rights: (4) the Minister acted unreasonably and irrationally in finding that exceptional circumstances had not been shown for the purposes of the Policy Document: (5) the Minister acted unreasonably and irrationally in finding that the appellants did not meet during any of the first appellant's visits to Algeria since 2016 apart from on the occasion of their marriage in 2017: (6) the Minister acted unreasonably and irrationally in finding that there was not

ongoing contact between the first and second appellants or that such contact was insufficient: (7) the Minister acted unreasonably and irrationally in finding that the screenshots of video chats between the first and second appellants were not screenshots of such video chats: (8) the Minister acted unreasonably and irrationally in finding that the child was not homeschooled for reasons related to her condition of ASD and that she does not in fact suffer from this condition: (9) the Minister acted unreasonably and irrationally and unlawfully fettered her discretion in imposing an absolute requirement of documentary evidence in respect of all factual assertions: (9) the decision of the Minister is invalid due to a fundamental lack of clarity in particular aspects: (10) the Minister acted unreasonably and irrationally in finding that the appellants had not shown that it would be more difficult or maybe extremely burdensome for them to live together anywhere else: (11) the Minister erred and acted unreasonably and irrationally in finding that the appellants must show evidence of a relationship in existence prior to the marriage and evidence that the spouse who was not an Irish citizen is financially dependent on the Irish citizen spouse: (12) the Minister acted in breach of section 3 (1) of the European Convention on Human Rights Act 2003, with particular reference to Article 8 of the Convention.

The High Court judgment

52. In a judgment delivered on 30th September 2022 the High Court refused all of the reliefs sought and upheld the decision of the Minister. The judgment is a lengthy one in which the arguments of the parties were examined in great detail. It set out the factual background and carefully examined the decision in *Gorry,* and examined the issues under thirteen different headings. The full judgment may be read at [2022] IEHC 536. I will refer further in the course of this judgment to key aspects of the High Court judgment when dealing with each of the issues raised on appeal.

The parameters of the appeal

53. The Notice of Appeal sets out a number of grounds of appeal which may be paraphrased and summarised as follows. It is said that the High Court judge: -

- Erred in finding that the impugned decision was in compliance with the legal principles set out in *Gorry*, and in accepting that the first and second appellants could sustain their marriage indefinitely through holiday visits and messaging, and failed to acknowledge cohabitation as a basic incident of marriage;

- Erred in finding that the findings of fact were not unreasonable or irrational and flowed from the evidence in relation to a number of specific issues: (a) whether the child was homeschooled for reasons relating to her condition of autism spectrum disorder: (b) whether the child in fact suffers from autism spectrum disorder at all; (c) whether the first appellant plays an active role in the child's life; (d) whether the first two appellants met during any of his visits to Algeria since 2016 apart from the occasion of their marriage in 2017; (e) whether the first two appellants are in daily contact; (f) whether the screenshots of video chats were in fact screenshots of such video chats;

- Erred in his approach to the assessment of evidence: matters put forward on behalf of the appellants were required to be either accepted or rejected on the balance of probabilities but the High Court judge approved the creation of a third category whereby a matter asserted is neither accepted nor rejected but rather is put to the side and not taken into consideration on the basis that insufficient evidence supporting it has been put forward. In the context of a paper-based immigration application, the Minister may not dismiss important matters as fact

unless the respondent can reasonably say that what was put forward is probably not true and are finding should be made one way or the other. Further or in the alternative, the standard of proof was set too high;

- Erroneously dismissed the letter from the child's mother;

- In interpreting the Court of Appeal decision in *Abbas v Minister for Justice* [2021] IECA 16 as authority for the proposition that signed but unsworn statements cannot constitute evidence in the context of a paper-based immigration application; or alternatively that *Abbas* should not be followed insofar as it supports the proposition;

- In finding that this was not a case where a balancing exercise pursuant to article 8 (2) ECHR should have been carried out, in light of the Supreme Court's subsequent decision in *MK (Albania) v Minister for Justice and Equality* [2022] IESC 48 (which found that the approach taken by the Court of Appeal in *CI v Minister for Justice, Equality and Law Reform* [2015] IECA 192; [2015] 3 IR 385 was erroneous);

- In failing to engage with the argument as to whether a finding was made that the situation of the child would make it unreasonable to expect the first appellant to move to Algeria to live with his wife; and therefore failing to consider the best interests of the child;

- Erred in requiring the first two appellants to show evidence of a close relationship prior to their marriage and evidence of financial dependency on the Irish citizen spouse, when there are no such requirements under the policy;

- Failed to consider the fact that the Minister had not put the appellants on notice that evidence of the child's condition was insufficient or not accepted, in breach of fair procedures, relying on paragraph 21.6 of the Policy Document

- Erred in finding as reasonable and rational the conclusion that exceptional circumstances for the purposes of paragraph 1.12 of the Policy Document had not been shown and that the financial requirements accordingly should not be waived.

54. For the purposes of this judgment, I have grouped the grounds of appeal into three broad categories;

- That the High Court should have found that the Minister's assessment of the evidence in the case was flawed in a number of different respects ("the first issue – fact-finding by the decision maker");

- That the High Court should have found that the Minister failed properly to understand and apply the Supreme Court decision of *Gorry* ("the second issue - constitutional analysis");

- The High Court should have found that the Minister erred in failing to carry out an appropriate balancing exercise under Article 8(2) the European Convention on Human Rights ("the Article 8 ECHR issue").

55. I will set out the parties' respective submissions on these issues on an issue-by-issue basis followed by analysis and conclusions on that issue. I preface this by indicating the parameters within which this exercise should be conducted.

The approach of an appellate court in this type of appeal

56. It should be borne in mind that this is an appeal from a decision of the High Court which in turn consisted of a review of a Ministerial decision within the parameters of judicial review proceedings. All of the issues argued on the appeal must be viewed through that prism. As the High Court judge pointed out, the exercise he was required to conduct was not an appeal on the merits from the Minister's decision, and similarly this appeal is not an appeal on the merits but rather an appeal from a High Court decision on judicial review.

57. This being so, it is necessary to consider what was said by this Court in *A.K. v. U.S.* [2022] IECA 65 (judgment delivered by Murray J., Haughton and Barniville JJ. concurring). Having discussed caselaw such as *Hay v. O'Grady* [1992] 1 IR 210, *Ryanair v. Billigfluege.de GmbH* [2015] IESC 11, and *Minogue v Clare County Council* [2021] IECA 98, Murray J. pointed out that appeals (and indeed distinct issues within appeals) of different kinds fall on a variety of points along a spectrum and that different standards of review fall to be applied depending on the nature of the issue(s) arising in the appeal. He identified, at one end of the spectrum, cases such as those involving issues of pure law where the appellate court simply forms its own view, while at the other end of the spectrum lay findings with which an appellate court would interfere only in very limited circumstances, such as cases where the trial court has heard oral evidence and made findings of fact. Murray J identified an intermediate category which involved (a) findings based on affidavit or documentary evidence alone, or (b) what Humphreys J. had described in *Minogue* as "*secondary findings of fact that are not dependent on oral evidence such as inferences from admitted facts or those proven by way of oral testimony.*" In reviewing such findings, the appellate court is "*somewhat deferential.*"

58. The present case is not on all fours with *A.K. v. U.S.* however, because the latter involved child abduction proceedings in which, as is usual in such cases, the High Court itself had made findings of fact on the basis of affidavit evidence and the appeal was from that decision. The present case is one where the High Court was reviewing the Ministerial fact-finding within the parameters of the tests applicable in judicial review proceedings, such as whether there was any evidence before the Minister for the conclusions reached, or whether the conclusions were irrational or unreasonable, and this Court in turn is considered whether the High Court fell into error in its approach to how the Minister had conducted that exercise. The High Court was not itself the primary fact-finder. Matters such as (a) whether the findings of the Minister were unsupported by evidence or (b) there was a misinterpretation of the legal tests to be applied e.g. a misunderstanding or misapplication of *Gorry* or the jurisprudence of the ECtHR are essentially matters of law, although in practical terms of course they require some degree of scrutiny of the evidence put before the Minister and the conclusions reached and the connection (or lack of connection) between the two. However, it is important to maintain the distinction between fact-finding by the Court, and a judicial review of facts found by the Minister.

The first issue – fact-finding by the decision-maker

The High Court judgment

59. The High Court judge carefully examined each of the items submitted to the Minister on behalf of the appellants and the approach of the impugned decision to them. He drew a clear distinction between submissions to the Minister and evidence submitted in support of those submissions, and noted in particular (i) the gap between submissions concerning the first appellant's health situation and the terse GP report submitted (described earlier in this judgment); (ii) the gap between the submissions regarding the child's needs and the

information actually submitted; (iii) the gap between the assertions concerning the nature of the relationship between the first two appellants and the screenshots and messages submitted; (iv) the submissions and the bank statements concerning financial support of the second appellant by the first appellant. As to the general approach regarding fact-finding by the Minister, he referred to the comments in *Abbas* at paras 80-83 of the judgment of Binchy J.. He observed that comments by the Minister with regard both to the gaps in the evidence, as well as inconsistencies in the evidence, were not unreasonable or irrational. He did not find in favour of the appellants on any of the complaints put forward in respect of the Minister's approach to the facts.

The appellants' submissions on the first issue

60. I have grouped together under this heading a number of complaints as to how the High Court judge approached the decision-maker's assessment of the evidence submitted by them.

61. As a general criticism, the appellants submit that the Minister did not make clear determinations as to whether particular salient facts were true or not and/or had set the standard of proof too high. Counsel cites *ON v Minister for Justice and Equality* [2017] IEHC 13 and *H v Minister for Justice* [2019] IEHC 836 for the principle that that the appropriate standard of proof is the balance of probabilities.

62. A key factual issue in this regard was whether the child has Autism Spectrum Disorder (hereinafter ASD), and/or whether she requires to be home-school for reasons relation to her condition. It is said that the failure of the decision maker to reach conclusions on these issues in turn tainted various aspects of the judgment, for example, the obligation of the Minister to consider the best interests of the child and therefore the assessment of the overall

circumstances under both the constitutional principles under Article 41, and Article 8 of the ECHR. The appellants add that there was nothing to support the High Court's finding that the Minister may have reasonably accepted that the child had been diagnosed with autism but had placed little weight on it because the level of severity was not established. They cite Murray CJ in *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 in support of the proposition that any such exercise or rationale should be patent from the terms of an administrative decision.

63. Other key factual issues on which, it is submitted, the decision maker failed to reach clear conclusions included: (a) Whether the first appellant plays an active role in the child's life; (b) Whether the first and second appellants met during any of the first appellant's visits to Algeria since 2016, apart from the occasion of their marriage in 2017; (c) The question of whether the first and second appellants are in daily contact; and (d) Whether the screenshots of video chats between the first and second appellants were in fact what they purported to be.

64. The appellants submit that the High Court judge erred in interpreting the decision of the Court of Appeal in *Abbas v Minister for Justice* [2021] IECA 16 as authority for the proposition that signed but unsworn written statements such as that provided by the mother of the third named appellant in this case cannot constitute 'evidence' in this context, being a paper-based visa application. They also submit that if the decision in *Abbas* is to be read as authority for that proposition, it is incorrect and should not be followed.

65. In particular, counsel for the appellants argues that the Minister was not justified in dismissing what was said by the child's parents in relation to her autism as not amounting to 'evidence'. Counsel argues that it appears that the High Court judge conflated the concepts of 'documentary evidence' and 'medical evidence' and wrongly dismissed the

parents' evidence as falling into the category of 'submission'. Counsel also argues that paras 55 and 58 of the High Court judgment taken together can be seen as having conflated the evidential value of a solicitor's submissions with the evidential value of an applicant's own statements.

66. Counsel submits that the High Court judge erred in upholding as reasonable and rational the Minister's conclusion that exceptional circumstances (for the purposes of paragraph 1.12 of the Respondent's 2016 Policy Document) had not been shown and that the financial requirements of the said Policy Document accordingly should not be waived. Counsel submits that the present circumstances, where the second appellant has professional qualifications in computer programming and may reduce the burden her husband presents for the State, is similar to the factual matrix in *Khan v Minister for Justice* [2021] IEHC 789 where a decision to deny a spouse a visa was quashed by the High Court.

The Minister's submissions on the first issue

67. The Minister submits that the High Court's conclusions should not be disturbed, citing *Hay v O'Grady* [1992] 1 IR 210. The Minister submits that the High Court's conclusions were anchored in the correct principles of law: (i) There is a high threshold to meet in respect of a claim of unreasonableness and irrationality; (ii) The Minister's decision must be read as a whole; (iii) The qualitative assessment of the evidence is a matter for the decision-maker; (iv) It is not for the Minister to advise an applicant on their proofs; (v) The onus and burden of proof lay with the Appellants; (vi) No decision-maker can be expected to regard submissions as to a particular factual position as equivalent to evidence which establishes the facts to which those submissions relate; (vii) The absence of evidence; and (viii) Inconsistencies in the evidence before the decision-maker. The Minister submits that the

findings were ones which were reasonably open to the Minister to make on the evidence provided, as the High Court judge found.

68. The Minister also submits that the *Abbas* was correctly interpreted and applied. The Minister submits that the Court of Appeal in *Abbas* correctly differentiated between mere assertion and documentary or vouching documentation, and that a similar view had been taken by the Supreme Court in *Pervaiz v Minister for Justice* [2020] IESC 27.

69. The Minister submits that the High Court judge was entitled to find that, apart from the letter from the child's mother, no documentation had been submitted to substantiate the claim that the first appellant is involved in his daughter's life. Further. there was no expert evidence regarding any diagnosis of autism nor as to any specific needs and challenge arising out of her condition. The conclusions of the High Court as to the Minister's approach to these issues was therefore correct.

Analysis

70. At the heart of all of the appellant's submissions in the present case is the contention that the decision-maker erred fundamentally in how she approached the fact-finding exercise, and that the High Court judge erroneously failed to condemn the Minister's approach. This submission is not only a self-standing ground of appeal (or more accurately, group of grounds) of appeal but also forms an essential building block in the later submissions concerning the constitutional and Convention analysis respectively. Logically, therefore, it makes sense to deal with the issue of the decision-maker's approach to the factual findings in the first instance.

71. The key factual matters around which the arguments turned may be summarised as the following:

(a) whether the child was homeschooled for reasons relating to her condition of autism spectrum disorder;

(b) whether the child in fact suffers from autism spectrum disorder at all;

(c) whether the first appellant plays an active role in the child's life;

(d) whether the first two appellants met during any of his visits to Algeria since 2016 apart from the occasion of their marriage in 2017;

(e) whether the first two appellants are in daily contact; and

(f) whether the screenshots video chats were in fact screenshots of such video chats.

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.

75. Next it is submitted that *Abbas* does not support the proposition that signed but unsworn statements cannot constitute evidence in the context of a paper-based immigration

application, or alternatively that *Abbas* should not be followed insofar as it supports the proposition. In my view (and I note that Power J. took a similar view in *S.K. v. Minister for Justice and Equality* [2023] IECA 309) Binchy J. expressed the position entirely correctly when he said the following in his judgment in *Abbas* in relation to the evidential status of statements (and indeed affidavits) from applicants or other persons:

> 80. There was also included with the Application a two page statement of the first named respondent, in which he describes the dependency of the second named respondent on him, firstly in London between 2010 and 2011, then in Pakistan from November 2011 to January 2014, and then in Ireland from that time onwards. A further single page statement in support of the Application was provided by the first named respondent on 26th September 2017, in connection with the appeal of the First Decision. The statements also provide information about the first named respondent, in particular relating to the exercise by him of his EU travel rights. The statements contain substantially the same information set out by the respondents in their affidavits grounding these proceedings, as summarised under the heading "Background" at the outset of this judgment.
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> 81. As I have mentioned earlier, it was a matter of some controversy in the court below as to whether or not these statements constitute "evidence" in support of the Application. The trial judge took into account that the first statement made by the first named respondent was included as part of the Application, the standard form of which concludes with the stern warning that it is an offence to provide false information or make false statements for the purposes of the Application. He therefore considered it appropriate to accord the statement the status of evidence, in effect thereby accepting the contents of the statement in relation to matters of fact.

82. However, in my opinion, the legal character of the statements made by the first named respondent is not of any particular significance. If the statements had been sworn, then they would of course constitute evidence in a legal sense, but the contents of the statements, regardless as to their legal character (i.e. statement or affidavit) could never amount to anything more than mere assertion. For the purposes of such applications, the appellant clearly requires to be provided with supporting or vouching documentation in relation to the matters asserted therein. While the statements are necessary in order to provide the appellant with essential background information relating to the Application, and to give a context to assist in explaining supporting or vouching documentation provided by an applicant, it is really only the latter documentation that constitutes evidence i.e. it is evidence provided in support of the factual background relied upon by an applicant in his supporting statement(s). Without such supporting or vouching documentation, the appellant would have great difficulty adjudicating favourably upon an application for residency.

83. In short, the appellant cannot be expected to accept either the contents of an unsworn statement made or an affidavit sworn by an applicant for residency at face value, in the absence of supporting documentation. The quality of that documentation is obviously central to the consideration of such applications. On the other hand, it is not open to the appellant to ignore such statements either. Their credibility should be assessed in the light of the supporting documentation provided…

76. Likewise, in *Pervaiz*, the Supreme Court (judgment delivered by Baker J.) had (albeit in the context of the EU Citizens' Directive which uses the language of 'duly attested') drawn a clear distinction between assertions and evidence:-

> 113. The phrase used in the Citizens Directive that the durable relationship be "duly attested" does not sit easily in domestic legal parlance. I read that expression as requiring *that the applicant provide evidence, in whatever form is relevant and suitable in the light of his or her circumstances*, and that the Minister is to engage with that evidence not by the application of a general policy, but by reference to the individual facts and indicia of the relationship put forward by the applicant and established by evidence.
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> 114. That is not to say that the evidence must always be in documentary form, but can be a narrative explaining the context of the relationship, how it arose, how long it was endured, where the couple have lived, what elements of their life have been and are still interconnected, and any personal factors which they may wish to show to establish their commitment to one another. In that regard, it should be remembered that while many of the indicia of commitment are self-evident, some may be personal to the couple. They may, for example, celebrate the day they met, have particular places which have a special importance to them, and commitment is shown not only by formal public events such as an engagement to marry but by many other indicia, all of which are likely to be recognisable by members of the community in which the couple live and by society generally.
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> 115. *What is required, however, is something more than mere assertion. To say that the evidence must be "duly attested" requires that it be "evidenced*", and may, in a suitable case, be evidenced by oral evidence or narrative. Were an applicant required

> to notarise or establish definitely by documentary evidence that he and the Union citizen are in a committed relationship, the test would be impossibly high. What is required is evidence by which the relationship is proved or substantiated, and a proper reading of the Citizens Directive means that the criteria, whatever they are and however they are stated, must not impose too high a standard and make it impossible for a person to meet that standard. (Emphasis added)

77. In my view, drawing strict lines between what is considered "evidence" and what is not may ultimately lead into semantic distinctions which are unhelpful. The exercise in which the Minister is engaged is of an administrative/executive nature whereas the strict concepts relating to the law of evidence belong more properly to court proceedings. The reality is that the Minister must consider all the information put before her and that different types of information carry more weight than others. Common sense has to be brought to bear on the matter. Independent, documentary verification will necessarily carry greater weight than a bare assertion by an applicant or his/her solicitor. That is not to denigrate applicants as a group but rather to state the obvious fact that all applicants have an interest in the outcome. Solicitors usually have no direct knowledge of facts being asserted and are merely relaying their clients' instructions by way of letter or submission which is therefore both second-hand and non-independent information. Some facts are likely to be capable of being relatively easily supported by documentation; others are not, and a decision-maker is entitled to take into account whether one would expect certain types of supporting documentation or not. The failure to submit what would seem to be obvious documentation may be taken into account. Inconsistencies and incorrect assertions in what has been submitted may also be taken into account. A decision-maker is also entitled to consider the cumulative effect of the information submitted (and not submitted). It is ultimately, in my view, more a question of the weight to be placed on the different pieces and sources of

information and documents submitted, both individually and collectively, rather than a linguistic or legal question as to whether a particular item submitted falls within the category of "evidence" and some kind of notional category of "non-evidence". None of this is intended to disagree with what was said in *Abbas* or *Pervaiz* which in my view are simply and ultimately making the obvious point that some information/documents carry more weight than others.

78. It follows from the above that the Minister was entitled to look at all of the information and documents submitted and assess their weight in the round, having regard to the assertions made in documents such as letters and statements as well as the presence or absence of documentation or other source to support those assertions. It seems to me that the Minister in fact did so, and that the High Court was correct in so finding.

79. Let me now address some of the specific issues in respect of which it is said that the decision-maker shirked the duty to reach a conclusion or, alternatively, reached a conclusion which was irrational or unreasonable. Some of these relate to the child's circumstances. The Minister was furnished with a letter/statement from the child's mother, the contents of which have been set out above at paragraph 20. There was no supporting documentation showing there had been a diagnosis of ASD or that it had been advised that the child needed home-schooling. The only document furnished was a document from Tusla which contained the very little information and nothing of substance on those two issues (the diagnosis, or a need for home-schooling). It is clear from the existence of the Tusla letter that the State authorities have interacted with the child and her mother and one would, as a matter of common sense, expect there to be further documents from Tusla which could confirm (if it be the case) that the child has a formal diagnosis of ASD and requires homeschooling. Further, as the High

Court judge pointed out, the condition covers a wide spectrum of presentations and needs and there was no information at all where the child, even if she fell within the spectrum, fell on it.

80. I would therefore entirely endorse what the High Court judge said in this regard:

> 83. It is common case that no documentary evidence from any doctor or other professional, be they medical or educational, accompanied the visa application. Thus, there was no expert evidence regarding the diagnosis of ASD; or the effect of the diagnosis on the third named applicant, as regards needs or challenges. Thankfully we live in a world where there is increased awareness of neurodiversity. As commonly understood in society generally, ASD is a neurological condition which affects how a person learns, behaves, and communicates. However, the "Spectrum" referred to in the term "Autism Spectrum Disorder" appears to recognise the wide variation in the experience and presentation of those with the condition. It is fair to say that evidence as to the type and severity of symptoms experienced by the third named applicant was not put before the Minister. Thus, there was no evidence proffered as to the extent to which, if at all, the first named applicant met needs of the third named applicant which arose from ASD. The letter signed by SH referred to support provided by BB by way of driving (as SH was unable to drive). In addition, the letter stated that BB looked after AB when things like weekly shopping were being done. It was also said that BB had a good relationship with her, visits her a few times a week and takes her to places such as the cinema, restaurant, or bowling. It is fair to say that whether the "extreme problems" and "issues" referred to in the 08 January 2018 letter refer to treatment, by others, of the third named applicant at school (such as, for example, unkindness or bullying) or whether they relate to the third named applicant's symptoms is entirely

unclear. No additional clarity is provided in the 12 January 2016 letter addressed to [the child's mother] from TUSLA.

…..

84. The observations made by the Minister are objectively accurate. The letter from TUSLA neither refers to any diagnosis with ASD, nor states that the reason the third named applicant is being home - schooled arises from ASD. There is no reference to the type or severity of symptoms suffered by the child in question and nothing is said with respect to what particular or additional supports the third applicant might require consequent on a diagnosis of ASD.

81. Similarly, the information furnished in support of the assertion that the father had a close relationship with his child and played an essential role in her life was thin, with no photographs or evidence of communications or any other evidence showing contact between them. Again, common sense would suggest that in these modern days of technology, some evidence would exist showing his daily or weekly interactions with his own child, were the relationship as it was being described. In fact, and on the contrary, the situation was that the child's existence had not even been mentioned in the initial application for the visa. While the appellants seek to attribute this omission to the fact that the appellants did not realize its significance at a time when they were not legally represented, it is a rather surprising oversight if, as is subsequently claimed in support of the application, he plays such an important role in the child's life that it represents an insurmountable or significant obstacle to his living in Algeria with his wife.

82. Having regard to all of this, I cannot possibly see how the decision-maker can be criticised for finding there was insufficient evidence of the child's diagnosis; of the fact that

any home-schooling was related to the diagnosis; or of the depth of the father-child relationship and/or how essential he was to her daily or weekly routine. Nor can I see any basis for criticising the High Court's failure to condemn the Minister's approach in this regard.

83. I should add that I do not consider that the Minister was obliged to give notice to the appellants in advance of her view that the evidence was insufficient on these points. The Policy Document at para 21.6 provides that the appeals officer "*may* make further enquiries into any aspect of the application" (the language is permissive rather than obligatory), and that any decision to deny the appeal may be based on the original grounds for refusal or any new grounds he/she may consider to be justified but in the latter case the applicant will be given the opportunity to address any new grounds for refusal before a final decision is made. The present case is not one where decision-maker was refusing on the basis of a new ground. Quite apart from the Policy Document itself, I do not consider that there was any breach of fair procedures in circumstances where the appellants were identifying the child's condition and needs as a key plank of their case on exceptional circumstances, yet had provided no more than a personal letter to the decision maker in support the fundamental facts in relation to the condition and the child's needs.

84. As to the nature of nature of the relationship between the first two appellants, and even allowing for the customs in other religions and culture and confining ourselves to the post-marriage period, the evidence was again thin, to say the least. There were few photographs and some of those were from the wedding itself. The most recent one was from January 2018. The messages were brief and only covered a certain period. For example, the Facebook messages were from November and December 2017 and 31 December 2016.

There was evidence of the travel on the part of the first appellant but no evidence that this travel involved time spent with the second appellant. The decision in *Gorry* mandates some degree of qualitative assessment of the nature of the relationship between the parties but it is difficult to see how the Minister is supposed to draw general conclusions about the nature of the relationship when so little supportive information is provided. Added to this, there were inconsistencies - carefully described by the Minister in the impugned decision - within the body of evidence submitted by the appellants as to the circumstances of their marriage.

85. The situation eminently warranted the Minister's conclusions and again I cannot see any basis for criticising the decision-maker, nor, in turn, the High Court's failure to condemn the Minister's approach in this regard having regard to the standard of review described in the earlier section of this judgment.

86. Having therefore considered the evidence submitted on behalf of the appellants to the Minister, the contents of the impugned decision, and the High Court's assessment of these matters, I can find no basis for criticising the High Court's conclusions in respect of the factual findings of the Minister, let alone anything that would amount to such an error that it should be overturned on appeal.

The second issue – the constitutional analysis and *Gorry*

The High Court judgment

87. The High Court carefully considered the judgment in *Gorry* and was satisfied that a careful reading of the impugned decision showed that it did not depart from the principles explained in the judgment of O'Donnell J (as he then was). He was of the view that the Minister properly took into account that O'Donnell J. had said that the starting point for the analysis was that a non-citizen does not have a right to reside in Ireland and does not require

such a right by marriage to an Irish citizen, and had correctly treated the burden of proof as resting squarely on the appellants. The High Court pointed out that this was not an appeal on the merits but rather a proceeding by way of judicial review and he set out the relevant principles applicable to such proceedings arising from classic judicial review decisions. He also pointed out that it was not for the Minister to advise applicants and their proofs and that it was well established that their documents would be subjected to a qualitative assessment. With regard to the suggestion that the Minister should have asked for additional evidence in relation to the child's condition if he had any doubt on the matter, the High Court judge correctly pointed out that this was an attempt to shift the burden onto the Minister and that the latter had no obligation to inform an applicant as to what evidence might be required to meet the burden of proof. It was in the course of this discussion he referred in some detail to the decision in *Abbas*.

88. The High Court judge rejected the submission that the impugned decision had treated the desire to cohabit as being of no value and found that, on the contrary, this was taken into account and weight was indeed afforded to the fact of their marriage as well as their desire to cohabit. He noted the careful distinction made by O'Donnell J. in *Gorry* between the fact of a marriage (the 'status of marriage'), on the one hand, and the length and duration or durability of a marriage, on the other. He was of the view that the Minister had considered matters appropriately in light of the factors set out by the Supreme Court, including the relationship between the parties both before and after the marriage to the extent that this could be established on the evidence submitted. He considered that the impugned decision contained a careful consideration of all matters that have been put forward by way of evidence while adhering firmly to the guidelines set out in *Gorry*.

The appellants' submissions on the second issue

89. The appellants' second main area of attack upon the High Court's treatment of the impugned decision was by reference of the legal principles relating to marital life set out by the Supreme Court in *Gorry* . Three essential points are made on behalf of the appellant.

90. First, the appellants refer to the analysis by the Supreme Court in *Gorry* as to the relationship between cohabitation and marriage, and contend that the High Court judge had no basis for concluding that the Minister had had regard to factor (d) on the list set out by O'Donnell J. in his judgment in *Gorry* (namely the fact that the visa refusal would prevent cohabitation in Ireland and may make it difficult, burdensome or even impossible anywhere else). Counsel submits that the closest the respondent came to considering factor (d) was in the following passage where the Minister is said to have mixed together the concepts of visits and cohabitation, stating:

> *"In considering whether family life could be established elsewhere, insufficient information has been submitted demonstrating that the sponsor would be prevented from continuing to travel to Algeria to visit their spouse and maintain the relationship in the manner in which it developed or that it is more difficult or may be extremely burdensome for the applicant and sponsor to reside together anywhere else, be that in the applicant's home State or any another State of their choosing."*

91. Counsel submits that the first appellant could not reasonably have been expected to move to Algeria for several reasons including: his Irish citizenship, his twenty five years' residence (private life) in Ireland, his relationship with his daughter, who lives with her mother and has ASD and is home schooled, and his daughter's best interests. Counsel argues, as outlined above, that the decision maker did not come to a conclusion on whether

the third appellant has ASD nor on whether her father plays an active role in her life, and that this meant that the decision maker could not properly consider factor (d).

92. Counsel submits that the High Court failed to acknowledge cohabitation as 'basic and almost intrinsic to marriage' by accepting a finding of the Minister that the first and second appellants could sustain their marriage indefinitely through holiday visits and messaging and thus that family life would not be interfered with as such. Counsel cites the case of *Khan v Minister for Justice* [2021] IEHC 789 as an analogous case in which a decision to refuse a spouse a visa was quashed, and in which it was said: *'The fact that there have been regular visits to Pakistan by the Second Applicant and the couple's children is considered solely from the perspective of establishing that family life can continue in this manner rather than from the perspective of establishing an ongoing commitment to their marriage in very difficult circumstances.'*.

93. The second (and alternative point) made is that if the impugned decision is interpreted as containing an implicit finding that cohabitation abroad would be difficult, burdensome or impossible, the visa refusal must be seen as disproportionate if *Gorry* is properly applied. Counsel submits that the High Court judge took it as a given that a threat to public finances and resources would be sufficient reason to refuse a join-spouse visa even where cohabitation abroad would be difficult, burdensome or impossible. Counsel submits that none of the judgments in *Gorry* pointed to the lack of finances as an appropriate justification for an immigration decision which *de facto* prevents any cohabitation. Counsel submits that it runs contrary to the very significant protection afforded to the family by Article 41 of the Constitution and the special place in married life which cohabitation occupies if a financial test is allowed to be the ultimate determining factor as to whether a married couple can cohabit *at all*, even where the family life is prospective as in this case. Counsel relies on

AMS v Minister for Justice and Equality [2014] IESC 65 as an analogous situation in which the Supreme Court found that entry to the state for family members of refugees could not be denied on financial grounds alone. *AMS* is also relied upon for the further proposition that while it would not be illegitimate for a Minister to have regard to broader economic circumstances than those at issue in the immediate case, it would be necessary that there would be materials available analysing what the relevant costs would be.

94. The third point advanced by the appellants is that while *Gorry* allows for the length and durability of a relationship to be assessed by the Minister, the latter placed a disproportionate emphasis on the pre-marital period of the relationship and had little or no regard to the post-visa application duration of the relationship. They submit that at the time of the Minister's impugned decision, the first and second appellants had been married for more than four years and had spent the time doing all that they could to be able to cohabit with each other. They cite *Pervaiz* for the proposition that the intention to cohabit is a 'fundamental element of [a] relationship and an index of … commitment', drawing attention to the fact of such intention in this case. They cite *Khan v Minister for Justice* [2021] IEHC 789 as an analogous factual matrix where a decision to refuse a similar visa was quashed when *'the length and enduring nature of the Applicants' marriage was not given any weight.'* They submit that the High Court judge wrongly distinguished *Khan* from the present case on the basis of facts despite the decision maker having failed to reach conclusions on those facts, and because it is inappropriate to treat inadequate finances as a determining factor where cohabitation abroad is *de facto* not a realistic possibility.

95. Counsel submits that the effect of the Minister's approach to the financial criteria and duration of the relationship meant that the Minister effectually inserted two preconditions to reliance on rights as a married couple under Article 41 of the Constitution which do not flow

from *Gorry*, namely (a) evidence of "a relationship in existence prior to the marriage"; and (b) evidence that the spouse who is not an Irish citizen is financially dependent on the Irish citizen spouse.

The Minister's submissions on the second issue

96. The Minister submits that the High Court judge was correct in his approach to the Minister's view that the marriage could reasonably be sustained by visits and electronic communications. Reference was made to *AZ v Minister for Justice* [2022] IEHC 511 as a decision in which a similar finding was maintained by Burns J. in the High Court. Contrary to the appellants' submissions, neither the Minister nor the High Court judge failed to acknowledge cohabitation as a normal incident of marriage, indicating in particular Heslin J.'s express reference to the principle at paragraph 75 of the judgment, and the Minister's express reference to the principle at page 16 of the decision. The Minister refers to the passages in *Gorry* in which the Supreme Court referred to the significant State interests which are also at stake in such decisions. In this regard, it is of importance that the first appellant has a very limited history of work in the State, has been reliant on social welfare payments, never furnished P60 despite request, and provided no evidence of any attempts to obtain alternative employment or to engage in educational upskilling. Counsel submits that the High Court's assessment of the GP letter was entirely correct. Therefore, the granting of the visa in this case would in all probability result in an immediate reliance on public funds/resources, which clearly affects the economic interests of the state in a real and tangible way. The *Gorry* judgment seeks to strike a balance between the competing interests of the individual and the State and there were good reasons in the present case leaning against the grant of a visa.

97. Counsel relied on *AZ v Minister for Justice* as a case with analogous facts to the present case, in which a decision to refuse a spousal visa was upheld by the High Court. Counsel submits that any contentions that the present case is dissimilar on the basis that the second appellant is highly skilled and that the first appellant was not a burden on the State prior to health difficulties do not stand up to evidential scrutiny. Counsel argues that the High Court was entitled to note that NR's most recent qualification was from 2009 and points out that no documentary evidence was submitted to support the assertion that NR was informally employed in Algeria.

98. The Minister submits that there was nothing in the decision to suggest that the respondent had disregarded the intention to cohabit or failed to acknowledge it as an index of commitment.

99. The Minister submits that the present case can be entirely distinguished from *Khan* on its facts insofar as appellants' marriage has not possessed the same length or durability as the marriage in *Khan*.

Analysis

100. Although the judgment of O'Donnell J. in *Gorry* is carefully nuanced, it may nonetheless be helpful to set out a bullet-point summary of key principles therein identified:

With regard to matters of constitutional right

- The right of a citizen to live in Ireland is a fundamental attribute of citizenship (para 22)

- A fundamental distinction between a citizen and a non-citizen is that the former has a general right to reside here, the right to travel with the protection of the

State, and to re-enter the country, whereas the non-citizen has none of these rights. These are the basic consequences of citizenship, nationality and sovereignty.

- A person has a constitutional right to marry (para 22)

- Cohabitation is a normal and expected incident of marriage and any interference with it should be closely scrutinised (para 22)

- However, Article 41 does not provide for a right to cohabit (para 23, 55-62, 75).

- The rights in Article 41 are inalienable and imprescriptible, and this is a reason to be cautious about the extension of the rights therein contained (para 38)

- Even if a right to cohabit is provided for elsewhere in the Constitution (such as in Article 40.3.1), an Irish citizen does not have a constitutional right to cohabit in Ireland with their non-Irish spouse (paras 22 and 23)

- Therefore, marriage to an Irish citizen does not create an automatic right to enter the State or to continue to reside here having entered illegally or after a lawful entry but where any permission has expired (para 23, 65, 70, 71).

As to the manner in which the Minister's discretion must be exercised

- An important part of the way the State shows its performance of the constitutional obligation to guard with special care the institution of marriage in Article 41 is how it treats individual marriages and therefore when a decision is made which has a fundamental impact on a married couple, account must be taken of relevant matters and the Minister must therefore set out the matters and considerations to justify a decision which has that effect. (para 25, 64)

- When it is asserted on credible evidence that the consequences of a decision are that the exercise of a citizen's right to reside in Ireland will mean not just inability to cohabit in Ireland with their spouse, and where it may be "extremely burdensome" to reside together anywhere else, these facts should be taken into account and given "substantial weight", and may involve" a more intensive consideration of the facts and evidence". (para 74)

- The Minister is entitled to decide who is permitted to enter and reside in the State and there is "advance preloading of the scales by characterising a right to cohabitation as worthy of the highest protection feasible in a modern society". (para 26)

- The correct starting point is the opposite; namely, that a non-citizen does not have a right to reside in Ireland and does not acquire such a right by marriage to an Irish citizen (para 28)

- The Minister when making decisions on immigration and deportation should have regard to: (a) the right of an Irish citizen to reside in Ireland;(b) the right of an Irish citizen to marry and found a family; (c) the obligation on the State to guard with special care the institution of marriage; (d) the fact that cohabitation is a natural incident of marriage and the family and that deportation would prevent cohabitation in Ireland and may make it difficult, burdensome or even impossible anywhere else for so long as the deportation order remains in place. (para 75)

- The issue cannot be reduced solely to the reasonableness of expecting the spouse to relocate even though this is a significant factor (para 77)

- It is not sufficient to show that the decision merely affects the spouses' desire to cohabit in Ireland and that it would be "more difficult and burdensome to live together in another country".

- One of the factors of relevance is the "length and duration" or "length and durability" (both phrases are used) of a relationship (para 66, 67,68, 74) (as distinct from the marital status itself); the length and durability of the relationship is a factor since it tends to remove the possibility that the marriage is one directed in whole or in part to achieving an immigration benefit and reduces the risk that any permission will establish a route to circumvent immigration control. (para 74)

- Evidence of medical or other conditions may establish that it is "impossible" to cohabit anywhere but Ireland, that the marriage is an enduring relationship, and that the non-citizen spouse poses no other risk; but such cases will be rare. (para 74)

- The fundamental question is whether, where a couple is married, the Ministerial decision can be said to have failed to recognise the relationship or to respect the institution of marriage because of its treatment of the couple concerned.

- As a matter of fact, there may be "straightforward cases where there are no countervailing circumstances" (para 23, 71). Examples include a long-term partner in an established marital or non-marital family with an Irish citizen partner; here a refusal of entry to the long-term partner would require "clear and persuasive" justification (para 71).

- However, in some cases, even though the refusal of entry may have the effect of preventing of preventing a married couple from cohabiting that may be a consequence of the marriage they have made; it does not fail to respect the institution of marriage if cohabitation is "made more difficult, or even impossible, by a decision of the state for a good reason". (para 73)

101. Interestingly, Baker J. in *Pervaiz* had the following to say about the term 'durability' (which features at a number of points in O'Donnell J.'s judgment in *Gorry)* (albeit in the immediate context of EU Citizens Directive):-

> 73. The partner must be someone with whom the Union citizen has a durable relationship. "Durable" does not mean "permanent", and a test that required permanence in that sense would be an impossible burdensome hurdle, and would not be in accordance with any modern understanding of intimate relationships. What is meant, it seems to me, is that the relationship be one which has continued for some time and to which the parties are committed, with an intent that the commitment continues, one, therefore, which carries the indicia of commitment such that, at the present time, each of the parties to the partnership would express a view and a hope that the relationship will continue for the foreseeable future.
>
> 74. Thus, a durable partnership will tend to be one of some duration, but that is not to say that the duration of the relationship is, in itself, a defining feature. The length of a relationship will be an important, and sometimes compelling, index of the degree of commitment between the couple, but it is perfectly possible for a committed long-term, what is often called a "serious" relationship, to exist between persons who have known one and other for a short time. Indeed, that profile, while it is not common, is

found in persons who marry after a short relationship, and the duration of the relationship is not, therefore, always a useful indicator of its durability.

75. Duration, therefore, is an important factor, but not always an essential one. Durability is not measured only, or even always, by duration, but a durable relationship is often one which has endured, such that the duration may illustrate its durability. 76. Durability connotes a relationship which carries indicia of permanence and commitment such that the couple live a life where each of them is connected to the other by a number of identifiable threads, such as their social life and social network, their financial interconnectedness or interdependence, their living arrangements, and the extent to which they are recognised and acknowledged by their family circle and their friends as a couple.

77. While all of the elements of a durable partnership might not be easy to list, it is probably true to say that most persons would be aware when their friends, acquaintances, or family members are in a durable partnership. For that reason, it seems to me that the language of the 2015 Regulations can readily be understood in its plain terms as connoting a committed personal interconnectedness which is recognised and recognisable between the couple and by the members of their circle or broader acquaintances, whether social or business, and which is anticipated as being likely to continue for the foreseeable future.

102. As we have seen, in the course of the document recording the impugned decision, it was said that "[i]n considering whether family life could be established elsewhere, insufficient information has been submitted demonstrating that the sponsor *would be prevented from continuing to travel to Algeria to visit their spouse and maintain relationship in the manner in which it developed* ***or*** *that it is more difficult or maybe extremely*

burdensome for the applicant and sponsor to reside together anywhere else, be that in the applicant's home State or any other State of their choosing". (The disjunctive 'or' should be noted in the sentence).

103. The appellant contends that in this the Minister conflated the question of visiting his spouse in Algeria with the question of moving to Algeria and was wrong in so doing. I do not agree. In my view this would be neither a fair characterisation of the decision of the Minister as a whole nor of the above passage. The references in the above passage to 'visiting' and to residing anywhere else are expressed in the alternative; clearly, the Minister was, at the very least, taking both matters into account.

104. Further, I would agree with the Minister's submission that the passage above, in referring to visiting, was merely pointing out the circumstances in which the marriage had been entered into and sustained to date. The first appellant had been living in Ireland for many years and entered into the marriage with an Algerian national, outside the State, in Algeria in 2017. On his own case, he had visited the second appellant a number of times in Algeria since the marriage. They had never lived together as far as one can ascertain from the evidence and they have no children together. This this is very far, for example, from a case where a couple have lived together for a long time abroad and wish to live in Ireland, one of them being an Irish citizen. That is merely an example of the type of circumstances that are at the opposite end of the spectrum. This was a marriage entered into when the Irish citizen was in Algeria, and which had to date been sustained by his visiting her in that jurisdiction. No difficulties in doing so were described. All of this was relevant and to be taken into consideration. From the decision as a whole, however, the question of whether the first appellant needed to reside in Ireland as distinct from Algeria was certainly

considered by the Minister and I do not accept that this passage demonstrates that she applied an erroneous test in her overall consideration of the relevant issues.

105. Further, I agree with the High Court judge that the facts of *Khan* were entirely distinguishable from the present case for the reasons he clearly described at para 118 of his judgment: (i) In *Khan*, the relevant marriage was of 30 years duration; (ii) The couple in *Khan* had three children; (iii) These three children were Irish citizens aged 23, 21 and 18; (iv) The married couple in *Khan* lived together for many years prior to the second applicant coming to Ireland with two of the couple's children and giving birth to the third child in this State; (v) Furthermore, there was a radically different work–history established in the *Khan* case. As the High Court judge said:

> 120. As a matter of first principles, a scenario where a married couple lived together in Pakistan for some fifteen years prior to Mrs. Khan coming to this State with two of the couple's children could hardly be more different from a scenario where the couple never lived together, never had children together and, following a very short courtship, got married in Algeria full in the knowledge that there could be no guarantee of being able to conduct their family life in this State.

106. The second point made by the appellant with regard to the constitutional analysis in the impugned decision is that the Minister wrongly over-weighted the threat to public finances and under-weighted the 'fact' that cohabitation abroad would be difficult, burdensome or impossible. I do not accept this as a fair characterisation of the Minister's decision.

107. A significant part of the problem for the appellants flows from my conclusions in relation to the first issue ("Fact-Finding by the Decision Maker"). Their submissions place great emphasis on matters such as the appellant's alleged essential support for his child and the child's condition and educational circumstances. They say that the Minister's view on the potential for the couple to become a burden on State resources should not outweigh the difficulties which would arise if the first appellant had to live abroad. However, I have earlier in this judgment found against them on the first issue ("Fact-Finding"). This conclusion undermines their argument. The Minister cannot properly factor in a matter in respect of which the facts have not sufficiently been established. The decision in *Gorry* clearly pointed to the importance of cohabitation as a normal and important incident of married life (as did the impugned decision); but it also pointed out that it was not a matter of right, and that the particular facts of a case were crucial to assessing whether a Ministerial decision had properly factored it in. It is obvious that the Minister can only factor into the assessment facts which have been sufficiently established with appropriate evidence.

108. I do not accept either the appellant's contention that the Minister laid undue emphasis on the pre-marriage length and nature of the relationship between the first appellants, or that she imposed "preconditions" as suggested in argument. It is entirely appropriate for the Minister to take into account the nature of the relationship both before and after the marriage. Even if one confines oneself to the relationship *after* the marriage in this case, there was very little to demonstrate the nature of the relationship. Reference has already been made to what was submitted by way of evidence in the way of photographs, messages, and flight/travel details. In the modern era of technology with two spouses living in different countries, the evidence submitted could only be described as scant. Counsel laid considerable emphasis on the fact that they had been doing everything in their power since

2017 to obtain the visa which enable them to live together. I cannot accept that this fact is particularly cogent in terms of proving of the nature of their relationship. Again I would endorse what the High Court judge said:

> 64. The respondent's decision in the present case set out and considered the history and nature of the first and second applicant's relationship, having regard to the evidence presented. This was not at all impermissible. A submission was made on behalf of the applicant to the effect that a reading of the respondent's decision demonstrated that the Minister took the view that proof was required of a long personal relationship prior to their marriage in order for the first applicant to benefit from family unification with his spouse. That is not at all a fair reading of the decision. The respondent did not impose a test such that evidence of a relationship or a long relationship in existence prior to the marriage was required. Rather, as she was entitled to do, she looked at all evidence tendered in respect of the relationship between the first and second named applicants, both prior to and subsequent to their marriage. Doing so was not at all inconsistent with the principles in Gorry.
>
> Indeed, I take the view that it could not be seriously suggested that in approaching the question of whether to grant or not a visa of this type, the Minister must confine her consideration of the evidence to the period beginning from the date of the marriage in question. Such a period would obviously encompass the length of the marriage. However, the Minister's analysis was not confined merely to the length of the marriage. That issue is one of simple mathematical calculation. Relevant considerations concerned the nature of the relationship, namely, what O'Donnell J. referred to in Gorry as the "durability of a relationship". The Minister was entitled, indeed obliged, to consider all of the evidence before her, including, very obviously,

such evidence as was put forward as to the nature of the relationship between the first and second applicants, not merely the chronological length of the relationship as a married couple, but also what the evidence demonstrated as to the enduring nature of the relationship.

109. Accordingly, and having considered both the impugned decision and the High Court's treatment of it with regard to the constitutional aspect of the visa application, I agree with the High Court judge's analysis, find no reason to criticise let alone overturn it, and would reject this ground of appeal.

The third issue – the European Convention analysis

The appellant's submission on this third issue

110. The third broad category of complaint relates to Article 8 of the European Convention on Human Rights. The appellants submits that this was clearly a case where the rights of the three appellants under Article 8 of the Convention were engaged and where a balancing exercise under Article 8(2) ECHR should have been carried out. They submit that the High Court judge was incorrect in coming to the opposite conclusion. They rely on the decision in *MK (Albania) v Minister for Justice and Equality* [2022] IESC 48, noting that the Supreme Court in *MK* found the approach to Article 8 as set out in *CI v Minister for Justice, Equality and Law Reform* [2015] IECA 192; [2015] 3 IR 385 to be incorrect. Counsel accepts that this will not lead to the quashing of a decision in every case but submits that in this case it cannot be said with certainty that the correct application of Article 8 of the Convention would not have led to a different result. In this regard counsel *inter alia* on the premise that the present case involves a child with autism in respect of whom the first appellant was

providing essential support. It may be noted that the Supreme Court judgments in *M.K. (Albania)* was delivered some two months after the High Court judgment in the present case.

111. Counsel submits that the Minister wrongly transformed an 'insurmountable obstacles to *moving*' test to an 'insurmountable obstacles to *visiting*' test, and therefore applied the wrong test to the case. He submits that the Convention jurisprudence, set out in judgments such as *Jeunesse v Netherlands* (2015) 60 EHRR 17 (Application Number 12738/10) and *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 expresses the test as one of 'insurmountable obstacles to *moving*'. Counsel also cites the case of *Abdulaziz v UK* (Application Nos 9214/80; 9473/81; 9474/81) where it was said that family life normally comprises cohabitation and that it was scarcely conceivable that the right to found a family should not encompass the right to live together.

The Minister's submissions on the third issue

112. The Minister submits that the impugned decision did not invent or apply a new test as claimed by the appellants but instead was simply referring at that point in the decision to the objective fact that the first two appellants' relationship had to date been entirely long distance in nature. Counsel submits that this fact was not conflated by the decision maker with the overall question as to the degree of difficulty with which family life could be established elsewhere.

113. Further, insofar as it is suggested that the decision maker did not sufficiently take the child's interests into account, the Minister points out that the first appellant did not disclose that he even had a daughter until the appeal stage, during representations submitted by solicitors on his behalf on 12 January 2018. The totality of the documentary evidence

furnished in relation to the child was (i) her birth certificate, (ii) the "bio" page of her passport, (iii) a letter from her mother dated 8 January 2018, and (iv) a letter from Tusla to her mother dated 12 January 2016. This was all taken into account, it is said, and the High Court judge correctly so found.

114. The Minister relies on *Nunez v Norway* (Application Number 55597/09) for the proposition the State has a wide margin of appreciation under Article 8 when family life arises when the immigration status of one or more members of the family is "precarious" (a term used in the Convention jurisprudence).

115. Again, it is submitted that the Minister was entitled to note that insufficient reasons were submitted to explain why the first appellant could not continue to travel to Algeria to visit his spouse and maintain the relationship in the manner in which it developed, and the High Court judge was entitled so to find.

116. The Minister contends that the Supreme Court decision in *MK (Albania)* has no application in the present context as it was concerned exclusively with removal from the jurisdiction and/or deportation. The Minister argues in the alternative that if this Court finds that *MK (Albania)* does have application in the present context, it is clear in any event that the Minister did consider the substance of the appellants' rights proportionately while also balancing the legitimate countervailing concerns of the State, most notably public finances, such that *certiorari* should be refused. The Minister's decision did not rely on the approach taken in *Razgar* [2004] UKHL 27 as interpreted by *CI*, which was in turn departed from in *MK (Albania*. Accordingly, the Minister submits, the decision in *M.K. (Albania)* makes no difference to the outcome in the present case.

117. The High Court judge found that the appellants had not established that the Minister had misapplied the Convention jurisprudence to the extent that the consideration given to

the family rights under Article 8 was fundamentally flawed. He also said that this was not a case where the balancing exercise pursuant to Article 8 (2) should have been concluded. He said it was clear that the decision-maker had properly considered the jurisprudence of the European Court including the decision in *Nunez*. At paragraph 145 of his judgment, he pointed out that the family life of the first two appellants had come into being at a time when there could be no expectation of any absolute right to conduct their family life in this State. The Minister was entitled to take the view that insufficient reasons were submitted preventing the first appellant from continuing to travel to Algeria to visit his spouse and maintain the relationship in the manner in which it had developed, and the Minister was entitled to conclude that the refusal of the visa application did not involve a lack of respect for family life under Article 8. This aspect of the High Court judgment, it may be said, followed of course upon is earlier detailed analysis of the Minister's approach to the evidence submitted and his rejection of the criticism made of that approach.

Analysis

118. In the first instance, I do not accept the appellants' argument that the Minister transformed the appropriate test from a consideration of the obstacles to the couple *living* in Algeria to a consideration of whether they could sustain the marriage by his *visiting* her in Algeria. I refer to the same conclusion reached by me in the previous section, concerning the constitutional analysis for the reasons set out above.

119. Secondly, in relation to the appellants' argument that there is a requirement to conduct a proportionality assessment, I have taken into account the decision in *M.K. (Albania).* There the Supreme Court conducted a careful analysis of the Convention jurisprudence in the context of a deportation order made by the Minister and unanimously

held that the Minister's assessment of Article 8 rights, which had followed the approach set out by the Court of Appeal in *C.I.*, was incorrect. (The court split on the question of remedy, but that need not concern us here). The *C.I.* decision had, it was decided, fallen into error by reason of its application of the five-part test set out in *Razgar*, which was as follows:

i. Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
ii. If so, will such interference have consequences of such gravity as potentially to engage the operation of Art. 8?
iii. If so, is such interference in accordance with the law?
iv. If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
v. If so, is such interference proportionate to the legitimate public end sought to be achieved?"

120. The impugned decision in *C.I.* considered that the applicant's case did not exhibit any exceptional feature such that the decision to refuse leave to remain could be said to have such grave consequences for the applicant as potentially to engage the operation of Article 8, and therefore failed at the *second* hurdle of the five-part test, and therefore the proportionality stage was not even reached. This approach, the Supreme Court held in *M.K (Albania)*, was incorrect. The applicant's case ought to have been assessed under the *fifth* limb of the test, namely whether such interference was proportionate to the legitimate public end sought to be achieved. O'Donnell CJ described the essential flaw as being the

implication that the second part of the test established a significant hurdle for applicants to surmount. In reality, the court held, Strasbourg caselaw demonstrated a relatively low threshold for Article 8 engagement, and exceptional circumstances did not arise when considering engagement under Article 8 but rather when weighing factors for and against deportation.

121. I am inclined to think that the overall approach in *M.K. (Albania)* is not confined to deportation cases, because it sets out a general framework for the assessment of Article 8 considerations; that said, it is likely that in the application of that general framework, outcomes will actually vary considerably depending on the context and facts of each case and the specific aspect of immigration law in issue. However, I do not think it is necessary to engage minutely with the question of the scope of the decision in *M.K. (Albania)* in the present case because I am of the view that the appellants face a more significant difficulty, namely that the factual premises underpinning their arguments on this issue are not sufficiently in place to give substance to their proportionality argument in any event.

122. They place great emphasis on matters such as the appellant's alleged essential support for his child and the child's condition and educational circumstances, but I have earlier in this judgment found against them on these factual matters (by which I mean that I have found that the High Court judge had not erred when he failed to condemn and quash the Minister's approach to fact-finding on these issues). Similarly, the appellants have put forward their Convention arguments on the premise that the second appellant would be in a position to gain employment here and support the family so that they would not present a financial burden on the State. Again, I have found against the appellants in their challenge to the Minister's fact-finding here. Essentially, the problem the appellants face is that they placed insufficient evidence before the Minister to establish most of the essential building

blocks from which to construct their proportionality argument. Without sufficient evidence of those building blocks, the proportionality argument falls away. Again, as with the constitutional analysis, when one subtracts from the equation the facts which were not sufficiently established, the first two appellants are left with some bare facts; he is an Irish citizen, she is an non-EEA citizen, they got married outside the State in 2017, he has a child in Ireland, they wish to live together within the State, that she has particular educational qualifications, and he has been to Algeria on a number of occasions in recent years. The countervailing considerations that the Minister was entitled to take into account included such matters as the first appellant's financial situation, his receipt of Jobseekers Allowance, the absence of evidence on the second appellant's employment record in Algeria, together with the entitlement of the Minister to regulate entry into and residence into the State and to take the overall economic wellbeing of the country into account in terms of the potential burden on the social welfare system. In the circumstances of this case, and having regard to my conclusions on the first issue, I cannot accept the appellants' argument that if the Minister had conducted a proportionality assessment, the outcome might have been different, and therefore it is not strictly necessary to consider whether or not a proportionality exercise should have been conducted in the first place and/or the precise remit of the *M.K (Albania)* decision.

123. I am therefore of the view that there is no basis for criticising or overturning the High Court's approach to the Minister's analysis and conclusions on the Convention issue raised by the appellants. I would reject this ground of appeal also.

Conclusion

124. In my view, none of the grounds of appeal have been made out and the appeal must be dismissed.

125. 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).

126. As this judgment is being delivered electronically, I wish to record the agreement of my colleagues Whelan J. and Haughton J. with it.