THE HIGH COURT

[2022] IEHC 617

[2021/114 JR]

BETWEEN

O.

APPLICANT

AND

MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Bolger delivered on the 9th day of November, 2022.

1. The applicant seeks to challenge the decision of the respondent dated 25 November 2020, refusing his application for family reunification with his non-marital partner pursuant to s. 56 of the International Protection Act 2015. He claims that s.56(9) is repugnant to the provisions of the Constitution and incompatible with EU law and the State's obligations under the ECHR. For the reasons set out below I am refusing this application.

Background

2. The applicant is a Nigerian national who arrived in the State in January 2015 and sought international protection. In May 2015 he married an EU citizen but they later separated. The marriage has been found by the Minister in a separate process to have been a marriage of convenience but the applicant disputes that and has averred in these proceedings that it was, and still is, a genuine marriage. In August 2020, the applicant was declared a refugee. In November 2020, he applied for family reunification with his non-marital Nigerian partner and their three children who had all continued to reside in Nigeria since the applicant was forced to flee. He was granted reunification with his children but his application for his partner was refused on the basis that s. 56(9) only permits unification with a marital partner. Non-marital partners are covered by a separate administrative non-EEA Family Reunification Policy (hereinafter referred to as the "policy").

The applicant's submissions

3. The applicant argues that the Minister is improperly seeking to expand the basis for the refusal of his application to include his marital status in these proceedings, even though the refusal of his application for family reunification was grounded solely on his partner not being his marital partner.

4. The applicant claims that the policy will not afford him reunification with his partner because he is unable to comply with its financial requirements. He submits the Minister must show that the policy affords him a very good chance of success so that it is a real, and not an illusory, alternative remedy.

5. Limiting statutory family reunification to a spouse will unfairly split non-marital families by leaving one parent isolated from the other and the children which, he says, does not accord with the purpose of family reunification to ensure that people can flee persecution without fear of leaving their families behind forever. This limitation is contrary to Article

40.1 of the Constitution, Articles 8 and/or 12, in conjunction with Article 14, of the ECHR and/or Articles 7 and/or 9, in conjunction with Articles 18 and 21 and/or 24 of the Charter of Fundamental Rights and Freedoms.

6. The applicant relies on constitutional rights to equality pursuant to Articles 40.3 and family rights pursuant to Article 41 of the Constitution in arguing that s.56(9) is unconstitutional. He seeks to compare himself to a married refugee who has a marital partner and family in the country of origin, to whom he says he is in a materially similar situation and argues that the only basis for his different treatment is the existence of a marriage which is not a relevant, rational or proportionate difference. He cites the decision of O'Donnell J. (as he then was) in *Murphy v. Ireland* [2014] 1 IR 198 where marriage was described as a "kind of suspect category" and that differentiation on the grounds of marital status "must be demonstrated to comply with the principles of equality". He argues that the precise constitutional status of the non-marital family was left open by the court in *I.R.M. v. Minister for Justice* [2018] 1 IR 471.

7. The applicant asserts that his ECHR rights to non-discrimination on grounds of his marital and refugee status have been breached and identifies a similar married comparator whose married partner qualifies under s.56(9).

The Minister's submissions

8. The Minister relies on the policy which she says allows a discretion to grant a permission even in cases that do not meet its requirements, including financial requirements. It must be presumed that the Minister will exercise her discretion lawfully until the contrary is shown and so any challenge the applicant wishes to bring should be against a negative decision under the policy in the event of such a decision being made. There is no unlawful discrimination in affording rights via a non-statutory scheme rather than a statutory scheme.

9. The Minister relies on the applicant's status as a person married to a third party to condemn, firstly, his attempt to impugn s. 56 by reference to a hypothetical married person and, secondly, his reliance on another married person as a comparator in asserting his constitutional rights to equality. The Minister says her reliance on the applicant's marital status relates to the constitutionality of s. 56 and not the justification for any decision made under it. She submits the proceedings are misconceived and amount to a *jus tertii* which should not be permitted in a constitutional challenge.

10. Whilst the Minister maintains the applicant's marriage to an EU citizen was a marriage of convenience, she relies firstly on *S. v. Minister for Justice* [2020] IESC 48 that even a marriage of convenience cannot be a nullity at law and secondly on the applicant's own assertion that it was a genuine marriage which she says prevents him from saying it is a nullity. The Minister submits the correct comparator for the applicant is as a refugee in a polygamist marriage, a status not recognised in Irish law.

11. The Minister submits that no EU law rights are engaged as the Qualification Directive does not apply to family members in the country of origin and Ireland has opted out of

Directive 2003/86/EC on the right to family reunification. Therefore, neither the Directives nor the Charter have any application.

12. The Constitution does not mandate the comparable treatment of marital and non-marital couples. If married and unmarried couples are comparable then the Minister submits that any difference in the applicant's treatment pursuant to s. 56 is justified.

13. The Convention does allow for different treatment of marital and non-marital couples but, in any event, any Convention rights the applicant may have to family reunification with his partner are capable of being vindicated through the policy.

Section 56 International Protection Act 2015

14. Section 56 provides for a statutory scheme whereby a recipient of international protection can apply to the Minister for a member of their family to enter and reside in the State. A member of the family is defined by s. 56(9) as follows:-

> "(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),
>
> (b) where the sponsor is a civil partner, his or her civil partner (provided that the civil partnership is subsisting on the date the sponsor made an application for international protection in the State),
>
> (c) where the sponsor is, on the date of the application under subsection (1) under the age of 18 years and is not married, his or her parents and their children who, on the date of the application under subsection (1), are under the age of 18 years and are not married, 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".

15. A refugee's right to reunification with their spouse or civil partner is not unlimited as the marriage or civil partnership must have been subsisting when the application for protection was made. If the marriage comes to an end after permission is granted, the permission also ceases.

16. Section 56 exists outside of any State obligation to implement the provisions of competent EU law. A different section of the Act (section 57) gives effect to the Qualification Directive 2004/83/EC in providing for family reunification for family members in the State. Council Directive 2003/86/EC on the Right to Family Reunification does cover family members who remain in the country of origin but Ireland opted out of that Directive. Therefore, insofar as the applicant is entitled to seek to be reunified with his family who remain in the country of origin, the State has lawfully determined that those rights are be governed by national law alone. There is no basis for the applicant's attempts to invoke EU law or the provisions of the European Charter as the essential requirement of competence and conferral is missing.

The policy

17. The policy allows a different way of applying for family reunification in addition to sections 56 and 57. This process is, in some ways, wider than the statutory process of s.56, in that it expressly includes *de facto* partners, defined at para. 13.2 as "a de facto relationship is a cohabiting relationship akin to marriage duly attested". In other ways it is more restrictive, for example by imposing a requirement for the sponsor to have minimum levels of income. Whilst economic considerations are described as a very necessary part of family reunification, paragraph 1.12 also recognises that each case must be considered on its own merits:

> "While this document sets down guidelines for the processing of cases, it is intended that decision makers will retain the discretion to grant family reunification in cases that on the face of it do not appear to meet the requirements of the policy. This is to allow the system to deal with those rare cases that present an exceptional set of circumstances, normally humanitarian, that would suggest that the appropriate and proportionate decision should be positive".

The policy is expressed at paragraph 1.6 to be subject to ministerial discretion "with some margin of appreciation retained by decision makers". Humphreys J. cited paragraph 1.12 of the policy in *R.C. (Afghanistan) v. The Minister for Justice and Equality* [2019] IEHC 65 in confirming that the policy's financial conditions can be waived.

18. The Minister's deponent has averred that it is open to the applicant to make an application under the policy for reunification with his non-marital partner. The applicant says he has not invoked the policy as he believes his income would be insufficient. His statement of grounds pleads at para. 4 that:

> "The Respondent's decision to deem the Applicant's application for family reunification with his unmarried partner ineligible is in breach of his rights to family unity and to marry and found a family, in circumstances where any application pursuant to the Policy Document on Non-EEA Family Reunification is doomed to failure as the Applicant does not meet the income threshold set out therein. In any case, the Applicant is entitled to invoke the provisions of a statutory regime where same is available to persons in the materially similar situation, and the deprivation amounts to a breach of his rights and/or invidious discrimination".

He verifies this plea in his affidavit but provides no further details about his income or why he could not satisfy the financial requirements of the policy. He does not comment on the Minister's discretion.

19. The applicant has asked this Court to declare s. 56(9) repugnant to the Constitution, incompatible with the State's obligations under EU law and the ECHR. These are very serious remedies and would be considered by the court in an appropriate case. It has been held that such relief should not be granted where there is an alternative remedy open to an applicant. In *R.C. (Afghanistan) v. The Minister for Justice and Equality, Ireland and the Attorney General* [2019] IEHC 65, Humphreys J. stated at para. 8:-

"That is a point I made in *North East Pylon Pressure Campaign v. An Bord Pleanála* [2016] IEHC 300 [2016] 5 JIC 3008 (Unreported, High Court, 12th May, 2016) at paras.175 - 177, in the context of the principle that exhaustion of remedies is of particular importance where an applicant seeks to challenge the validity or ECHR-compatibility of a statute. Such a context invokes the principle that the court should "reach constitutional issues last" per Denham J., as she then was, in Gilligan v. Special Criminal Court [2005] IESC 86 [2006] 2 I.R. 389 at p.407: see also O'B. v. S. [1984] I.R. 316 per Walsh J. at 328. This approach has a considerable history in US constitutional law: see *Ashwander v. Tennessee Valley Authority* 297 U.S. 288 (1936) and as more recently put by Easterbrook J. in *Alliance for Water Efficiency v. Fryer* (US Court of Appeals, 7th Circuit, No. 15–1206, 22nd December, 2015) "*courts should not decide constitutional issues unnecessarily*" (p. 7). Clarke J., as he then was, dealt with the issue of alternative remedies in *E.M.I. Records v. Data Protection Commissioner* [2013] IESC 34 [2013] 2 I.R. 669 at paras. 41 and 42, in particular noting that "the default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings" (para. 41) but "*there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review*" (para. 42). The types of exceptions identified by Clarke J. could be described as falling under four headings:

> (i). Where the alternative remedy is inadequate, a point also discussed in *J.N.E. v. Minister for Justice and Equality* [2017] IEHC 96 [2017] 2 JIC 2004 (Unreported, High Court, 20 February 2017) at para. 10.
>
> (ii). Where the body to whom the alternative remedy lies would not have jurisdiction to deal with all of the issues.
>
> (iii). Where the applicant was deprived of the reality of a proper consideration of a first instance decision. That of course does not have the implication that any procedural error at first instance means that an applicant can litigate; because that would deprive the doctrine of alternative remedies of all content.
>
> (iv). Other exceptional circumstances, which is not a closed category, as Clarke J. recognised".

20. In that case, Humphreys J. refused to quash a decision, refusing family reunification for a spouse to a marriage that post-dated the protection application on the basis that the same policy as the Minister relies on in the instant case, afforded an alternative remedy which the applicant had not established would be inadequate. The entire application was found by Humphreys J. to have been premature.

21. A different view was taken by Barrett J in *A v Minister for Justice and Equality; S v Minister for Justice and Equality* [2019] IEHC 547, a decision later overturned by the Supreme Court though not expressly on the issue of the policy. Insofar as there is a

conflict between both decisions, I prefer the approach of Humphreys J. and the jurisprudence of this court on which he expressly based his findings.

22. For similar reasons as identified by Humphreys J., I find that this application for judicial review is premature. The applicant can apply for family reunification for his non-marital partner through the policy which permits a decision maker the discretion to disallow the financial requirements contained herein and requires the decision maker to take account of the applicant's constitutional and Convention rights in considering his application. Counsel for the respondent accepted, quite properly, that this requirement is in accord with the decision of the Supreme Court in *Burke v. Minister for Education* [2022] IESC 1 where Charleton J. stated at para. 13:

> "Schemes for administration set up by executive decision of the Government …. must respect constitutional rights, including the right to home-school children".

23. The applicant contends that the existence of an alternative remedy does not disentitle him to a consideration of the constitutionality of s. 56(9) and relies on the Supreme Court in *A., S. and I. v. Minister for Justice* [2020] IESC 70, an appeal concerning three cases including the *A* and *S* case in which judgment was delivered by Barrett J., as mentioned in para. 21 above. Dunne J. referred to the same policy as having left the door open to the applicant who had been refused family reunification under s. 56 because the marriage was a post-flight marriage. The applicant can seek to rely on that decision's analysis of pre and post flight marriages in an application pursuant to the policy.

EU law

24. This is not a situation in which the court is required to interpret s.56(9) in a manner that renders it consistent with a binding provision of EU law (for reasons set out at paragraph 17 above). If it were then there might be a basis for directing the Minister to consider the applicant's non-marital relationship within a section 56 application rather than through a different non-statutory process, so as to afford the section an interpretation consistent with binding EU law. Outside of that EU law context, it would be verging on judicial law making for the court to direct the Minister to include an excluded category in a s.56 application in circumstances where there is a non-statutory process for family reunification for persons falling within that excluded category. It is not in breach of any provision of the Constitution for the State to process an application for family reunification via a non-statutory, rather than a statutory, process as long as that process respects the applicant's constitutional and Convention rights. Insofar as the applicant's alternative prospects for family reunification are non-statutory, I note the Supreme Court held in *Minister for Justice and Equality v. O'Connor* [2017] IESC 21 that it was not a breach of the Constitution for legal representation to be made available through different routes, one statutory and the other non-statutory.

25. In the event that I am wrong in my views as to the relevance of the applicant's right to apply for reunification under the policy, I proceed now to consider whether the provisions of s. 56(9) are repugnant to the Constitution and/or to the Convention, as the applicant has claimed.

The Constitution

26. I accept that the applicant can rely on constitutional rights as a refugee residing in the State. He argued that s. 56(9) is repugnant to the Constitution on the basis that his nonmarital family is being treated less favourably than a marital family by restricting his application for reunification with his non-marital partner in circumstances where a married refugee would be entitled to seek family reunification with their spouse. He claims that this is in breach of his constitutional right to equality pursuant to Article 40.1, his asserted right to cohabit and to marry and found a family pursuant to Article 40.3 and his family rights pursuant to Articles 41.

27. Four issues arise in considering the constitutionality of s.56(9):

    (i) The applicant's marital status

    (ii) Is the applicant in a materially similar situation to his chosen comparator?

    (iii) A right to cohabit

    (iv) Rights to marry and to found a family.

(i) The applicant's marital status

28. The applicant says he is being treated less favourably than a married refugee who has been separated from their spouse. He refers to a classification based on marriage having been criticised as suspect (as per O'Donnell J. (as he then was) in *Murphy v. Ireland* where the Supreme Court held that a differentiation on the grounds of marital status "must be demonstrated to comply with the principles of equality". The applicant makes the following argument in his written submissions:-

> "The Applicant clearly has a comparator that he can point to, being a person married to a refugee who was a long-term partner with the refugee in the country of origin and had a family there with the refugee, prior to fleeing persecution in that place. The only basis for the profound difference in treatment is marriage".

29. For the reasons set out below, I am satisfied that the applicant's status is that of a married person and he cannot, therefore, assert what he says are the constitutional rights to equality of a non-married person to be treated equally to a married person.

30. The applicant's right to equality under Article 40.1 is to be held equal before the law as a human person. The phrase "as human person" was discussed by O'Donnell J. in Murphy v Ireland at para. 34:

> "It is however, increasingly understood that it is intended to refer to those immutable characteristics of human beings, or choices made in relation to their status, which are central to their identity and sense of self and which, on occasions, have given rise, whether in Ireland or elsewhere, to prejudice, discrimination or stereotyping. As Walsh J. observed in *Quinn's Supermarket v. Attorney General* [1972] I.R. 1 at pp. 13 and 14:-

> '[Article 40.1] is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals, or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community.'
>
> Matters such as gender, race, religion, marital status and political affiliation, while not all immutable characteristics, can nevertheless be said to be intrinsic to human beings' sense of themselves. Differentiation on any of these grounds, while not prohibited, must be demonstrated to comply with the principles of equality".

31. Thus, it is by reference to the individual's marital status, i.e. as married, divorced, single etc that they may have a right to be treated the same as persons in comparable situations. The applicant's marital status is that he has been married since shortly after he arrived in Ireland in 2015. Whilst his marriage has been found by the Minister, in a separate process, to be a marriage of convenience, he has deposed in these proceedings that he does accept that and has instructed his solicitors to apply for a review of that finding. That marriage has not been dissolved by divorce or annulment. Even if the Minister is correct and it was a marriage of convenience, the law recognises that this does not render the marriage a nullity (*M.K.F.S. v. Minister for Justice* & Equality [2018] IEHC 103).

32. The applicant disputes that the Minister can rely on his marriage in these proceedings to justify the refusal of his application for family reunification as this was not the basis for her decision which the applicant now seeks to quash. That point might have some relevance insofar as the respondent's reasoning in her decision is being challenged but it cannot alter or ignore the applicant's status insofar as he seeks to assert his constitutional right, as a human person, to be held equal before the law. Such an assertion of equality requires him to identify the relevant characteristic on which he claims to have been subjected to less favourable treatment. Marital status has been identified by the courts as a prohibited ground of discrimination. However the applicant's marital status is, by his own actions, that of a married person and so he cannot claim that he is being treated less favourably on grounds of that status by comparing himself to another married person. It was not his status as a married person that precluded him from seeking reunification with his partner under s. 56(9), it was the fact that he is not in a marital relationship with the partner with whom he seeks reunification.

33. If the applicant's marital status was single, he could conceivably seek to compare himself with a married refugee who was able to secure family reunification with their spouse pursuant to s.56(9). That single person could argue that their marital status as a single person in a relationship had been treated unequally by the application of a suspect classification and, if that argument found favour, the distinction in question might require to be justified by the Minister as legitimate and proportionate – as indeed it was in *M.K.F.S.* That is not the situation here and the issue is, therefore, *jus tertii* which is an

inappropriate basis on which to seek to have legislation struck down as repugnant to the Constitution.

(ii) Is the applicant in a materially similar situation to his chosen comparator?

34. The applicant argues that the only basis for his different treatment to a married refugee is the existence of a marriage which he says is not a relevant, rational or proportionate difference. He says he has been treated less favourably in breach of his constitutional right to equality as his relationship with his non-marital partner is akin to marriage and he is therefore in a materially similar situation to his chosen comparator. I do not accept that the applicant's non-marital relationship is akin to the marital relationship as recognised in Irish law, i.e. a relationship that prohibits either party from entering into another marriage for so long as the first marriage is subsisting in law. The applicant chose to marry a third party in 2015. He seemed to contend at the hearing that his relationship with his non-marital partner had fallen away at that time but that it was resurrected some years later after he had separated from his spouse. Insofar as the applicant contends that the relationship between him and his non marital partner is akin to marriage, it could only be akin to a polygamous marriage. Such a status is not recognised in Irish law (*H.A.H. -v- S.A.A.* [2017] 1 IR 372; *I.H. -v- Minister for Justice* [2020] IECA 241) and cannot, therefore, ground a comparison for the purpose of asserting a constitutional right of a non-married person to be treated equally to a married person.

35. What the applicant is really seeking to do is to assert a constitutional right to have his non-marital relationship treated the same as a married refugee's marriage. Article 40.1, insofar as it applies, recognises a person's right as a human person to equality before the law. That is a different protection to the protection of a relationship. The Constitution affords express protection for the family via Articles 4 but does not entitle the applicant to unrestricted rights to family reunification with all members of his family. The applicant has been allowed family reunification with his children but that does not in itself allow him to rely on Articles 41 to assert a right to reside in the State with the mother of his children. It is open to the State to determine, within constitutional and Convention parameters, what restrictions it will impose on any other family members who may wish to join the applicant. I find support for this in the decision of the Supreme Court in *A, S, and I v Minister for Justice & Equality* [2020] IESC 7 which upheld the constitutionality of the State's restriction on post flight marriage for statutory family reunification entitlements.

36. The State has legislated for a reliance on, *inter alia*, the existence of a subsisting marriage that has been subsisting since the refugee was forced to flee, as a basis for determining a refugee's statutory right to family reunification. The State is entitled to do so, subject to the availability of an alternative process to determine the rights of a non-marital family member to also seek reunification within which the refugee's constitutional and Convention rights will be respected.

37. Marriage is a legitimate basis for the State to use to determine the existence of a committed relationship, as long as it does not exclude the possibility of determining a non-martial relationship to be a committed relationship. Entering a marriage requires

each spouse to take on legal commitments that are simultaneously onerous and valuable and elevates a stranger in law to the status of their next of kin ahead of all other persons. Each spouse immediately acquires a myriad of legal rights and obligations in areas such as inheritance, property, maintenance and deemed dependency. That commitment by each spouse to each other, whether welcome or not, is imposed by law. Contrast that with the vast spectrum of non-marital relationships that exist, ranging from casual recent encounters to long standing, strong relationships based on mutual support. The support that may exist in a non-marital relationship has a far more limited basis in law and cannot necessarily be compelled, against a person's wishes, by reference to the existence of the relationship as versus any duties or obligations that may flow from how the parties have chosen to arrange their affairs. It is therefore legitimate for the State to provide different schemes for assessing a refugee's entitlement to family reunification for marital and non-marital relationships. This is subject to the State providing a process for the possibility of reunification with a refugee's non-marital spouse that takes due account of the refugee's constitutional and Convention rights and allows them to argue any entitlement they might assert to have their non-marital relationship treated as favourably as a marital relationship would be. I am satisfied that such a method is available to the applicant in the within case.

38. Insofar as the legislature has decided to limit an entitlement to family reunification to married persons whose marriage was subsisting at the date of the application for international protection, I am bound by the decision of the Supreme Court in *A., S. and I.* to uphold that distinction as legitimate and proportionate, particularly in circumstances where there are alternative prospects for family reunification available to the applicant within which his constitutional and Convention rights will be respected.

(iii) A right to cohabit

39. The applicant also seeks constitutional protection for his right to cohabit and claims that right has been breached in the Minister's refusal to allow his application for family reunification with his non-marital partner. O'Donnell J. (as he was then) recognised the possibility of such a right under Article 40.3 in *Gorry v. Minister for Justice and Equality, A.B.M & anor v. Minister for Justice and Equality* [2020] IESC in a decision that rejected the existence of a rights of a marital couple to cohabit pursuant to Article 41. Any personal constitutional right to cohabit that does exist is not distinguished or heightened by marriage as it is not, according to O'Donnell J, encompassed within a married couple's Article 41 rights. If the applicant does have a right to cohabit with their marital or non-marital partner, such rights would arise under Article 40.3. I do not need to determine the existence of any such right in these proceedings as if the applicant does enjoy that right, he can assert it by applying for reunification pursuant to the policy.

40. A refugee has the possibility of family reunification with their non-marital partner via the policy. A refugee's right to apply for family reunification by invoking the policy was noted by Donnelly J. in *I.H.* at para. 69 where she said:

> "The appellant in this case was in a subsisting marriage at the time he entered into his third marriage in Pakistan. Simply because the appellant does not have an

automatic right to family reunification with his third wife does not mean that he has no opportunity of residing with her in this jurisdiction. He has applied for a determination in accordance with the IHAP provisions and he is entitled to a determination in respect of that matter. I do not consider it helpful or appropriate for me to give an opinion on whether that should succeed or otherwise. No doubt the appropriate decision maker/makers will take all relevant matters into consideration".

The fact that s.56(9) may afford different or even lesser recognition of a non-marital relationship does not, of itself, deny any rights of cohabitation that may exist and any such rights as may exist can be asserted by the applicant in any application he may decide to make pursuant to the policy.

41. Section 56(9) does not deny any constitutional right to cohabit that may exist but, rather, utilises marriage as a basis on which to recognise the statutory entitlement to family reunification. The Supreme Court in *A., S., and I.* recognised the right of the legislature

> "to make a distinction between those who were married and whose marriage was subsisting on the date the sponsor made the application for international protection to seek permission for their spouse to join them in the State. I am of the view that this was a choice open to the legislature to take".

Dunne J. was satisfied

> "that the distinction sought to be made in the legislation between those who were married prior to seeking international protection and those who married subsequently is one which is legitimate and is proportionate having regard to the need to provide for family reunification on the one hand and the need to have regard to immigration control on the other hand".

On that basis, she determined the provisions of s. 56(9) were not unconstitutional.

(iv) The right to marry and found a family

42. As set out at paragraph 35 above, Article 41 does not restrict the State's entitlement to determine, within constitutional and Convention parameters, what restrictions it will impose on any other family members with whom the applicant may wish to be reunited. The applicant does not enjoy a constitutional right to reside in the State with the mother of his children with whom he has been granted family reunification. Neither does Articles 41 oblige the State to facilitate a person's entry into the State to enable them to marry; *Akhtar v The Minister for Justice and Equality* [2018] IEHC 781.

ECHR

43. Insofar as the applicant seeks to rely on his right not to be discriminated against on grounds of his marital status pursuant to the Convention, for the same reasons as set out above, I consider the exclusion of his non-marital relationship from the scope of s.56 is grounded on the relationship with the applicant's non-marital status and not on his marital status and, in any event, his status is that of a married person.

44. The applicant is entitled to assert Article 8 rights in his relationship with his non-marital partner. Section 56(9) does not preclude the applicant from exercising his family rights under Article 8 or from exercising any Convention rights he may have to cohabit or form a family, in circumstances where he has yet to invoke the policy. I follow the *dicta* of Dunne J. in *A., S., and I.* where she held at para. 106:

> "It was and remains open to Mr. A and Mr. S to make an application under the Policy Document. Such an application has never been made. It is only if an application under the policy document was made and was rejected for a suspect reason that a consideration of the jurisprudence to be found in *Hode and Abdi* might be of assistance. In all the circumstances, I am satisfied that there is no question of incompatibility in relation to the provisions of s. 56(9)(a) of the Act of 2015 with the European Convention on Human Rights".

Conclusions

45. No EU law rights are engaged in the application of s.56 and the Charter is not therefore applicable.

46. It is open to the applicant to invoke the policy which includes a Ministerial discretion to disapply the financial requirements which the applicant says he cannot satisfy. It is lawful for the State to provide a non-statutory scheme for family reunification of non-marital partners, even where marital partners are permitted to avail of a less restrictive statutory scheme, as the decision maker respects is required to respect any constitutional or Convention rights that the applicant may have.

47. The State has not breached the applicant's constitutional rights by providing a different and potentially more restrictive non-statutory scheme to assess the nature of his non-marital relationship in order to determine his entitlement to family reunification with them. A subsisting marital status confirms commitment by virtue of the parties having entered into the relationship, in contrast to the need to prove commitment within a non-marital relationship by a consideration of the circumstances of the relationship rather than just the fact of it.

48. The applicant's status is that of a married person which precludes him from asserting any potential constitutional rights of an unmarried person seeking family reunification with their non-marital partner as the issue is *jus tertii*.

49. The applicant's non-marital relationship is not materially similar to marriage as his relationship permitted him to marry a third party, as he chose to do, whereas no such choice would have been available to him had he been in the martial relationship that is recognised in Irish law.

50. The applicant's Convention rights have not been breached by denying him the benefit of s.56 family reunification.

51. I therefore refuse the application for *certiorari*.

Indicative view on costs

52. As the applicants have not succeeded in their application, my indicative view on costs is that costs should, in accordance with s.169 of the Legal Services Regulation Act, follow the cause and the respondents are entitled to their costs against the applicants.

53. I will list the matter for mention before me at 10:30 am on 18 November to allow the parties to make such further submissions on costs as they wish to make and to hear whatever submissions the parties wish to make on the final orders to be made.