THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2020/905 JR]

BETWEEN

DEEQA HAJI AXMAD

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

Judgment of Mr. Justice Cian Ferriter delivered on the 8th December 2021

Introduction

1. In these judicial review proceedings, the applicant seeks an order of certiorari quashing the decision of the respondent (the “Minister”) dated 28th August, 2020 refusing the applicant’s application for family reunification with her niece and nephew (which application was lodged on 18th June, 2020).

Background

2. The application for family reunification was made pursuant to s.56 of the International Protection Act, 2015 (“the 2015 Act”) (‘s.56’), which provides that a “qualified person” (referred to in the section as the “sponsor”) may make an application to the Minister for permission to be given to a member of the family of the sponsor to enter and reside in the State.

3. S. 58(a) of the 2015 Act provides that such an application shall be made within twelve months of, inter alia, the giving of a refugee declaration to the applicant. In this case, the applicant, who is a national of Somalia, was granted a refugee declaration on 9th July, 2019. S. 58(9) provides that a “member of the family” of the sponsor means, inter alia,:

“A child of the sponsor who on the date of the application under subsection (1) is under the age of eighteen years and is not married”.

4. By letter dated 11th June, 2020, the applicant made (within the one-year period from the grant to her of a declaration of refugee status on 9th July, 2019) an application in respect of her husband and her niece and nephew who reside with her husband in Mogadishu, Somalia and are in his care (“the Application”).

5. The Application was said to be in respect of the applicant’s husband (Mr. Mokhtar Mohamed Ahmed) and “child (non-biological) Muad Saed Mohamoud DOB 01.02.2016” and “child (non-biological) Asho Ali Haji, DOB 20.10.2004”. A series of documents was enclosed with the application. Those documents were listed in the application letter. Included amongst those documents (and so listed in the application letter) was a “Declaration of Responsibility from Banadir Regional Court of the Federal Government of Somalia Republic, with translation” (the “Declaration of Responsibility”).

6. The application letter stated as follows:

“We are instructed that Ms. Axmad fled from Somalia, reluctantly leaving her family behind, on 5th April, 2018 and arrived in Ireland the following day and applied for asylum at Dublin Airport. She was granted refugee status by the Minister for Justice and Equality on 9th July, 2019 following an interview with the IPO.

At the time of fleeing Somalia, Ms. Axmad was living with her husband Mr. Ahmed, and her mother and her thirteen-year-old niece Asho Ali Haji, and her two-year-old nephew Muad. These children’s natural parents were Deeqa’s brother and sister. Asho’s birth parents were Ali Haji Axmad and Fadumo Hassan Dhuhlow. Ali Haji Axmad was Deeqa’s brother. Muad’s birth parents were Saed Mohamoud and Sahro Haji Axmad. Deeqa and Sahro were sisters. The children’s parents are deceased and she has been granted responsibility for them as their closest surviving relative. Our client instructs that she was in the process of obtaining the death certificates of Sahro Haji Axmed and Ali Haji Axmad, however due to the outbreak of the ongoing pandemic, this process has been halted.

We refer to the recent judgment of the High Court (Mr. Barrett J) which states that the term “child” in s.56(9) is not defined, and that it can extend to non-biological children”. [There then followed a link to that judgment].

7. The enclosed “Declaration of Responsibility” of the Somalia Court stated in material part that:

“presented in front of the court jury the two witnesses below [the witnesses being identified] after oath the two witnesses attested in front of the court that they were responsible for the two children, Haji Axmad died on 09/03/2018, meanwhile were transferred the children to Deeqa Haji Axmad.”

The names of the children [being the niece and nephew of the applicant in these proceedings] were then set out. The declaration went on to say that: -

“The witnesses also verified that Mrs. Deeqa Haji Axmad who was primarily between aunt and aunt, who currently live in Ireland, after their parents died that children in different reasons, Mr. Ali Haji…he was killed in Muri 09/03/2018. While Mrs. Sahra Haji Axmad born on 03/02/1988, she died a maternity death in Muri after bleeding 02/02/2016.

Thereupon, Mrs. Deeqa Haji Axmad accepted the responsibility of the two children.”

The section of the declaration headed “Court Confirmation” then stated: -

• “After having heard the statements expressed by two witnesses.

• After having verified responsibility transferred to Deeqa Haji Axmad.

• After having examined the parents had died, the court after scrutiny declared its indispensable to transfer the children and taking care of having no other parents look after their career”.

The document is then signed by the Chairman of the Court.

8. The applicant supplemented the Application with a number of further death certificates. Receipt of these death certificates were acknowledged by Steven O’Gorman of the Family Reunification Unit of the Minister’s department by letter of 28th July, 2020.

9. There were then three letters sent by Therese O’Connor of the Family Reunification Unit of the Minister’s department on 28th August, 2020. The first of these letters was addressed to the applicant’s solicitors and stated:

“I am directed by the Minister for Justice and Equality to refer to your client’s application for family reunification pursuant to s.56 of the International Protection Act 2015. I wish to acknowledge receipt of the following documents”

10. Ten such documents were set out. The list of documents made no reference to the Declaration of Responsibility which had been submitted with the applicant’s Application to the Minister on 11th June, 2020.

11. The letter concluded with the sentence “Please find enclosed a decision letter to be forwarded to your client”.

12. That decision letter, also dated 28th August, 2020, and also signed by Therese O’Connor, constitutes the decision under challenge in the judicial review proceedings (“the Decision”).

13. The Decision was addressed to the applicant and named the applicant’s niece and nephew in its title. The Decision then stated:

“I am directed by the Minister for Justice and Equality to refer to your application for family reunification which was received on 18/06/20.

Section 56(9) of the International Protection Act, 2015 defines a member of the family for the purpose of family reunification as:

• A spouse or civil partner where the marriage or civil partnership was subsisting at the time of the application for international protection.

• A child of the sponsor who is under the age of eighteen and unmarried at the date of the application for FRU.

• Where the sponsor is under eighteen and unmarried at the date of the application for FRU, their parent(s) and their unmarried minor children.

As Asho Ali Haji and Muad Saed Mohamoud do not come with the definition of member of the family your application in respect of them cannot be accepted”.

14. The third letter sent to the applicant’s solicitors on 28th August, 2020, also from Therese O’Connor, listed the relevant family member as being the applicant’s husband, Mokhtar Mohamed Ahmed. This letter acknowledged receipt of various documents including “copy of Declaration of Responsibility from Banadir Regional Court of the Federal Government of Somalia Republic and translation in respect of Deeqa Haji Axmad” i.e. the Declaration of Responsibility.

15. This letter enclosed a questionnaire which the applicant was asked to complete. This letter contained a different application number to that contained on the two letters of the same date relating to the applicant’s application for family reunification in relation to her niece and nephew.

16. No affidavit was sworn by Therese O’Connor to explain whether she in fact reviewed and took into account the Declaration of Responsibility when considering the applicant’s application for family reunification in respect of her niece and nephew. There is no reference to the Declaration of Responsibility on the face of the Decision letter, notwithstanding that the fact that the Declaration of Responsibility was cited (as set out above) in the body of the applicant’s application letter in support of her application.

17. An affidavit was sworn in these judicial review proceedings by Mr. Jeffrey Ward, a Higher Executive Officer within the Family Reunification Unit of the Department of Justice. Mr. Ward averred in this affidavit that:

“due to clerical error, the ‘Declaration of Responsibility’ was retained on the file pertaining to application number [number set out], that being the eligible application in respect of Mr. Mokhtar Mohamed Ahmed, and was acknowledged by letter dated 28th August, 2020 accordingly. Despite this clerical error, the decision maker had sight of both files and all the documentation submitted by Abbey Law in arriving at the decision in respect of [the applicant’s niece and nephew] and in respect of Mr. Mokhtar and in respect of [the applicant’s husband] when arriving at the Decision of 28th August, 2020”.

18. The applicant submits that this is wholly inadmissible evidence and cannot be deployed to retrospectively plug the lacuna in the Decision itself whereby there is no reference to the Declaration of Responsibility whether in the Decision or in the accompanying letter enclosing the Decision which lists the documents received by the decision maker, Therese O’Connor. I will return to this issue later in the judgment.

19. By letter dated 9th October, 2020, the applicant’s solicitors responded to the Decision letter of 28th August refusing family reunification in respect of the applicant’s niece and nephew. This letter requested a review of the Decision by a higher officer “as we believe there have been errors made in the assessment of the situation”. This letter specifically stated as follows:

“It appears that the decision maker may have overlooked the ‘Declaration of Responsibility’ we had submitted (copy enclosed). This Declaration of Responsibility document is not referred to in the letter refusing the application – but it is listed as a document in the other letter issued by the Family Reunification Unit on 28th August, 2020 in respect of Ms. Axmad’s application for her husband Moktar Mohamed Ahmed (copy enclosed). It does not relate to this application at all, which leads us to believe there may have been an administrative error here”.

20. This letter went on to state that:

“The Declaration of Responsibility is an Order from the Banadir Regional Court, Mogadishu and is headed with the crest of the ‘Federal Government of Somalia Republic’. The documents states that Aho Ali Haji and Muad Saed Mohamoud have been placed in the custody of Ms. Axmad, who has legal responsibility for them. They are therefore her children.

As you are no doubt aware, adoption procedures vary in different countries. In Islamic cultures ‘adoption’ is not a term that is generally used. However, the affect is the same, and we submit that these children are ‘members of the family’ under s.56 of the International Protection Act 2015”.

21. The Minister takes issue with the latter paragraph as being an inappropriate, retrospective attempt to seek to advance an argument in support of family reunification in respect of the applicant’s nephew and niece based on adoption which was not an argument present in the original application of 11th June, 2020. I will return also to this issue later in the judgment.

22. There was no response at all to this letter. The applicant’s solicitors followed up with a further letter of 12th November, 2020 requesting a response within seven days failing which an application for judicial review would be made in respect of the Decision. No response was received to that letter either.

The applicant’s case

23. The applicant’s case, in short, is that the Decision is vitiated by two legal errors.

24. Firstly, she says, the Decision is bad in law for failing to consider or have regard to the very relevant and material consideration of the fact of the Declaration of Responsibility granted to the applicant by court order in Somalia which conferred legal guardianship and responsibility for the children on the applicant in circumstances where the applicant’s siblings had both deceased.

25. Secondly, it is submitted that the Decision is bad in law for failing to provide reasons and in particular for failing to provide reasons as to why the relationship as between the applicant and her niece and nephew did not amount to adoption having regard to the concept of adoption in country of origin (Somalia).

26. I will consider these contentions in turn, and in doing so, will outline the respondent’s submissions on those contentions.

Failure to have regard to relevant considerations

27. The applicant submits that central to her application for family reunification in respect of her niece and nephew was the fact of the Declaration of Responsibility which she had obtained from the Somali court in respect of her niece and nephew and which meant that she had been “granted responsibility for them as their closest surviving relative”, as her application put it. While the applicant accepts that her application letter referenced the judgment of the High Court in X v Minsiter for Justice [2019] IEHC 284 (“the X case”) (as opposed to the Supreme Court judgment overturning the High Court), she submits that this was in the context of highlighting that the word “child” in s.56 (9) did not have to mean the natural child of the refugee.

28. As it transpired, the Supreme Court had, two days prior to the Application, overturned the High Court decision. However, the applicant submits that this is beside the point in circumstances where, at a minimum, the decision maker was obliged to engage with the submission based on the grant of the Declaration of Responsibility in respect of the children to the applicant and that there was simply no engagement with or, indeed, even reference to, that core submission/consideration in the Decision.

29. The applicant submits that there is no admissible evidence before the court from the decision maker to evidence that she did in fact (if that was the case) consider the Declaration of Responsibility in arriving at the Decision. The applicant relies in this regard on the recent Court of Appeal decision in MNN v. Minister for Justice and Equality [2020] IECA 187 (“MNN”), where the Court of Appeal held that it was impermissible for the Minister to seek to rely on second hand evidence as to what the actual decision maker may or may not have taken into account.

30. The Minister, for her part, submits that the MNN case is readily distinguishable as that involved a situation where material information had been submitted to the decision maker after his initial decision and there was no evidence from the decision maker as to how he then dealt with that matter. The Minister submits that in any event it can clearly be inferred from the material before the Court that the decision maker had regard to the Declaration of Responsibility, because it is referenced in a letter (in relation to an application for family reunification for the applicant’s husband) which went out on the same date as the impugned decision and which can legitimately be read together with the letter enclosing the impugned decision, and the impugned decision itself, in circumstances where all the documentation was submitted in one batch by the applicant on the one application (which combined an application for family reunification for both her niece and nephew and her husband).

31. In my view, it is not necessary to resolve the question of whether the principle in MNN applies to a situation such as that which obtains here where the relevant material is said to be before the decision maker in advance of the decision maker making her decision. The fact is that there was no evidence put before the Court from the decision maker (Ms. O’Connor) indicating whether she had in fact considered the Declaration of Responsibility in arriving at her decision to refuse the family reunification application in respect of the applicant’s niece and nephew.

32. The affidavit of Mr. Ward does no more than point out the fact that from his consideration of the file there was a clerical error as regards which file the “Declaration of Responsibility” had been retained on and that “the decision maker had sight of both files and all the documentation submitted” in arriving at the decision. Apart from the fact that it is difficult to see how Mr. Ward can aver to what the decision-maker in fact had sight of, his averments do not amount to an averment that the decision maker in fact considered the Declaration of Responsibility in respect of the applicant’s application for family reunification under s.56 in respect of her niece and nephew in the course of arriving at the Decision.

33. The Declaration of Responsibility was a core part of the grounds for family reunification advanced by the applicant in respect of her family reunification application for her niece and nephew; it was clearly integral to the short submission made in support of the Application and was therefore a material consideration to which regard should have been had in arriving at the Decision. However, it is nowhere referenced or engaged with in the Decision refusing the application. In my view, the decision maker fell into error in the circumstances in failing to advert at all in the Decision to the Declaration of Responsibility and the submission grounded on same.

34. I should say in this regard that the Minister’s refusal to even acknowledge the application for a review of the Decision based on this apprehended error, let alone provide some explanation as to whether the applicant was misconceived in her concern that the decision maker had failed to have regard to the relevant consideration of the Declaration of Responsibility, fortifies me in the view that the Minister fell into error in the Decision.

Failure to provide adequate reasons?

35. As regards the second ground advanced by the applicant, namely the alleged failure of the decision maker to give adequate reasons for her decision, I accept the point made on behalf of the respondent that the case sought to be advanced, and in respect of which of leave to apply for judicial review was advanced, i.e. that the respondent erred in law “in failing to provide reasons for the Decision and in particular failing to provide reasons as to why the relationship as between the applicant and her niece and nephew did not amount to an adoption having regard to the concept of adoption in the country of origin (Somalia)” is a ground of challenge that fails to get out of the starting blocks in circumstances where there was no submission contained in the original application of 11th June. 2020 to the effect that the Declaration of Responsibility should be accepted as amounting to an adoption for the purposes of the Minister’s consideration of the application. Rather, this was a submission contained in the applicant’s solicitor’s letter of 9th October, 2020, pursuant to which the applicant sought a review of the refusal decision.

36. Just as it is not open to the Minister to seek to explain and justify the Decision as regards the Declaration of Responsibility on an ex post facto basis (see in that regard the well settled principle in R v. Westminster City Council Ex Parte Ermakov [1996] 2 All E.R. 302) it is not open to the applicant to seek to challenge an alleged inadequacy of reasons in the original decision stemming from a submission which was not before the decision maker at the time of the decision.

37. I accordingly do not believe that the Decision was vitiated by a failure to give reasons as alleged.

Any relief would be futile?

38. Having taken the view that the Decision was vitiated by an error of law for failure to have regard to a relevant consideration, the question arises as to whether the Court should proceed to grant the order of certiorari sought.

39. The Minister contends forcefully in this regard that it would be futile to grant such relief in circumstances where the Supreme Court has made it very clear in its judgment in the X case (X v Minister for Justice [2020] IESC 30) that the concept of a “child” for the purposes of a s.56 family reunification application is confined to a biological or adoptive child where the adoptive child satisfies the criteria set out in s.18(d) Interpretation Act, 2005 i.e.:

“A reference, however expressed, to a child of a person shall be read as including –

(i) in an Act passed after the passing of the Adoption Act 1976 a reference to a child adopted by a person under the Adoption Acts 1952 to 1998 and every other enactment which is to be construed together with any of those Acts or

(ii) in an Act passed on or after 14th January, 1988 (the commencement of s.3 of the Status of Children Act 1987, a child to whom subparagraph (i) relates or a child adopted outside the State whose adoption is recognised by virtue of the law for the time being in force in the State.”

40. The Minister submits that the judgment of Dunne J. for the Supreme Court in the X case makes it crystal clear that the definition of “child” for the purposes of a s.56 family reunification application is confined to a biological child or an adopted child within the meaning of s.18(d) Interpretation Act 2005 as set out above. The Minister submits that it is manifest that the applicant’s niece and nephew simply cannot satisfy that definition as they are neither children who have been adopted under the Adoption Acts 1952-1998 nor children who have been adopted outside the State whose adoptions are recognised by virtue of the law for the time being in force in the State, Somalia not being a party to The Hague Convention and there being no evidence before the court that the children have been the subject of adoption orders in Somalia which would be recognised by the Irish Court.

41. In this regard, Dunne J. held in the X case (at paragraph 107) that:

“Having considered the provisions of s.56(9)(d), it seems to me the legislature can only have intended the words ‘child of the sponsor’ to mean a biological child. I am satisfied that this is the natural and ordinary meaning of the words ‘child of the sponsor’ As we have seen, by virtue of the provisions of the Interpretation Act 2005, an adopted child falls into the same category. Can it be inferred as believed by the trial judge that given the wide diversity of family structures that the legislature in this case intended a broad definition of child to be given to that word as used in s. 56(9)(d)? The answer to that question in my view is clear. ‘Child of the sponsor’ can only mean a biological or adopted child. If there was any doubt about that, it seems to me that the legislative history is illustrative. The fact that the legislature has seen fit to restrict the categories of those who can be regarded as members of the family is clear from the legislation, for example, by removing grandparents from the list of those considered to be members of the family. To interpret the phrase ‘child of the sponsor’ as having a broader meaning than the biological child would be at odds with the clear intent of the legislature in restricting the categories of those entitled to be considered for family reunification. I find it very hard to understand how the phrase ‘child of the sponsor’ can be read as including a relationship of father/child where that relationship is not a biological/adoptive relationship. I accept that that there is now a wide diversity of family structures as noted by the trial judge but I cannot agree with his conclusion that the relationship of father/child is not confined to a biological father in the context of this legislation. Bearing in mind the plain and ordinary meaning of the words ‘child of the sponsor’ and the legislative history of the Act of 2015, I find it impossible to reach a conclusion that the legislature in making such a change from the provisions of the 1996 Act and the 2013 Regulations, intended by narrowing down the categories for whom family reunification could be sought, could at the same time be said to have intended to expand the category to whom the word ‘child’ applied. Given that the Oireachtas had, in the Act of 1996 and in the 2013 Regulations expressly provided a broader definition of ‘member of the family’, one would have expected that if the Oireachtas had intended to give a broader meaning to the word ‘child’ in the Act of 2015, it would have said so clearly. It has not provided for a broader definition. Accordingly, I am satisfied that the use of the phrase ‘child of the sponsor’ in the Act of 2015 is limited to the biological/adopted child of the sponsor. I accept that this may give rise to certain anomalies and one of the areas mentioned in the course of submissions was the situation in relation to surrogate children or indeed the children of a partner or spouse of the sponsor who were not the biological children of the sponsor. That there may be anomalous situations is undoubtedly the case but unfortunate though that may be, the fact that there may be anomalous situations created by the legislation does not in my view affect the interpretation of the statute. It is for these reasons that I am satisfied that there is only one possible interpretation open having regard to the clear words of the statute”.

42. The applicant, for her part, submits that the judgment of Dunne J. in the X case is not necessarily dispositive of the matter as she would wish to argue that a refugee-sensitive approach to the concept of “adoption” should be taken just as a refugee-sensitive (and more expansive) approach to the concept of marriage was taken by the High Court (Cooke J.) in Hamza v. Minister for Justice [2010] IEHC 427.

43. Counsel for the applicant submits that it is at least open to argument that notwithstanding the Supreme Court’s decision in the X case, the concept of adoption (within the definition of same in Section 18(d) Interpretation Act, 2005) could at least arguably include the facts obtaining in the applicant’s case vis-à-vis her nephew and niece. He submits that the Supreme Court in the X case was not in fact dealing with a fact situation where there was a relationship arguably equivalent to adoption (that case involving a refusal by the applicant to take a DNA test to prove whether he was a biological father of the relevant dependent child). It was submitted that the applicant would wish to advance the case that her niece and nephew do come within the concept of “child” in Section 18(d) as interpreted by the Supreme Court in the X case in the event that the matter was remitted for reconsideration to the respondent on foot of an order of certiorari of the impugned decision.

44. It may well be the case that the applicant faces very difficult if not insurmountable problems in demonstrating that her niece and nephew are children within the meaning of s.56 in light of the Supreme Court decision in X. However, I am reluctant to pronounce a definitive view as regards whether the applicant’s situation is covered by the Supreme Court decision in X in circumstances where I do not have before me evidence or more detailed submissions as a matter of Somali law or indeed as a matter of Irish law as to whether the legal situation of the applicant’s niece and nephew may come within the restricted definition of “child” articulated by the Supreme Court in X.

45. I believe it would be more appropriate for the Minister to consider the relevant evidence and legal argument on that issue by way of a fresh first instance decision given that the first instance decision under challenge in this case was vitiated by legal error. In my view, the justice of the case would be met by an order remitting the applicant’s application for family reunification in respect of her niece and nephew to the Minister for a fresh decision, which fresh decision should be arrived at having granted to the applicant an opportunity to tender such further evidence and submission that she sees fit in support of her s.56 family reunification application for her niece and nephew. While the Minister may well be correct in the submissions she has made to the Court as to the application of the Supreme Court decision in X to the facts of the applicant’s situation, in my view it would be more appropriate for the Minister to assess the applicant’s application (with the benefit of such further evidence and submission as the applicant sees fit) afresh in a process which complies fully with fair procedures.

46. In the circumstances, I will grant the order of certiorari sought and remit the matter for fresh consideration by the Minister on the basis set out in the preceding paragraph of this judgment.