THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 117

[Record No.: 2021/508JR]

BETWEEN:

I.A.H.

APPLICANT

AND

THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 8th day of March, 2023.

INTRODUCTION

1. The Applicant is an Iraqi national who enjoys subsidiary protection status in Ireland. In these proceedings she challenges a decision made on the 4th of March, 2021 to affirm on appeal a refusal of a Join Family visa to her husband, who is also a national of Iraq.

2. The visa in question is granted by the First Respondent pursuant to her executive powers in relation to the entry of third country nationals into the State. In every application before arriving at a decision, the First Respondent in exercise of these powers must balance State policy concerns against the rights of the individual.

3. The issue at the heart of this case, is whether there has been a failure to properly consider the fact that the Applicant has subsidiary protection status, in consequence of which she cannot safely return to Iraq to establish family life, which embraces a right to co-habit, with

her husband in their country of nationality in weighing the respective rights and interests of the Applicant and the State.

BACKGROUND

4. The Applicant has resided in the State since 2011 and in 2013 she made an application for subsidiary protection, in which she claimed to be the widow of a named person who had been murdered by her family. She was granted subsidiary protection in January, 2015 for a period of 3 years and this permission was extended for a further three years in February, 2018.

5. The Applicant married an Iraqi national by proxy in December, 2018. The Applicant's nephew stood in the Applicant's stead to formalise the marriage. The Applicant and her husband were both in their 40s at the date of their marriage.

6. An application for a long stay (Join Family) visa was made on behalf of the Applicant's husband in February, 2019. The application was supported by documentation which included:

1- Visa Application

2- Applicant's letter and passport photos size.

3- Copy of applicant's passport.

4- Certificate of Iraqi Nationality translation (applicant)

5- Iraqi ID translation translation (applicant).

6- Marriage contract translation (applicant).

7- Subsidiary protection letter (wife).

8- Travel document+ID+Iranian visa (wife).

9- Disability assessment letter. (wife).

10- Accommodation contract in Monaghan (wife).

11 Bank Statement (wife).

12 WhatsApp conversion (applicant and wife).

13 wedding's photos (applicant and wife).

7. In the body of the letters accompanying the application, the Applicant and her husband described meeting in Mashed in Iran. There was, however, a discrepancy in the dates of first meeting (subsequently corrected as a typographical error) as between the Applicant's letter and the narrative provided by her husband. On the translated marriage certificate which accompanied the application, the Applicant is described as a "*virgin*", a notably strange description which is not easily reconcilable with her claim to have been previously widowed. In support of the application, emphasis was placed on the Applicant's age and the couple's wish to start a family, as well as the threat to the Applicant's life were she to return to Iraq in the correspondence. The Applicant explained in this correspondence that she had been in receipt of disability benefit since 2019 and had recently been allocated two bed accommodation in the rural town where she lives.

8. In a later letter from the Applicant's solicitor in support of the application, emphasis was again placed on the fact that the Applicant was a person who had been granted subsidiary protection status in the State. Reference was made to the decision of the European Court of Human Rights in *Tanda-Muzinga v. France* App. No. 2260/10 (ECHR, 10 July, 2014) which recognised the heightened vulnerability of protection applicants who seek family reunification.

9. By letter dated the 4th of November, 2019, the Applicant's husband was advised that his visa application had been refused. The reasons given for the refusal included:

- the sponsor's finances were insufficient and she did not meet the financial criteria as set out in the Policy Document on Non-EEA Family Reunification;
- insufficient documentation or evidence had been submitted of relationship history to establish genuineness of the marriage, ongoing communication, face to face meetings, sponsor's accommodation and sponsor's bank statements for the required period of six months;

- inconsistencies in the documentation with specific reference to a different name of the sponsor on the marriage certificate submitted and the marital status of the sponsor at the time of marriage;
- risk that the grant of a visa might result in a cost to public funds or public resources.

10. By a solicitor's letter dated 23rd of December, 2019, an appeal was submitted against the visa refusal. At that time, as explained in the appeal letter, the Applicant was dependent on social welfare and was in receipt of a Disability Benefit. Her husband was a heavy machinery operator and their stated expectation was that he would have no problem securing employment in Ireland. It was repeated that the marriage was a proxy marriage contracted in December, 2018 on foot of a power of attorney given to the Applicant's nephew. Thereafter, the couple arranged to meet in Iran in January, 2019 where they spent four weeks together before the Applicant returned to Ireland and her new husband to Iraq.

11. It was claimed on the Applicant's behalf by her solicitor that due to her subsidiary protection status the Applicant is unable to travel to meet her husband in Iraq, and he had been unable to leave Iraq because his passport had been submitted to the Irish authorities in support of his visa application. Despite being unable to meet in person, it was pointed out that they were in frequent contact by phone (mainly on WhatsApp) and documentation evidencing this communication was submitted (albeit this documentation was not translated).

12. The letter further explained the origin and spelling of the Applicant's name in response to the query raised regarding the name appearing on her marriage certificate, and this explanation was supported with reference to the variations of the Applicant's name given during the protection application process, it being contended that the way her name is recorded on her marriage certificate is due to the manner in which the Iraqi system records names.

13. Documentation submitted in support of the appeal with the Applicant's solicitor's letter included a letter from the Applicant, which alternated between referring to the Applicant in the first and third person and appears to have been written with assistance from someone else, and a copy of the marriage certificate together with translation. The Applicant's husband's bank statement, which was referred to in the letter for the purpose of demonstrating his financial position, was omitted. Despite their omission from the documentation submitted in support of

the appeal, the Applicant's husband's bank statement was not subsequently furnished nor exhibited in the within proceedings. The Applicant's bank statements were submitted.

14. Documentation on the First Respondent's file exhibited by the First Respondent and having potential relevance to issues in this case includes a copy of the Applicant's Irish travel document, which was issued to the Applicant because of her subsidiary protection status. The Irish travel document is endorsed to the effect that it is valid for travel to all countries "*except Iraq*". File documentation exhibited further includes internal correspondence with the Department of Justice and Equality, where a query seems to have been raised in 2016 in relation to travel by the Applicant to Iraq and whether this was permissible. It was noted that her travel document bore two visas for Iran. The question of whether the Applicant had a separate Iraqi passport was mooted, but it appears to have been concluded that she did not and it was recorded that in consequence her Irish travel document would be returned to her.

15. The file documentation reflecting consideration of the question of the Applicant's travel to Iraq in 2016 was printed off or generated for the visa file on the 5th of April, 2019 (as noted in the date appearing on the bottom of the page), which was just three days before the draft first instance refusal decision dated the 8th of April, 2019 was placed on the file. It appears from the file consideration, however, that the Applicant was found not to be in possession of a travel document which would have allowed her to travel to Iraq, even though as an Iraqi national she would be entitled to travel on an Iraqi passport if she had one. Thus, while there appears to have been a concern about travel to Iraq in this case, there is no finding on the file that such travel had occurred. In the absence of an Iraqi passport, it is questionable whether the Applicant could travel to Iraq when the Applicant's Irish travel document does not permit it, however, that depends on the factual position in relation to travel between Iran and Iraq which has not been addressed in the evidence before me.

DECISION TO REFUSE JOIN SPOUSE VISA

16. By correspondence dated the 4th of March, 2021, the Applicant was advised that the First Respondent had refused her husband's appeal against the refusal of a visa permitting him to join her in the State. The letter of refusal was accompanied by a detailed considerations document. Certain inconsistencies emerging from the documentation submitted in support of

the husband's application were highlighted in this documentation, including a reference to the couple meeting in Iran in 2007 (not previously raised with the Applicant and explained in these proceedings as a typographical error which should have read 2017), when other correspondence suggested that they met for the first time after the proxy marriage. Despite these inconsistencies and other inconsistencies , the First Respondent appeared in the decision documentation to accept the explanation for the name differences on the marriage certificate, and proceeded to consider the application on the basis that that the couple constituted a family within the meaning of Article 41 of the Constitution, before deciding that the application should be refused.

17. The reasons for refusal as they emerge from the letter and the considerations document, might be summarised as being that the sponsor was dependent on social welfare and had not demonstrated sufficient funds to mitigate the risk that granting permission might result in a reliance on public funds. It was considered likely that the family might become a burden on the State. In the reasoning advanced it was further explained that the Constitution does not guarantee a right to choose the most suitable place to develop a family life. The right to enjoy a family life in the State may be made subject to the State's countervailing interest in pursuing immigration control and ensuring the economic well-being of the country. It was reasoned that the First Respondent was therefore entitled to consider the impact of granting a visa on the health, education and welfare system in the State and the precedential value of a decision to grant a visa for spousal reunification, and then balance these considerations against the impact of a refusal on the rights of the Applicant and her husband.

18. A relevant factor in this weighing process was identified as whether a family life could be established elsewhere. It was stated in the context of the Article 41 consideration that:

> "*in considering whether family life could be established elsewhere, insufficient reasons have been submitted preventing [Applicant's name] from continuing to travel to Iran to visit with their spouse and maintain the relationship in the manner in which it had developed*".

19. Further, the evidence of a relationship history was described as "*insufficient evidence of ongoing routine communication*", in circumstances where the Whatsapp evidence submitted had not been translated.

20. Weighing the respective position and rights of the family against the rights of the State, it was concluded that the rights of the State were weightier and a refusal was not disproportionate as:

> *"the State has the right to uphold the integrity of the State and to control the entry, presence, and exit of foreign nationals, subject to international agreements and to ensure the economic well-being of the State."*

21. In a separate consideration of rights protected under Article 8 of the European Convention on Human Rights (hereinafter "ECHR"), it was concluded that there was no lack of respect for family life under Article 8.1 of the ECHR and therefore no breach of Article 8 as the couple had lived apart from each other for the entirety of their relationship. In this regard it was stated that the Applicants had strong linguistic and cultural links with Iraq and:

> *"in considering whether family life could be established elsewhere, insufficient reasons have been submitted preventing [Applicant's name] a citizen of Iraq, continuing to travel to visit the applicant in the manner they have previously*."

22. Leave to proceed by way of judicial review to challenge the refusal was granted by Burns J. on the 21st of June, 2021. Between the issue of the within proceedings and the listing of this case for hearing, the Applicant was granted a certificate of naturalisation which was issued on the 5th of December, 2022. Accordingly, her status has changed since the decision under challenge was taken and she now enjoys the status of an Irish citizen.

PROCEEDINGS

23. In the Statement of Grounds filed in June, 2021 the Applicant seeks an order of *certiorari* of the First Respondent's decision to refuse the appeal against the refusal of the visa application made on the 4th of March, 2021, on the grounds that there had been a failure to

adequately consider that the Applicant had been granted subsidiary protection in considering whether family life could be established elsewhere in breach of the Applicant's rights under Articles 40.3.1 and 41 of the Constitution and Article 8 of the ECHR. Other grounds of challenge pleaded and in respect of which leave was granted, notably in relation to the Policy on non-EEA Family Reunification [hereinafter "the Policy document"], were not pursued at the hearing before me.

24. By a Statement of Opposition filed in December, 2021, the Respondents opposed the granting of the relief sought, pointing out that while lawfully established in the State, the Applicant does not enjoy a right to have her spouse join her in the State and her rights were her rights were limited to a consideration of her marriage as a relevant factor which supported her spouse's visa, but that this was at all times subject to other relevant published policy considerations. The Applicant's standing to maintain the proceedings is disputed on the basis that the application was manifestly incomplete and did not achieve the minimum conditions required of such applications; specifically referring to her failure to meet minimum standards in relation to finance, the lack of evidence provided as to her husband's financial status and in failing to submit "*intelligible*" documentary evidence in support of the claims of meaningful contact.

25. The First Respondent pleads that the Applicant's subsidiary protection status was noted and taken into account. It is further denied that a basis had been demonstrated for contending that the decision was disproportionate or breached the Applicant's rights. The First Respondent stands over the refusal as a reasoned and rational decision taken on a sound factual basis which is justified on the basis of standalone grounds, not sought to be impugned in the within proceedings.

26. The Statement of Opposition is grounded on the Affidavit of M.B., a Higher Executive Officer working in the Immigration Division. Helpfully, in her Affidavit, M.B. exhibits additional documents from the visa application file including a report of the Applicant's interview in relation to her application for a declaration as a refugee and internal communication in relation to queries raised regarding travel by the Applicant outside of Ireland. Of some considerable significance, M.B. deposes as follows:

"As it would appear to be relevant to the issues at hand I say that immigration authorities recorded an alert on 1 February 2016, which was prompted by the fact of international travel by a non-national who was the holder of an international protection permission. While there was nothing improper or unlawful in that travel (which was for the declared purpose of attending a funeral), it does reliably indicate that [Applicant] travelled to Iraq, a matter which was not declared to the Court and which would appear to conflict with the position which has been expressed on her behalf in this Application. It is not indicated whether or not the Applicant met with [Sponsor] at the time, as it pre-dated their marriage, but not the commencement of their relationship as elsewhere declared."

27. In a replying affidavit sworn in March, 2022, the Applicant confirms that she had not travelled to Iraq since 2011. She confirms that in 2016 she travelled to Iran, not Iraq, and the purpose of her visit was to visit a shrine, not to attend a funeral as had been stated. She confirms that while she had bought a ticket to travel to Iraq, she did not in fact travel. The circumstances in which this occurred are not expanded upon. She explained that on her return from this trip she was detained at Dublin Airport and questioned as to whether she had been to Iraq but advised immigration officials that she had been in Iran. Her travel document was taken from her and it was returned to her approximately eight months later without a letter. She says that she travelled to Iran again in 2017 and met her husband there. She further explains that the reference in the letter (accompanying the application) to meeting her husband in Iran in 2007 was a typographical error in the letter typed by her friend which she did not notice until it was brought to her attention. She confirms that the date should have been given as "2017".

POLICY DOCUMENT ON NON-EEA FAMILY REUNIFICATION

28. In 2013 (revised in 2016) the Respondent published a detailed policy document to set out a comprehensive statement of Irish national immigration policy in the area of family reunification [hereinafter "the Policy document"].

29. A number of specific elements of the Policy document require special note as they are relevant to this case in terms of the guidance to be gleaned as to the manner in which Executive discretion will be exercised, namely, paras. 1.8, 1.12, 8.4, 17.2, 17.4, 17.5, 17.6, 17.7 and 17.8. These provide as follows:

"1.8 It is intended however that family reunification with an Irish citizen or certain categories of non-EEA persons lawfully resident will be facilitated as far as possible where people meet the criteria set out in this policy. It is considered as a matter of policy that family reunification contributes towards the integration of foreign nationals in the State. Special consideration will also be given to cases where one of the parties concerned is an Irish citizen child.

1.12 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.

8.4 It is a question of finding the correct balance between rights and responsibilities. All other things being equal however, a non-EEA resident of Ireland in active well-paid employment will have a considerably greater opportunity of being joined by family members than a person who is subsisting on State supports. Indeed, a person who is unable to support him/herself cannot expect the State to assume the necessary financial obligations on his/her behalf.

17.2 An Irish citizen, in order to sponsor an immediate family member, must not have been totally or predominantly reliant on benefits from the Irish State for a continuous period in excess of 2 years immediately prior to the application and must over the three-year period prior to application have earned a cumulative gross income over and above any State benefits of not less than €40k.

17.4 Category B sponsors must have a gross income in each of the previous 2 years in excess of that applied by the Department of Social Protection in assessing eligibility for family income supplement and the expectation must be that this level of income will be maintained.

17.5 Declared and verified savings by the applicant or sponsor may be taken into account in assessing cases which fall short of the income threshold set out above. (A suggested approach would be to annualise the savings as income spread over a 5-10

year period). Alternatively, a nominal income may be determined based on the amounts involved.

17.6. The FIS does not apply in cases of couples where there are no children. Therefore, a minimum level of gross income in such cases would be €30,000. This is the minimum salary for which an employment permit would issue. ….

17.7 However, these figures are for guidance purposes and represent a minimum financial requirement. For instance a case could be presented where a worker is on a marginal salary and admission would give rise to an immediate obligation by the State to provide education to a number of school going children. The State's liability in this respect would need to be considered, even where the family appeared to exceed the financial levels applicable to the FIS. Visa/Immigration officers will have some discretion in this area and also in cases where there are doubts regarding sustainability of earnings.

17.8 The onus will be on the applicant to satisfy the immigration authorities as to the level of earnings or financial resources and to provide any evidence required in support thereof. The immigration authorities may also consult directly with the Revenue Commissioners as appropriate."

30. It is noted with regard to the financial eligibility criteria specified in the Policy document that in *AZ v. Minister for Justice* [2021] IEHC 770 Burns J. recorded (at para. 7 of her judgment) that the First Respondent had altered her policy as set out in the Policy document. This alteration was confirmed in an answer to a parliamentary question in the following terms (quoted in the judgment of Burns J.):

"In general, the sponsor must be in a position to support such family members by not having been reliant on State benefit from the Irish State for a continuous period in excess of two years immediately prior to the application. Disability allowance payments are excluded from such a requirement. Since it must be assumed that such benefits recognize a lack of capacity to otherwise earn a living, the end result would be that a person on disability benefit could never benefit from family reunification. This would be unfair. Therefore, persons receiving disability benefits are considered eligible sponsors, subject of course to meeting any other necessary requirements."

31. As an aside as no issue was raised in this regard in these proceedings, I observe that no reference was made to this deviation from the terms of the Policy document in the considerations in this case, notwithstanding the fact that the Applicant is in receipt of Disability Benefit and financial considerations were clearly an important factor in the decision to refuse.

32. Separately, the Policy document makes clear (see para. 13.4) that the onus is on the applicants for family reunification to satisfy the immigration authorities that the familial relationship is as claimed. The Policy document sets out (at para. 15.2) that as a general principle applicable to all decision making, marital relationships or those involving civil partnership must be monogamous, freely entered into by both parties, lawfully conducted and recognised under Irish law. The Policy document also refers specifically to "*proxy marriages*" and confirms that they may be recognised under Irish law. A proxy marriage is identified for the purpose of the policy as one where an appointed substitute (proxy) stands in for a party to the marriage at the ceremony. Such marriage is considered to have been contracted in the country in which the ceremony took place. If the country in which the ceremony takes place permits proxy marriages, such a marriage will meet the requirements of the First Respondent's policy. It is noted, however, that a proxy marriage gives rise to additional concerns not only in immigration terms but also for the protection of the parties.

33. The Policy document confirms that the immigration authorities will enquire into the circumstances of the marriage and must be satisfied that the marriage is genuine and freely entered into by both parties and that it is "*not a device aimed predominantly at securing an immigration advantage*". The parties must also be able to show that they have met each other in person.

34. It is apparent that the purpose of the Policy document is to offer guidance and to assist with consistency in decision making. However, the Policy document itself provides that decision makers will retain a discretion to grant family reunification in cases that on the face of it do not appear to meet the requirements of the Policy, usually because exceptional or humanitarian considerations have been demonstrated on the facts of a given case, such that proportionality in decision making warrants a departure from the general rules reflected in the Policy document (para. 1.12 set out above refers).

DISCUSSION AND DECISION

35. There are clear weaknesses in the application for a visa the subject of these proceedings. Elements of the account given during the visa application process are contradictory, specifically as to how the couple met, decided to marry and the manner in which the marriage was arranged with the consent of the Applicant's next of kin. Indeed, the involvement of the Applicant's family in the marriage does not sit comfortably with the history as given by the Applicant in her application for subsidiary protection in circumstances where the successful application for subsidiary protection was advanced on the basis of family persecution arising from the Applicant's earlier marriage and the murder of her first husband by her family members. The inconsistencies identified are undermining of the application. These inconsistencies give rise to a justifiable concern, which the First Respondent is properly required to consider, that the marriage was not the consequence of a genuine relationship but was contracted for immigration purposes.

36. While justifiable concerns undoubtedly exist in this case and are clearly relevant factors to be weighed in a decision-making process, they do not expressly or in direct terms form the basis for the refusal of the application. Concerns as to the genuineness of the relationship are reflected as a basis for the decision, if at all, only insofar as they may be captured by the assertion in general terms that there has been inadequate evidence of a relationship history submitted and the asserted interest of the State in pursuing immigration control. If concerns as to the genuineness of the marriage weighed on the First Respondent's considerations, these concerns are not made explicit and the application is not refused on the basis that the First Respondent is not satisfied as to the genuineness of the marriage or that it was not contracted for immigration purposes.

37. A further weakness in the application is that it is manifestly the case that the minimum financial thresholds set under the Policy document are not met in this case. Such a failure to meet the minimum financial thresholds identified as a matter of policy by the First Respondent, is capable of providing a sufficient basis on its own to refuse an application for reunification in most cases.

38. Pointing to the undoubted difficulties with this application which it is contended are capable of providing a rational basis for refusing the Join Spouse visa, I am invited on behalf of the First Respondent not to treat any identifiable frailties in the decision-making process in this case as grounds to intervene in circumstances where there are other standalone and sound bases identified for refusal. I have been referred to my own decision in *S.M. v. Minister for Justice* [2022] IEHC 611 as an example of a case where, notwithstanding identified frailties in the decision-making process, relief by way of judicial review was refused.

39. In *S.M.* I relied on the earlier decision in *Olakunori v Minister for Justice, Equality and Law Reform* [2016] IEHC 473 where Humphreys J. provided a summary of the principles to be applied in a judicial review involving a challenge to a visa refusal which applied the Policy document. He found (at para. 23 of his judgment) that all applicants must be taken to be on notice of the published criteria for applications. At para. 64 of his judgment, he summarised the principles to be applied as follows:

> *"(i) […] (vii) in immigration matters, which are classically at the core of the executive power of a State, there must be a wide discretion vested in the decision-maker in the absence of clear statutory provisions to the contrary;*
>
> *(viii) the integrity of the immigration system is promoted by consistency in decision making, and the Minister may lawfully take this into account in deciding on a visa; […]*
>
> *(x) if in a particular decision the correct test is not articulated in a precisely legally correct manner, that is not fatal as long as the correct test is applied in substance;*
>
> *(xi) the weight to be attached to various factors is quintessentially a matter for the decision-maker; […]*
>
> *(xiii) where a decision is based on a number of independent grounds each capable of supporting the result, the decision will not be quashed if any one or more grounds stand unaffected by any error in any impugned grounds."*

40. It is, of course, the case that an infirmity with a discrete element of a decision does not and should not always result in the decision being condemned in judicial review proceedings. There are cases where it is clear that the decision is based on valid and properly expressed grounds such as would permit the decision to stand, notwithstanding defects in some other

aspect of the decision. This is so where a defect or defects can be isolated from and do not contaminate or taint the other independent bases for that decision, and these independent and uncontaminated bases are sufficiently strong in their own right to satisfy a court that the identified frailty did not affect the outcome which would have been the same even if an error had not occurred.

41. A number of factors are identified on behalf of the First Respondent in this case as immunising the refusal from challenge, prime among them is the failure by the Applicant to meet the minimum financial criteria. It is accepted, however, that a failure to meet minimum financial criteria identified in the Policy document will not always result in the refusal of an application. Even the Policy document, in its own terms, recognises that it is not determinative in all cases and a residual discretion remains where there are humanitarian concerns or where necessary to ensure proportionality in decision making. Indeed, it seems to be further acknowledged by the First Respondent in the material quoted by Burns J. in *AZ* (set out above) that financial thresholds are not strictly applied to those in receipt of disability benefits as there is an apparent acceptance or understanding that this would be unfair. It is firmly established that the First Respondent's discretion is not fettered by the terms of the Policy. As observed by Ferriter J. in *SH v. Minister for Justice & Ors.* [2022] IEHC 392 the Policy document is a manifestation of the First Respondent's overriding discretion but is not exhaustive of it (para. 81).

42. It has been urged on me on behalf of the Applicant, and I accept, that this is a case where the possibility of special humanitarian considerations arise and require to be factored into the mix by the decision maker by virtue of the Applicant's protection status in the State. The fact that the Applicant enjoys subsidiary protection status means that the application for spousal reunification in the State cannot be summarily dismissed as not requiring a further and full consideration in view of the failure to demonstrate financial eligibility or otherwise satisfy the First Respondent's normal policy requirements, albeit these factors remain relevant. The Applicant's subsidiary protection status constitutes a red flag that there are safety considerations which are required to be measured and weighed if proper consideration is to be given to the applicants' rights, most particularly if a visa refusal is sought to be justified on the basis of an ability to maintain family life in Iraq. Indeed, in my decision in *S.M.*, I noted (para. 50) that a failure to consider a safety issue could be fatal to a decision to refuse as follows:

"Separately a concern arises from the apparent failure of the Respondent to appreciate that the Applicants were contending that there were safety concerns pertaining to residence by the First Named Applicant in Ethiopia. This failure would, in my view, be a serious omission and would be fatal to the refusal of the application but for the fact that only a very passing reference is made to the existence of a travel alert affecting Ethiopia and no proper or real submission was made in this regard in support of the application. On the contrary, the evidence presented to the Respondent was that the Applicant had travelled to Ethiopia and lived there for several months without any reference to a security concern for her during that period. Furthermore, it seems that from an evidential perspective, the Applicants contend that the situation in Ethiopia has deteriorated since the application was made."

43. Unlike the situation in *SM*, it is quite obvious that the application in this case was squarely predicated on the Applicant's subsidiary protection status and her consequential vulnerability. There are clear humanitarian concerns which give rise to a need for special consideration of her application in this context, notwithstanding non-compliance with financial and other criteria identified in the Policy document. I am not satisfied that failures on the part of the Applicant and her husband in presenting the visa application with optimal supporting documentation are capable of constituting standalone and unimpeached bases for refusal on the facts and circumstances of this case, such that I can be confident that the application would have been refused even if the frailties upon which factual and legal grounds of challenge are advanced in these proceedings were to be substantiated. Accordingly, I am not prepared to conclude that because the application fails to meet the financial eligibility threshold or because valid issues were raised regarding the adequacy of the documentation submitted or inconsistencies identified in the narrative as to how the couple met, the application for a Join Spouse visa could never have succeeded with the result that the Court should not intervene by way of judicial review.

44. This brings me to the substance of the complaint advanced in these proceedings. It is an undeniable feature of the decision challenged that no reference was made to the impact of the Applicant's subsidiary protection status in Ireland on her ability to establish a family life elsewhere. Without referring at all to the Applicant's subsidiary protection status, other than in an introductory statement acknowledging that this was the lawful basis for the sponsor's

residence in the State, the First Respondent concluded that the applicant spouse had not demonstrated exceptional/humanitarian circumstances which would warrant the granting of a visa by way of exception under the Policy document in view of the failure to meet the financial criteria there set out in the case of non-EEA Family Reunification. Nor was co-habitation as an incident of family life addressed anywhere in the record of the decision. Instead, the continuing family life envisaged for the Applicant and her husband in the terms of the decision to refuse the visa application is that they could sustain their relationship in the same manner in which it had developed, whether by way of visits or telephonic and electronic means of communication or potentially and inferentially, but unspoken, return by the Applicant to Iraq. An open acknowledgement of a return to Iraq as the potential means by which family life including an ability to cohabit might be achieved would, however, have necessitated the decision maker in addressing directly and expressly the safety concerns for the Applicant arising from such a return given that she holds an international protection status.

45. The failure to properly identify co-habitation as an incident of family life and to record even a single reference to the impact of a refusal on the ability to co-habit of the Applicant and her spouse given her subsidiary protection status is very troubling. Indeed, notwithstanding that the decision in this case post-dates the decision of the Supreme Court in *Gorry v. Minister for Justice and Equality* [2020] IESC 55, and contrary to a practice seen in other cases where issues of family reunification arise, it is striking that the *Gorry* decision is not mentioned anywhere in the considerations document, still less are the factors (principally cohabitation) identified by the Supreme Court as embraced within the right to family life considered. Accordingly, while the decision is squarely predicated on it not being shown that the Applicant and her husband were prevented from enjoying a family life elsewhere, the right to family life as described is limited to a right to visit and enjoy telephone contact but not co-habitation or a right to reside together which typifies other refusal decisions which are detailed in the various judgments of the Courts in this area.

46. Of course, as acknowledged in *Gorry*, while co-habitation is a normal incident of marriage and family life, this does not mean that the State cannot make decisions which make co-habitation impossible or significantly restrict that possibility. Nonetheless the fact that co-habitation as an incident of family life is interfered with as a consequence of the decision requires it to be "s*crutinised*" (see para. 24 of judgment of O'Donnell CJ) and should properly

be weighed as a relevant consideration in the decision-making process. There is no evidence that this occurred in this case. As stated at para. 25 of the majority judgment in *Gorry*:

> *"….any decision which did not take account of that fact, or the impact on a married couple and the family of the decision could properly be said to fail to respect the institution of marriage which the State is obliged to guard with special care."*

47. The Court continued at para. 74 in clear terms as follows:

> *"This, however, did not mean Finlay Geoghegan J was of the view that the consideration given by the Minister to the application in relation to the constitutional rights of the applicants was in accordance with law. She noted that the Minister had applied the same approach to the State's obligations under Article 41 as he had to the obligations imposed by section 3 of the 2003 Act (having regard to Article 8 ECHR)."*

48. My concern that there was a failure to properly weigh the impact of a refusal of the visa in the decision-making process, in terms of the ability of the Applicant and her husband to co-habit because neither cohabitation nor difficulties in residing together in Iraq are mentioned anywhere in the decision is further underscored by the fact that it appears from the averment in M.B.'s affidavit in opposing these proceedings, that the First Respondent had formed the view, although this was never communicated to the Applicant in any manner which is evident on the file, that she had travelled to Iraq in 2016. While the matter is seemingly identified on behalf of the First Respondent as evidence of lack of candour on the part of the Applicant and is not identified as a basis for refusal of the visa application, its significance to the issues in these proceedings is quite fundamental. This is because it is obviously integral to the question of whether the Applicant could safely return to Iraq to maintain a family life with her husband in their joint country of origin. The presence of the material on the file relating to the question of a trip to Iraq together, with the terms of the decision and the wording used give rise to the inference that the First Respondent refused the application believing that the option of establishing a family life in Iraq (to include cohabitation) was reasonably open to the Applicant and her husband because she had returned to Iraq since obtaining international protection status.

49. Although nowhere in the decision to refuse the visa is it stated in terms that the Applicant could return to live with her husband in Iraq, nor is the fact that the Applicant was granted subsidiary protection status because of the real risk she would face of serious and individual threat to her life or person were she returned to Iraq addressed in any way in the decision. The decision does not acknowledge that her travel document does not permit travel to Iraq or that the First Respondent had been satisfied on foot of enquiries made that there was no evidence that the Applicant held an Iraqi passport. That being the case, MB's averment that the Applicant had returned to Iraq appears to reflect an understanding on the part of the First Respondent as to the options open to the Applicant, which was neither put to the Applicant nor readily reconcilable with information on the First Respondent's file.

50. It remains the case that it was not stated in clear terms in the decision to refuse that the Applicant could enjoy her rights to family life by returning to Iraq. A question therefore arises for me as to whether the evidential basis for concern that the belief averred to by MB in relation to the possibility of travel to Iraq also informed the decision to refuse the visa and is sufficiently strong to justify relief in these proceedings. It seems to me that a clear inference arises from the terms of the refusal and the averment of MB, that the First Respondent considered that travel to Iraq was an option for the Applicant. I am mindful in deciding what weight or substance to give the inference that arises that the date that is recorded in relation to the queried travel to Iraq is contemporaneous with the first draft of the decision to refuse the visa. This fact strongly suggests that this material was put on file for the purpose of consideration in the context of the visa application and its refusal.

51. It seems to me that this case is distinguishable from other cases to which I have been referred in which refusal of spousal visas have been upheld by the Court. None of the cases referred to in submissions involved an application for reunification in the case of a spouse who is resident in the State on foot of the grant of subsidiary protection. I consider that the fact that the Applicant has a recognised protection status is of some real consequence given that such status arises from an acceptance of serious safety concerns for the Applicant in her country of origin.

52. In *BB v. Minister for Justice* [2022] IEHC 536, Heslin J. refused relief in a case which shared some common features with this case, in that there was an inadequacy of documentation provided and a failure to meet the financial criteriaindicated.. However, there the similarities

end. The Irish resident spouse in the *BB* case did not enjoy international protection status in the State. Furthermore, very full consideration was given (in a 26 page document) to the family life of a couple of shared Algerian nationality. Heslin J. specifically noted (para. 133) in his judgment the reasonable conclusion arrived at by the Minister that it had not been demonstrated that the sponsor would be prevented from continuing to travel to Algeria to visit their spouse and maintain the relationship in the manner in which it developed, "*or that it is more difficult or may be extremely burdensome for the applicant and the spouse to reside together anywhere else, be that in the applicant's home State or any other state of their choosing*". It was therefore clear that, in contrast to this case, consideration was given in *BB* to the possibility of the couple residing together elsewhere in circumstances where there was an established pattern of travel to Algeria, the shared country of origin.

53. Similarly, *AZ v. Minister for Justice* [2021] IEHC 779 bears some comparison with this case in that the application concerned an Iraqi national where minimum financial thresholds were not satisfied. However, it did not concern a person who had been granted international protection status in the State. Even though the decision to refuse pre-dated the decision of the Supreme Court in *Gorry*, Burns J. was satisfied that the principles identified in *Gorry* had been adhered to. She noted (at para. 38) in her judgment that the first respondent had regard to the fact that cohabitation was a natural incident of marriage and the family and stated (para. 17) that the respondent found that insufficient reasons had been provided as to why the applicant could not continue to travel to Iraq to visit his wife with a view to maintaining and developing the relationship "*in light of the fact that the Applicant had travelled to Iraq on a number of occasions, and has stayed for six months on his last visit, it had not been established that there were restrictions on him returning to Iraq to visit his wife*." This type of proper consideration of relevant factors is clearly absent in this case.

54. A further decision of Heslin J. identified in argument before me which also concerned a refusal in reliance on the Policy Document on Non-EEA Family Reunification is that of *LTE and KAU v. Minister for Justice* [2022] IEHC 504. This was a case concerning a proxy marriage between an Ethiopian citizen and a naturalized Irish citizen of Ethiopian origin where there was again a failure to meet minimum financial criteria and a finding of inadequate evidence of a relationship history. In a very detailed and considered judgment Heslin J. highlights just how inadequate the information provided in that case was. However, importantly for present purposes, no question of international protection arose for

consideration. Furthermore, very clear regard was had to the decision of the Supreme Court in *Gorry* in the Respondent's consideration of the application (see para. 98 of the judgment). A finding was recorded in express terms that it had not been established that the couple would find it more difficult or extremely burdensome to reside together in Ethiopia (the applicant's home country and shared country of origin) or elsewhere. The impact on the ability of the spousal couple to cohabit or "*reside together*" was expressly addressed in the decision, in a way which did not occur in this case.

55. While Ireland has not adhered itself to Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, and it is clearly correct that the EU legislature was establishing a right of family reunification for the situations covered by the Directive (see, for example, Recital (16)) and not simply regulating a pre-existing right in that Directive (*per* Ferriter J. in *SH* at para. 109), it is nonetheless instructive to note that an impetus for this Directive (as reflected in Recitals 2 and 8 to the Directive) is identified as the fact that respect for the fundamental rights and principles recognised in particular in Article 8 of the ECHR and in the Charter of Fundamental Rights of the European Union warrant that special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. It was considered that more favourable conditions should therefore be laid down for the exercise of their right to family reunification.

56. The impetus for the Family Reunification Directive chimes with the case-law of the European Court of Human Rights which does not provide for a free-standing right for family reunification, but does recognise that the circumstances of persons fleeing persecution require special consideration. In his submission letter in support of the application, the Applicant's solicitor placed reliance on the decision of the European Court of Human Rights 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 …"

57. In Ireland it is recognised that those with protection needs are a separate class when it comes to the question of family reunification because of their vulnerability. It is noteworthy that had the Applicant been already married at the time of the grant of subsidiary protection she would have been entitled to apply under Part 8 of the International Protection Act, 2015 (which gives effect to the EU Asylum Qualification Directive) for permission for her spouse to reside in the State pursuant to s. 56 of the 2015 Act. Section 56(4) of the 2015 Act provides that the Minister upon being satisfied that the person is a family member "*shall give permission… to enter and reside in the State*", save in limited and statutorily prescribed circumstances. This clearly constitutes a more favourable consideration of an application for spousal reunification made in the case of a spouse of a person granted subsidiary protection status, where that status is granted to a person who is already married. It reflects an acknowledgement of a special obligation of consideration on the State.

58. The family reunification provisions of the 2015 Act have no application in this case and there is, of course, a difference between the situation of the person who is already married and one who marries having already obtained subsidiary protection. This difference may be relied upon to justify different treatment. Indeed, the constitutionality of such difference in treatment was recently the subject of full consideration in the case of *S,S,S, & I v. Minister for Justice* [2020] IESC 70 (extensively relied upon by Ferriter J. in his decision in *SH*) by Dunne J. in the following terms (para. 99):

99. I find myself in agreement with the conclusions of Humphreys J. on this issue. I have referred previously to the importance of family reunification. The passage quoted from the decision in Tanda-Muzinga referred to above neatly encapsulates the importance of allowing those who have fled persecution to resume normal life with family members. That case recognised the fact that there was a consensus on the need

for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for others. The legislature in this jurisdiction has sought to give effect to that consensus by means of the provisions of s. 56 of the Act of 2015. In the provisions at issue in this case, the legislature chose 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. The thrust of international consensus is that the refugee should be enabled to resume normal life. In the case of an individual who was not married at the time of seeking international protection, the question of resuming normal life simply does not arise. Those in the position of Mr. A and Mr. S and, indeed, R.C. in the case previously referred to, are not in the same position as a person whose relationships have been ruptured by the persecution which caused them to flee from their country of origin."

59. To the extent that the provision for family reunification mandated under s. 56 is not necessitated by EU law because Ireland has not adhered to either the Family Reunification Directive or Recast Qualification Directive (more fully considered in *SH* by Ferriter J.), then clearly the special provision made in s. 56 of the 2015 Act is a reflection of a policy choice by the Legislature rather than a separate free-standing legal entitlement. Nonetheless, this policy choice was doubtless prompted by an acknowledgement that the restrictions on family life in the case of a person who benefits from international protection status are likely to be greater than in other cases, albeit in the case of persons who were already married this difficulty is coupled with an interruption in an existing relationship, a factor which does not arise for those who marry subsequently.

60. This important distinction apart, however, it seems to me to be undeniable that a difficulty in maintaining family life together in the country of origin, which is one of the factors which gives rise to a need for special consideration in the case of applications for family reunification where a person has a recognised protection status, is similar whether the marriage is contracted pre or post recognition of protection status. I am satisfied that the State is under a particular obligation to individuals who are unable to enjoy the right to family life and family unity in another state, such as is likely to be the case for refugees and beneficiaries of subsidiary protection, and this particular obligation feeds into the weight to be attached to competing

factors and proportionality in decision making. This is because the options open to such families to establish a family life elsewhere are necessarily curtailed in a manner which does not arise in non-protection cases and should be scrutinised. It seems to me that a need for this such special or particular consideration flows as a matter of constitutional justice and proportionality in decision making, even absent any special legislative measures.

61. A difficulty in maintaining family life, specifically through residing together, very clearly does not give rise to an automatic right to reside in the State and there is ample authority to this effect. The grant of protection status is, however, a special feature of the case because it evidences a real and substantive concern on the part of the First Respondent as to the ability of the couple to reside together in the sponsor's country of origin (which in this case is also her husband's country of origin) for reasons of safety. In her judgment in *S,S,S, & I v. Minister for Justice*, Dunne J. added (later in para. 99):

> *"….I have been somewhat critical of the reasons put forward by the Minister for making a distinction between pre-flight marriages and post-flight marriages. I have explained why I have come to the conclusion that the Minister is entitled to distinguish between pre-flight and post-flight marriages. The latter reasons put forward by the Minister, in reality, flow from the first reason. Thus, the Minister, in dealing with a person who has been granted refugee status or international protection and seeks family reunification, should deal with their application speedily. Further, it will be easier for the Minister to more carefully scrutinise a post-flight marriage than a pre-flight marriage. These are consequences which flow from the legitimate distinction that the Minister is entitled to make."*

62. It is implicit in the Supreme Court's approach in in *S,S,S, & I v. Minister for Justice* that protection needs remain a feature of the case in post flight marriages. Such protection needs and their implications for family life including an ability to cohabit should be properly weighed and measured in the exercise by the First Respondent of her executive discretion. It seems to me that the Applicant's protection needs and their implications for family life including an ability to cohabit have not been properly weighed and measured in the decision to refuse a Join Spouse visa impugned in these proceedings. There has been no proper regard in this case to the particular obligation on the State in the case of a person with protection status

who seeks family reunification. The fact of protection status raises special concerns regarding the ability to maintain a family life elsewhere, including as an incident of same the ability to cohabit or reside together, and requires to be measured when weighing competing considerations and arriving at a proportionate decision.

63. Further, given that it is now known that the First Respondent believed that the Applicant had travelled to Iraq in 2016, it has been demonstrated as a real possibility that the First Respondent refused the application on the basis of a belief that the Applicant could return to Iraq to enjoy a family life with her husband. The Applicant was never notified of this belief and was not given an opportunity to address it in the context of her visa application. The First Respondent could not therefore have considered her account of the circumstances of her travel in 2016 before refusing the application for a visa for her husband. Of course, this belief on the part of the First Respondent cannot be easily divorced from the question of co-habitation, an incident of family life and safety issues, both unaddressed in the terms of the decision. To my mind, the existence of a document which appears to have been relied upon by the First Respondent to conclude that the Applicant had travelled to Iraq, without notice to the Applicant who has denied in these proceedings that such travel ever occurred, puts a different perspective on various statements in the decision to the effect that the First Respondent concluded that *"in considering whether family life could be established elsewhere, insufficient reasons have been submitted preventing [Applicant's name] a citizen of Iraq, continuing to travel to visit the applicant in the manner they have previously.*"

64. A refusal of the Join Spouse visa in this case without a proper consideration of the implications of the Applicant's protection status and its implications for family life and particularly the ability to co-habit as an incident of same, is legally unsustainable.

CONCLUSION

65. The First Respondent failed to have proper regard to the obligation on the State in an application for spousal reunification where the sponsor has been granted subsidiary protection in this case. The First Respondent does not address in the consideration document that an incident of family life is cohabitation nor the fact that there is any impediment to the Applicant residing together with her husband in their shared country of origin or engage in any weighing of these considerations. For this reason alone, the decision should fall. However, in addition,

a serious concern arises that the First Respondent may have concluded that the Applicant had returned to Iraq previously, albeit without raising this issue with her during the application process. If, as appears likely, the First Respondent concluded that the Applicant was in a position to return to Iraq for the purpose of exercising a right to family life because of a belief that the Applicant had previously returned, then this conclusion was not properly arrived at and does not provide a sound basis for the ultimate refusal of the visa in this case.

66. For the reasons set out above, I propose to make an order quashing the decision for the First Respondent to refuse the appeal against the refusal of the visa application in respect of the Applicant's husband made on the 4th of March, 2021. I will hear the parties in respect of any consequential matters.