THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 392

Record No: 2021/926 JR

BETWEEN:

SH

Applicant

AND

THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

Respondents

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2021/591 JR

Between:

AJ

Applicant

and

THE MINISTER FOR JUSTICE, THE CHIEF INTERNATIONAL PROTECTION OFFICER, IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr Justice Cian Ferriter delivered this 27th day of June 2022

I. Introduction

Overview

1. These two cases raise a number of potentially important issues as to the proper application of the family reunification provisions contained in s.56 International Protection Act 2015 ("s.56"), including issues as to the compatibility with EU law, the Constitution and the ECHR of the requirement in s.56 that a child of a refugee must be under the age of 18 at the date of the family reunification application in order to qualify for family reunification. Both applicants contend that such a requirement is contrary to EU law, the Constitution and the ECHR in circumstances where they had children who were under 18 at the date the applicants applied for international protection (and, in the case of AJ, at the date of him being granted international protection status) but where through no fault of theirs, those children had "aged out" i.e. become over 18 before the date on which applications for family reunifications could be, or were, made.

2. Both cases also raise potentially significant issues as to the proper scope and application of a non-statutory scheme operated by the Minister in respect of family reunification of non-EEA nationals.

3. There is a separate issue in AJ's case, which is a significant issue in its own right, concerning the alleged non-transposition of article 22 of Directive 2004/83/EC ("the Qualification Directive"), which is a provision concerning the information to be provided to beneficiaries of international protection status on their acquisition of such status.

4. While the two cases were heard separately, the same counsel appeared for both the applicants and the respondents in each of the two cases, and many of the arguments run in SH (which was heard first) were adopted by the parties in the AJ case. In the circumstances, I took

the view that a single judgment was appropriate as it will, I hope, provide for a more comprehensive and coherent elucidation of the wider issues arising.

5. This judgment is structured as follows:

I. Introduction
II. Factual background
III. s.56(9)(a) decisions vitiated by delay/error of law?
IV. s.56(9)(a)/its operation repugnant to the Constitution and/or in breach of EU law and/or in breach of the ECHR?
V. Non-EEA policy scheme
VI. Non-transposition of article 22 Qualification Directive?
VII. Conclusion

S.56 of the International Protection Act 2015

6. Given its centrality to the issues in these cases, it worth quoting the relevant provisions of s.56 at this juncture. S.56(1) provides:

> *"A qualified person (in this section referred to as the "sponsor") may, subject to subsection (8), 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."*

7. Under s.2 of the 2015 Act, a 'qualified person' includes a person who has been granted refugee status.

8. S.56(9) provides:

> *"(9) In this section and section 57, "member of the family" means, in relation to the sponsor—*
>
> *(a) where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date the sponsor made an application for international protection in the State),*

.. or

(d) a child of the sponsor who, on the date of the application under subsection (1), is under the age of 18 years and is not married."

9. As can be seen, s.56(a)(d) requires that the child of the applicant for family reunification be under the age of 18 (and unmarried) at the date of the application for family reunification.

II. Factual Background

10. In order to set the legal issues in their appropriate context, it is necessary to set out the relevant factual background in respect of each of the cases of SH and AJ.

SH: Factual Background

11. SH is a national of Syria from Latakia. He was born on 5 April 1969. His wife remains residing in Latakia, Syria, with their three children, NH (born 31 May 2009), AH (born 24 April 2003), and ZH (born the 29 January 2000).

SH's Application for International Protection

12. SH left Syria around 1997 and resided and worked in Saudi Arabia for some 22 years. He left Saudi Arabia in 2019 but could not return to Syria due to his religion (he is Sunni Muslim), fearing both the regime and the militias. He travelled to Turkey in May 2019 where he stayed for six months. In October 2019, he states that he was rescued from the sea in Greece, and that he then stayed in Greece for three months. He left Greece on 30 January 2020 and travelled through Barcelona, Luxembourg and then to Ireland where he arrived on 4 February 2020 and sought international protection, completing the initial forms on that day.

13. On the date of his application for international protection SH's son AH, residing in Syria, was 16 years old. His other son, ZH was over 18 at that time.

14. SH completed his Application for International Protection Questionnaire ("AIPQ") on 21 February 2020. On 3 March 2020, he was interviewed by the international protection office

('IPO') under the Dublin III Regulation, subsequent to which a "take back" request was made to Greece.

15. The respondents state that the holding of interviews by the IPO was suspended by reason of the Covid pandemic and resultant public health advice between:

- 13 March 2020 – 20 July 2020;
- 22 October 2020 – 1 December 2020;
- 18 December 2020 – 10 May 2021 (although a single call-back interview was held on 21 December 2020).

16. By letter dated 3 June 2020, the Greek authorities refused the take back request for SH on the basis that he had not in fact lodged an application with them. His application in Ireland was thereafter accepted for processing. SH did not become aware of the request to Greece to take him back, and the refusal of that request, until receipt of the replying papers in this judicial review.

17. On 16 November 2020, SH's solicitors requested a copy of his file. On 17 November 2020, the Minister sent them the English copy of his AIPQ. The Minister stated that *"due to the current Covid-19 situation the* [provision of the full file] *may take longer than usual".*

18. On the 17 November 2020, SH had an assessment with Dr. Martín O Maoláin, examining physician for SPIRASI, who found that SH "currently has features of severe depression on a background of bipolar affective disorder" and has "active suicidal ideation". Dr. O Maoláin provided a letter in support of SH, dated the 18 November 2020, stating: "*A prolonged period of delay before his IPO interview may further exacerbate his current symptoms*."

19. SH's solicitors emailed the IPO on 20 November 2020, enclosing a copy of the letter from Dr. O Maoláin and requesting that the IPO progress the case as a matter of priority.

20. SH's solicitors emailed the IPO again on 25 November 2020 enclosing written submissions in support of his protection application. In this email, his solicitors requested that his application be dealt with as soon as possible in light of the fact that SH was suicidal. The

email stated: *'We would ask that he be scheduled as promptly as possible for interview in order to facilitate a quick determination of his application.'*

21. On 26 November 2020, the IPO wrote to SH's solicitors enclosing a copy of SH's full file to date, and stated that the IPO would be in contact soon about an interview.

22. On 8 January 2021 SH's solicitors wrote requesting that the IPO progress the case and deal with his international protection application. The IPO replied on 8 January 2021 confirming that his substantive case was to be determined in Ireland and acknowledging that requests were being made to hear the case on an expedited basis given his health.

23. On 18 February 2021, the organisation, Doras Luimni, a non-governmental organisation working to support and promote the rights of migrants in Ireland, emailed the IPO enclosing a signed letter of authority from SH and seeking an update. On 19 February 2021, the IPO replied stating that:

> *"I can confirm that due to Covid-19, interviews are currently postponed: further details regarding our policies and practices during Covid-19 can be found on our website…"*

24. SH's solicitors emailed on 26 February 2021 asking for a decision to issue within 14 days, failing which SH would institute High Court judicial review proceedings seeking an order of *mandamus*.

25. SH instituted High Court proceedings which were resolved between the parties and struck out on 14 May 2021.

26. SH's son AH turned eighteen on 24 April 2021.

27. SH was interviewed by the IPO on 21 May 2021. He was told on 1 June 2021 by letter that it was recommended that he be granted a declaration of refugee status. A declaration of refugee status was granted to him on 9 June 2021.

SH's Application for Family Reunification

28. On 7 July 2021 SH then made an application for family reunification pursuant to s.56 in respect of his wife, his daughter, and his two sons AH and ZH, following his formal grant of refugee status.

29. By letter dated 9 July 2021 the Minister refused SH's application for family reunification in respect of AH and ZH, citing s.56(9) and stating "*As AH and ZH do not come within the definition of member of the family your client's application in respect of them cannot be accepted*."

30. On 28 July 2021 SH through his solicitor wrote to the Minister requesting a review of that decision.

31. The Minister replied on 12 August 2021 stating that:

> *"On the date your client placed their application for Family Reunification (07/07/2021) your client's sons were 18 and 21 years of age. The International Protection Act 2015 is clear in this regard, in order to be eligible for Family Reunification under the terms of IP Act 2015 your client's sons must have been under the age of 18 and unmarried on the date of application for Family Reunification."*

32. On 14 October 2021, SH applied under the Minister's non-statutory scheme for non-EEA family reunification ("the scheme"), for a long stay visa for both AH and ZH. The terms of the scheme are set out in a policy document ("the policy document").

33. On 1 November 2021 SH through his solicitors wrote to the Minister demanding a determination of these applications. No response was received to that letter.

34. Doras Luimni sent further documents on behalf of SH in support of the visa applications under the scheme at the end of November 2021. It appeared that SH had not paid the visa fee required as part of the application process, and this was paid on January 2022.

35. At the date of hearing of SH's judicial review (7 and 8 April 2022), the applications for visas under the scheme had not been determined. The Court was informed that the Minister will determine the visa applications for SH's sons (including AH) "within a reasonable period of time".

AJ: Factual Background

36. AJ is a national of Somalia. He was a member of the Somali police force involved in cases relating to the terrorist group Al Shabab. He became a target of Al Shabab as a result. He was attacked with guns and grenades in his house which left him wounded. His driver and one of his sons were murdered in a bomb attack on his car by Al Shabab. AJ had a child, MJ, born 2 January, 2003, with his first wife. He has twins born 8 October, 2005 with his second wife. The twins and MJ still live together with his second wife in Somalia. AJ lived with them in Somalia as a family unit before he was forced to depart. He fled Somalia to avoid further persecution by Al Shabab.

37. AJ arrived in the State on 8 August, 2019 and applied for international protection on that date. A preliminary interview pursuant to s.13(2) of the 2015 Act was conducted on 20 August, 2019. AJ completed the application for international protection questionnaire on 11 September, 2019. He was interviewed pursuant to s.35 of the 2015 Act on 3 February, 2020.

38. On 29 October, 2020, AJ was informed by letter that the IPO was recommending that he be granted refugee status. He was formally granted a declaration of refugee status on 11 November, 2020.

39. AJ received an Irish residency permit on 15 December, 2020. His son, MJ, turned 18 on 2 January, 2021. AJ was not in receipt of legal aid or legal assistance at this time and has averred that he was unaware that the Minister would assess the age of his dependent children for family reunification purposes by reference to the date on which the application for family reunification was made and not the date on which he was granted international protection.

40. On 29 January, 2021, AJ made an application to the Minister pursuant to s.56 for family reunification for his wife and his three children, including MJ. The Minister refused this

application in respect of MJ by decision of 29 January, 2021, on the basis that MJ was over eighteen years of age at the date of the application.

41. On 19 March, 2021, AJ requested a review of that decision.

42. A decision on review was handed down on 25 March 2021 upholding the original decision.

43. AJ then made an application under the scheme on behalf of MJ, and another son who was also over 18 at that time, for family reunification pursuant to the policy document. He received a first instance decision on that application on 6 May 2021 refusing the application. I will come to the terms of that refusal in due course. AJ sought a review of that first instance refusal and a decision on that review application was pending at the time of the hearing of the judicial review and, I understand, is still pending at the time of this judgment.

III. S.56(9) decisions for SH and AJ vitiated by excessive delay/error of law

44. Both SH and AJ maintain that there was excessive delay in processing their applications for international protection, which led to a situation where their children who were aged under 18 at the date of their applications for international protection had "aged out" by the time they were in a position to make applications for family reunification on their behalf pursuant to s.56(9)(d). They maintain that such delay vitiates the s.56(9)(d) decisions. AJ maintains a separate argument that his s.56(9)(d) decision was vitiated by a separate error of law. I will turn now to those contentions, addressing first SH's case under this heading.

(1) SH's case: Minister's decision under s.56(9)(d) should be disapplied by reason of excessive delay in processing his application for international protection

45. SH's first argument is that the Minister unlawfully refused his application for family reunification in that the Minister was estopped from refusing the application under s.56(9)(d), where his son would have been under 18 at the date of the family reunification application (and therefore eligible for family reunification) if the Minister had not unjustifiably delayed in dealing with the applicant's international protection application.

46. SH's international protection application was made on 4 February 2020, but was not determined until 1 June 2021, despite his diligent lodging of all necessary material (including legal submissions, country of origin information and medical evidence) and SH, from November 2020 onwards, consistently pressing the IPO for a speedy determination of his protection application.

47. SH relied on *Moldovan v. Minister for Justice and Equality* [2013] IEHC 653 ("*Moldovan")* where O'Malley J. endorsed a list of factors considered relevant in determining whether delay in making a decision was unreasonable, as set out by Edwards J. in *KM v Minister for Justice, Equality and Law Reform* [2007] IEHC 234. *Moldovan* concerned the time which may be lawfully taken by the respondent to determine an application for a passport. The Court examined whether the time taken was reasonable by reference to the following five criteria:

(i) The overall period in question;
(ii) The complexity of the issues to be considered;
(iii) The amount of information to be gathered and the extent of the enquiries to be made;
(iv) The reasons advanced for the time taken; and
(v) The likely prejudice to the applicant on account of delay.

48. SH submitted that if the Court was satisfied that the IPO/Minister had culpably delayed in dealing with his international protection application, and that but for that delay, he could have made a family reunification application before AH reached 18 (which occurred on 24 April 2021) it was open to the Court to fashion a remedy, such as an appropriate declaration, to the effect that it was not lawfully open to the Minister to refuse the grant of family reunification for AH under s.56 due to the Minister's unlawful failure to deal with his international protection application more promptly. SH says, in effect, that he should be given the benefit of a decision under s.56(9)(d) as if AH were under 18 at the date of his family reunification application.

49. While no authority was advanced for a situation on all fours with, or analogous to, the situation presented on the facts here, SH submitted that the Court would have jurisdiction to grant such relief in light of his entitlement to an effective remedy. The applicant pointed to authorities such as *McCabe v Ireland* [2014] IEHC 435 and *Carmody v Minister for Justice*

[2010] 1 IR 635 where the Courts fashioned remedies to address the consequences of unconstitutional *lacunae* in statutory schemes/provisions. In essence he contends that the wrong he has identified must be the subject of an appropriate remedy.

50. It is clear that the Courts have been very careful, in light of the constitutional separation of powers, not to encroach on the sphere of the legislature by making orders which effectively seeks to rewrite statutory provisions or disregard them: see e.g. *Crotty v An Taoiseach* [1987] 1 IR 713.

51. In response to a query I raised during the course of the hearing, as to whether there was precedent for the Court disregarding or disapplying a mandatory statutory condition on the basis of a prior breach of an applicant's rights by a State agency involved in operating the statutory regime of which that condition was a part, counsel for SH drew my attention to an *ex tempore* judgement of Kearns P. in *Barska v The Equality Tribunal* [2011] IEHC 239. In that case, Kearns P. held that s.78(7) of the Employment Equality Act 1998 (as amended) had to be read in conformity with the relevant EU directive and EU law such that the requirement in that provision that an application be made within 28 days of a resumption of a hearing following mediation was not such as to deprive the Director of the Equality Tribunal of jurisdiction to deal with an application which was made outside that time. However, I do not believe that this authority avails SH's case as it is clear that Kearns P. effectively read into the Irish statutory provision to ensure it conformed with the relevant EU law. For reasons which I will come to later in this judgment, I do not believe that an applicant has a right as a matter of EU law to family reunification for a child who is over 18 at the date of a family reunification application. In any event, the issue of whether the Court could disapply the terms of s.56(9)(d) on the facts could only arise if the respondents had been guilty of unreasonable delay in processing the SH's international protection application. I will accordingly turn to that issue.

52. The Minister contended that there was no inexcusable delay on the part of the relevant state entities (including the IPO) in dealing with SH's international protection application in circumstances where, as explained by Mr. Jeffrey Ward in an affidavit filed on the respondents' behalf, the process of interviews by the IPO was severely affected by the Covid pandemic for almost the entire of the period from SH's international protection application in February 2020 up to the grant to him of a declaration of refugee status in June 2021.

53. Mr. Ward explained in his affidavit that SH attended for a Dublin III Regulation interview on 3 March 2020 (in circumstances where a Eurodac check recorded that the applicant had applied for international protection in Greece on 3 October 2019). Following that interview, the Minister sent a "take back" request to the Greek authorities, and the Greek authorities replied on 3 June 2020 refusing the request of the basis that SH had not in fact submitted an international protection application while he was in Greece.

54. Mr. Ward averred at paragraph 6 of his affidavit:

> *"From March 2020, the Covid-19 pandemic caused unprecedented disruption and suspension of services nationally, which included those provided by the IPO. The IPO had to suspend interviews from 30 March 2020 to 20 July 2020. The interviews were caused to be suspended again, by reason of the pandemic, from 22 October 2020, and they recommenced on 2 December 2020 until 18 December 2020. A single call-back interview was held on 21 December 2020. By reason of the worsening public health situation and public health restrictions introduced on 24 December 2020, it was not possible for the IPO to resume the holding of interviews until 10 May 2021."*

55. It will be recalled that SH, through his solicitors, did not request an expedited hearing until 20 November 2020, at which time his solicitors submitted a medical report from his GP (as set out at paragraphs 18 and 19 above) which made clear that he was suffering from severe depression, with a background of bipolar affective disorder, and that he had active suicidal ideation.

56. It is clear from Mr. Ward's affidavit that following receipt of this report IPO interviews resumed only for a short 18 day window of 1 December 2020 to 18 December 2020. Following the severe lockdown restrictions which come into place just after Christmas 2020 and which lasted into spring 2021, IPO interviews did not recommence until 10 May 2021.

57. In the circumstances, I do not believe SH's case as to culpable delay on the part of the IPO is made out. While I accept the premise that an applicant for international protection is entitled, within reason, to a prompt determination of that application, the process of consideration of international protection applications was clearly severely impeded by the

Covid pandemic and the restrictions introduced on foot of it as made clear by Mr. Ward's evidence.

58. While SH contends that the respondents have not explained why other potential approaches to IPO interviews, such as remote interviews, were not explored or if explored, were not feasible, the Court can understand why the unprecedented global pandemic had an inevitably limiting impact on the IPO's interview processes, particularly where in-person interviews can realistically be regarded as the fairest form of interview, from both sides' perspective, in a process of such importance for applicants.

59. SH submitted that the IPO could have dispensed with the need for an interview, pursuant to s.35(8) of the 2015 Act, as his international protection application was ultimately a straightforward one. S.35(8) states:

> *"(8) A personal interview may be dispensed with where the international protection officer is of the opinion that—*
>
> *(a) based on the available evidence, the applicant is a person in respect of whom a refugee declaration should be given,*
> *(b) where the applicant has not attained the age of 18 years, he or she is of such an age and degree of maturity that an interview would not usefully advance the examination, or*
> *(c) the applicant is unfit or unable to be interviewed owing to circumstances that are enduring and beyond his or her control."*

60. However, as noted at paragraph 20 above, SH through his solicitors in fact sought an interview and did not himself call for the invocation of s.35(8). I do not believe it can be said that there was any legal error in the IPO not choosing to invoke s.35(8) in the circumstances.

61. I cannot overlook the reality that the IPO system was severely impeded during the pandemic. I do not believe, in the circumstances, that any level of delay by the state agencies, including the IPO, was of a degree as to constitute such an infringement of SH's rights for the Court to seek to fashion, on a wholly exceptional basis, a remedy which would involve

declaring that the Minister was disentitled to apply a statutory provision which on the face of it SH did not meet.

62. I should say that I accept SH's submission that he cannot be faulted for any delay in the IPO process. He corresponded promptly, sought to press his position and lodged legal submissions and medical evidence. He issued legal proceedings seeking to force matters along. He was ultimately interviewed by the IPO on 21 May 2021 and a decision was issued promptly thereafter. He received his declaration of refugee status on 9 June 2021.

63. As I shall come to later, in my view the fact that SH missed out on a family reunification right for his son through no fault or delay on his part is a matter to which all appropriate weight should be given when assessing his application under the scheme.

(1) AJ's case re delay in processing International Protection Application

64. AJ makes very similar arguments to SH as regards the contention that the State, through the IPO, unreasonably delayed in processing his international protection application, such that he was left with a very short window within which to make a valid application under s.56 for family reunification for his son MJ. The respondents submitted an affidavit from Anthony Doyle, an assistant principal officer in the IPO, which included a detailed chronology of the timeline for the steps in the processing of AJ's international protection application. I set out that chronology below:

8 August 2019	AJ arrived in the State and applied for international protection.
8 August 2019	Preliminary interview.
21 August 2019	Second preliminary interview at which applicant given an Information Booklet for Applicants for International Protection in Somali.
10 September 2019	AJ submitted his International Protection Questionnaire in Somali.
24 October 2019	English translation of AJ's questionnaire submitted to the IPO by Word Perfect Translations.

20 November 2019	Letter sent to AJ's solicitors informing him of his s.35 interview date.
3 February 2020	AJ was interviewed pursuant to s.35 by an IPO Panel Member (PM) at the Mount Street Office. At the interview, the PM requested AJ forward a medical report to support aspects of AJ's claim.
7 February 2020	The Spirasi report was received in relation to AJ and forwarded to the PM.
6 March 2020	The PM finalised their draft report and submitted same to the IPO.
18 March 2020	AJ's file was allocated to a Case Processing Unit to await examination by the International Protection Officer.
24 March 2020	The IPO began operating a rota as a result of an increase in Covid-19 cases in the State, resulting in fewer staff in Case Processing.
27 March 2020	A nationwide lockdown was announced. Following this, the access to physical files was severely limited and remote working was not available for all staff immediately.
3 July 2020	Case Processing Units were granted access to the Mount Street Office on a rota basis, as per health and safety protocols, and could access physical files.
14 August 2020	The examination of AJ's file, along with several others, commenced.
9 September 2020	The report was reviewed remotely and the file checked when in the office and once the recommendation of Refugee Status (RS) was well-founded, due diligence checks were carried out.
21 October 2020	Due diligence checks completed.
23 October 2020	AJ's file was finalised and forwarded to the Recommendations Team.

29 October 2020 AJ was informed that, pursuant to s.39 of the International Protection Act 2015, the second respondent was recommending that he be granted refugee status.

11 November 2020 AJ was granted refugee status by the first respondent.

65. Mr. Doyle averred that:

> *"The COVID-19 pandemic severely disrupted and delayed the processing of all international protection applications and in particular the applicant's application from 24th March 2020 to 14th August 2020. During this time, case processing units had a significant volume of cases and processed these while working remotely with limited access to physical files. These cases were reviewed in chronological order according to when an applicant had been interviewed and the file submitted for review."*

66. Further, he averred:

> *"The delay from 9th September 2020 to 21st October 2020 resulted from the* [IPO] *requiring due diligence checks to be carried out and, 6 to 8 weeks was the turnaround period for these at that time."*

67. As with SH's case, I accept that a valid reason for the delay has been proffered by the respondents. However, in my view, there is considerable force in the contention made by counsel for AJ, that it is not fair that the entire of the consequences for that delay are left to be borne by AJ. In my view, it must be a relevant factor to be taken into account by the Minister in exercise of her discretion under the policy document that but for the impact of the pandemic in slowing down the processing of international protection applications, AJ would very likely have received a declaration of refugee status at a point in time which would have left him a much longer window within which to bring his family reunification application under s.56 in respect of MJ. I will return to this later.

(2) AJ: Alleged error of law in s.56 Review Decision

68. I will turn now to address a discrete issue arising as to the lawfulness of the s.56 decision in AJ's case.

69. On 19 March 2021, AJ requested the Minister review her decision refusing him family reunification in respect of his son MJ pursuant to s.56. This letter was submitted by the Irish Refugee Council ("IRC") on AJ's behalf, after he had made contact with their helpline. In this letter, the IRC submitted that the relevant date for assessing AJ's entitlement to family reunification was the date of his application for international protection. The CJEU decision of *Case C-550/16 A & S v Staatsecretaris van Veiligheid en Justitie (12th April 2018) ("A & S")* (discussed further later in this judgment) was relied on in this regard. The letter stated that AJ delayed in submitting his application for family reunification in order to receive his Irish residency permit in advance of his family reunification application. The respondents lay some emphasis on the fact that the letter did not state that AJ was unaware of the fact that he was required to submit any application for family reunification in respect of MJ prior to MJ reaching eighteen (which occurred on 2 January, 2021). AJ says that he had not been aware of this requirement because he was not informed of this requirement by the Minister, in breach of what he says are his entitlements under article 22 of the Qualification Directive (an issue which I shall come to later in this judgment). The respondents accept that there is no necessary inconsistency as between these positions and I do not think that anything turns on it for present purposes.

70. The IRC letter made a separate submission calling on the Minister to exercise her discretion in favour of granting family reunification in light of MJ's personal circumstances. It pointed out that AJ was extremely concerned for his son's safety were the family reunification application to be refused and if MJ had to remain in Somalia. This letter stated:

> *"We would submit that M would be extremely vulnerable if separated from his family in Ireland. M has been approached more than once by Al Shabab recruiters. He has resisted requests to join the group, at great risk to his personal safety. M has had to move from place to place in an effort to avoid further approaches by Al Shabab recruiters. We would therefore submit that the Minister ought to exercise his discretion and grant the application in favour of M."*

71. The letter also submitted that allowing the application for family reunification for MJ was necessary in order to ensure that AJ's rights to respect for private and family life in accordance with article 8 ECHR were respected. This part of the letter noted that:

> *"We would submit that our client's application for international protection demonstrates that he did not irrevocably decide to leave his children but was required to seek protection in Ireland. By the fact of his successful application for international protection there are insurmountable circumstances which prevent our client from reunifying with M in Somalia. Reunification in Ireland is therefore the most appropriate means to allow [AJ] and his son to exercise the right to family life."*

72. The Minister issued a decision (from Mr. Jeffrey Ward of the Family Reunification Unit of the Minister's Department) on 25 March, 2021. The letter rejected the submission that the relevant date for assessing the entitlement to family reunification was the date of the application for international protection. The letter referred to s.56(9)(d) and stated that:

> *"taking the date of birth given by your client for the above named subject 02.01.2003 at the date of the application referred to by section 56(9)(d) above M was 19 years old [sic] and therefore not 'under the age of 18 years' and therefore not an eligible family member as defined by section 56(9) International Protection Act 2015".*

73. While this paragraph was clearly in error in stating that MJ was nineteen years old, the paragraph does recite his correct date of birth and I do not believe this error can be regarded as material in the circumstances. The material point is that MJ was over 18 at the date of the family reunification application under s.56(9).

74. AJ contends that the Minister erred in the next paragraph of the letter, where it was stated as follows:-

> *"The Minister has no discretion to alter this definition or accept applications from persons who fall outside of these definitions."*

75. The letter went on to refer to the fact that AJ *"may be able to pursue other immigration permissions for his son M. Details of other such permissions can be found on the INIS website"*.

76. AJ submits that the Minister was error insofar as the letter states that the Minister had no discretion to accept applications of persons who have fallen outside the definitions in s.56.

77. AJ tendered affidavit evidence to show that in fact the Minister had exercised discretion on some s.56 applications in respect of persons who had arrived in the State as unaccompanied minors but who had turned 18 by the time their applications for family reunification under s.56(9)(d) had been made. Katie Mannion, a solicitor with the Irish Refugee Council averred that:

> *"I am aware that the Minister has previously granted family reunification, purportedly pursuant to section 56 of the International Protection Act 2015, in the case of persons who are unaccompanied minors at the time of entry to the State but who reached the age of majority prior to the receipt of a declaration of refugee status"*.

78. Ms. Mannion exhibited a covering letter in respect of one such decision. Jeffrey Ward swore an affidavit in reply on behalf of the respondents in which, *inter alia*, he specifically addressed Ms. Mannion's averment on this issue and stated, in respect of that averment, that:

> *"The position of persons who are unaccompanied minors at the time of entry to the State but who reach the age of majority prior to the receipt of a declaration of refugee status is distinct from the application in the present case by a beneficiary of international protection who has at all material times been an adult. I can confirm that no applications for family reunification made under s. 56 of the 2015 Act would be processed if the family member the subject of the application was eighteen or over on the date of application for family reunification. An applicant in such circumstances is not debarred from applying for family reunification at all and they do so under the* [Policy Document]*."*

79. In light of Mr. Ward's replying affidavit, the fact that the Minister has permitted family reunification for persons who were unaccompanied minors at the time of entry into the State but who were eighteen prior to their receipt of declaration of refugee status did not appear to

be in dispute. Counsel for AJ submitted that the state of affairs underscored the fact that the Minister validly exercised her discretion in such cases to permit family reunification. It would appear from Mr. Ward's averment that such grants of family reunification were not done under the scheme. It follows that in order for them to have lawfully done, they were done pursuant to the Minister's executive discretion. In response, Counsel for the respondents contended that AJ could not rely on any error which may previously have been made by the Minister in applying s.56(9)(c) in circumstances where the terms of that provision were not met by such applications.

80. The long title of the 2015 Act expressly notes the executive power of the State in relation to matters addressed by the Act. The respondents, in their statement of opposition in AJ's case, accept that the Minister *"has an executive discretion to accept applications for family reunification beyond the scope of legislative provisions"* and notes that the Minister "*has established a specific procedure on a transparent basis for the exercise of this discretion in the policy document on non-EEA family reunification (PDFR)"*.

81. In my view, counsel for AJ is correct in his contention that the policy document and process should be validly regarded as a manifestation of the Minister's overriding discretion but is not exhaustive of that discretion.

82. However, I do not believe that it follows that AJ is correct in his contention as to the unlawfulness of the 25 March 2021 review decision. In my view, the objective reading of the impugned sentence in the 25 March 2021 review decision letter (as set out in paragraph 74 above) is that the Minister was referring to any discretion under s.56 to alter the definition of family member at the date of the family reunification application or to accept applications under s.56 for persons who fall outside of the definition, and not to her executive discretion more generally. The decision in question was a review of an earlier decision made pursuant to an application expressly stated to be under s.56. The IRC's letter of 19 March, 2021, in fairness to the IRC and SH, could have been reasonably taken as an invitation to the Minister to exercise her executive discretion beyond the terms of s.56, particularly in its reference at p. 2 of that letter to a submission that the decision to refuse family reunification ought to be reviewed in accordance with MJ's personal circumstances. However, in my view, Mr. Ward in his decision letter was focusing his reason solely on s.56. His letter specifically noted, following his decision on the s.56 matter, that *"your client may be able to pursue other immigration*

permissions" and referenced the INIS website. It may have been preferable if the policy document was clearly identified as the obvious next port of call at this point. In any event the IRC acted consistently with this view of matters by then launching a formal application under the policy document on 6 May, 2021. Accordingly, I do not believe the review decision was vitiated by error of law as alleged.

83. Both SH and AJ raise issues as to the proper scope and application of the policy document. As the State accepts that the policy document operates outside of s.56, I propose to address the policy document arguments after a consideration of the compatibility of s.56(9)(d) with the Constitution, EU law and the ECHR. The analysis of the compatibility of the provision with the Constitution, EU law and the ECHR will in any event assist in a proper evaluation of the arguments raised in relation to the policy document.

IV. Is section 56(9)(d) or its operation in these cases, repugnant to the Constitution and/or in breach of EU law and/or in breach of the ECHR?

Overview

84. SH sought to contend that s.56(9)(d), or its operation in his case, was both in breach of EU law and repugnant to the Constitution. AJ raised very similar arguments and also advanced the case that s.56(9)(d) and its operation in his case was contrary to the ECHR. In broad terms, the applicants contended that s.56(9)(d) or its operation on the facts presented by their cases, offended the equality and family right provisions of the relevant legal instruments (Constitution, Charter and ECHR).

85. Given the significant degree of overlap of the legal concepts underpinning the relevant provisions of those instruments and the jurisprudence considering those provisions, it is appropriate to deal with these arguments together.

86. The applicants' case, in short, is that each of them has been treated unequally as compared to other applicants for international protection whose children were the same age as theirs but who were granted international protection at an earlier point than them, thus allowing those applicants get the benefit of family reunification when that benefit was denied to them. It is said that this unequal treatment is not objectively justifiable and constitutes a

disproportionate attack on their rights, and in particular their right to respect for family life. They also seek to contend that they have a self-standing right to family reunification from the point at which they applied for international protection status given that the conferral of refugee status is declaratory of the status enjoyed from the point at which they become refugees.

87. The State's answer to these contentions, in broad terms, is that it is clear that there is no right to family reunification *per se* outside of such rights to family reunification as are found in the Qualification Directive and in the Qualification Directive Recast (Directive 2011/95/EC) (which do not avail the applicants) and in the Family Reunification Directive (Directive 2003/86/EC) (to which Ireland is not a party). Accordingly, the State submits, it was entirely for the Oireachtas as a matter of legislative policy to choose if, and if so from what date, the right to family reunification for children outside of Ireland would be conferred. Accordingly, the State submits, there is no question of any violation of fundamental rights. The State lays particular emphasis in disregard on the decision of the Supreme Court in *A,S,S & I v Minister for Justice* [2020] IESC 70 ("*ASSI"*).

88. I will deal firstly with the applicants' argument that they are entitled to a right to family reunification from the date of their international protection applications as a matter of EU law.

EU Law Case

89. The applicants contend that s.56(9)(d) or its operation in their cases was contrary to EU law. They ground this contention in an argument that article 18 of the Charter of Fundamental Rights of the EU ("the Charter"), which creates a right to asylum as a matter of EU law, must be taken to include a right to family reunification from the date an application for asylum/international protection is made. They say this is so because EU law recognises that a formal decision to grant international protection is declaratory of the fact that the subject of the declaration has been a refugee from the point in time at which he or she arrived in the relevant state and made an international protection application. They say this is consistent with the family law rights protected in article 7 of the Charter and the protection of the best interests of the child recognised in article 24 of the Charter.

90. Article 18 of the Charter provides:

"The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union".

91. The respondents say that no right to family reunification is found in either the Geneva Convention or TFEU (as referenced in article 18) and that article 18 accordingly provides for no right to family reunification *per se,* whether expressly or by implication. They say that such rights to family reunification as may exist in EU law are those expressly provided for in either the Qualification Directive (which only provides for family reunification rights for family members of refugees who are present in the member state along with the refugee and which therefore does not avail the applicants given that their children were at all times living outside the State) or in the Family Reunification Directive, to which Ireland is not a party, and which cannot avail the applicants.

92. The applicants accept that they cannot avail of the provisions of either the Qualification Directive or the Family Reunification Directive. They nonetheless seek to contend that case law under those directives is supportive of the contention that a right to family reunification exists in EU law independent of those directives and rooted in article 18 of the Charter.

93. The Qualification Directive states in recital (14) that "*the recognition of refugee status is a declaratory act."* Similarly, the recast Qualification Directive states in recital (21) that "*the recognition of refugee status is a declaratory act."*

94. The Qualification Directive provides, in article 23, for a right to maintain the family unit in respect of family members of the beneficiary of refugee status who are present in the same member state as the beneficiary of the successful application for refugee status. Ireland has implemented the Qualification Directive. The Qualification Directive was subsequently enacted in recast form which retained this right. Ireland has not opted into the recast Qualification Directive. In any event, the original Qualification Directive (which Ireland remains bound by) cannot avail the applicants given that their children were not resident in Ireland at the date of either their international protection applications or their family reunification applications.

95. The Family Reunification Directive creates a right to family reunification for refugees whose status as refugees has received recognition and who otherwise fulfil the criteria set out in that directive for reunification with family members. The Family Reunification Directive does permit family reunification of members outside the protecting state in certain circumstances.

96. While accepting that the State has not opted into the Family Reunification Directive, and that they therefore cannot rely on the provisions of that directive, the applicants nonetheless submit that the right to family reunification inheres in the right to asylum protected outside of that directive by article 18 of the Charter. They accordingly say that s.56 involves the implementation of EU law. They submit that as under EU law the recognition of refugee status is a declaratory act, s.56(9)(d) is not compatible with such a designation and must be disapplied to the extent that it undermines same notwithstanding that the family reunification directive is not applicable here.

97. The applicants in support of this argument rely on the analysis of the CJEU in its decision in *A & S* (mentioned at paragraph 69 above*). A & S* concerned the proper interpretation of the term "unaccompanied minor" in article 2(f) of the Family Reunification Directive. In that case, the daughter of A and S arrived unaccompanied in the Netherlands when she was still a minor. She applied for asylum and reached 18 before her asylum status was confirmed. Having achieved refugee declaration status, her parents sought entry and residence in the Netherlands for the purposes of family reunification with her (under article 10(3) of the Family Reunification Directive). The applicants contend that the reasoning in the CJEU's judgment in *A & S* supports their arguments as both the directive and the CJEU recognises that recognition of refugee status as declaratory, and effectively links the right to family reunification for unaccompanied minors to the date of application for international protection and not the date of application for family reunification.

98. The relevant paragraphs of *A & S* on which the applicants relied state:

> *53. "Recital 21 of Directive 2011/95 the [Recast Qualification Directive] states, in addition, that recognition of refugee status is a declaratory act.*

54. Thus, after the application for international protection is submitted in accordance with Chapter II of Directive 2011/95 [the Qualification Directive recast]*, any third-country national or stateless person who fulfils the material conditions laid down by Chapter III of that directive has a subjective right to be recognised as having refugee status, and that is so even before the formal decision is adopted in that regard.*

*55. In those circumstances, to make the right to family reunification under Article 10(3)(a) of Directive 2003/86 [*the Family Reunification Directive*] depend upon the moment at which the competent national authority formally adopts the decision recognising the refugee status of the person concerned and, therefore, on how quickly or slowly the application for international protection is processed by that authority, would call into question the effectiveness of that provision and would go against not only the aim of that directive, which is to promote family reunification and to grant in that regard a specific protection to refugees, in particular unaccompanied minors, but also the principles of equal treatment and legal certainty.*

56. Such an interpretation would have the consequence that two unaccompanied minors of the same age who have each submitted, at the same time, an application for international protection could, as regards the right to family reunification, be treated differently as a result of the duration of the processing of those applications on which they generally have no influence and which, beyond the complexity of the situations at issue, may depend both upon how much work the competent authorities have and the political choices made by Member States as regards the staff made available to those authorities and the cases to be dealt with as a priority."

99. By analogy, the applicants submit that it is contrary to their EU law rights under article 18, but also contrary to their EU law rights to equal treatment and legal certainty, for them to be denied reunification for their sons who were under 18 at the time they lodged their international protection applications but who, through the happenstance of the IPO taking so long to deal with their international protection applications, were over 18 at the date of their applications for family reunification.

100. The applicants rely in this regard on the recognition EU law gives to the declaratory nature of refugee status. To deploy the language of paragraph 54 of *A&S* they maintain that

they had a "subjective right" to be recognised as having refugee status before a formal decision was adopted in that regard by way of declaration. The reference to "subjective right" here is that of an inchoate right or a right that exists subject to its declaration or confirmation.

101. The applicants also sought to find support for their EU law arguments in the opinion of Advocate General Hogan (dated 19 March 2020) and the judgment of the CJEU (dated 16 July 2020) in *BMO & Others v Belgium* Joined Cases C-123/19, C-126 /19 and C-137/19 ('*BMO*') and the opinion of Advocate General Hogan (dated 25 March 2021) in Case C-768/19 *Bundesrepublik Deutschland v SE* ("*SE*"). Again, both of these cases involved the proper interpretation of the provisions of directives which Ireland has not opted into (being, respectively, the Family Reunification Directive and the Qualification Directive recast) and are accordingly subject to the same precedential limitations as the *A & S* case.

102. In *BMO,* the matter at issue concerned the proper interpretation of article 4(1)(c) of the Family Reunification Directive which provided for a right of family reunification for "the minor children including adopted children of the sponsor where the sponsor has custody of the children who are dependent on him or her". The relevant provision did not identify the date at which it was appropriate to assess whether or not a child was a minor for the purposes of the provision. The question that arose on the facts in *BMO* is whether children who were still minors at the date of their application for family reunification with a parent should continue to be treated as such for this purpose even if they later became 18 during the course of the process in which the family reunification application was being considered. The CJEU held (at paragraph 44) that the date of submission of the family reunification application was the appropriate date, under the provisions of the directive properly interpreted, for determining whether a child was a minor child within the meaning of article 4(1)(c) (and not the date of a decision on that application).

103. The respondents here say that this finding in fact supports their case as this finding mirrors the position which obtains under s.56(9)(d) i.e. that the relevant date was the date of the family reunification applicant. The applicants argue that the reasoning is supportive of their case because the earliest point in time available to the child was chosen by the CJEU.

104. As regards, *SE* the applicants sought to rely on the analysis in the opinion of Advocate General Hogan in that case. (An English language version of the judgment of the CJEU in *SE*

was not available at the time of the hearing or the date of the writing of this judgment although it is believed that the CJEU followed the opinion of Advocate General Hogan on the issue said to be relevant to these proceedings). In the introduction to his opinion, Advocate General Hogan stated that the case "*raises again rather vexing questions regarding the appropriate dates which govern family reunification applications arising from the grant of international protection to other family members.*" The issue in the case turned on the proper interpretation of the provisions of article 2(j) of the Qualification Directive recast. Article 2(j) provided that: "*For the purposes of this Directive the following definitions shall apply:…(j) "family members' means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection…the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried".* Article 2(k) defined "minor" for the purpose of this provision as "*a third-country national or stateless person below the age of 18 years*".

105. The facts of the case concerned a claim under the Qualification Directive recast for subsidiary protection by the parent of an unmarried minor, where the unmarried minor was a beneficiary of subsidiary protection in the relevant member state (Germany). On the facts of that case, the father of the minor son applied for subsidiary protection one day after his son ceased to be a minor. At the date of his application, he was in the same member state as his son.

106. The applicants relied on the terms of paragraph 65 of Advocate General Hogan's opinion which stated "*it is clear from the judgments in A & S and BMO that the court did not envisage that the applicant's rights to family life should be made dependent on the rapidity and length of a national application and decision-making process. The principle which subtends these two decisions is that the entitlement to make an application for family reunification cannot be determined by the happenstance of the dates when certain decisions are made by third parties*".

107. Advocate General Hogan went on to conclude that in order for a father to benefit from the family reunification rights in article 23 of the Qualification Directive recast, on the basis he is a "family member" of a "minor" who was a beneficiary of international protection, those

rights must actually be asserted or claimed by the father while his son is still a minor. The respondents submit that, again, this supports their position as the relevant date was not the date of the son's application for international protection but rather the date of his father's application for protection (i.e. the date of the family reunification application made by his father).

Discussion

108. In my view, the applicants' contentions as to a self-standing right to family reunification in EU law are misconceived as a matter of EU law. The case law they seek to invoke is clearly concerned with the proper scope and interpretation of provisions of either the Qualification Directive recast or the Family Reunification Directive where those provisions have no application to the applicants' case. The Supreme Court (Dunne J.) rejected reliance on *A & S* in the *ASSI* case precisely because the Family Reunification Directive was not applicable in Ireland; Dunne J. stated (at paragraph 118):

> *"Reference was then made on behalf of Ms. I to two decisions of the CJEU [one of which was* A & S*] said to be illustrative of the approach required in international protection cases involving children. Those decisions concern Directive 2003/86/EC, the Family Reunification Directive. Ireland has not opted into that Directive and it is therefore inapplicable in this jurisdiction."*

109. In any event, quite apart from the fact that case law on the proper interpretation of the Family Reunification Directive cannot be applied to s.56 where Ireland is not a party to that directive, it seems to me that the respondents' point is well made that *BMO* and *SE* demonstrates that there was nothing offensive as a matter of EU law in having family reunification determined by reference to the age of a child at the date of the family reunification application as opposed to the date of application for international protection; therefore, at EU law level, the matter was one of policy choice as to the appropriate reference date. The recitals to the Family Reunification Directive underscore this by making clear that the EU legislature was *establishing* a right of family reunification for the situations covered by the Directive (see e.g. recital (16)) and not simply regulating a pre-existing right arising under article 18. This reading of the Directive is re-enforced by the fact that the UK and Ireland were not bound by its adoption and not bound by or subject to its application (recital (17)).

110. The applicants further sought to submit that article 18 had to be read in light of the protections contained in the ECHR. They found support for this argument in paragraph 72 of the judgment of Dunne J. in *ASSI* where Dunne J. referred to the decision of the ECHR in *Tanda-Muzinga v. France*, 2260/2010 (10th July, 2014) ("*Tanda-Muzinga*") in which it was stated at paragraph 75 as follows:

> *"The Court reiterates that the family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life…It further reiterates that it has held that obtaining such international protection constitutes evidence of the vulnerability of the parties concerned (see Hirsi Jamaa and Others v. Italy [GC] No. 27765/09, 155, ECHR 2012). In this connection, it notes that there exists a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens, as evidenced by the remit and the activities of the UNHCR and the standards set out in Directive 2003/86 EC of the European Union …"*

111. The applicants submitted that article 18 of the Charter accordingly has to be read in light of the provisions of the ECHR. However, as we shall come to, the ECHR does not provide for a self-standing right to family reunification and Dunne J. also noted at paragraph 72 of *ASSI* that the applicants in that case acknowledged that a refugee does not have an absolute right to family reunification in their host country.

112. The applicants further relied on the EU law principle of legal certainty. However, legal certainty in this context cuts both ways; there is as much legal certainty created by providing that family reunification is only available to those children who were under 18 at the date of the family reunification application as there is in providing that family reunification is available at the date of grant of refugee status or at the date of arrival into the host state or at some other date in between.

113. In their submissions, the applicants canvassed different dates that might be compliant with the EU law right to family reunification they asserted, such as the date of application for international protection or the date of the decision on such an application. The respondents submitted that the fact that the applicants were pointing to different potential dates as the source

of the asserted EU law rights demonstrated that the selection of appropriate cut-off dates for family reunification rights was classically a matter of policy choice for the legislature. In my view, the respondents are correct in this regard.

114. In conclusion, in my view, article 18 of the Charter does not create a right to family reunification. There is no EU law right to family reunification from the date of a refugee's application for international protection which applies in Ireland. The provisions of the Qualification Directive as regards family reunification do not avail the applicants. The provisions of the Family Reunification Directive, as interpreted by the CJEU, cannot be availed of by the applicants as that directive is not applicable in this State. The matter is governed by Irish law and, specifically, the provisions of s.56. The terms of s.56 are a matter of policy choice by the legislature. It follows that s.56(9)(d) is not in breach of EU law.

Constitutional and ECHR arguments

115. The applicants contend that each of them has been treated unequally as compared to other applicants for international protection whose children were the same age as theirs but who are granted international protection at an earlier point than them, thus allowing those applicants get the benefit of family reunification when that benefit was denied to them. They contend this is a breach of their rights under article 40 of the Constitution and further constitutes a violation of article 14 ECHR. It is said that this unequal treatment is not objectively justifiable and constitutes a disproportionate attack on their rights, and in particular their rights to respect for family life under articles 40.3 and 41 of the Constitution and article 8 ECHR.

116. The applicants contend that their rights to equal treatment are breached in circumstances where children born on the same day to applicants for international protection who apply for such protection on the same day can end up being treated unjustifiably differently, through no fault of their own or their parents, simply because the IPO takes longer in respect of one protection application than another, such that one child is validly the subject of a family reunification application while still a child, but the other is over 18 and therefore ineligible by that time. They submit that this is objectively unjustifiable discrimination as between different members of the same class (being the class of applicants for international protection who make their applications for protection at the same time and who have children born at the same time). The applicants submit that s.56 subjects them to objectively

unjustifiable discrimination on grounds cognizable by article 40 (including those inherent human characteristics of age and parenthood) compared to the appropriate comparator of an applicant for protection on the same date, with a child born on the same date, but who gets granted protection earlier than them and gets family reunification for a child of the same age as a result.

117. Article 40 of the Constitution provides that:

> *"All citizens shall, as human persons, be held equal before the law.*
>
> *This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."*

118. Article 14 ECHR provides:

> *"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

119. The respondents submit that the applicants' equality case is misconceived in circumstances where both applicants were treated just the same as all those in the category to which they belong i.e. all those applicants for family reunification who had children over 18 at the date of their applications for family reunification.

120. In my view, in considering the equality arguments, the analysis of the Supreme Court in *ASSI* is instructive. In that case, the Supreme Court considered the constitutionality of s.56(9)(a) of the 2015 Act (which limited applications for family reunification with a spouse to those with a marriage subsisting on the date the applicant made an application for international protection), and, separately, the constitutionality of s.56(8) of the 2015 Act (which imposed a time of 12 months from the date of the grant of a refugee or subsidiary protection declaration for the making of a family reunification application). The judgment accordingly considered issues in a family reunification context of alleged inequality of treatment contrary to the Constitution and contrary to the ECHR.

121. In *ASSI,* the Supreme Court held as follows:

(i) There is no self-standing constitutional, ECHR or EU law right to family reunification for a member of a beneficiary's family who resides outside the State, whether at the date of the beneficiary's application for international protection, the date of the beneficiary's declaration as a refugee or otherwise (paragraph 124, Dunne J. endorsing Humphreys J. in the High Court in *I.I.*).

(ii) In the case of family reunification as between spouses where the spouse of a beneficiary is outside the State, it is objectively justifiable for the Oireachtas to legislate for difference in treatment as between spouses who were spouses of the beneficiary at the date of application for international protection, and those who became spouses at a later date (Dunne J., paragraph 99).

(iii) While constitutional and Convention family law rights are engaged in principle by the imposition of a time limit for the making of applications for family reunification (being the time limit of twelve months from the date of declaration of refugee status for the making of family reunification applications for children who are under eighteen at the date of the family reunification application – s. 56(8)), such time limits did not constitute inequality of treatment, impermissible discrimination, or breach of any family law rights of the applicant as a twelve-month time limit is not incompatible with the Constitution and the Convention (Dunne J., paragraphs 124, 125, 132 and 133).

(iv) The existence of an alternative route to family reunification *via* the policy document may be a relevant consideration in assessing the overall vindication of the rights of an applicant which may be engaged by family reunification (Dunne J., paragraphs 105 and 124).

(v) The State enjoys a margin of appreciation in deciding how it chooses to introduce family reunification rights (outside of such rights as stipulated in the Qualification Directive in relation to family members already in the State with the beneficiary) (Dunne J. paragraph 124).

122. In *ASSI,* Dunne J. quoted from a passage of the judgement of O'Donnell J. (as he then was) in *Minister for Justice and Equality v O'Connor* [2017] IESC 201 where he stated (at

paragraph 20) that "article 40.1 requires equality, not identity, of treatment" and (at paragraph 21) "*the essence of an inequality claim is the sense of injustice that one experiences when a person similarly situated is being treated differently and normally more favourably and in particular the circumstances are suggestive of a discriminatory ground related to a person's human personality*".

123. Dunne J. (at paragraph 99) upheld the constitutionality of s.56(9)(a) on the basis that it was open to the legislature to make a distinction in those seeking permission to have a spouse join them in the State between those whose marriage was subsisting on the date the sponsor make the application for international protection and those who were married subsequent to that date. (It might be noted that the relevant reference date in s.56(9)(a) was the date of application for international protection and not the date of application for family reunification).

124. Dunne J. upheld the constitutionality of s.56(8) on the basis that the 12-month time limit imposed by the provision "*applies to all refugees, minors and adults alike. No distinction was made between any category of applicant for family reunification*" (paragraph 124). She also pointed out that "*the Act of 2015 is not the sole means by which family reunification can take place. As is clear, it is also possible to pursue family reunification pursuant to the policy document* [i.e. the non-EEA family reunification policy document]" (also at paragraph 124).

125. Dunne J. relied on the fact that the time limit commenced at the date a declaration of refugee status had been granted (paragraph 124). She endorsed the following passage from the judgment of Humphreys J. in *I.I.* (being one of the judgments under appeal in that case):

> *"It is worth noting that for the purposes of the Geneva Convention, family reunification is encouraged by interested agencies but is not a legal obligation. It is hard to see how it can be said to be a matter of fundamental human rights such that it must be viewed as an implied constitutional right. In the absence of a substantive constitutional entitlement to family reunification, the Act is not in breach of Article 40.3 or 41…*"

126. The evidence advanced by the State here (in AJ's case) in support of its position as regards the compatibility of s.56(9)(d) with the Constitution and the ECHR was contained in an affidavit of Jeffrey Ward delivered on 26 April 2022 (after the AJ had filed his written submissions in respect of the hearing and just before the hearing took place):

"The differentiation between children who are minors, and those who are adults, when their parents make an application for family reunification under [s. 56] *is justified by the difference in capacity, legal status and their social junction depending on whether that child is a minor or an adult. Sections 56 and 57 of* [the 2015 Act] *were enacted to give effect to Article 23 of the Qualification Directive, although the sections conferred greater rights than those conferred by the Directive."*

127. The applicants contend that this does not address their key point which is that the *Heaney* proportionality test (which, of course, mirrors the proportionality test applicable under the ECHR and EU law) is not met; in particular, the selection of the date of the family reunification application as being the relevant date for assessing minor status of a beneficiary's child is arbitrary and not rationally connected to the objective of regulating immigration control, impairs the right to family life (and the children's rights) excessively and leads, therefore, to a disproportionate attack on those rights.

128. In my view, it follows from the absence of any right to family reunification outside the right created under s.56 that the appropriate comparator for the applicants is any other applicant who applied for family reunification on the same dates as they did. SH and AJ are treated precisely the same as any other such applicant. To hold that an appropriate comparator is an applicant for international protection who applied at the same time and who has a child of same age but who was granted a refugee declaration before SH or AJ would be to re-write the terms of s.56(9)(d) by effectively holding that a qualifying child within the provision is a child who was 18 not at the date of family reunification application but at the date of the sponsor's international protection application. That would involve the Court in an improper usurpation of its constitutional role. The legislature has chosen to provide the significant benefit of family reunification to those persons who have children under the age of 18 at the time they are declared refugees and have made a family reunification application. Once that policy choice was open to the legislature, I do not see how it can be said that it involves a breach of article 40 of the Constitution or article 14 ECHR (even assuming, without so deciding, that s.56(9)(d) relates to a matter which sufficiently concerns the applicants' human personality such as to engage article 40 at all). An applicant for international protection who successfully achieves a declaration of refugee status is objectively in a different category, for the purposes of conferral of benefits, such as family reunification, from those applicants for international protection

status who have not yet achieved such a declaration. The status of a parent with a minor child is capable of being objectively differentiated from the status of a parent with an adult child.

129. In the absence of a self-standing right to family reunification from the date of an application for international protection, it was open to the Oireachtas to choose as a matter of policy those children of beneficiaries of international protection status who would be conferred with the right to family reunification. The law is replete with examples of a differentiation in treatment (in respect of the conferral of benefits) as between persons who have been recognised as having refugee status, and those who have made applications for international protection but who have not yet been declared to be refugees. Accordingly, there is on the face of it an objective justification for the Oireachtas choosing to confer the benefit of family reunification on those children who were under eighteen at the date of applying for family reunification but not conferring such a benefit on children who were adults at that date. The selection of that date as the "cut-off" for conferral of a benefit as a declared refugee's children seems to me to be within the margin of appreciation afforded to the Oireachtas in considering how rights such as a right to respect for family life should have been vindicated.

130. In proportionality analysis terms, it can be said that the objective of the relevant provisions in s.56 is to facilitate family reunification for refugees who have been declared as such. The means chosen for achieving that objective include a requirement that a child of the beneficiary of a refugee declaration be under 18 at the date of the family reunification application. A family reunification application can be made at any point after a refugee has been formally declared to have refugee status. There is no self-standing constitutional, ECHR or EU law right to family reunification from the date of arrival of refugee into the host country. Accordingly, insofar as there are rights against which a proportionality analysis is required to be undertaken, the rights would appear to be rights to respect for family life, the right to be free from invidious discrimination and (potentially) the rights of children.

131. In my view, once it is accepted that there is no *a fortiori* right to family reunification for refugees from the date of entry into Ireland, it is clear that, insofar as a proportionality argument arises at all in relation to s.56(a)(d), it cannot be said that the choice of the date of the family reunification application (as the relevant date for determining those children of a declared refugee who will be entitled to seek family reunification under s.56) fails the proportionality test. All declared refugees are treated equally as of the date of their family

reunification applications. There is no difference of treatment within that class. While it is of course the case that, as with any legislation based on cut-off dates or time limits, there will be cases that fall just outside the cut-off dates or the time limit, such as to create what might be perceived to be a harsh result for persons in that category, it does not seem to me to follow that the provision is unconstitutional or in breach of the Convention.

132. In support of their ECHR arguments, the applicants sought to rely on the European Court of Human Rights decision in *Tanda Muzinga* (referenced in paragraph 110 above). *Tanda Muzinga* does not support the proposition that there is a self-standing or inherent right to family reunification for refugees under the ECHR from the date when an applicant for family reunification became a refugee (as opposed to from the date on which an applicant was the beneficiary of a declaration of refugee status). Rather, in circumstances where the applicant there had been told that his family reunification application was approved in principle, it was held to be a breach of the ECHR rights to respect for family life and to the equality of treatment for the French authorities to take some 3 years to process these applications which are necessary to give effect to the family reunification which had already been approved in principle.

133. It is clear that the Supreme Court in *ASSI* took a similar view. As already pointed out (see paragraph 110 above), in her judgment in that case, Dunne J. cited from paragraph 75 of *Tanda Muzingia* (a passage on which the applicants placed heavy reliance in their submissions before me) but nonetheless held that s.56(8) and s.56(9)(a) were not incompatible with the ECHR.

134. When assessing the compatibility of s.56(8) with the ECHR, Dunne J. stated that "*I accept that an application for family reunification engages article 8 rights*…" (at paragraph 132). In rejecting the contention that s.56(8) was incompatible with the Convention either by violation of article 8 rights or by violation of rights under article 14, Dunne J. held that "*the provisions of s.56(a) apply without distinction to all declared refugees. There is no difference in treatment between various categories of declared refugees. The only difference is that Ms. I did not comply with the time limit."* Dunne J. went on to emphasise that the time limit at issue in that case did not commence such time as the applicant for family reunification had been granted a declaration of refugee status or international protection: *"Thus, it is difficult to see at the time and could be said to be unreasonable."*

135. In my view, similar reasoning can be applied to the case made by the applicants here. SH's case is that he has been discriminated against by reason of a difference in treatment between children the same age as AH who got the benefit of family reunification because their refugee parent was conferred with a declaration of refugee status before SH. However, this is not the relevant comparator; SH cannot say that he was treated any differently to any other person who was conferred with a declaration of refugee status at the same date as him. In relation to AJ, he complains that he is being treated differently to other applicants who were conferred with refugee status on the same date, and who had children the same age as MJ but whose application for family reunification were made before that of MJ. Again, however, AJ cannot point to any difference in treatment with other declared refugees who made applications for family reunification on the same date that he did.

136. For reasons similar to those outlined above in respect of the applicant's arguments as to breach of equality guaranteed under article 40 of the Constitution, I do not see that a case in violation of article 14 of the ECHR has been made out. There is no difference in treatment of persons in analogous or relevantly similar situations.

137. Accordingly, in my view, s.56(9)(d) is not repugnant to the Constitution or contrary to ECHR.

Irish case law re benefits of refugee status including family reunification

138. The respondents placed emphasis on a series of Irish decisions which made clear that there was a valid distinction, when it came to the enjoyment of benefits and rights, between those persons who had applied for international protection or refugee status and those who had received a grant of international protection or refugee status, including *VB v Minister for Justice and Equality* [2019] IEHC 55 and *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC. These cases are supportive of the proportion that, outside of benefits which are mandatory as a matter of EU law, it is a matter for the Oireachtas to determine as a matter of policy what benefits are to be provided to beneficiaries of international protection status.

139. The respondents submitted that, in reality, the applicants are asking the Minister and this Court to retrospectively apply a benefit of the grant of a refugee declaration, being the right to family reunification, which the Oireachtas has decided is not to be conferred until the

declaration is granted. The recognition of refugee status granted to the applicants granted them the benefits of the State's protection (including the benefit of family reunification) from that point in time, and it was from that date that they were entitled to make an application for family reunification within a twelve-month period, not any date before then.

140. In *B.K (A Minor) v. Minister for Justice* [2011] IEHC 526 ("*BK*"), it was contended that the minor applicant could rely on her mother's residence in the State prior to the grant of refugee status for the purpose of satisfying the reckonable residence requirements for citizenship. While Feeney J. endorsed the view that a person is a refugee within the meaning of the 1951 Refugee Convention as soon as the person fulfils the criteria, (and logically, that occurs prior to the time at which the person's refugee status is formally determined), he held that the declaration does not have retrospective effect for the purpose of the applicable legislation (then the Refugee Act 1996). He held (at paragraph 10):

> *"The provisions of the Act are such that a person who is found to be a refugee does not have the benefits of refugee status backdated under the Act and it follows that if this Court were to accept the interpretation of s. 9(2) of the Act contended for by the applicant, such interpretation would be inconsistent with the other provisions of the Act… This Court is satisfied that a correct reading of the statutory provisions results in the situation being that as of the date of the applicant's birth, the applicant's mother was a person entitled to remain in Ireland on the basis that her entitlement to remain was for the purpose of ensuring a final determination of her application for refugee status. It was therefore the case that as of the date of birth of the applicant that the applicant's mother was a person within the State with a restriction on her period of residence."*

141. It followed, therefore, that such period of residence was held not to be reckonable for the purposes of the Irish Nationality and Citizenship Act, 1956 (as amended).

142. Similarly, in *Michael (A Minor) & Ors. v Minister for Social Protection* [2019] IESC 82 ("*Michael (A Minor)"*), the question arose as to whether child benefit could be retrospectively applied at a time when protection applications of the children's parents had not yet been determined. Dunne J. held that there was nothing in article 28 of the Qualification Directive to suggest that the payment of child benefit should be backdated to the date of the grant of a declaration of refugee status to the child. The Supreme Court held that the payment

is made from the date upon which the decision was made to grant the applicant's mother, the qualified person entitled to receive the payment, the right to reside in the State. In O'Donnell J.'s judgment, he held:

> *"14. The provisions of s.246 set out a careful scheme which distinguishes between a right to reside, and habitual residence. The scheme can be understood by taking an example of refugee status. A person granted refugee status, for example, is taken to have a right to reside in the State pursuant to s.246(7)(c), and therefore is capable of being habitually resident within the terms of subs. (1) to (4). However, the mere making of an application does not mean that a person can be regarded as habitually resident and where, in due course, a permission has been granted, that does not have a retrospective effect so that he or she is not to be regarded as having been habitually resident prior to the date of the declaration. Applying that scheme to this case, it is apparent that both Emma's mother and Michael's mother ultimately received permissions which meant that they were to be taken to have a right to reside in the State, and accordingly had an entitlement to be treated as habitually resident from the period from the date the permission was granted, but not before."*

143. In my view, *B.K.* and *Michael (A Minor)* are consistent with the principle that a *declaration* of refugee status does not have retrospective effect as regards the benefits conferred by law from the date of such declaration including the benefit of the right to family reunification conferred by s.56.

144. It is clear that the law recognises different benefits and entitlements as between the periods before and after the grant of a declaration of recognition of refugee status. The fact that such grant/recognition is declaratory does not mean that the benefits and entitlements conferred on a person who has been granted a declaration of refugee status must as of right be retrospectively applied to the date on which the refugee entered the State. The fact that the benefits of the grant of refugee status are not retrospective underpins the Courts' analysis in *BK* and in *Michael (a Minor).* SH pointed to a provision in the Irish Nationality and Citizenship Act 1956 whereby citizenship for the beneficiary of a refugee declaration was taken to run from the date of entry into the country. However, this simply underscores that it is for the legislature to decide as a matter of policy what benefits (above and beyond asylum and the right to remain in the State) are to be conferred on beneficiaries of refugee status and from what point.

V. Non-EEA Policy Scheme Argument

145. Both SH and AJ contend that the scheme and its policy document fail to adequately vindicate their rights, albeit on somewhat different bases.

SH: Policy Document fails to protect his rights

146. As noted earlier in this judgment an application has been made by SH pursuant to the scheme for visas for AH and ZH which would allow them join their family in Ireland. Those applications have yet to be determined by the Minister. SH makes the point that he is not, on the face of it, able to bring himself within the financial threshold provisions of the policy document for the scheme. However, the Minister points to the fact that the policy document (at paragraph 1.12) states that "*it is intended that decision makers will retain the discretion to grant family reunification in cases that on the face of it do not appear to meet the requirements of the policy. This is to allow the system to deal with those rare cases that present an exceptional set of circumstances, normally humanitarian, that would suggest that the appropriate and proportionate decision should be positive."*

147. SH expresses concern that the availability of the scheme does not provide an effective remedy for his family reunification claims. He points out that the Minister has at all times, as she accepts, retained her overriding executive discretion to admit his sons into the State but she has not exercised that discretion to date and has rather, in his submission, relied on *pro forma* rejections of his application.

148. I accept that a permission granted under the scheme does not confer the same level of rights as the permission granted pursuant to s.56. However, it does provide a potential route to family reunification of a sort that would resolve the current situation whereby the family unit is fractured. As we have seen, the Supreme Court took the view in ASSI that the existence of a route to family reunification via the scheme was relevant to an assessment of the State's ability, in the round, to vindicate the constitution and ECHR rights of applicants for family reunification.

149. In my view, the fact that SH may have missed out on a statutory right to family reunification by reason of a significant delay in the processing of his application for international protection to the IPO as a result of systemic delays arising from the Covid pandemic, and in circumstances where SH was not guilty of any delay, is a matter to which all appropriate weight must be given by the Minister in assessing SH's application for family reunification under the scheme (particularly where his wife and daughter have already been the subject of a successful s.56 family reunification application), in order to ensure proper vindication of SH's rights. As SH's application has yet to be the subject of a decision under the scheme, I will not say anything further in relation to the application.

AJ: Policy Document contrary to AJ's Rights under the Constitution, the Convention and EU Law?

AJ's Policy Document application

150. On 6 May, 2021, the IRC made an application on AJ's behalf for MJ to join AJ in Ireland by way of family reunification, pursuant to the scheme. The IRC in its application requested that *"this application is accepted for consideration in accordance with paragraph 1.2 of the policy document on non-EEA family reunification on humanitarian grounds, or under any other grounds under the policy document, or in exercise of executive power"*. This letter noted that AJ was not aware that he would lose his right to family reunification under the 2015 Act as soon as MJ turned eighteen and that AJ believed that the Family Reunification Unit would consider the age of his children at the date he was recognised as a refugee (if not the date he applied for international protection).

151. The letter pointed out how MJ had been living with his half siblings and his stepmother in Mogadishu and had previously been living with his older brother who was killed in 2006, along with AJ's driver, by Al Shabab terrorists while travelling in his father's car. The letter noted that AJ's:

> *"work with the police made, and continues to make, him and his family a target for attack. Members of Al Shabab continue to call M on private phone numbers requesting that he join Al Shabab or disclose the current location of AJ or failing to do this, they threatened his life M is afraid that to get a job at a regular place of work would make*

him a target for Al Shabab… AJ is extremely concerned for his son's safety should his application for family reunification on his behalf be refused. M would be extremely vulnerable if separated from his family in Ireland. M has been approached on multiple occasions by Al Shabab recruiters. He has resisted requests to join the group, at great risk to his personal safety. M has had to move from place to place in an effort to avoid further approaches by Al Shabab recruiters."

152. A statement from MJ was attached to the application letter. This statement outlined his fears that Al Shabab may "kill me similarly they have already killed my brother" and detail was given as regards three periods when MJ fled Mogadishu to evade Al Shabab. It was submitted that MJ's circumstances *"are of an exceptional humanitarian need* [and] *that the appropriate and proportionate decision in this case should be the granting of a visa"*.

153. Confirmation was specifically sought in the letter *"that the Department is willing to process this as an urgent request"*.

154. The policy document states that *"applications (assuming all required information has been submitted) should ideally be dealt with within 6 months or 12 months of application depending on the category"*.

155. Despite the fact that the request was made for an urgent handling of the application, no response as all was received to the application until some six months later when an email was sent on 9 November, 2021 from the Minister's Department stating *"unfortunately, we received no payment in respect of the received application. Although a print out of some sort of payment was included with the paperwork, no fee was ever found in our account in respect of* [AJ]*"* and requesting the payment to be made *"in order to progress his application"*.

156. Once the fee issue was resolved, the family reunification application in respect of MJ was refused by letter of 27 January, 2022. The basis for the refusal included that:

"The applicant is an adult and as such is not normally considered as an immediate family member for the purposes of reunification. The Policy Document states in section 13.2(a) that immediate family consists of a spouse and children under the age of 18. The Policy Document further clarifies in footnote 11 that the maximum age can be

extended to 23 where the child is in full time education and remains dependent on the parents. The applicant was 18 years old at the time of application, has not submitted evidence that they enrolled in full-time education and has not demonstrated they are dependent on the sponsor. Applicant has failed to demonstrate any special circumstances that would warrant an exception."

157. The decision went on to state:

"The visa officer has additionally considered the applicant under section 1.12 of the Policy Document and has not found that the application as submitted has demonstrated through documentary evidence an exceptional set of circumstances that would suggest that the appropriate and proportionate decision on the visa application should be positive."

158. While this decision is not under challenge in these proceedings, it would be remiss of me not to observe that this decision altogether fails to engage with the direct evidence submitted by MJ (entirely consistent with the basis upon which his father was granted international protection in the State) as to the circumstances in which MJ manifestly feared for his life at the hands of a terrorist group, who had already sought to kill his father and had killed his stepbrother. The relevant events addressed by MJ in the application largely occurred when he was under eighteen and a child. Furthermore, no regard appears to have been had to the fact that AJ had a legal right under s.56(9), on the face of it, up to 2 January, 2021 to obtain family reunification with MJ and the reasons why such an application had not been made in time.

159. The decision also cited insufficient documentation including that *"insufficient information has been submitted to show the extent to which family life exists between the sponsor and the applicant since sponsor first arrived in the State in 2019"*. How such family would be documented in this period, when the sponsor (AJ) had to flea Somalia having been the subject of murder attempts and based on a well-founded fear of persecution, and where MJ remained in Somalia and had to spend periods away from home to seek to protect his life, is not anywhere explained.

160. This decision is currently under review. On any review decision, in light of the content of this judgment, appropriate regard may be had to the fact that AJ had a right to apply for

family reunification for his son under s.56 between the date he was granted refugee status (on 11 November 2020) and 2 January 2021, when MJ turned 18. The Oireachtas regards this right as being necessary to vindicate, *inter alia*, the right to respect for family life under article 41 of the Constitution. Article 8 of the ECHR is also engaged in this context. Secondly, there is the point that but for the significant adverse impact of the Covid pandemic on the operation of the IPO system, AJ would likely have been granted international protection at an earlier date, likely many months before he was, such that he would have had a longer period to make a successful family reunification application in respect of MJ. Finally, as I shall come to, the State has acted in breach of AJ's right under article 22 of the Qualification Directive by failing to give him information on the criteria and cut-off dates for family reunification purposes in Somali subsequent to him being declared to be entitled to international protection. The evidence shows that this breach of rights had a direct causal link to him not claiming family reunification for MJ prior to MJ's eighteenth birthday.

Policy Document systemically deficient?

161. AJ contended that the policy document was in breach of his rights, under the Constitution, the ECHR and EU law, in failing to provide for a sufficiently rapid decision for refugees in his position seeking family reunification. As we have seen, the policy document contains a "target" (not an upper limit) of six to twelve months for making decisions on family reunification applications. Whatever about the legitimacy of such a target in a non-refugee context, AJ submits that, as was made clear by the European Court of Human Rights in *Tanda Muzinga*, family reunification applications in a refugee context should be the subject of a *"rapid decision"*. Here, AJ applied pursuant to the policy document on 7 May 2021. The first instance decision was not made until the 27 February 2022.

162. It does not appear that there is any system of triaging urgent applications for family reunification, particularly where pressing humanitarian considerations are engaged. Certainly, no such system is referenced in the policy document itself. The facts of AJ's case provide a particularly compelling example of why such availability of a "fast track" system for urgent humanitarian applications would be appropriate; MJ was still only eighteen at the date of the application, and the evidence was that his life had been threatened as a child and that he remained in real danger. It would also seem to be relevant that MJ, in fact, was *prima facie*

entitled to be the subject of a family reunification application under s.56(9) in the period from 11 November 2020 to 2 January 2021 (when he reached eighteen).

163. I do not believe it would be appropriate to consider striking down the policy document as a whole, as it is clearly a set of guidelines intended to cover a wide variety of circumstances where migrants to the State (and not just refugees) seek family reunification. It is also the case that AJ has not sought to impugn the Minister's refusal decision under the policy document of 27 January 2022 in circumstances where that decision is currently subject to review by the Minister. Counsel for the respondents properly accepted that rights such as the right to respect for family life enshrined in article 41 of the Constitution and article 8 ECHR (and article 7 of the Charter) are engaged by an application under the policy document, in addition to rights to fair procedures. This appears to have been accepted by the Supreme Court in the judgment of Dunne J. in *ASSI* (at paragraph 106). I accept the submission made on behalf of the respondents that it must be presumed that the review decision will be lawful.

164. In my view, situations could arise where it would not be proportionate for an applicant facing very difficult humanitarian circumstances to wait twelve months or more for a decision under the scheme. On the facts here it would seem that, apart from there being no initial screening or triaging to identify genuinely urgent cases, there is also no initial administrative screening to check that fees have been paid. It seems clear from the correspondence submitted by the IRC in support of the family reunification application made on 29 January 2021 that it believed that the fees were enclosed. AJ heard nothing in relation to the application for six months, until he received an email saying that it appeared that the fee had not been received. On the Minister's case, the clock only began to run from the date of receipt of the payment, with six months, thereby being "lost" from the applicant's perspective. Such an approach is hardly conducive to the vindication of an applicant's rights to fair procedures and to a timely decision in circumstances where fundamental rights may be in peril.

165. The policy document is clearly an exemplification of the executive discretion enjoyed by the Minister in relation to the control of immigration. It is clearly preferable that there are detailed guidelines governing such applications. However, it is also important that those guidelines properly reflect scenarios, such as those presented with the facts of AJ's case, where there is genuine urgency and ostensibly compelling humanitarian circumstances engaging fundamental rights considerations.

VI. AJ's Article 22 Qualification Directive case

166. AJ raises a separate and significant point, which is not part of SH's case, concerning an alleged failure by the State to transpose, and to give him the benefit of, the provisions of article 22 of the Qualification Directive (Directive 2004/83/EC). AJ claims relief, including *Francovich* damages for that alleged failure of transposition.

167. Article 22 of the Qualification Directive provides:

> *"Member States shall provide persons recognised as being in need of international protection, as soon as possible after the respective protection status has been granted, with access to information, in a language likely to be understood by them, on the rights and obligations relating to that status."*

168. The respondents accept that article 22 has not been transposed in terms. It is not denied that AJ was not provided with the information required under article 22 in a language likely to be understood by him (i.e. Somali) after being granted international protection status.

169. The respondents submit, however, that the non-transposition does not avail AJ for a number of reasons. They submit that:

(i) Article 22 is not applicable to rights arising under s.56 as a matter of EU law.

(ii) In the alternative, if article 22 is applicable, it was complied with in substance by the prior provision of information to AJ in Somali in relation to his rights under s.56.

(iii) In the further alternative, if article 22 is applicable, it was complied with by the provision to AJ post-conferral of refugee status of information in English in relation to his rights under s.56 in circumstances where AJ had the benefit of legal advice.

170. I will deal with each of these contentions in turn.

Article 22 is not applicable to rights arising under s.56

171. AJ contends that article 22 is directly effective; it is clear, precise, unconditional and intended to confer rights. The respondents do not seriously dispute that article 22 is directly effective and intended to confer rights but submits that such rights as it addresses are more procedural than substantive. More fundamentally, they contend that article 22 only confers a right to information as to such rights as are available as a matter of EU law under the Qualification Directive and, as the Qualification Directive does not confer a right to family reunification in respect of a family member outside the State, no breach of article 22 can have occurred in AJ's case.

172. I do not believe that this latter submission is well founded. Article 22 is not confined in its terms to the provision of information as to only those article 22 rights and obligations set out in the Qualification Directive. In its ordinary meaning, article 22 imposes a mandatory obligation on Member States to provide persons recognised as being in need of international protection with access to information, in a language likely to be understood by them *"on the rights and obligations relating to that status* [i.e. the status of being recognised as being in need of international protection in that Member State] *as soon as possible after the protection status has been granted*."

173. It seems to me that the information in question must include information on the rights and obligations relating to that status as conferred by the relevant Member State. Clearly, the recognition of the fact that a refugee is in need of international protection is a significant development for an applicant for refugee status. It typically leads to such a person being entitled to a range of rights (and being subject to obligations) which he or she was not entitled to (or subject to) before that point. Where such persons may be otherwise hindered (by reason of lack of language, lack of means or limited resources) in becoming aware of, or availing of, rights to which they have now become entitled, it would make no sense for article 22 not to extend in principle to information to the full panoply of rights available to someone who has received the benefit of international protection status in a given Member State.

174. I make no comment as to the extent of the information which would be required to be provided to give effect to the right in article 22; the material point here is that no information

at all in Somali was produced to AJ in relation to any rights relating to the status as a declared refugee after his protection status was granted.

If article 22 is applicable, was it complied with in substance by prior provision of information to AJ?

175. The respondents also rely on the fact that AJ was twice informed, at the outset of the international protection process, of his entitlement to apply for family reunification for family members who were under eighteen at the date of the family reunification application, in the event he was granted international protection.

176. The first provision of such information occurred when AJ was given an *"*Information Booklet for Applicants for International Protection" (the "information booklet") at his s.13(2) interview. AJ signed the acknowledgement of receipt of this booklet on 21 August 2019. The purpose of the information booklet is explained, on its first page, as helping the applicant:

> *"understand the procedures for processing applications for international protection in Ireland. It will also explain what your rights and obligations are and who you will be dealing with during the application, examination and recommendation/determination process. This booklet also provides information about the grant of permission to remain."*

177. Under a heading "Important Notes", it is stated that *"you should keep this information booklet so that you can refer back to it while your application is being processed"*. These notes also state that *"the law governing the examination and determination of applications for international protection as well as permission to remain and family reunification in Ireland is set out in the International Protection Act 2015…"*.

178. The information booklet contains a section (s.14) headed "Family Reunification". This section of the booklet explains what family reunification is, the time limits applicable and then specifically sets out the definition of "family member" to include, *inter alia*, *"a child of the person who, on the date of the application for family reunification, is under the age of 18 years"*.

179. A paragraph in this section also states *"If you have been granted refugee status or subsidiary protection and wish to apply for family reunification for a family member referred to in paragraph 14.3, you should apply in writing to the Family Reunification Unit (INIS)"* with the address of that unit provided.

180. The respondents also rely on the fact that the AIPQ completed by AJ on 10 September 2019 included a section in Part 10 headed "Information relating to Possible Future Applications for Family Reunification" which also set out the same definition of family member and emphasised the time limits for such applications. AJ filled out the details of his family, including MJ's details, in this section. It is submitted that it is clear from this that AJ was not only aware of the requirements in relation to family reunification, but evinced an express intention to apply for same when filling out his AIPQ.

181. Both the information booklet and the AIPQ were provided in Somali, being AJ's first language.

182. The respondents contended that this prior provision of information was such that the *"effect utile of* [Article 22] *is respected in practice"*. The respondents were unable to cite any authority in support of this proposition or point to any analogous scenario where a requirement to provide information subsequent to a conferral of status was satisfied by the provision of such information when the status was not applicable.

183. AJ while not denying that he would have received the information booklet, and accepting that the AIPQ which he completed and signed also contained information relating to family reunification, avers in an affidavit sworn in these proceedings that he *"simply did not know when I was granted refugee status in November 2019 that it was necessary to apply for family reunification under* [s.56] *prior to my son's eighteenth birthday… Had the State provided me with this information in question as soon as possible after the grant of protection I would in fact have been able to exercise my right to family reunification with my son* [M]*"*.

184. I accept AJ's submission that had the EU legislature intended to leave to the discretion of Member States as to when to provide the information addressed in article 22, it would not have used the word *"after"* in article 22. One can readily understand how being told of the actual entitlements which arise following the grant of international protection status, at the time

they arise, is of a very different order to being informed at the time of application for international protection (when such benefits are only prospective and may not eventuate for a long time, as borne out by the facts here). There is also the reality that many applicants for international protection when they arrive in the State may be traumatised and not yet sufficiently equipped to absorb information as to what their future entitlements might be, if and when they are ever conferred with protection status.

185. Accordingly, I do not accept that AJ's article 22 rights were met by the respondents on the facts of this case.

If article 22 is applicable, was it complied with by the provision to AJ, post-conferral of international protection status, of information in English in relation to his rights under s.56 where AJ had the benefit of legal advice?

186. As a further fall-back, the respondents contended that the information which the State did in fact provide to AJ subsequent to him being conferred with refugee status (being the standard letter sent to AJ confirming that he had been declared as a refugee) did make reference to s.56, albeit it was accepted that this information was only in English.

187. Under the heading *"Section 53 International Protection Act 2015 – Extension to Qualified Personal Certain Rights"* the relevant document stated as follows:

> *"You may apply to the Minister for Justice and Equality for permission to be granted to a member of your family to enter and reside in the State, in accordance with s. 56 of the International Protection Act 2015. If you wish to do this, you should contact the Family Reunification Section, Irish Naturalisation and Immigration Service, Department of Justice and Equality, 13/14 Burgh Quay, Dublin 2."*

188. The respondents also contended that AJ had the benefit of legal advice throughout the international protection application process up to the date of receipt of his declaration. However, AJ did not in fact have the benefit of legal advice subsequent to receipt of the declaration; it appears that the fees paid under the relevant international protection process legal aid scheme only extend (where an applicant is successful before the IPO) to legal advice in relation to a personal interview with the IPO officer including the making of submissions in

relation to international protection and permission to remain, and the obtaining of COI. There is no fee provided in relation to the provision of advice as regards the consequences of a successful grant of international protection status.

189. AJ also points out that nowhere in the document he received at the time of grant of his protection status is it specified that there is a necessity to apply for family reunification in respect of a child before that child turns eighteen. Given the importance of that cut-off date, AJ submits that (quite apart from the fact that no information was given in AJ's language, Somali, at all) the information supplied in English was a breach of article 22.

190. I do not believe that I need to determine this latter issue. The undisputed fact remains that AJ was not given any information at all in Somali subsequent to him being declared to be a refugee, and that failing cannot be answered by pointing to provision of information to him in a language he was not proficient in.

Conclusion on applicability of article 22 to AJ's case

191. In my view, the provisions of article 22 are directly effective. The provisions are clear, precise and unconditional. They are directed to the precise category of person to whom AJ belongs i.e. persons recognised as being in need of international protection. AJ did not receive any information in a language likely to be understood by him after his international protection status had been granted. In particular, he did not receive any information in Somali as to his rights to family reunification pursuant to s.56. Accordingly, the respondents acted in breach of AJ's rights under article 22.

Claim for relief for breach of article 22 rights

192. The question that next arises is as to what, if any, relief AJ is entitled to for breach of his article 22 rights.

Non-monetary relief?

193. AJ submits that, following from the recent Court of Appeal decision in *MacFhlannchadha v Minister for Agriculture, Food and the Marine, Ireland and the Attorney General* [2022] IECA 1, he is entitled to a declaration of non-transposition quite apart from any entitlement to *Francovich* damages. He further sought to contend that reparation in a *Francovich* damages context was not confined to monetary reparation. In his written submissions, he contended that he was entitled to an order directing the Minister to grant family reunification with MJ equivalent to that available under s.56 in order to remedy the actual damage suffered in circumstances where the uncontroverted evidence was that as a result of the denial of his information rights under article 22, he was unable to effectively enjoy the right to family reunification under s.56.

194. I do not believe this latter submission is well founded. A reading of the relevant passages in *Brasserie du Pecheur v Germany* [1996] ECR I-1131 ("*Brasserie du Pecheur")* (at paragraphs 67, 74, 84 and 90) makes clear that the remedy for non-transposition is monetary damages and not some other form of non-monetary reparatory order. I am satisfied that the applicant is not entitled to any form of relief for non-transposition which would involve the Court directing the Minister to provide it with family reunification whether under s.56 or otherwise.

195. I should also say that I am satisfied that this is not an appropriate case in which to consider the type of declaratory order made in *MacFhlannachdha w*here, as explained by Hogan J. in his judgment in that case, very particular circumstances arose given that the provisions of the relevant directive had been about to expire.

196. In my view, the material question that arises is whether AJ satisfies the requirements for establishing an entitlement to *Francovich* damages for breach of his article 22 rights and it is to that question I will now turn.

Francovich damages claim

197. The requirement for making out an entitlement to *Francovich* damages were summarised by O'Donnell J. in *Glegola v Minister for Social Protection* [2019] 1 IR 539 ("*Glegola*") at paragraph 23 as follows:

> *"The starting point for considering the award of [Francovich] damages is that it is decidedly the case that the establishment of a breach of European Union law does not, as it might have done, give rise per se to an award of damages to a party who has suffered loss, or might have obtained a benefit under the relevant provision. The jurisprudence is strict, in requiring, first, that the rule infringed must have been intended to confer rights on individuals, second that the breach of the rule was sufficiently serious, and third, that there is a direct causal link between the breach of the obligation imposed on the State and the damage sustained by the injured party."*

198. I will consider each of these requirements in turn.

Intended to confer rights on individuals?

199. As already discussed, I am satisfied that article 22 is intended to confer rights on individuals and did confer a right on AJ.

Breach of rule sufficiently serious?

200. As regards this requirement, AJ contends that he meets the test in *Brasserie du Pecheur* (at paragraph 55) that *"the decisive test for finding that a breach of community law is sufficiently serious* [to warrant *Francovich* damages*] is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on itsdiscretion"*. At paragraph 56 of *Brasserie du Pecheur,* the CJEU stated:

> *"The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed*

towards the omission, and the adoption or retention of national measures or practices contrary to Community law."

201. O'Donnell J. noted in *Glegola* at paragraph 14 (p. 551) that "*it is clear that it is for the national court to make a decision on the question of manifest and grave disregard of the limits of discretion in light of these considerations*". As further noted by O'Donnell J. in the same paragraph, CJEU case law subsequent to *Brasserie du Pecheur* explained that *"where the Member State is not, in effect, in a position to make legislative or other choices, and has considerably reduced or even no discretion, the mere fact of infringement may be sufficient to establish the existence of a sufficiently serious breach"*.

202. The respondents submit that there was not a sufficiently serious breach here. They sought to contend that there was a lack of clarity as to whether the provisions of article 22 extended to the provision of information on s.56 in circumstances where the right to family reunification set out in s.56 was a right which was not found in the Qualification Directive. They relied in this regard on *British Telecom* Case C.392/93 (26 March 1996). In that case the CJEU held that the criteria for an entitlement to *Francovich* damages were not made out where the EU provision in question, which had not been properly transposed, was "*imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it by the Court in this judgment, the interpretation given to it by the United Kingdom and on the basis of arguments that were not entirely devoid of substance. That interpretation, which was also shared by other member States, was not manifestly contrary to the wording of the directive or the objectives pursued by it*." (at paragraph 43)

203. In my view *British Telecom* is readily distinguishable. Article 22 is clear, precise and straightforward in its terms. It is mandatory. It requires the provision of access to information in a language likely to be understood by the beneficiaries of international protection as to the rights and obligations relating to that status. In my view, the breach of article 22 is sufficiently serious to satisfy the second requirement for making out an entitlement to *Francovich* damages. This was not a case of inadequate transposition by the State or the State seeking to implement article 22 in a way which proved incomplete. There was simply no transposition of the provision at all. Indeed, the State did not seek to explain on affidavit its approach to the question of whether it ever considered its obligation to transpose the provisions of article 22 or what obstacles as to clarity were thought to be presented by the provisions of article 22.

204. In my view, in the circumstances, the breach of article 22 is sufficiently serious to satisfy the second requirement for making out an entitlement to *Francovich* damages. Article 22 confers an important right. It is clear and unambiguous in its terms. There was no provision of access to any information in Somali at all as regards AJ's rights subsequent to the conferral of his declaration. Accordingly, there was a "manifest and grave disregard" of a non-discretionary obligation to provide the information in question in a language likely to be understood by AJ once he was recognised as having the status of a protected person.

Causal link between breach and damage

205. The respondents next submitted that there was no direct causal link between the State's breach of its obligations under article 22 (if the Court accepted there was such a breach) and any damage to AJ.

206. On the unchallenged evidence before the Court there was a clear causal link between the breach of the State's obligation to transpose and put into effect the rights to information in article 22 and the damage caused to AJ by his resulting failure to put in an application for family reunification for MJ before MJ turned eighteen. As matters stand, that has resulted in a situation where the apparently straightforward entitlement to family reunification for AJ under s.56(9)(d) has not been availed of and, rather, AJ is in the more precarious position of hoping that the Minister will exercise her executive discretion to let MJ into Ireland, in circumstances where the Minister's Department has refused to exercise that discretion in his favour at first instance.

207. However, it is difficult to form any view on the damage said to arise in circumstances where a review decision is still pending in respect of AJ's scheme application. If it is the case, for example, that the Minister ultimately decides to exercise her discretion in favour of permitting MJ to join AJ in Ireland, the question of loss or damage may become substantively if not entirely moot. In the circumstances, it seems to me that the appropriate step to take at this point is to hold over any further consideration of *Francovich* damages until after the review decision in respect of AJ's scheme application has been handed down. I will accordingly adjourn this aspect of the case for further consideration until after the review decision has been handed down on AJ's scheme application.

VII. Conclusion

208. In conclusion, I will refuse SH's application for relief. I will adjourn for further consideration AJ's claim for *Francovich* damages for non-transposition of article 22 of the Qualification Directive pending determination by the Minister of the application for review of the refusal of AJ's claim for family re-unification pursuant to the scheme. Given the intersection between the issues in the two cases, I propose also to hold over consideration of any costs issues arising until AJ's case is finally disposed of by me.