THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 694

[Record No. 2023/1313JR]

BETWEEN

TA, NM, TA, FA & HA

APPLICANTS

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms Justice Miriam O'Regan delivered on 4 December 2024

Background

1. The first named applicant (hereinafter 'the husband') is a Shia Muslim Afganistan national born on 11 December 1976. The second named applicant (hereinafter 'the wife') was born in Kabul on 21 March 1981 and lived in Iran between 1981 and 2019. The husband lived in Iran between 1997 and 2006. The parties married in Tehran on 11 December 1998. The three remaining applicants are said to be children of the husband and wife although in the impugned decision it was held that there was insufficient evidence that the third and fourth named applicants are the children of the husband. The third named applicant was born in Iran on 28 January 2002, the fourth named applicant was born in Afghanistan on 17 August 2004

and the fifth named applicant was born in Iran on 02 December 2014.

2. The husband was obliged to leave Afghanistan for Iran in 1997 and was subsequently obliged to flee Iran in 2006 when he came to Ireland. The wife has resided in Iran between 1981 and 2019 when she and the children moved to Turkey. They are international protection applicants in Turkey since 18 March 2021. The husband is an Irish citizen since December 2021.

3. On 22 December 2021 the wife and children made four long stay visa applications to come to Ireland. These applications were refused on 10 June 2022 and following an appeal of 16 June 2022 a decision was made to refuse them on 01 September 2023 which is the impugned decision.

Applicant's Position

4. Leave to maintain the within judicial review proceedings was granted on 11 December 2023.

5. In the statement of grounds of 14 November 2023 there are five separate complaints set out in respect of the decision namely: -

(1) It was irrational to accept that the husband had supported the wife and children financially but insufficient evidence of emotional and social support was found in the decision. It is complained that the decision maker failed to have regard to the financial contribution when dealing with emotional and social support.

(2) It is said that the decision is not capable of being clearly understood in that it was held that there was insufficient evidence of ongoing social contact between the parties nevertheless it was also held that the relationships were capable of being sustained in the same manner in which they are currently maintained and furthermore there was an acceptance that family life existed.

(3) It was said that there was an unlawful disregard in respect of the husband's trips to Iran and Turkey with inadequate consideration of the correction relative to the 2022 photographs and no consideration at all to the correction photograph of 2023.

(4) It is complained that the lack of birth certificates in respect of the third and fourth named applicants resulting in a finding that the familial connection could not be proven was irrational and unreasonable without DNA testing.

(5) It is said there was a breach of family rights under Article 41 in a failure to recognise the marital relationship and under Article 8 of the European Convention on Human Rights in that the respondent failed to act in the best interests of the child.

6. In written submissions it is said that the issues to be determined could be classified as:

(1) Did the respondent properly assess the evidence?

(2) Did the decision respect family rights?

7. The applicants accept that the respondent is entitled to have guidelines and set a financial threshold with a wide discretion. In this regard reference is made to the judgment of Allen J in *FHS v The Minister for Justice* [2024] IECA 44 as to the desirability of having a policy document as same would support equality and consistency provided it was not

implemented in an inflexible manner.

8. It is argued that it was irrational and unreasonable to accept financial support but not emotional and social support and it is said in this regard that the two have been artificially divorced without a reconciliation as to the finding that there was financial support but not emotional and social support. In this regard the applicant relies on the matter of *BB & Ors. v Minister for Justice* [2024] IECA 36 where it was held it is necessary to assess the weight of the information supplied in the round.

9. It is argued that there is no public policy issue arising such as a marriage of convenience or criminal offences. It is said that the issues which exercised the decision maker, namely that there were no birth certificates for the daughters, the husband had blocked the wife's WhatsApp, and reference to deportation from Turkey in two of the four visa application forms, were all explained (it is said that it was impossible to secure the birth certificates from Afghanistan, the parties did not recollect the husband blocking the wife's WhatsApp, the husband is illiterate, and reference to deportation from Turkey was inaccurate respectively). It is further said that a finding of no social support is contradicted by the parties being capable of sustaining the relationship in the same manner as heretofore and by virtue of the fact that it was accepted family life existed within the meaning of Article 8 of the ECHR.

10. It is acknowledged that in this matter reasons do not have to be as precise or detailed as a decision engaging rights but must be discernible and comprehensible (*Abounar v Minister for Justice* [2024] IECA 57).

11. It is said that it was unlawful to disregard the husband's trips to Iran and Turkey and it was only in respect of 2022 and 2023 that there were discrepancies between travel and photograph dates. However, it is said that this discrepancy was corrected without consideration by the respondent. It is also said that the photographs produced were compelling evidence of family life and not considered.

12. It is said that it was unreasonable to say that the familial connection between the husband and the third and fourth named applicants couldn't be proven based on the lack of birth certificates without DNA undertaken and it is argued that it was incumbent on the visa officer having mentioned that a discretion to take DNA exists, to request such DNA. In this regard it is argued that the differentiating factor between the within matter and the matter considered by Barr J in *NI v Minister for Justice* [2023] IEHC 239 is the fact that the visa officer in a fair procedure letter had mentioned the discretion to request DNA. In *NI* Barr J rejected the claim that the visa officer ought to have required DNA and reiterated that the onus was on the applicants to show all necessary proof to secure the visa requested.

13. Reliance is placed on the judgment of O'Donnell J in *Gorry v The Minister for Justice & Equality* in that it is said that there was a failure to respect the institution of marriage and it was unreasonable to expect the husband to move from Ireland in order to cohabit with the wife, such cohabitation being a natural incident of marriage.

14. The applicant urged the Court to follow the decision of Burns J in *Khan v Minister for Justice* [2021] IEHC 789, paras. 27 and 28 thereof when the court held that the length and enduring nature of the marriage was not given any weight and the fact of regular visits by the second applicant and the children were considered solely from the prospect of establishing

that family life can continue in this manner rather than from the prospective of establishing an ongoing commitment to their marriage in very difficult separated circumstances. The fact of living in separate countries was treated as a choice notwithstanding previous refused visa applications.

15. It is said that the visa officer failed to act in the best interests of the fifth named applicant which is said to be not possible absent family reunification.

16. In oral submissions notwithstanding a request not to do so several arguments were raised that were not encompassed within the statement of grounds and in respect of which I do not intend to address in this decision. In addition, the matters mentioned aforesaid in the written submissions were also raised and it was argued that ongoing contact as is was an inadequate manner in dealing with the parties' cohabitation.

Respondent's Position

17. The entirety of the applicant's claim is countered by the respondent.

18. The respondent points out that:

1. in the policy document at part 14.1 the dependency requirement is identified as financial dependency and social dependency and in those circumstances it was appropriate to deal with the financial and social aspects separately.
2. The onus of proof as to the genuineness of the family relationship rests squarely with the applicant and sponsor as was confirmed in *BB* aforesaid and *LTE v Minister for Justice* [2024] IECA 114.

3. Insofar as reasonable and rationality is concerned the test identified by the Supreme Court in *The State (Keegan) v Stardust Victims* [1986] IR 642 is the relevant test and the respondent also makes reference to *O'Keeffe v An Bord Pleanála* [1993] 1 IR 93 where Finlay CJ indicated that it was necessary that an applicant should establish that the decision maker had no relevant material which would support its decision in order to establish irrationality. The applicants did not argue against the application of these principles.
4. It is pointed out that on a review of the content of the WhatsApp messages between the husband and the wife and between the husband and the fourth named applicant that it established little more than evidence of some communication but nothing to demonstrate that the names listed on the messages corresponded with the phone numbers on the application forms.
5. The only response to the blocking by the husband of the wife's WhatsApp contact between 10 February 2021 and 25 May 2021 was that this could not be recalled.
6. Given the fact that some photographs and travel history did not coincide then the respondent is said to have acted reasonably in finding that such discrepancies renders it difficult to accept the photos as sufficient evidence of social support or that the travel history established social support.
7. The respondent relied on the judgment of Phelan J in *MB v Chief Appeals Officer* [2023] IEHC 88 where it was stated at para. 78 the Connolly test as to reasons is met where the reasons can be identified following a reasonable inquiry - "to be satisfied as to the considerations which led to the decision and there is no need to address each document sequentially at each stage of the process or in the final record of the decision."

8. Given that the only evidence of a familial connection between the husband and the two daughters was identity cards which identified the father as 'QADIR' it was said in these circumstances in the absence of DNA by the applicants then the conclusion that the familial connection had not been established was reasonable.
9. Similarly the effect of lack of more clarification as to why WhatsApp was blocked was a reasonable basis to rely on in coming to the conclusion that social support was not established. The respondent points out that in the decision, in respect of family life acknowledgment this was made in the context of Article 8 of the ECHR and must be viewed in that specific context.
10. It is argued that the *Gorry* principles were identified and applied correctly.
11. The decision recognised that the best interest of the child should be regarded as a primary consideration although one which may be outweighed by the integrity and consistency of the immigration system.

19. In oral submissions the respondent argued that the decision was reasoned rational and proportionate in its application of the policy. (The respondent did identify a number of the arguments raised as not being in the statement of grounds as aforesaid however I do not intend to deal with either the applicant's argument or the respondent's response in respect of each of those matters.) It is said that the WhatsApp communications were furnished by the applicants in support of social support however the blocking of the WhatsApp between the husband and wife or husband and the fourth named applicant was not adequately dealt with, and the content of the WhatsApp was such as to amount to insufficient evidence of social support. Insofar as the photographs and the travel arrangements of the husband not coinciding is concerned the response was merely to change the dates in respect thereof. Furthermore

notwithstanding the fair procedures letter asking for photographs prior to the application being made only two photographs prior to that date were furnished. The respondent refers to the decision in *BB* aforesaid where the Court of Appeal upheld the decision in respect of insufficient social dependency in like circumstances. In that matter the Court of Appeal was satisfied that travel history alone was not indicative of social support.

Decision

20. Given that the policy document refers to financial support and social support as being separate items in my view it was open to the respondent to find that there was financial support, but no emotional or social support. It was not a precondition of such a finding that the emotional and social support would not be assessed independently of financial support.

21. The decision states that "these relationships are capable of being sustained in the same manner in which they are currently maintained" (p.13 of the decision). Later in the decision under the heading of consideration under the ECHR and Article 8 thereof, it is stated "it is accepted that family life exists between the sponsor and the applicants within the meaning of Article 8 of the European Convention of Human Rights." In the circumstances it does appear to me that having regard to the totality of the decision and the context in which the statements are made, the decision is capable of being understood. There is no contradiction in the evaluation that the applicants had not demonstrated sufficient social and emotional support whereas the acknowledgment of the existence of the family life was said to be in the context of Article 8 of the ECHR. Therefore the statements were made in an entirely different context.

22. There is no contradiction (nor was one identified) between "insufficient social support" and "these relationships are capable of being sustained in the same manner in which they are currently maintained". If one reads the decision assuming that it is lawful it is capable of being clearly understood in regard to the difference aforesaid.

23. Reading the decision as a whole and assuming that it is lawful it does not appear to me that the husband's trips to Iran and Turkey were disregarded. The finding quoted at page 16, 1st para. of the decision is evidence of this (which acknowledges a relationship which can continue noting the sponsor is not restricted in returning to Turkey).

24. There is no evidence of an inadequate consideration of the photographs, as, on inquiry the dates were merely changed, and the photographs, contrary to the request for photographs prior to the date of application, postdated the date of application. The Applicant's have not demonstrated that the photographs were not considered at page 12 of the consideration under the heading "social support" it is said "the… renders it difficult to accept the photos as sufficient evidence of social support".

25. It is said that what makes the decision *vis-à-vis* the familial connection between the husband and the third and fourth named applicants irrational and unreasonable is mention of the fact in the fair procedure letter that the respondent can request DNA sampling.

26. I am not satisfied that this argument, namely the recording in a letter of the fact that the respondent can request DNA sampling takes the matter beyond the decision of Barr J in *NI* aforesaid, so that the reference to the Minister's option as to DNA in the fair procedures letter, is enough to trigger the obligation to request DNA.

27. It is clear from the policy document that DNA can be undertaken by the applicants at any time and indeed whether undertaken by themselves or whether as a consequence of a request from the Minister the applicant must discharge the cost of such DNA testing.

28. No reason was identified to the court as to why, given the lack of birth certificates and the difficulty identified in respect of the residence card, the applicants did not themselves of their own volition secure DNA testing.

29. Insofar as Article 8 of the ECHR is concerned the statement of grounds states: -
"The respondent further infringed the right to family life as guaranteed by Article 8 of the European Convention on Human Rights. The respondent failed to act in the best interests of the fifth named applicant, a child."

In the decision at p.17 it is indicated that the best interests of the child must be paramount however it is noted that there is a difference between the best interests of the child being a determining factor and not an exclusive factor. It is acknowledged that such best interests include having the care and company of both parents but this must be weighed against the rights of the State. It was accepted that in general terms the best interests of minor children would be to be raised in the company of both parents. However, it was felt reasonable to take into account that that had not been the case thus far in relation to the minor applicant and the husband. Having weighed the above factors at p.18 it was found that the State's rights are weightier than those of the rights of the child and the child's relationship with the husband is a relationship that is capable of being sustained in the same manner as it has been since the sponsor fled to Ireland.

30. Under the consideration of Article 8 of the ECHR position is concerned it was accepted that family life exists within the meaning of Article 8. It was noted from ECHR caselaw that Article 8 does not impose on a state any general obligation to respect the choice of residents of a family and the State has the right to control the entry of non-nationals into its territory.

31. Given the foregoing and the general and unparticularised complaint in the statement of grounds aforesaid I am satisfied that the applicants have not demonstrated that Article 8 family life rights have been infringed or that the respondent failed to act in the best interests of the infant applicant.

32. Under the Article 41 of the Constitution complaint it is stated that the respondent failed to properly recognise the marital relationship between the husband and wife and/or to respect the institution of marriage.
It seems to me that the above wording is a clear reference to the decision of O'Donnell J in *Gorry* aforesaid. Although *Gorry* was dealing with a deportation order, at para. 2 of the judgment of O'Donnell J it was indicated that on a general level the question of the weight to be given to the constitutional protection of marriage and the family may arise in a variety of situations where it is claimed that the decision will have an impact upon a marriage and family. Article 41.3 requires the State to guard with special care the institution of marriage.

O'Donnell J at para. 63 when discussing Article 41.3 and Article 43 finds that in both cases the value is seen as general and institutional and the principle focus of the Constitution is to protect the institution of marriage generally rather than individual marriages. Decisions in individual matters are said to be capable of failing to respect the institution of marriage and even, in some cases, to constitute an unjust attack on the institution of marriage.

The Court noted that the Constitution does not conceive of different categories of marriage - once two persons get married validly they acquire the status of a married couple and the legal consequences that flow from it. O'Donnell J came to the view that the fact of marriage should be given the same weight whatever the length or circumstances of any individual marriage.

The law must consider more carefully the consequences of a very short marriage to remove the possibility that the marriage is one to achieve an immigration benefit and to reduce the risks of circumventing immigration control.

The State is not obliged to record any automatic immigration status consequent on the marriage and it might be said to be inconsistent with the State's obligation if it were otherwise. The length and duration of a relationship is relevant.

At para. 68 O'Donnell J stated that the length and durability of a relationship is something that must be valued and respected and is relevant weighed under that heading.

The fundamental question was identified at para. 69 is whether where a couple is married, can the Ministerial Decision be said to have failed to recognise the relationship, or to respect the institution of marriage because of its treatment of the couple concerned. The right of automatic entry into the State does not *per se* represent a failure to respect the institution of marriage. If the couple can add to the fact of marriage evidence of an enduring relationship, if the State were to refuse the non-citizen party entry, for no good reason save that it was the prerogative of the State to refuse, it could be said that such an approach failed to respect the rights of those involved and the institution of marriage.

At para. 71 it was stated that the starting point is that citizenship of one spouse plus marriage plus perspective interference with cohabitation does not equal a right of entry to a non-national spouse, but any refusal of entry would require clear and persuasive justification.

At para. 73 it is said that in some cases refusing entry may have the effect of preventing a married couple from cohabiting presents as a difficult type of situation. There may be many reasons why a couple may not be able to cohabit and it is said that the State does not fail to respect the institution or protect it if cohabitation is made more difficult or even impossible by a decision of the State for a good reason (the example given by O'Donnell J is imprisonment).

Where credible evidence is given that the consequences of a decision is that the exercise of a citizen's right to reside in Ireland will mean not just inability to cohabit in Ireland with the spouse and where it may be extremely burdensome to reside together anywhere else, the State would fail to have regard to and respect for the institution of marriage not to take those factors into account and give them substantial weight (para. 74). At para. 75 it is indicated that the Minister is required to have regard in decisions on immigration to the right of an Irish citizen to reside in Ireland, to marry and found a family and the obligation of the State to guard with special care the institution of marriage. Furthermore, the Minister must have regard to the fact that cohabitation is a natural incident of marriage, and that deportation would prevent cohabitation in Ireland may make it difficult, burdensome or even impossible anywhere else for so long as the deportation order remains.

The right of a citizen to reside in his or her own country is of particular weight and the fact that a couple may be able to live together somewhere else does not neutralise that consideration (para. 77)

The issue cannot be reduced solely to the reasonableness of expecting the spouse to relocate even though that is clearly a significant factor; the assessment must be made on all the facts of the case and the circumstances prevailing.

33. In the impugned decision under the heading of consideration under Article 41 of the Constitution various articles under the Constitution are set out and reference is made to the judgment of O'Donnell J in *Gorry*.

The starting point is the entitlements of the State to decide who should or should not be permitted to enter is identified as is the fact that a non-citizen does not have a right to reside nor can acquire such a right by marriage to an Irish citizen. The fundamental question is identified as whether the decision can be said to have failed to recognise the relationship or respect the institution of marriage because of its treatment of the couple. It is said that although there is no separate unspecified right to cohabit cohabitation is a normal incidence of marriage. While cohabitation is something the State is required to have regard to in its decision the State is not obliged, by the requirement to protect the institution of marriage, to accord any automatic immigration status consequent on a marriage. Reference is made to the State's right to control immigration and prevent disorder or crime and ensure economic wellbeing of the country. Accordingly it is said that the appeals officer must take into account the costs to the public funds and public resources as a consequence of a decision to grant the applications and as to how a decision may lead to similar decisions in other cases.

34. At page 16 it was considered that this particular relationship has almost entirely been long distance in nature since 2011. Because the husband has spent 116 days in Turkey it is said that there is no restriction on him returning to Turkey. In considering whether family life could be established elsewhere insufficient reasons have been submitted preventing the sponsor continuing to travel to Turkey to visit with the wife and children and maintain their relationship in the manner in which it has been sustained.

35. In the circumstances, I am not satisfied that the decision maker has discharged its obligation identified in *Gorry* aforesaid under the provisions of Article 41 of the Constitution. In this regard: -

(1) There is general rather than any specific reference to cohabitation of the within couple.

(2) There is no consideration of the ability of the spouses to cohabit in their own country.

(3) No consideration is given to the length and duration of the marriage.

(4) No reference is made to the fact that the current arrangements have not arisen by choice as is evident by this being the second visa attempt and the circumstances of the husband coming to Ireland in 2006.

(5) Visits on an annual or even biannual basis would not equate to an ability to cohabit, or comprise a reasonable comparator or substitute.

(6) There is no finding of the ability of the couple to cohabit anywhere else.

(7) The fact that the visa applicants are I.P. applicants in Turkey currently without any future permissions to reside security was a factor or information which would be relevant to the assessment of ability to continue to travel to Turkey to visit but not mentioned at pages 16 and 17 of the consideration where it is concluded that insufficient information has been submitted to demonstrate that the husband would be prevented from visiting Turkey and maintaining the relationship in the manner in which it exists.

(8) Neither husband or wife was an I.P. applicant at the date of marriage and so their status was not precarious.

(9) No reference or assessment is made as to whether or not the parties could reside in their country of origin.

36. In the light of the foregoing I am satisfied that the decision on Article 41, failed to recognise the relationship or respect the institution of marriage and this aspect of the matter should be remitted to the respondent for further consideration. Clearly depending upon the outcome of such further consideration it may be necessary to revisit the interests of the infant in these proceedings.

37. Otherwise the relief claimed is refused.

38. As this judgment is being delivered electronically, with regards to the issue of costs, it is my provisional view that the applicants should be entitled to their costs, to be adjudicated in default of agreement. As the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words within 7 days of this judgment being delivered should they disagree with the order proposed. In default of such submissions being filed, the proposed order will be made.