THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 72 J.R.]

BETWEEN

O. M.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 28th day of July, 2017

1. In these proceedings the applicant seeks to quash the decision of the respondent refusing the applicant's application for family reunification pursuant to s. 18(4) of the Refugee Act 1996, as amended ("the 1996 Act").

2. The applicant is a Ukrainian national. He came to Ireland as an asylum seeker in March 2003. He was granted refugee status by the respondent on 30th December, 2004, and has resided in the State since that time. The applicant is married with two children and is employed as a clinical researcher.

3. On 20th October, 2014, the applicant applied for refugee family reunification in respect of his sister and her son, the applicant's nephew. On 21st November, 2014, he was informed that the application in respect of his nephew was not accepted as his nephew did not come under the ambit of s. 18(4) of the 1996 Act. The applicant was further advised that the application in respect of his sister had been referred to the Office of Refugee Applications Commissioner (ORAC) for investigation, as provided for in the 1996 Act.

4. On 24th November, 2014, ORAC sent the applicant a family reunification questionnaire to be completed which the applicant returned on 19th December, 2014. On 4th March, 2015, the applicant submitted additional documents (namely his sister's birth certificate and a divorce certificate) in support of the application. On 10th April, 2015, ORAC notified the applicant that it had completed its investigation of the application and had forwarded its report to the respondent for a decision. A copy of the report was enclosed.

5. The ORAC report noted, *inter alia*, information which had been provided by the applicant in support of the application, notably:

- That his sister was currently residing with him in Ireland following her arrival in the State in September, 2014;
- That the applicant had lived with his sister in Ukraine from March, 1976 until 1999;
- That for the three years prior to her arrival in Ireland his sister lived on her own in a named part of Ukraine;
- That his sister's marriage to the father of her child had been dissolved in 2004;
- That the applicant's sister had become the victim of ongoing violence in Ukraine and that at the end of August, 2014 she had lost her partner, her house, most of her belongings, some documents and money;
- That his sister had as a result become homeless and had been forced to seek refuge elsewhere in Ukraine;
- That his sister "suffered severe mental breaks (asked for help in Hospital), depression at the time when [the applicant] tried to help and support her";
- That his sister's boyfriend had arranged her travel and that she had arrived in Ireland in September, 2014 undocumented with the assistance of people unknown to the applicant;
- That the documents (which were not her own) which had been given to the applicant's sister to facilitate her travel had been taken from her;
- That his sister was a teacher with a university degree who had been employed for three years in Ukraine as a physiotherapist until her employment ended due to the conflict there.

6. The author of the report also noted:

> "[The applicant] stated in his FR questionnaire that he had not applied for Family Reunification for the subjects prior to now, as when he sought refugee status in Ireland his family situation was different. He stated that ongoing conflict in his country of origin had left his sister homeless, traumatised, and mentally unstable, and that she was forced to leave Ukraine due to her desperate situation and that she had no alternative way of supporting herself. [The applicant] stated in his FR questionnaire that he provides 'accommodation, food, basic financial means, and psychological support' in support of the subject of the application.
>
> He stated in his FR questionnaire that his sister does not have a mental or physical disability or illness.
>
> However, he also stated in his FR questionnaire that his sister is deeply traumatised after leaving a place of military conflict and that she is very confused, anxious, in a depressed condition and that he provides a comfortable living environment for her. He states …that his sister is [a teacher with a university degree and had been employed as a physiotherapist in Ukraine and was] currently 'self studying' English at home and helping his family with everyday chores.
>
> …

> [The applicant] stated …that his sister would be able to support herself financially if she were allowed to do so, and that she may be able to obtain work in Ireland as a health-care assistant. He also stated in his FR questionnaire that his sister will be able to support herself after she recovers from her current condition and her status in Ireland is confirmed.
>
> The applicant states …that he is living in a 4 bedroom house with his wife, daughter, the subject of the application, and her son. He further states that he and his wife (whom he states is employed) have a joint mortgage of €950 per month and that he is employed as a clinical researcher and receives a salary of €3,000 per month. The applicant stated if the subject was granted family reunification, he would be able to offer her and her son a double room in his house. He further states …that he has savings, and that he is willing to support his sister. The applicant submitted a photocopy of his Nationwide UK (Ireland) account statement showing a balance of €5,900 as of 15/10/2014. The applicant stated if his financial support were to cease, his sister would present her case to [ORAC] and seek refugee status in Ireland."

7. It was noted that the information which the applicant provided was consistent with that given in his application for asylum in that the name and date of birth given for his sister was the same in both applications.

8. ORAC's findings were as follows:

> • The applicant submitted his sister's original driving licence and her original birth certificate to attest her identity.
>
> • He submitted his own birth certificate to attest to their relationship.
>
> • The applicant stated that the subject does not have a mental or physical disability or illness.
>
> • However, he stated in his FR questionnaire and in letter to FR INIS dated 20/10/2014, that his sister was traumatised as a result of problems arising out of the conflict in the Ukraine and that she was confused, anxious, in a depressed condition, mentally unstable, that she suffered from 'severe mental breaks (asked for help in Hospital), depression', and that he provides her with psychological support. The applicant has not submitted any medical reports to support his assertions with regard to his sister's psychological condition.
>
> • His sister is part of his separate family unit in that she is divorced and has a child.
>
> • The applicant stated that he is in employment, has savings, and he is willing to continue to provide his sister with accommodation and support.
>
> • He has submitted a financial statement from his Nationwide UK (Ireland) account detailing savings of €5,900.
>
> • The applicant stated that he believes that his sister could find employment and support herself if her status in Ireland is confirmed.

9. The respondent's decision issued on 5th November, 2015 advising the applicant that the respondent had decided "not to exercise her discretion, pursuant to s. 18(4), to grant the application". A "Family Reunification Consideration" accompanied the letter.

10. The relevant contents are as follows:

> "[The applicant] has made an application for Family Reunification on the 31st October 2014 … Section 18(4) (a) of the Act provides that the Minister may, at his or her discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State.
>
> …
>
> The ORAC report and the documentation submitted have been taken into consideration.
>
> The applicant has provided a birth certificate for the above named subject in order to establish her identity. This in itself is only evidence that a person was born on a particular day in a particular place or country.
>
> The information provided by the applicant on his family reunification questionnaire is consistent with the information provided on his asylum questionnaire as per the ORAC report, in that he names the subject as his sister.
>
> The applicant states that his sister is currently residing with him, his wife, and their child, his nephew is also residing in the household, no documentary evidence has been submitted to substantiate this information.
>
> He stated on the Family Reunification Questionnaire that his sister is suffering from depression, deeply traumatised, confusion and anxiety, no documentation has been submitted to substantiate this information.
>
> The applicant stated in his Family Reunification that his sister obtained help from a Hospital regarding her depression; however, no documentary evidence has been provided to substantiate this information.
>
> He further claims that his sister and his nephew were assisted in travelling to this state by her Lithuanian boyfriend, who is no longer in contact with the subject, again no documentary evidence has been forwarded to substantiate this information.
>
> The applicant stated in his family reunification questionnaire if he no longer financially supported his sister, she would have to present her case to [ORAC] and seek refugee status in Ireland.
>
> The Minister having considered the facts of this case cannot be satisfied that [the applicant's sister] is a dependent member of the family as defined in Section 18(4) of the Refugee Act and therefore the application … is not granted."

11. Leave was granted on 15th February, 2016, by Stewart J. to challenge the decision on the following grounds:

> 1. Given that the applicant sister's is entirely dependent on him in Ireland and has no other means of support and cannot work or claim social welfare, the decision that she is not dependent on the applicant is unreasonable or disproportionate.

2. The respondent unreasonably relied on the absence of documentation from the applicant to substantiate that his sister was residing with him. The said finding was unreasonable in circumstances where the applicant sister is not paying rent or claiming rent allowance or making a financial contribution to the household. The applicant and his sister did their best with the application and could do nothing else to better establish dependency. Had the respondent required sworn statements from the applicant and/or his sister these would have been provided.

3. The respondent failed to have regard to relevant considerations. The applicant had a good job in Ireland and lives in a four bed roomed house with his wife and one child. He is therefore in a position to support his sister and her son by providing food and a home. The respondent did not dispute those assertions.

4. The respondent referred to the applicant's statement that if he withdrew his material support, his sister would have no option but to claim asylum as a reason for finding that she was not dependent, which was unreasonable. Further or in the alternative the respondent erred in law with respect to the meaning of and or the assessment of "dependency" under s. 18(4) of the 1996 Act.

12. In the statement of opposition, the respondent opposes the application for judicial review on the following grounds:

"As a matter of law, and upon true construction of Section 18 of the Refugee Act 1996 as amended, it is *ultra vires* the Respondent thereunder that she might exercise her statutory discretion to grant permission to an alleged dependent member of the family of a refugee to enter and reside in the State in circumstances where (a) the fact of dependency prior to the family member's entry into the State is not established and/or (b) the family member has already entered the State and the refugee applicant is relying upon the former's *post hoc* dependency upon him within the State as grounds for the exercise of discretion on the part of the Respondent to grant permission to that family member to reside in the State.

In the premises, and in circumstances where (a) at no time has it been claimed that the applicant's sister was dependent upon him prior to her entry into the State and/or (b) her alleged dependency derives from the fact that she is already within the State, irrespective of any other consideration or alleged ground of judicial review, she is not entitled under Section 18 of the 1996 Act as amended to be considered for permission to reside in the State."

13. It is further pleaded without prejudice to the preliminary objection and to the extent that it might have been *intra vires* for the respondent to consider the application for family reunification that the decision was not unreasonable and that there was no breach of fair procedures. It is pleaded that the application was fully considered by reference to all available material and submissions made on the applicant's behalf. It is denied that the respondent relied on the applicant's statement that if he withdrew his material support his sister would have no option but to claim asylum as a basis for the respondent's finding that the applicant sister was not dependent upon him. It is further denied that the respondent erred in law with regard to the meaning and or assessment of "dependency" under s. 18 of the 1996 Act.

The issues in the case

14. Following upon the pleadings and the parties' submissions, the following issues arise to be determined:

1. On a true construction of s. 18 of the 1996 Act, was the respondent without *vires* to consider an application for family reunification when the family member in respect of whom family reunification was sought was already in the State?

2. Where an alleged "dependent member of the family" within the meaning of s. 18(4) (b) of the 1996 Act has already entered into the State, is it possible for him or her to rely upon his or her *post hoc* dependency as grounds for the exercise of discretion on the part of the respondent to grant permission to that family member to reside in the State under s. 18(4) (a) of the Act?

3. What is the correct test for dependency in respect of applications for family reunification pursuant to s. 18(4) of 1996 Act?

4. Did the respondent act in breach of fair procedures in refusing the application on the basis of failure to provide documentary evidence of dependency when the investigative report of ORAC did not raise any issue in this regard and the applicant was not otherwise given notice of the respondent's concerns in this regard?

5. Did the respondent act unreasonably and/or fail to have regard to relevant considerations in refusing the application on the basis of failure to provide documentary evidence?

6. Did the respondent err in law in refusing the application for family reunification on the basis that if the applicant withdrew his material support for his sister she would have to apply for asylum?

Issues 1 and 2

15. Albeit that the respondent considered the application for family reunification and rendered a decision thereon, the argument now being advanced both in the statement of opposition and in written and oral submissions is that the respondent had no power to engage upon such a consideration by virtue of the fact that the applicant's sister was already in the State at the time of the application and given the applicant's reliance on his sister's *post hoc* dependency in this State as a ground for the exercise of the respondent's discretion under s. 18(4) (b) of the 1996 Act. Counsel for the respondent submits that the ordinary and literal meaning of s. 18(4) (b) is that the fact of dependency of an alleged dependent family member must be established prior to entry into the State. Counsel submits that the crux of this case is whether, objectively, the applicant's sister comes within the scope of the 1996 Act. It is submitted that she does not given that she was resident in Ireland at the time of the application and in circumstances where her dependency prior to her entering the State was not established.

16. The respondent contends that as a matter of pure syntax, s.18(4) presupposes that the family member in respect of whom such permission is sought will at that time be (i) present outside the State and (ii) already dependent on the refugee in question. The family member's dependency is, therefore, an *ante hoc* consideration that falls to be determined before his or her entry into the State. Permission to enter and reside in the State is given to a dependent of a refugee who is outside the State. It is further submitted that in any event, if it is possible for an application for family reunification to be made where the family member has entered the State, it remains the case that his or her dependency must have arisen outside the State.

17. As an aid to his argument that dependency must exist prior to entry into the State, counsel points to Article 3 of Directive 2004/38/EC ("the Citizens Directive") which reads as follows, in relevant part:

> "
>
> …
>
> 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the
>
> Union citizen;
>
> …
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

18. The provisions of Article 3(2)(a) of the Citizen's Directive have been interpreted by the ECJ in case C-1/05(2007) ECR, Jia as follows:

> *"In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national*." (at para.)

19. In response to the respondent's *vires* argument, counsel for the applicant makes the case that s.18(4)(b) of the 1996 Act contains no restriction on applications from refugee applicants in respect of family members who are already in the State. It is submitted that the respondent is not entitled to ignore the express terms of the legislation and to simply add a ground of exclusion based on her own policy considerations. Accordingly, counsel fundamentally disagrees with the respondent's interpretation of s. 18(4) (a).

20. It is further submitted on the applicant's behalf that, if necessary, the proviso "to enter and reside" as set out in s. 18(4) (b) can be disconnected to accommodate an application where the family member is already in the State. Counsel stresses the purpose of s. 18 which is to facilitate refugees in being able to reunify with family members.

21. Counsel points to the provisions of Article 5(3) of Directive 2003/86/EC on the right to Family Reunification (to which Ireland is not a party). It provides:

> "3. The application shall be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides.
>
> By way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory."

It is accepted however that the derogation provided for in Article 5(3) is for a Member State in transposing the Directive and does not provide for a discretion at large to be given to the decision-maker to overlook the terms of the Directive.

22. Counsel also refutes the respondent's contention that the s.18 procedure was not available in respect of family members already in the State and argues that contrary to the respondent's counsel's arguments, the established practice of the respondent is to accept applications for family reunification on behalf of a refugee whose family member or members are already in the State. It is submitted that this occurs where a minor child has been granted refugee status and whose parents are already in the State with the child but, for whatever reason, do not themselves qualify as refugees. It is submitted that many applications under s. 18 of the 1996 Act have been granted on this basis. Counsel contends that if a parent of a refugee child was required to leave the State in order to be able to apply for family reunification pursuant to s. 18 of the 1996 Act, that would result in an interpretation of the section that would be contrary to the Constitution and/or the European Convention on Human Rights, as it would amount to a grossly disproportionate interference with the rights of the child. As an instance which demonstrates a grant of family reunification where the family member was already in the State , counsel points to the decision in *W.T. v. Minister for Justice, Equality and Law Reform* [2016] IEHC 108. The issue of family reunification was not the basis of the challenge in that case. The challenge concerned the refusal of a subsidiary protection application. However, an issue Humphreys J. had to consider was whether the judicial review proceedings should be struck out because the applicant, by the time of the hearing, had been granted permission to remain as a family member of a recognised refugee, pursuant to s. 18(3) (a) of the 1996 Act.

23. The Court notes that the present case does not concern a child refugee. However, the Court is prepared to accept, based on what appears to be the factual matrix *W.T.,* that on at least one occasion the respondent has entertained an application pursuant to s. 18 of the 1996 Act in respect of family members who were already in the State. That course of action of course would not bind the respondent in this case if it is established that she had no *vires* to consider the family reunification application in issue in this case.

Decision on issues 1 and 2

24. The essential question to be determined is whether consideration of an application for family reunification where the family member said to be a dependent is already in the State is inconsistent with the statutory scheme provided for in s. 18(4) (a) such that it deprived the respondent of jurisdiction from embarking on a consideration of the application in issue in this case.

25. Counsel for the applicant points to the fact that the *vires* issue now being raised by the respondent was not addressed in the refusal decision or indeed in the ORAC report which preceded it. Yet, the respondent had seen fit to advise the applicant that his nephew was not covered by the Act and that his circumstances would therefore not be considered. It is submitted that it is not open to the respondent to adopt the position that she was without jurisdiction to deal with the application. It is urged that the Court

should not accept the preliminary objection that is now being made by the respondent. Counsel relies on the well established principle that it is not open to the respondent to seek to advance reasons for a decision in judicial review proceedings if those reasons are not contained in the impugned decision.

26. The respondent argues that there is no merit in the applicant's complaint since, if the respondent is correct in her interpretation of s. 18, then any complaint that the respondent is somehow estopped from making the plea cannot be sustained in light of the decision in *Re Green Dale Building Company Limited* [1977] I.R. 256. Accordingly, the assertion that the respondent's plea is not supported by affidavit is unmeritorious as the plea concerns the true construction of s. 18, which is a question of pure law. Equally, it is the respondent's contention that since what is in issue is a matter of statutory interpretation and a matter of law, there is no merit in the submission that the respondent is now trying to adduce further reasons at the judicial review stage to uphold the refusal of the application.

27. It is accepted by counsel for the applicant that if the Court agrees with the respondent's argument that the respondent acted without jurisdiction to entertain the application, the applicant could not succeed in the judicial review as he would not be able to argue any irrationality or unfairness as might attach to the decision given that the respondent would have been found to be without jurisdiction to entertain the family reunification application in the first place. Accordingly, he acknowledges that any issue of estoppel could not arise. In *Re Green Dale Building Company Limited*, the principle was stated in the following terms; "*a plea of estoppel of any kind cannot prevail as an answer to a well founded claim that something was done by a public body in breach of statutory duty or limitation of function is ultra vires*".

28. Section 18(4) of the 1996 Act provides:

> "(a) The Minister may, at his or her discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State and such member shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State.
>
> (b) In paragraph (a), "dependent member of the family", in relation to a refugee, means any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully.

29. Section18(5) and (6) provide:

> " The Minister may refuse to grant permission to enter and reside in the State to a person referred to in subsection (3) or (4) or revoke any permission granted to such a person in the interest of national security or public policy ("*ordre public*").
>
> The Minister may, on application in writing in that behalf and on payment to the Minister of such fee (if any) as may be prescribed with the consent of the Minister for Finance, issue to a person in respect of whom a permission granted under subsection (3) or (4) is in force a travel document identifying the holder thereof as such a person."

30. There is no doubt but that the provisions of s.18(4)(a) and (b) were drafted to give effect to the will of the Legislature, which was to afford the respondent power to exercise discretion as to whether to grant family reunification to a family member of a refugee applicant who satisfies the requirements of s.18(4)(b).

31. It is undoubtedly the case that if the respondent sees fit to exercise the discretion under s. 18(4)(a), that the permission that is provided for in the section is for the family member "to enter and reside" in the State. Does the nature of this permission, and the manner in which the relevant provision is constructed, prohibit the respondent from considering a family reunification application where a family member is already in the State?

32. Counsel for the respondent quotes Craises on Statute Law, as cited with approval in *Howard v. Commissioner for Works* [1994] 1 I.R. 101, as follows:

> "*The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expand those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."*

33. Counsel also referred the Court to the *obiter dictum* of Hogan J. in *R.X. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 446: The learned Judge stated:

> *"55. Of course, the dependent family member who is the subject of the family reunification application in question will, by definition, be living abroad. In the nature of things, it is likely that the majority of applicants will be residing in a developing country where both the cost of living and living standards generally will be significantly below those prevailing in this State, even in these economically difficult and challenging times. One may readily conjecture a situation where the family member in question is actually financially dependent on the person who has been given refugee status at the date of the application for family reunification, even though - having regard to the higher living costs here - the refugee might not necessarily be in a position to support the other family members in the State."*

34. The respondent accordingly relies on the dictum of Hogan J. in *R.X*. in aid of his argument as to how s. 18(4) is to be interpreted.

35. On the other hand, counsel for the applicant contends that the *dictum* of Hogan J. in R.X is not to be read as a statement of the law, rather the learned judge's observation reflected merely the factual situation in the majority of family reunification cases, namely that the family members would be living abroad at the time family reunification is sought. It is submitted that it is not clear that Hogan J. intended to infer that all family reunification applications will concern family members who are living abroad at the time of the application.

36. I am not entirely persuaded that the *dictum* of the learned Hogan J. in R.X. can be said to be dispositive of the respondent's primary contention. I tend to agree with counsel for the applicant that the learned Judge's comment, to the effect that a refugee dependent family member "*will, by definition, be living abroad*", is an acknowledgment of the reality of the situation in applications such as the present rather than being a definitive treatise on the true construction of s. 18(4), or an answer to the question of whether, for the respondent to have jurisdiction to consider an application for family reunification, the family member in question must be residing abroad at the time of the application.

37. It seems to me that s.18(4)(a) of the 1996 Act cannot be construed in isolation from s.18(4)(b). In the course of his submissions counsel for the respondent cited *Ali v. the Minister for Justice, Equality and Law Reform* [2011] IEHC 115 as authority for the proposition that the respondent's discretion under s. 18 of the 1996 Act is not at large, and that the qualifying pre-conditions for a finding that the applicant's sister was a dependent family member went to *vires* of the respondent. In *Ali*, Cooke J. opined:

> *"13. It is thus clear that in order for an application for family reunification to be successfully maintained under s. 18(4), two elements are involved. First, the person subject to the application must be a "dependent family member" which in turn involves demonstrating that the person comes within the degrees of relationship listed and secondly that the person is in fact "dependent" upon the applicant. Secondly, the Minister must exercise his discretion in favour of those dependent family members. By contrast to the entitlement under subs. (3), there is no right to the grant of permission upon the sole basis that the requirements of the definition of "dependent family member" are met. It is equally clear, however, that the exercise of the Minister's discretion does not arise unless the requirements of the first element are present. The Minister cannot exercise his discretion in favour of the grant of permission to persons who fail to come within the definition of "dependent family member".*

38. I concur with the learned Cooke J. but I do not agree that his observations in Ali are necessarily dispositive of the issue of the respondent's alleged lack of *vires* as argued by counsel for the respondent, namely that if the respondent is confronted by an application for family reunification from a refugee applicant whose family member is already in the country that fact of itself renders the respondent immediately without jurisdiction to consider the application. While a successful end result in a s.18(4) application will be that permission will be given "to enter and reside" in the State, the whole purpose of the section is to afford family reunification, at the respondent's discretion, to qualifying family members as described in s. 18(4)(b). In *Ali*, the learned Cooke J. outlined the factors upon which the exercise of the respondent's discretion is contingent, namely (i) it being established that the family member in respect of whom an application for family reunification is made comes within the ambit of family relationship prescribed by s. 18(4) (b) of the 1996 Act and (ii) it being established that the family member is in fact dependent on the refugee applicant. I also note that in *R.X.*, Hogan J. emphasised that the key words in s. 18(4), to wit, "*who is dependent on the refugee*", refer to "*dependency in fact*". (at para. 54) Thus, before any ministerial discretion can be exercised under s.18(4)(a), the fact of dependency has to be established. To my mind, the fact that a family member may have somehow reached the shores of the State by the time the family reunification application is made cannot of itself deprive the respondent of *vires* to consider the matter.

39. It is also of some note that s.18(4)(a) of the 1996 Act itself does not prescribe, in express language, that an application for family reunification by a refugee applicant can only be considered by the respondent when the family member is in their country of origin or whatever other country he or she might reside in. That is not to say that it was not in the mind of the drafters of the legislation (and the Legislature in passing it) that family reunification applications will "*by definition*", as noted by Hogan J. in *R.X.,* be made in respect of refugee family members who are living otherwise than in the State. Indeed, when one looks at s.18(6) of the 1996 Act, provision is made to facilitate family members in respect of whom family reunification is granted by the provision of a travel document to travel to the State, if such is required.

40. That being said, it is very difficult to conceive in the real world in which we all live that there would not be situations where a family member of a refugee applicant might somehow find his or her way into the State otherwise than through the statutory procedures laid down by the 1996 Act. According to the applicant, his sister arrived in the State in the month preceding the family reunification application. That being said, arrival on the shores of the State in those circumstances does not confer a family member of a refugee applicant with any status or benefit or advantage under the 1996 Act. However, as I have said, the fact that a family member in respect of whom family reunification is sought under the 1996 Act is in the State does not, to my mind, jurisdictionally constrain the respondent from considering an application for family reunification in such circumstances. The salient consideration is whether the asserted circumstances of the individual concerned satisfy the criteria set out in s.18(b) of the Act, in order that the respondent might consider an exercise of the statutory discretion to grant family reunification. As to whether the criteria are satisfied, this is a matter for the respondent to determine by reference to the factual matrix as to the individual's degree of relationship to the refugee applicant and his or her dependency on the refugee applicant.

41. In the course of his submissions, counsel for the respondent advanced the alternative argument that even if the respondent had *vires* to consider an application for family reunification where the family member is already in the State, that did not detract from the principal tenet of the respondent's argument, namely that pursuant to s. 18(4)(b), ministerial discretion to allow a family member to enter and reside in the State is conditional upon family member's dependency upon the refugee applicant having being established in the country of origin. It is argued that if the position were otherwise, it would mean that a refugee family member could enter the State and then create a dependency – a situation which would wholly undermine the ordinary regulation of the asylum and immigration system. Counsel submits that the height of the case made on the applicant's behalf was that his sister was dependent on him following her arrival in the State and that the case was never put to the respondent that the applicant's sister was dependent on him prior to her entry into the State.

42. In response to the respondent's argument that dependency in the country of origin has to be established in order to give the respondent jurisdiction, counsel for the applicant argues that the key test is whether there was dependency at the time of the application for family reunification. It is submitted that that test was met by the applicant at the time of the making of the application based on the information which was furnished to the respondent. In any event, counsel argues that the applicant's sister's dependency did not arise only after she arrived in the State, save perhaps for her financial dependency on the applicant. He reiterates that insofar as the respondent hones in on the issue of dependency as referred to in s. 18(4) (a) and (b) of the Act, it is dependency in fact, as opined in Hogan J. in *R.X*.

43. As regards the foregoing arguments, the Court has already rehearsed that the issue of dependency, and whether it arises for the purpose of qualification under s.18(4)(a) of the 1996 Act as "a dependent member of the family of a refugee", is a matter of fact to be determined by the respondent in all cases. I am satisfied that dependency for the purposes of s. 18(4)(a) and (b) falls to be assessed by the respondent in the context of the State from which the family member originated. In *Ali v. Minister for Justice*, Cooke J. opined, at para. 17:

"It is not disputed that so far as the concept of "dependence" in that context is concerned, the question is one of fact as to whether the subjects of the application are, ***in their circumstances in the country of origin*** *"dependent" in the sense of reliant for subsistence on the means and support of the refugee." (Emphasis added)*

44. While it is now well established in case law that dependency is not confined to issues of financial or economic dependency (See *Ducale v. Minister for Justice* 2013 IEHC 25 and *A.M.S. v. Minister for Justice* [2014] IEHC 57), that does not take from the principle outlined by Cooke J. in *Ali* that the dependency which falls to be considered by the respondent must arise in the country of origin.

45. Therefore, in so far as counsel for the applicant submits that it is dependency at the date of the application that is to be determined and asserts that support for this is found in the *dictum* of Hogan J. in *R.X.,* I am satisfied that what is stated by the learned Hogan J. in *R.X.* must be read in the context of the factual matrix which pertained in that case, namely, that the family members in issue in *R.X.* were in their country of origin at the time of the application for family reunification, as is to be expected in the vast majority of cases where family reunification will be sought.

46. In summary therefore, for the reasons outlined above, the Court is not prepared to find that it would be *ultra vires* the respondent to grant family reunification where a family member of a refugee family reunification applicant is already in the State at the time of the application, provided the respondent was satisfied that the requirements of s.18(4)(b) were met (and providing that the respondent was satisfied to exercise her statutory discretion). Accordingly, the Court does not find that the respondent acted in excess of her *vires* in considering the within application.

I now turn to the refusal decision.

Issues 3-6 The impugned decision
47. The first thing to be noted about the decision is that the refusal letter of 5th November 2015 states that the Minister "has decided not to exercise her discretion" to grant the application. This can be contrasted with the final paragraph of the "family reunification consideration" which states that "the Minister cannot be satisfied that [the applicant's sister] is a dependent member of the family" as defined in the 1996 Act. Accordingly, the Court finds that there is something of a disconnect between the two statements since the exercise of the respondent's discretion could only ever arise if she was satisfied thereafter that the applicant's sister qualified as a dependent. I accept however that the basis for the refusal is contained in the "Family Reunification Consideration".

48. Counsel for the applicant submits that in effect the decision contains only two reasons that could be said to be linked to the ultimate conclusion that dependency was not established, namely the findings regarding the absence of documentary evidence that the applicant's sister was residing with him and the finding that there was no documentary evidence regarding his sister's emotional and mental state. It is contended that the respondent's finding that the applicant had not produced documentary evidence to substantiate his claim was unfair and unreasonable. It is the applicant's case that he should have been afforded an opportunity to address the perceived paucity of documents prior to any decision issuing. He asserts that by her failure to do so, the respondent breached fair procedures. It is also contended that the finding as to lack of documentary evidence as to the applicant's sister's living arrangements was irrational in all the circumstances and even if it could be said to be rational that of itself could not justify the finding that she was not a dependent family member, in the absence of any analysis in the decision of the wider concept of dependency, as mandated by case law. It is further submitted that it was equally irrational for the respondent to rely on the absence of documents relating to the applicant's sister's travel to the State, and the applicant's response (as given in the questionnaire as to what his sister might do if he were to cease supporting her financially, as grounds for the finding that the respondent could not be satisfied that she was a dependent member of the family for the purpose of s.18(4) of the 1996 Act.

49. It is submitted that the respondent failed to apply the proper test for establishing dependency. In particular, there was no consideration in the decision of the reason the applicant's sister left Ukraine. Nor was there any consideration of her emotional dependency on the applicant. Citing *Ducale* and *A.M.S.*, counsel submits that the respondent failed to engage properly with the concept of dependency. The applicant's case is that the respondent was required to engage with the wider unfortunate circumstances of his sister in Ukraine as part of the consideration of dependency. The fact that prior of the conflict in Ukraine she was not a dependent on the applicant could not be a bar to reunification since dependency arose consequent to the conflict in Ukraine and its impact on her personal situation such that it forced her to leave her country of origin, as set out in the submissions made to the respondent.

50. In *Ducale*, Clark J. had occasion to consider what is meant by "dependent family member" for the purposes of s.18(4) of the 1996 Act. She opined:

> *"47. The word "dependent" is not defined in the Refugee Act 1996. As noted above, s. 18(4) provides that "dependent member of the family", in relation to a refugee, means "any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully." There is nothing in that definition to suggest that dependency is measured by the size and frequency of financial contributions nor is it suggested that the dependency is confined merely to economic reliance on those financial contributions. The Court was not referred to any judgments which provide assistance with regard to the definition of dependency in the context of family reunification of refugees. It is noted that although the concept of dependency is central to the discretionary powers of Member States established under Directive 2003/86/EC on the right to family reunification (to which Ireland is not a party), the Directive contains no definition of the term.*
>
> *48. The UNHCR Resettlement Handbook (reissued in 2011) advocates a wide interpretation of the term "dependent" in the context of Family Reunification of refugees states at pp 178-179:*
>
> > *'Dependency infers that a relationship or a bond exists between family members, whether this is social, emotional or economic. For operational purposes, with regard to the active involvement of UNHCR offices in individual cases, the concept of dependant should be understood to be someone who depends for his or her existence substantially and directly on any other person, in particular for economic reasons, but also taking social or emotional dependency and cultural norms into consideration.*
> >
> > *The relationship or bond between the persons in question will normally be one which is strong, continuous and of reasonable duration. Dependency does not require complete dependence, such as that of a parent and minor child, but can be mutual or partial dependence, as in the case of spouses or elderly parents. Dependency may usually be assumed to exist when a person is under the age of 18 years, but continues if the individual (over the age of 18) in question remains within the family unit and retains economic, social and emotional bonds. Dependency should be recognized if a person is disabled and incapable of self-support, either permanently or for a period expected to be of long duration. Other members of the household may also be dependants, such as grandparents, single/lone brothers, sisters, aunts, uncles, cousins, nieces, nephews, grandchildren; as well as individuals who are not biologically related but are cared for within the family unit."*

> *"56. There is thus objective support for the contention that "dependency" is not confined to total financial dependence but involves a wider concept taking account of all relevant economic, social, personal, physical, familial, emotional and cultural bonds between the refugee and the family member who is the subject of the FRU application."*

51. In *A. M. S.*, Mac Eochaidh J. held that:

> *"The central and often exclusive focus placed on financial dependency in family reunification decisions is misplaced.*
>
> *…*
>
> *The purpose of s. 18(4) was to facilitate family reunification in Ireland where the sponsor proves the existence of relationships of dependency requiring the physical proximity of the family."*

52. This approach was upheld by Clarke J. in the Supreme Court in *A. M. S. v. Minister for Justice* [2014] IESC 65. He stated:

> *"8.2 However, again for the reasons set out in this judgment, I am satisfied that Mac Eochaidh J. was correct to conclude that the decision of the Minister to refuse family reunification in respect of the mother and the minor sister of Mr. S was disproportionate on the facts of this case. No wider financial consequences other than those applicable to just those persons were taken into account. In the light of the special and enhanced application status expressly conferred by s.18 on dependent family members, the overall undoubted entitlement of the State to regulate immigration access must, in cases such as this, have significantly less weight than in other cases. In those circumstances I am satisfied that a decision to refuse reunification was, notwithstanding the significant margin of appreciation conferred on the Minister by the legislation in that regard, outside of the range of proportionate decisions which were open to the Minister on the facts of this case."*

53. In his submissions, counsel for the respondent does not take issue with how the concept of dependency has been defined in the jurisprudence relied on by the applicant.

Decision on issues 3-6

54. I will first address the alleged breach of fair procedures. It is well established that the onus is on an applicant in family reunification cases to satisfy the respondent that conditions exist such as to satisfy the requirement of dependency. In *Z. M. H. v. Minister for Justice* (2012) IEHC 221, Cooke J. referred to this burden on the applicant in a s. 18 application in the following terms;

> *"The second preliminary observation is that while it is the Minister who must "be satisfied", the onus lies with an applicant to provide the information, evidence and documentary proofs which the Minister is entitled reasonably to require in order to be satisfied that the conditions of the provisions are applicable in a given case."*

55. In the course of his submissions, counsel for the applicant cited *P.O.T. v. Minister for Justice* [2008] IEHC 361 in support of the proposition that where there is an alleged evidential deficiency in a s. 18 application, the respondent is obliged to communicate with the applicant prior to a negative decision. However, I am not satisfied that *P.O.T* is authority for the proposition counsel for the applicant advances. *P.O.T*. concerned the Minister's dissatisfaction with the validity of documentation. As put by Hedigan J.:

> *"the obligation of communication between the Minister and an applicant applies only in the unique and special situation where the Minister is unsatisfied as to the validity of documentation submitted".*

56. In the present case, the validity of documents was not called into question, rather it was the absence of documents such as might verify the applicant's claims upon which was the focus of the decision-maker's attention. In those circumstances, there is no basis for the Court to depart from the *dictum* of Cooke J. in *Z.M.H.* and, accordingly, the challenge on the basis that there was a breach of fairness in not alerting the applicant as to the perceived lacuna in documentary evidence prior to any decision has not been made out.

57. The decision is also challenged on the grounds that it was irrational and unreasonable for the respondent to refuse the application because of absence of documentation. Counsel for the applicant submits that as the applicant's sister had no source of income, was living rent free with the applicant, not on social welfare and totally dependent on the applicant for all her needs it is difficult to see what possible documentary evidence could have been forwarded in this regard. It is submitted that it was equally unreasonable for the respondent to take account of the absence of documents evidencing the applicant's sister's depression and anxiety. Counsel argues that this was an irrelevant consideration given that the applicant was not making the case for family reunification based on mental or physical disability pursuant to s. 18.4 (b) of the 1996 Act. It is contended that it is therefore difficult to see how the respondent's finding could lead to the conclusion ultimately reached as regards the issue of dependency. Accordingly, the finding as to the lack of documentary evidence regarding her illness and medical history cannot be rational.

58. On behalf of the respondent, it is submitted that it is manifest from the text of the decision that the absence of documentary evidence was not a general objection but was noted with regard to three distinct matters namely: (a) evidence of residence; (b) evidence regarding the family member's trauma, confusion and anxiety and medical evidence in respect of a hospital visit regarding the family member's depression; and (c) her being smuggled out of Ukraine and into Ireland.

59. Counsel argues that the applicant cannot simply posit, as he does, that such documentary evidence was beyond his or his sister's reach by virtue of the very circumstances that rendered her dependent. In particular, there was nothing to indicate that communication or correspondence with Ukraine was not possible in this case. The respondent asserts that it was incumbent upon the applicant to put his best foot forward and to present such relevant facts and evidence as might be necessary to support the application for family reunification, including facts and evidence that would tend to prove dependency.

60. Accordingly, it is contended that the respondent cannot be criticised for the condition of the applicant's own proofs, or be subject to judicial review because she was not willing to accede to his application while in receipt of insufficient proofs.

61. In the first instance, I perceive no irrationality in the respondent commenting on the lack of any documentary evidence regarding the assistance the applicant's sister received from a hospital in Ukraine for her depression. While counsel for the applicant contends that the applicant was not claiming family reunification on the basis of "a mental or physical disability" as provided for in s.18(4)(b) of the 1996 Act, it remains the position that based on the representations made to the respondent, the applicant was claiming that dependency arose by reason of the trauma his sister suffered in Ukraine which, it is asserted, necessitated assistance from a hospital in Ukraine. Thus insofar as the respondent factored into her decision the absence of documentary proof in this regard, I find no

reason to impugn that finding.

62. However, I find some merit in the applicant's argument that it is not clear how a finding that there was no documentary evidence of the applicant's sister's presence in his house could rationally lead to a finding that the respondent was not satisfied that the applicant's sister was a dependent family member for the purpose of the Act. Before elaborating on this further, I should say that one of the difficulties with the decision is that it is not at all clear if the basis of the respondent not being satisfied that the sister was "a dependent member of the family" lay in a perceived lack of evidence of her relationship to the applicant or of her dependency on him, or both. Insofar as it can be deduced from the decision that a prevailing factor was the issue of dependency, to my mind, the lack of documentary evidence as to the applicant's sister's residence in his household could not, of itself, sustain the respondent's ultimate conclusion. This is so given that the requisite test for dependency pertains to the circumstances of the family member in his or her country of origin and not on any domestic arrangements provided for her in the State or on the applicant's ability to provide for her, albeit this may be a factor to be considered in the exercise of the respondent's discretion to grant family reunification, once the requirements of s.18(4)(b) are met. I accept however that the decision does not address this latter issue, presumably on the basis that the statutory hurdle as set out in s.18(4)(b) was found not to be satisfied.

63. It is also submitted on behalf of the applicant that it was entirely irrational for the respondent to rely on the absence of documentary evidence in respect of the applicant's sister's travel to Ireland as a reason for not being satisfied as to her dependency on the applicant. It is argued that the finding that the applicant's sister was not a dependent member of the family cannot be said to rationally flow from a perceived lacuna in documents relating to her travel. I an inclined to agree with counsel for the applicant. It is difficult to fathom how the respondent's ultimate conclusion, namely that she cannot be satisfied from the facts of the case that the applicant's sister was a dependent member of the family can be said to rationally flow from the finding with regard to her travel to this State, at least without further elaboration by the decision-maker on the issue. Even if it could be said to be a factor which could inform the decision-maker in some shape or form, there is no indication on the face of the decision whether any weight was attributed to the submission that the documents the applicant's sister had were those provided to her by the individuals who facilitated her travel and which were retrieved by the same individuals. Nor is there any indication whether the applicant's information, if accepted, could reasonably account for the lack of documentation.

64. Counsel for the applicant also argues that the respondent's reliance on the applicant's submission that if he no longer supported his sister she would have to claim asylum as a basis for not being satisfied that she was a dependent family member was unlawful. The applicant's case is that this finding cannot be said to accord with the relevant jurisprudence which mandates that the issue of "dependent member of the family" for the purposes of s.18(4)(b) is a factual determination. Counsel submits that it is not understood how the respondent can use the applicant's statement that his sister might seek international protection if he ceased supporting her as a basis to find that she was not a dependent member of the family.

65. Counsel for the respondent asserts that the applicant's sister was not considered not to be a dependent family member on the grounds that she might make an application for asylum herself. It is claimed that the respondent simply repeated in the decision what was posited by the applicant in the family reunification application. Counsel concedes that the decision-maker's focus on the applicant's assertion was an irrelevant and immaterial consideration. He asserts, however, that it could not, by definition, have affected the respondent's reasoning. It is submitted that the connection between this statement and the respondent's ultimate conclusion that she was not satisfied that the applicant's sister was a dependent family member is therefore non-existent.

66. I agree entirely with the respondent's counsel's submission (which echoes that of counsel for the applicant) that the question of the potential asylum application was an irrelevant and immaterial consideration in the context of the assessment as to whether the applicant's sister was "a dependent family member" for the purposes of s.18(4)(b) of the 1996 Act. However, I am satisfied, from the face of the decision, that it appears to have been considered to be an issue of some relevance to whether or not the respondent could be satisfied as to whether the applicant's sister was "a dependent member of the family as defined by s.18(4) of the Refugee Act". To my mind, this consideration could not rationally be said to be a factor to which the respondent should have had regard when considering whether the applicant's sister qualified for the purposes of s.18(4)(b).

67. In summary therefore, while the Court has upheld the finding that the applicant did not adduce documentary evidence of his sister's depression, trauma and confusion or of the assistance rendered to her by a hospital in Ukraine, all of which could reasonably inform the respondent for the purposes of assessing whether the applicant's sister qualified as a dependent family member, the Court cannot be satisfied that this finding on the paucity of documentary evidence as to the applicant's sister's mental state is sufficient to sustain the conclusion that the respondent could not be satisfied that the applicant's sister was a dependent family member for the purposes of s.18(4)(b). This is so in circumstances where it is not clear to the Court, on the face of the decision, what weight was placed by the decision-maker on the other factors recited in the operative part of the decision in coming to the conclusion on dependency, all of which have been found by the Court not to be rational or reasonable premises upon which to base the conclusion ultimately reached by the respondent. Nor is it clear in the decision that the absence of documentary evidence as to her trauma, depression and anxiety was the prevailing factor in the dependency finding such that the Court could uphold the decision. While the Court is mindful that the onus is on the applicant to establish dependency and that it may well be reasonable for a decision-maker to refuse to find that an individual is a dependent family member by reason of lack of documentation, it is the absence of any indication as to the extent to which the lack of documentary evidence as to the sister's trauma prevailed on the decision-maker in coming to a negative decision, coupled with the reliance on immaterial factors, which constrains the Court to find that ground 4 of the statement of grounds is made out. The Court also finds that ground 3 is made out to the extent that relevant considerations (to the extent highlighted in this judgment) were not taken into account.

Summary
For the reasons set out above, I will grant orders of *certiorari* quashing the respective decision and remit the matter for fresh consideration.