Neutral Citation Number: [2010] IEHC 446

THE HIGH COURT

2010 116 JR

BETWEEN

R.X., Q.M.A. AND C.X.M.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 10th December, 2010

1. In these proceedings the applicants seek to quash a decision of the Minister dated 29th September, 2009, whereby he refused an application to permit the second and third named applicants (who are respectively the mother and sister of the first named applicant) to enter and reside in the State in accordance with the provisions of the Refugee Act 1996 ("the 1996 Act").

2. The applicants are all Somalis. The first applicant, Ms. RX, arrived in Ireland in September, 2004 and was granted refugee status here in January, 2006. She subsequently applied to the Minister for travel visas for her three children and her mother, Ms. QMA and her sister Ms. CA in accordance with s. 18 of the 1996 Act. As it happens, I need not concern myself now with the situation of the three children. Their application was originally refused in December, 2008, but following DNA testing, the Minister ultimately acceded to this application following an internal review of the original decision. Two of the children now reside in Ireland with their mother and the other has moved to Sweden where she resides with an aunt.

3. Turning now to the position of the other family members, their application was originally refused by a decision dated 8th December, 2008. Among the reasons given bearing on the position of the mother and the sister was that:

> "….you have provided insufficient and unsatisfactory evidence of dependency;
>
> you have failed to establish that QMC and CXM are suffering from a mental or physical disability to such an extent that it is not reasonable to maintain themselves fully…."

4. On 11th March, 2009, the applicants' solicitor wrote to the Minister seeking an internal review of this decision. Documentation was then supplied to show that the mother was suffering from depression, stress, left eye poor vision and anxiety neurosis. In April, 2009 a further medical report was sent which apparently showed that the mother's condition had deteriorated significantly to the point that she was now blind in her left eye and had poor vision in her right eye, was suffering from depression and had difficulty walking due to rheumatism. The report concluded by stating that the mother was advised:

> "to continue medication regularly, have follow up every month and needs a close family support to take care of her grandchildren and she is unable to support herself and her children and operation for her eye."

5. On 3rd April, 2009, the Minister had undertaken to review this original decision. The applicant's solicitor then supplied the Minister with a range of further information to assist the decision-making process. This included birth certificates for the children, sister and mother and, as we have just seen, further medical certificates in respect of the mother's medical condition.

6. The Minister very fairly agreed to bear the costs of the DNA testing of the children. These tests confirmed that the first named applicant was indeed the mother of the children and once this information was communicated to the Minister in November 2009, the appropriate visas were then issued by our Embassy in Addis Ababa.

7. So far as the mother and sister were concerned, however, matters had already come to a head with a letter from the Minister to the applicants' solicitors dated the 29th September, 2009. Insofar as the applications of C.X.M. and K.M.A. were concerned, the letter merely stated that:-

> "Having considered all of the documentation and submissions made on behalf of the applicant, I decided to uphold the Minister's original decision not to grant family reunification to C.X.M. and K.M.A."

8. I pause here to observe that it was common case between the parties that no reasons were given for this particular decision. In this case, nothing turns on this because, as it happens, however, the Minister wrote a further letter on 1st October, 2009, which did, in fact, advance reasons for the decision:

> "Having taken all of the submissions made on behalf of the applicant and the supporting documentation submitted into account, I am of the opinion that the applicant is not in a position to support the family members applied for or that they qualify as dependent family members under s. 18(4) of the Refugee Act 1996.
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> I have concluded, therefore, that the Minister should not exercise his discretion, pursuant to s. 18(4) of the Refugee Act 1996, to grant permissions to the subjects named above to enter and reside in the State and that the decision not to grant family reunification should be upheld."

9. The net issues which arise in this application for judicial review are, accordingly, first whether the reasons given in the letter of the 1st October, 2009, are sustainable and, second, if they are, did the Minister have jurisdiction to conduct an internal review of the original decision having regard to the structure of s. 18(4) of the 1996 Act, especially in the light of the judgment of the Supreme Court *in Izevbekhai v. Minister for Justice, Equality and Law Reform* [2010] IESC 44. I propose presently to consider these questions

in turn.

Section 18 of the 1996 Act
10. The relevant statutory provisions may conveniently be described and set out at this juncture. In a case where an applicant has been given a declaration of refugee status, s. 18(1) provides that person may apply to the Minister for permission to be granted:

> "to a member of his or her family to enter and to reside in the State and the Minister shall cause such an application to be referred to [Refugee Applications] Commissioner."

11. Section 18(2) requires the Commissioner to investigate the application and to prepare a report for the Minister. It further requires that the report shall set out the relationship between "the refugee concerned and the person the subject of the application and the domestic circumstances of the person." Where the Commissioner is satisfied that the person the subject matter of the application is a "member of the family of the refugee", then, subject to considerations of national security or public policy, the Minister is obliged to grant that person permission to enter and to reside in the State: see s. 18(3)(a). Section 18(3)(b) defines "member of the family" for this purpose as a spouse and minor children and, where the refugee is himself or herself a minor, his or her parents. It will thus be seen that the Minister had no discretion at all in the case of the first named applicant's children, once the parentage and identity of those children was established by the DNA tests.

12. In addition, however, to s. 18(3), s. 18(4) also permits the Minister to exercise a discretion in the case of *other* family members who would not *otherwise* come within s. 18(3). 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."

13. It will be thus seen that it is s. 18(4) which governs the application of the mother and the adult sibling.

Whether the Minister had the power to conduct an internal review
14. Although the Minister agreed to conduct an internal review of the original decision of December, 2008 to refuse to agree to family reunification, the argument now advanced by Mr. Conlan Smyth is that, in the light of the Supreme Court's decision in *Izevbekhai*, there was in fact no *vires* to conduct such an internal review. There is admittedly something unusual - perhaps even unattractive - when a public body later argues that it had no jurisdiction to engage in the course of action it had earlier embarked on, but as the law now stands there can be no estoppel as against a statute: see the comments of *Re Green Dale Building Co. Ltd*. [1977] I.R. 256 at 264-265. In this regard, therefore, the fact that the Department had by its own conduct led the applicants to believe that such a jurisdiction is, therefore, irrelevant as a matter of strict law, since in view of the Supreme Court's decision in *Green Dale Building Co,* the doctrine of promissory estoppel has no application. We must, therefore, turn to the question of what *Izevbekhai* actually decided.

15. In *Izevbekhai* the court held that the Minister had no jurisdiction to consider an application for subsidiary protection in respect of persons who were the subject of a deportation order made before the 10th October, 2006, the operative date so far as the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). In his judgment for the court, Fennelly J. stressed the interlocking nature of Regulation 3, Regulation 4(1) and Regulation 4(2) of the 2006 Regulations.

Regulation 3 provides:

> "3. (1) Subject to paragraph (2), these Regulations apply to the following decisions (in these Regulations referred to as "protection decisions") made on or after the coming into operation of these Regulations:
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> (a) a recommendation under section 13(1) of the 1996 Act;
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> (b) an affirmation under paragraph (a) or a recommendation under paragraph (b) of section 16(2) of that Act;
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> (c) the notification of an intention to make a deportation order under section 3(3) of the 1999 Act in respect of a person to whom subsection (2)(f) of that section relates;
>
> (d) a determination by the Minister under Regulation 4(4) or 4(5)."

16. In respect of this provision, Fennelly J. noted (at paragraph 52):

> "For the purposes of the present appeal, only paragraph (c), relating to a proposal to make a deportation order, is relevant. The intention is clear: in future, that is from 10th October 2006, every subject of a deportation order which the Minister proposes to make after that date is guaranteed the right to make prior representations to the Minister that he or she runs the risk of exposure to serious harm if deported to the country of origin. On the other hand, persons against whom deportation orders have been made and notified, though not yet in fact deported are not accorded that right. The paragraph makes no provision for cases of deportation orders made before 10th October 2006, but not yet notified. Section 3(3)(b)(ii) of the Act of 1999 obliges the Minister to *"notify the person in writing of his or her decision and of the reasons for it…"*

17. Regulation 4 is in the following terms:

> "(1) (a) A notification of a proposal under section 3(3) of the Act of 1999 shall include a statement that, where a person to whom section 3(2)(f) of that Act applies considers that he or she is a person eligible for subsidiary protection, he or she may, in addition to making representations under section 3(3)(b) of that Act, make an application for subsidiary protection to the Minister within the 15 day period referred to in the notification.
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> (b) An application for subsidiary protection shall be in the form in Schedule 1 or a form to the like effect.
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> (2) The Minister shall not be obliged to consider an application for subsidiary protection from a person other than a

person to whom section 3(2)(f) of the 1999 Act applies or which is in a form other than that mentioned in paragraph (1)(b)."

18. These provisions were the subject of a detailed analysis from Fennelly J. who commented (at paras. 55 and 56 of the judgment):

> "55. Regulation 4(1) imposes a positive obligation on the Minister, but its area of application is limited to cases of deportation orders which the Minister proposes to make after 10th October 2006…..it makes no provision for deportation orders already made but not notified.
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> 56. ….. the Minister made the three deportation orders in respect of the appellants on 23rd November 2005, which was prior to the coming into operation of the Regulations. He gave notice of these orders on 29th November 2006. Section 3(3) of the Immigration Act, 1999 obliges the Minister to give notice in writing of a proposal to make a deportation order. The appellants were properly notified. Regulation 4(1)(a) of the Regulations applies only to a *notification* of such a proposal. The wording of that provision is capable of applying only to such notifications given after the coming into operation of the Regulations, i.e. after 10th October 2006."

19. In passing, I would observe that this analysis lays the foundation for the court's ultimate conclusion, because Fennelly J. here made it clear that any arguments based on the existence of some residual ministerial discretion would be inconsistent with the overall structure of the Regulations. This is, in any event, put beyond any doubt by the following subsequent passages:

> "75. In my view, Regulation 3 is crucial and clear in its own terms. It limits the scope of application of the Regulations. It provides that the Regulations "*apply to the following decisions,*" which it then specifies. For the purposes of the present case, it is crucial that it limits the scope of the Regulations to cases described in Regulation 3(1)(c) where "*the notification of an intention to make a deportation order under section 3(3) of the 1999 Act in respect of a person to whom subsection (2)(f) of that section relates*" is communicated after 10th October 2006.
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> 76. That limitation is itself closely related to the content of Regulation 4(1)(a) which obliges the Minister to give a specific type of notice to persons to whom he communicates notifications of the kind mentioned on Article 3(1)(c).
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> 77. Leaving aside the question of the scope of Regulation 3, and looking at the wording of Regulation 4(2) itself, one must ask by what words that provision confers on the Minister the discretion to consider applications from persons other than those affected by the decisions listed in Regulation 3, or other than persons expressly entitled to notice from the Minister pursuant to Regulation 4(1)(a).
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> 78. To begin with, it seems obvious that Paragraphs (1) and (2) of Regulation 4 must be read together. Paragraph (1) deals with a notification being given to a person to whom section 3(2)(f) of the Act of 1999 applies. It obliges the Minister to include in that notification notice of the right to make an application for subsidiary protection. Paragraph (2) adds that the Minister is not obliged to consider an application for subsidiary protection from any person other than one to whom that provision applies. The same applies *pari passu* to the provision regarding persons who have not completed the form provided in Schedule 1 and referred to in Regulation 4(1)(b). This appears to me to be a clear, complete and logical scheme. The three provisions interlock and complement each other.
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> 79. I can find no language in Regulation 4(2) conferring on the Minister, either expressly or implicitly, any discretion to consider applications for subsidiary protection in cases not provided for. The paragraph is negative in form: it says what the Minister is not obliged to do."

20. Of course, Regulation 4(2) provides that the Minister "shall not be obliged" to consider an application for subsidiary protection by persons not falling within its scope. If the language of Regulation 4(2) was looked at entirely in isolation, one might, perhaps, have been forgiven for thinking that it conferred an implicit discretion. As we have seen, Regulation 4(2) states that the Minister "was not obliged" to consider an application for subsidiary protection from a person not falling within the terms of Regulation 4(1) and, starting from that point, the argument could well be made that while the Minister was under no obligation in that regard, he nonetheless had an implicit discretion to consider such application.

21. Fennelly J. held, however, that Regulation 4(2) could not be read in isolation and that the combined effect of Regulation 3 and Regulation 4 was, in effect , to create an implicitly closed category of cases, so that the Minister could only consider an application for subsidiary protection where the deportation order had been made after the operative date in November, 2006.

22. As Fennelly J. pointed out (at para. 76) the wording of Regulation 4(1)(b) imposed a particular obligation on the Minister to give a particular notification in respect of an application for subsidiary protection to persons the subject to a deportation order after 29th November, 2006. Thus, any interpretation of the Regulations that the Minister retained an implicit discretion in respect of orders made prior to that date would have been inconsistent with the scheme posited by Article 3 and Article 4. The Minister's discretion with regard to subsidiary protection was made conditional on the notification which was required to be sent to any person who was the subject of the deportation order and that specific notification only applied to deportation orders made after the operative date. That, in my view, is the true ratio of *Izevbekhai*.

23. Furthermore, it may also be important to note that the Supreme Court was not here addressing any other statutory power. In addition, the court was interpreting Regulations which were designed to transpose a particular Directive. As Fennelly J. explained (at para. 73):

> "73. I propose to consider, in the first instance, whether the Regulations confer a right upon persons such as the appellants to apply to the Minister for subsidiary protection. Put otherwise, do the Regulations oblige the Minister to consider such an application for subsidiary protection? It is important to emphasise that these appeals arise solely in the context of the Regulations of 2006 and, to the extent that it is relevant, the Council Directive which they transpose. The appeals are not related in any way to the exercise of any other statutory power, such as that conferred by s. 17(7) of the Refugee Act, 1996….. Nor, it should be emphasised does this appeal concern the exercise through the Minister by the State of the general executive or sovereign power of the State with regard to the admission of persons of other nationality into the State. I will express no views on these matters."

24. What, then, is the significance - if any - of *Izevbekhai* so far as the present case is concerned? It would appear to be this: that

the courts will not imply any statutory power which would be inconsistent with the statutory scheme. This in itself is not a novel proposition (see, *e.g., McCarron v. Kearney* [2010] IESC 28), although, of course, the *application* of that principle can - as here - give rise to difficulties.

25. I cannot, however, agree that this means that a statutory power can be exercised once and only once. After all, s. 22(1) of the Interpretation Act 2005 provides that:

> "(1) A power conferred by an enactment may be exercised from time to time as occasion requires."

26. The real question is whether the existence of an internal review would be inconsistent with the statutory scheme, as Mr. Conlan Smyth strenuously contended. To recapitulate, it may be recalled again that each application for family reunification had to be transmitted to the Refugee Application Commissioner who was then required to prepare a report: see s. 18(1) and s. 18(2). If, "after a consideration of a report of the Commissioner submitted to the Minister under subs. (2)", the Minister is satisfied that the applicant is the spouse or child of a refugee, then the Minister is obliged to grant permission to that person to stay in the State: see s. 18(3). Finally, the Minister has a discretion under s. 18(4)(a) to grant permission to dependent members of the family.

27. If the decision to exercise the s. 18(4)(a) discretion was inextricably intertwined with the referral of the matter to the Refugee Application Commissioner, then, I think, the argument that an internal appeal would be inconsistent with *Izevbekhai* would be well founded. But is it so intertwined?

28. It is, of course, true that the entire s. 18 process starts with a reference to the Commissioner. The Minister is also required by section 18(2) to consider the Commissioner's report. But the Commissioner's report is fundamentally there to assist the Minister's deliberations. If, for example, the Commissioner's report were to contain a fundamental error, is to be suggested that the Minister could not receive additional evidence from an applicant to establish something as fundamental as the existence of a family tie? Surely not.

29. In my view, while the Commissioner's report is an essential starting point, it does not preclude the Minister receiving additional submissions or further evidence. If this is correct, then it follows that, once the Minister has the Commissioner's report, he can exercise the s. 18 powers from time to time as he sees fit.

30. It follows, therefore, that the Minister did not act ultra vires in conducting an internal review.

Are the reasons given by the Minister sustainable in law?

31. We may now turn to the question of whether the reasons actually given by the Minister are sustainable in law. Before answering that question, it is, perhaps, appropriate to note that this in turn raises the antecedent question of whether the first applicant's constitutional rights have been potentially affected or engaged by the Minister's decision to refuse to permit family re-unification. If the answer here is in the affirmative, then this has implications for the adequacy of these reasons: see, *e.g.,* the comments of Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3.

32. I would pause here to add that the references in asylum and immigration case-law to Article 8 ECHR have become such a common place, that it is perhaps easy to overlook the fact that even in this area, the ECHR merely supplements or enhances the role of the Constitution. Such is made clear by the Long Title to the European Convention of Human Rights Act 2003, and, in any event, the Supreme Court has confirmed that where there is an overlap between constitutional rights and rights deriving from the Convention, it is the former which, generally speaking at least, must be considered first: see, *e.g., Carmody v. Minister for Justice, Equality and Law Reform* [2009] IESC 71. The Convention comes into play only where the Constitution does not provide an adequate remedy in its own right.

33. Certainly in cases involving questions of the constitutionality of a statute or common law rule, s. 5(1) of the European Convention of Human Rights Act 2003, makes it clear that the Convention can only come into play only where it has been established that the Constitution does not provide an adequate remedy in its own right, a point which, in any event, is put beyond doubt by *Carmody*. But it seems to me that this principle must also apply by analogy where the issue concerns the application of a fundamental right and where the right in question is protected by both the Constitution and the Convention. As Murray C.J. observed in *Carmody*:

> "It hardly needs to be said that the provisions of the Act of 2003 cannot compromise in any way the interpretation or application of the Constitution, a principle which is acknowledged in the long title to the Act which states that the effect of the Act is "subject to the Constitution".

34. Of course, it is equally scarcely necessary to recall that this Court has long since rejected the argument that fundamental rights protected by the common law could be invoked in order in some way to supersede or qualify the fundamental rights provisions of the Constitution. As Martin Maguire J. said in *The State (Walsh) v. Lennon* [1942] I.R. 112 at 114:

> "The authority of the Constitution enacted by the People is paramount. Its clear provisions must be given effect to even though the rights, or some of them, now asserted were to some extent covered by the Common Law."

35. The Oireachtas has, of course, decided to give legal effect in the manner contemplated by the 2003 Act to the European Convention of Human Rights in accordance with Article 29.6 of the Constitution. The Convention is, of course, a central feature of the European legal patrimony and the jurisprudence of the European Court of Human Rights serves - among other things - as a salutary warning to the dangers of legal parochialism in matters of fundamental rights. But, as both Murray CJ and Fennelly J. pointed out in *McD v. L.,* the Convention provisions do not have direct effect in our domestic law. Nor did the Oireachtas intend - and could not constitutionally have intended - to create a form of parallel Constitution via the 2003 Act. Rather, the whole thrust of the 2003 Act was to provide a form of failsafe mechanism to deal with those - hopefully rare - cases where it has been actually established that the Constitution does not meet the international obligations to which we have solemnly committed as a State.

36. It may be accepted that the 2003 Act makes this clearer with regard to the declarations of incompatibility under s. 5(1), since this remedy (such as it is) is available only where no other remedy is available to the plaintiff. What, however, is the position where (as here) the case involves a straightforward challenge to the validity of an administrative decision which does not involve a challenge to the constitutional validity or Convention compatibility of statute or common law rule?

37. In my view, it would be anomalous and at odds with the appropriate and established system of legal norms if, for instance, Article 8 ECHR came to be regarded *de facto* as the primary guarantee of family life with the result that Article 41 of the Constitution came to be effectively replaced or supplanted in such cases. This would, however, be the practical consequence of permitting litigants to

invoke the ECHR as a first resort, instead of - as I believe the Oireachtas clearly intended with the 2003 Act - as a last resort.

38. It accordingly follows that, by analogy with the Supreme Court's reasoning in *McD v. L,* even in straightforward challenges to the validity of an administrative decision where fundamental rights are at stake, the most appropriate course is for the court to examine the pleas made with reference first to the fundamental rights provisions of the Constitution. It is only where such contentions prove to be unavailing, that the court should move to the consider arguments based on the ECHR. Again, none of this is to suggest for a moment that ECHR authorities cannot be invoked by way of argument in a purely constitutional context, much as has happened for the last fifty years or so, ever before the 2003 Act was enacted.

39. In the present case, therefore, the question which first arises is whether the guarantees of family life and the protection of the marriage which are contained in Article 41 can potentially extend to grandparents and to siblings. It is true that Article 41.3.1 commits the State to the protection the institution of marriage "upon which the family is founded". But that does not mean that the grandparents and siblings cannot, at least, for certain limited purposes and in certain special situations, come within the ambit of the protection of the family for the purposes of Article 41.

40. In my view, it cannot have been intended by the People in 1937 that the family contemplated by Article 41 should be confined exclusively and for all possible purposes to what nowadays would be described as the nuclear family of parents and children. The fact that marriage was (and, of course, is) regarded as the bedrock of the family contemplated by the Constitution does not mean that other close relatives could not, at least under certain circumstances, come within the scope of Article 41. In this regard, it must be borne in mind that grandparents and adult siblings form part of many family units which are (or, at least, were originally) formed by married couples and this was probably at least as true in 1937 as it is today.

41. Indeed, it is probably salutary to recall in this context that the principal political architect of the Constitution was himself raised for most of his formative years by his grandmother, uncle and aunt: see*, e.g.,* Ferriter, *Judging Dev* (Dublin, 2007) at 26. While, of course, the purely subjective beliefs and personal life experiences of even the most pre-eminent personage associated with the drafting of the Constitution cannot in itself determine the proper interpretation of Article 41, I mention this historical fact merely to show that the drafters could not have intended that close-knit relatives by blood and marriage looking after children in the absence of their married parents would never come within the scope of the constitutional definition of the family.

42. Putting this yet another way, a household consisting solely of a grandparent who was rearing a dependent grandchild would have been generally regarded as a "family" in 1937. It would be unthinkable that to suppose that the People would have assented to a state of affairs where, in circumstances where parents who had married and were deceased or otherwise absent from the child's life, the Oireachtas could have, for example, through legislation compelled a grandparent to yield up custody of the child to the State authorities, at least in the absence of some compelling justification for such a step. Yet unless the grandparent and grandchild were regarded as a "family" for this purpose, the Constitution would seem to have placed no impediment to the enactment of such legislation.

43. None of this is to take in the slightest from the fact that when the Constitution speaks of the family, it normally contemplates that the family will consist solely of married parents and children and such is evident from the language of both Article 41 and Article 42: see, *e.g. The State (Nicolaou) v. An Bord Uchtala* [1966] I.R. 567. It is, however, to say that there can be no *a priori* rule which *automatically* excludes grandparents and adult siblings from being within the scope of a "family" for the purposes of Article 41.

44. It is true that in *Caldaras v. Minister for Justice Equality & Law Reform*, a case concerning the proposed deportation of the grandparents of Irish born children, O'Sullivan J. concluded that:

> "I cannot see in them any warrant for extending the concept of 'family' as considered in those judgments in [*L & O v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1] to include grandparents within the concept of 'family' as guaranteed by Article 41 of the Constitution or indeed otherwise . . . I do not think that as a result of the *L & O* decision in the Supreme Court, the meaning of the word 'family' in section 3(6)(c) of the Act of 1999, has been widened to include grandparents."

45. As a matter of strictness, all that *Caldaras* decided was that *L & O* was not an authority for the proposition that grandparents came within the scope of Article 41. That is indisputably correct, since that issue was simply not before the Supreme Court in *L & O.* Insofar, however, as *Caldaras* is to be taken as having decided that grandparents cannot *ever* come within the scope of Article 41, I would decline to follow it and would respectfully prefer instead the reasoning of Edwards J. in *M v. Minister for Justice, Equality and Law Reform* [2009] IEHC 500.

46. Thus far we have been dealing with the question of whether there was any *a priori* rule of constitutional interpretation by which grandparents (and, by extension, adult siblings) were excluded from the scope of the family life envisaged by Article 41. For such persons to come within the scope of the constitutional protection, it is, however, necessary to demonstrate that they have such ties of dependence and inter-action with other family members that they would come within the rubric of that family and that the family itself is based on marriage. This normally pre-supposes that a person such as a grandparent would share the same house as the other family members in question and that they would have an active role in the comings and goings of the family in question. A grandparent could not, for example, be regarded as a family member simply by reason of ordinary social courtesies or even by reason of regular visits to the grandchildren's family home. While each case must turn on its own facts, something further than the ordinary inter-action between a grandparent and a grandchild or other family member would generally be required. This, as it happens, is also the position of the European Court of Human Rights with regard to Article 8 ECHR: see, *e.g., Marckx v. Belgium* (1979) 2 EHRR 330, *Boughanemi v. France* (1996) 22 E.H.R.R. 228.

47. The facts of the present case may be thought, however, to provide a paradigm example of where, exceptionally, perhaps, it would be appropriate to regard a grandparent and an adult sibling as coming within Article 41. The first named applicant, Ms. RX, came to Ireland in September, 2004. As the Refugee Appeal Tribunal found in its decision of 6th September, 2005, granting her refugee status, she was enslaved, raped and brutally treated by marauding clans. She managed to flee to Ethiopia and travelled on from there to Ireland. At the time she was forced to leave her three young children (then aged 5 and 2 and nine months respectively) in the care of her mother and sister in Addis Abba. While the mother and sister have no income - they are themselves Somali refugees living in Ethiopia - it is not in dispute but that the children were cared for by the mother and sister while being in receipt of remittances from Ireland from the children's mother, Ms. RX , during the period from 2006 to 2009. During this period, the children must have regarded their grandmother and aunt as their *de facto* parents.

48. Against this particular and special background, I am of the view that the grandmother and aunt came within the scope of Article 41. Even if I am wrong on this point, it is incontestable that the grandmother and the adult sibling would form a family for the

purposes of Article 8 ECHR: see, *e.g.*, the judgment of Edwards J. in *M* and that of Hedigan J. in *G.O. & Ors v. Minister for Justice, Equality and Law Reform* [2008] IEHC 190. In that case, Hedigan J. accepted that family life within the meaning of Article 8 of the Convention did exist between the first named applicant and her grandchildren, having regard to the circumstances of that case. He stated (at para. 26 of the judgment):

> "It is my view, having considered these authorities, that family life does exist between G.O and her grandchildren. I would place particular emphasis on the fact that G.O. lives with her grandchildren and is heavily involved in their upbringing. While cohabitation may not always be essential in order for 'family life' to exist, the fact that G.O. lives with her grandchildren strengthens the family ties between them. The cohabitation under one roof of the family members involved and extent of their daily contact add an extra dimension to the normal relationship between grandmother and grandchildren. This sets the present applicant apart from the normal level of contact that exists between grandparent and grandchild which was present, for example, in *Caldaras*.
>
> That said, this view by no means disposes of a consideration in this case of Article 8. The existence of 'family life' between G.O and her grandchildren does not, of itself, mean that the State cannot deport her. The right to family life under Article 8(1) is not absolute and the State is not compelled to abstain from interference with Article 8 rights. Rather, it falls to be considered whether such interference is justified in accordance with Article 8(2)…."

49. The significance of this is that given that the decision impacts on constitutional rights (and, for that matter, ECHR rights), the reasoning should, in the words of Murray C.J. in *Meadows,* "at least disclose the essential rationale on foot of which the decision is taken." But before examining the adequacy of that reasoning, it is important first to examine the language of s. 18(4).

50. The words "dependent member of the family" in s. 18(4)(a) is defined in section 18(4)(b). The Oireachtas chose to use the word "means", a word "which is *prima facie* at once explanatory and restrictive, exhaustive and exclusive": see *O'Neill v. Murphy* [1948] I.R. 72 at 84, per Kingsmill Moore J.

51. There are, therefore, two elements of the definition: the family member in question must *either* be (i) "dependent on the refugee" *or* (ii), suffering from a mental or physical disability to such an extent "that it is not reasonable for him or her to maintain himself or herself fully".

52. If we start with the second criterion and apply it to the case of the mother, it is hard to see how the decision can stand in view of the reasons actually given. Although it is true that the mother's medical position appears to have deteriorated between the first medical report of September, 2008 and the second report of April, 2009 - a fact which was the subject of some comment at the hearing – the reasons given by the Minister never suggested that the medical reports were unreliable or lacked authenticity. It must be recalled here that the second medical report in particular had concluded that the mother was suffering from blindness, chronic rheumatism and depression and needed close family support.

53. In these circumstances, one is frankly at a loss to understand how the Minister could have concluded that the mother was not suffering from a mental or physical disability such that it was not reasonable for her to maintain herself fully. The reasoning here is defective on *Meadows* grounds, since there is no explanation at all as to how this conclusion could possibly have been arrived at in the teeth of the available evidence. Another way of looking at this is to say - if you prefer - that this part of the decision itself so far as it concerns the mother is manifestly unreasonable.

54. So far as the dependency criterion is concerned, the key words of s.18(4) ("....who is dependent on the refugee…") refer to dependency in fact. The evidence here establishes dependency in fact, inasmuch as it is clear that the mother and the sister - who lived in abject poverty in Addis Ababa - depended for financial survival on the remittances transmitted by Ms. RX, even though she in turn was (and is) dependent on social welfare payments as her principal (if not, indeed, exclusive) source of income. That is a somewhat different thing from saying - as the Minister did in the letter of 1st October, 2009 - that Ms. RX was not "in a position to support the family members applied for". But this is not quite the test which s. 18(4) actually posits.

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.

56. Indeed, that is probably the situation here in that the mother and daughter were dependent in Ethiopia on the remittances from Ireland, even though one might wonder how Ms. RX could support her mother and sister if they were in fact to come to Ireland. Section 18(4) does not, however, posit a test of whether the refugee could afford to support the family members if they were to come to Ireland. It rather addresses itself to the somewhat different question of whether the family members were dependent on the refugee at the date of the application. The evidence available to the Minister would appear to admit of no conclusion other than that the mother and the daughter were so dependent.

57. In these circumstances, I am driven to the conclusion that so far as the dependency criterion is concerned, the Minister applied the wrong legal test. It follows that this aspect of this decision must also be quashed: see, e.g., *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218, *White v. Dublin City Council* [2004] IESC 35, [2004] 1 I.R. 545.

58. For these reasons, I propose to quash the decision of 1st October, 2009, and to remit the matter to the Minister so that a fresh decision on the application can now be made.