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THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 89
Record Number: 78/2019

Costello J.
Ní Raifeartaigh J.
Collins J.

BETWEEN

F.B.

APPLICANT/RESPONDENT

AND

THE MINISTER FOR JUSTICE AND EQUALITY.

RESPONDENT/APPELLANT

JUDGMENT of Mr Justice Maurice Collins delivered on the 7th day of April, 2020.

PRELIMINARY

The Appeal

1. F.B., the applicant in these proceedings ("*the Applicant*"), has made a number of unsuccessful applications for E.S. and E.L. to be permitted to enter and reside in the State pursuant to section 18(4) of the Refugee Act, 1996 ("*the 1996 Act*") on the basis that they were her granddaughters and were dependent on her and were therefore "*dependent member[s] of [her] family*" for the purposes of section 18(4). These are the second judicial review proceedings brought by the Applicant challenging the refusal of such applications.

2. The Applicant succeeded in the High Court: [2018] IEHC 716. This appeal is brought by the Minister for Justice and Equality ("*the Minister*") against that part of the Judgment and Order of the High Court (Keane J.), made on 13 December 2018 as quashed the decision of the Minister to refuse to permit E.S. to enter and reside in the State. . The Minister also seeks a consequential variation of the order for costs made by the High Court.

3. The High Court also quashed the decision of the Minister to refuse entry to E.L. but that aspect of the High Court's decision is not the subject of appeal, and at the hearing of this appeal the Court was informed by Counsel for the Minister that E.L. has since been given leave to enter and reside in the State pursuant to section 18(4) of the 1996 Act.

4. By Order dated 5 April 2019, this Court stayed the High Court Order insofar as it related to E.S. and also stayed the execution of 50% of the taxed costs of the High Court.

5. For the reasons set out in this judgment, I would allow the appeal, set aside the order made by the High Court in relation to E.S. and dismiss the application for judicial review relating to her.

Applicable Legal Framework

6. Prior to its repeal, section 18 of the 1996 Act provided for refugees to apply to the Minister for permission to be granted to a member of his or her family to enter and reside in the State. Such applications are commonly known as family reunification (FRU) applications.

7. Section 18 draws an important distinction – one that is not at all obvious without recourse to the definitions in the section – between the position of a "*member of the family*" of the refugee on the one hand and a "*dependent member of the family*" of such refugee on the other. "*Member of the family*" (as defined) encompasses the spouse of the refugee (provided the marriage is subsisting), the parents of the refugee (if the refugee is under the age of 18 and is not married) and a child of the refugee (if the child is under 18 and unmarried). The Minister is statutorily required ("*.. shall grant permission…*") to grant permission to enter and reside to persons established to be a member of the family in the sense just indicated, subject only to considerations of national security or *ordre public*: section 18(3)(a) and 18(5).

8. "*Dependent member of the family*" is defined in section 18(4)(b) of the 1996 Act as meaning:

> "*in relation to a refugee, ... any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such an extent that it is not reasonable for him or her to maintain himself or herself fully*."

9. In contrast to the position of a "*member of the family*", the entry of a "*dependent member of the family*" into the State is subject to the Minister's discretion ("*The Minister may, at his or her discretion…*"): section 18(4)(a). However, as explained by Clarke J. (as then he was) in *A.M.S. (Somalia, Family Reunification) v. Minister for Justice & Equality* [2014] IESC 65, that discretion, though wide, is not absolute and in exercising it the Minister must have

regard to the fact that the section as a whole is intended to confer a benefit on a refugee, and through the refugee on dependent family members, in the form of an enhanced possibility of such persons being permitted into the State.[1] It followed that those to whom the discretionary family reunification provisions applied must be regarded as being in a better position than those to whom the provisions did not apply.[2]

10. If permitted to enter by the Minister, a dependent family member is entitled to the rights and privileges set out in section 3 of the 1996 Act (including the right to reside in the State, to travel to and from the State, to enter employment and the right to receive the same medical care and social welfare benefits as those to which Irish citizens are entitled) which again distinguishes their position from that which applies to other categories of discretionary entrant to the State. Members of the family admitted pursuant to section 18 have the same section 3 rights and privileges.

11. It was common case before this Court that "*the discretion exercisable under s.18(4) only arose when the two pre-conditions set out in the subsection were met, namely that the required relationship was established and that the refugee relations were dependent in that they relied for subsistence or means of support upon the refugee. If the two conditions are satisfied, the Minister may then exercise a discretion under s.18(4).*"[3] In other words,

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[1] Para 6.4

[2] *Ibid.*

[3] *F.B. v. Minister for Justice & Equality* [2014] IEHC 427 (McDermott J.), at para 33, citing the judgment of the High Court (Cooke J.) in *Hassan Sheik Ali v. Minister for Justice, Equality and Law Reform* [2011] IEHC 115. *F.B. v. Minister for Justice & Equality* involved the same Applicant as in these proceedings and further reference is made to the judgment of McDermott J. below.

establishing as a matter of fact one of the specified relationships and the required dependency are statutory pre-conditions to the exercise of the Minister's discretion under section 18(4).

12. The 1996 Act was repealed by the International Protection Act 2015 but it is accepted by the parties that the application the subject of these proceedings and this appeal continues to be governed by section 18 of the 1996 Act. In passing, I note that the 2015 Act does not appear to contain any equivalent to section 18(4), i.e., it does not appear to provide for the discretionary entry into the State of a refugee's dependent family members, as that term is defined in section 18. Accordingly, it does not appear to be correct that the sole difference between section 18 and the equivalent provision in the 2005 Act (which is section 56) is the absence from the latter of any reference to wards, as was suggested in argument.

13. The Court was also informed of a Council Directive on the right to family reunification (Council Directive 2003/86/EC of 22 September 2003). However, Ireland is not bound by that Directive nor subject to its application.[4] Accordingly, it does not appear to be necessary to say anything further about the Directive, save to observe that the Directive does not o include grandchildren or wards amongst the family members that Member States either must or may permit to enter and reside in their territories: Article 4.

The Applicant's Section 18(4) Applications

14. The Applicant arrived in the State from Nigeria in November 2005 and applied for refugee status. Her application was unsuccessful at first instance but was successful on appeal to the

[4] Recital (17).

Refugee Appeals Tribunal, with the relevant declaration issuing in September 2008. The Applicant was subsequently naturalised as an Irish citizen in December 2012. She came to Ireland with a significant pre-existing health issue which has required extensive medical treatment over a prolonged period. She is now 76 years of age and remains in poor health. Since coming to Ireland, she has lived on her own (in any event until recently) and her sole source of income is the State old-age pension and rent allowance.

15. In February 2011, the Applicant made an application pursuant to section 18(4) for permission for her two granddaughters, E.L. and E.S., to come to Ireland and reside with her. A number of features of that application caused concern to the Minister. In the first place, the Applicant had previously mentioned having only one granddaughter, E.L.; secondly, the application disclosed that the Applicant's daughter (the mother of E.L. and E.S.) had died in December 2005, a fact that (according to the Minister) had not been disclosed previously and which was inconsistent with the accounts previously given by the Applicant.[5]

16. In any event, following investigation of the application by the Office of the Refugee Applications Commissioner (ORAC) and the submission of its report to the Minister (as provided for in section 18), the Minister decided to refuse the application in January 2012. The letter communicating that decision set out no reasons for the refusal but it enclosed a submission prepared by the FRU unit in the Immigration Division of the Irish Naturalisation and Immigration Services (part of the Department of Justice and Law Reform) which

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[5] See para 15 and following of the Affidavit of Declan Crowe sworn on 19 January 2018.

analysed the application and recommended refusal. As regards the question of whether E.L. and E.S. were granddaughters of the Applicant, the submission expressed the view that the evidence provided was not sufficient to verify that relationship and that DNA testing would be required but, even on the assumption that E.L. and E.S. were members of the Applicant's family as asserted, the author considered that the required dependency had not been established.[6] The Minister's decision to refuse this application was not challenged.

17. A second application was then made in August 2012. That application was again investigated by ORAC and it raised queries, including queries regarding the death of the Applicant's daughter and the status of the father of E.L. and E.S. (the Applicant had explained that E.L. and E.S. had the same father i.e. that they were full sisters) in circumstances where (it was suggested) apparently conflicting accounts had been given as to whether he was alive or dead. The Applicant, through her solicitors, responded to those queries and her responses prompted further queries to which further responses were provided. Ultimately, ORAC submitted a report to the Minister in February 2013 and a copy of that report was also provided to the Applicant. The Applicant's solicitor made detailed submissions on the report (also in February 2013) in the course of which he emphasised the Applicant's willingness to undergo DNA testing to establish the level of her relationship with E.L. and E.S.

18. In April 2013, the Minister wrote to the Applicant refusing the application. Again, that letter did not set out the Minister's reasons but enclosed the submission that had been made to the Minister. Again, that submission indicated that DNA evidence would be required to prove

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[6] Submission of 14 December 2011.

that E.L. and E.S. were members of the Applicant's family but – as had been the approach taken to the previous application – proceeded to consider the issue of dependency on the assumption that family membership had been established "*without prejudice to the requirement that this be verified by DNA evidence if the Minister considers that this may be appropriate*." The author of the submission concluded that the Applicant had failed to establish that either E.L. or E.S. was dependent on her and recommended refusal of the application on that basis.[7] In considering the issue of dependency, the submission focussed entirely on financial dependency.

19. This second refusal was challenged by way of judicial review. The proceedings were ultimately heard by McDermott J. in the High Court and he gave a detailed judgment on 5 September 2014: [2014] IEHC 427. For the reasons set out in that judgment, McDermott J. concluded that the refusal should be quashed. In brief, the Court considered a variety of materials addressing the question of what constituted "*dependency*" in this context, including the earlier decision of the High Court (Clark J.) in *Ducale v. Minister for Justice & Equality* [2013] IEHC 25, the *UNHCR Resettlement Handbook* (2011), the decision of the High Court (Clark J.) in *A.A.M. (Somalia) v. Minister for Justice & Equality* [2013] IEHC 68 as well as the decision of the High Court (MacEochaidh J.) in *A.M.S. v. Minister for Justice & Equality* [2014] IEHC 57 ("*A.M.S.*"), and concluded:

> *"41. The court is not satisfied that the respondent in this case applied the appropriate test in respect of "dependency" to the relationship between the applicant and her*

[7] Submission dated 4 April 2013.

> *granddaughters, either in respect of the issue of financial dependency or the wider dependency based on their relationship with her since infancy."*

20. The Court also concluded that the Minister had erred in law in failing to consider the rights of the applicant and her granddaughters as a family under Article 8 of the European Convention on Human Rights (ECHR), referring in that context to the decision of MacEochaidh J. in *AMS v Minister for Justice, Equality and Law Reform* [2014] IEHC 57, as well as the decision of the High Court (Hogan J) in *R.X. v. Minister for Justice & Equality* [2010] IEHC 446: see paras 42 & 43.

21. In her submissions, Ms Moorhead SC for the Minister emphasised that the only issue before McDermott J. was that of dependency. As McDermott J. noted at para 26 of his judgment, the decision the subject of the proceedings had been made on the basis that the relationship of grandmother and granddaughter had been established "*subject to the caveat that DNA evidence would be required to prove the relationship at a later stage."* The issue of whether E.L. and/or E.S. were in fact the granddaughters of the Applicant was not an issue before McDermott J.

22. The application was then remitted back to the Minister for reconsideration and, once again, was referred to ORAC for investigation. In the course of that investigation – though it is not entirely clear from the papers what were the precise circumstances in which the testing occurred – the Applicant, E.L. and E.S. submitted DNA samples for testing by Cellmark[8]

[8] Cellmark is the business name of a UK company, Orchid Cellmark Limited.

(the Applicant attending at a clinic in Ireland for that purpose and E.L. and E.S. attending in Nigeria). In a report dated 26 April 2016 (hereafter "*the Cellmark Report*") Cellmark reported that the DNA evidence supported the claimed relationship between the Applicant and E.L., indicating that the most likely relationship between them was Aunt and Niece or Grandparent and Grandchild (the report had earlier noted that aunt/uncle and grandparent DNA analysis has certain limitations). As regards E.S., the Cellmark Report stated that the evidence did not support the claimed relationship between the Applicant and her, going on to state that as between the Applicant and E.S. the result of the testing was "*No Relationship Determined*".

23. This was followed by another Ministerial letter of refusal,[9] referring to the Cellmark Report and stating that, as between the Applicant and E.L., the DNA evidence *"does not conclusively support the claimed relationship"* and, as between the Applicant and E.S., citing the "*no relationship determined*" language used in the report. The letter went on to say that as "*the claimed relationships have not been proven conclusively to the satisfaction of the Minister, the Minister has decided, in exercising her discretion, not to grant the application",* a statement that appears to reveal a significant degree of confusion on the part of the Minister as to the correct operation of section 18(4). However, following correspondence from the Applicant's solicitor[10] – in which he pointed to other evidence said to verify the claimed relationship between the Applicant and both E.L. and E.S., questioned the legality of the DNA testing but also placed reliance on the findings regarding E.L. – it

[9] Letter of 3 May 2016.

[10] Letter of 27 May 2016.

was suggested by the Minister that further testing would be undertaken of the existing DNA samples to establish the relationship between E.L. and ES.[11] It appears that consent to such testing was subsequently provided.

24. The outcome of that testing was first disclosed to the Applicant and her solicitor in September 2017 when, under cover of letters of 5 September 2017 indicating that the Minister had again refused the application, a document entitled *FRU Consideration* (also dated 5 September 2017) was furnished which indicated that the result of the testing showed "*weak support for a half sibling relationship between [E.L.] and [E.S.]*" and that the testing went on to say that the *"most likely relationship is that or (sic) half sibling or more distantly related*". No Cellmark report relating to this further testing appears to have been provided to the Applicant or her solicitor and no such report is exhibited in these proceedings.

25. In any event, the FRU Consideration indicated that the Minister now accepted that E.L. was indeed the granddaughter of the Applicant and also that E.L. was indeed dependent on her. The same Cellmark Report that had been invoked as a basis for refusing the application in respect of E.L. was now accepted as establishing EL's relationship to the Applicant. However (so the document went on), the Minister did not consider it in the best interests of E.L. to permit her to come to Ireland and to be reunited with the Applicant. As regards E.S. the document referred to the result of the initial DNA testing and then concluded as follows:

> *"The applicant has failed to establish the relationship as alleged between her and [E.S.] pursuant to Section 18(4)(b) of the Refugee Act 1996 (as amended) and*

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[11] Letter of 13 July 2016.

> *therefore the application in respect of her is* ***not granted****."* (Emphasis in the original).

26. Against the background I have described, it may not have come as a surprise to the Minister that this decision was challenged by the Applicant. Leave to seek judicial review was granted by the High Court (Humphreys J.) on 9 October 2017 on the grounds set out in the Statement of Grounds. Given that one of the grounds of the Minister's appeal to this Court is that Keane J. reached the conclusion he did in relation to E.S. on a basis that was not pleaded, and was not therefore within the scope of the leave granted by Humphreys J., it is necessary to look at the Applicant's Statement of Grounds with some care.

The Statement of Grounds and Affidavits

27. The Statement seeks separate orders of *certiorari* in relation to the decision of 5 September 2017 as it affected E.L. and ES. I have already explained that this appeal is not concerned with E.L., so the grounds that relate only to her need not detain us. The Statement of Grounds sets out two grounds said to relate to <u>both</u> E.L. and E.S., in the following terms:

> ***"1. The Respondent breaches Fair Procedures and Due Process by failing and omitting to answer submissions made by the Applicant.***
>
> *Relevant Facts*
>
> *The Applicants correspondence raised a number of issues, including the legality and*

quality of the DNA testing undertaken and the consideration given to her age, ill-health, and isolation in the State. The Respondent has not addressed these submissions.

2. The decision to refuse the Applicant family re-unification with [EL] and [ES] fails and omits to consider the application of Bunreacht na Éireann 1937 and of the [ECHR] to the circumstances of the case.

Relevant Facts

In previously quashing the Respondent's decision to refuse the Applicant family reunification, this Honourable Court, in proceedings entitled [FB] v Minister for Justice & Equality [2014] IEHC found that there was an obligation to consider the application of Article 41 of Bunreacht Na hEireann 1937 and of article 8 of the [ECHR]. No such consideration occurs in the decision dated the 5th of September 2017."

28. That is the full extent of the pleading in the Statement of Grounds. Notably, the Statement of Grounds contains no ground specifically directed to the position of E.S. even though, on any view, she appeared to be in a different position to E.L. in light of the Cellmark Report.

29. While there is an affidavit sworn by the Applicant, that contains nothing other than a formulaic verification of the Statement of Grounds. The principal affidavit is that sworn on her behalf by her solicitor, Mr Oyiki. That affidavit briefly refers to the FRU applications made by the Applicant, the earlier JR proceedings brought by her and refers to and exhibits

correspondence between the deponent and the Department. It refers to E.L. and E.S. as "*granddaughters*" of the Applicant "*whose mother is deceased and whose father's whereabout is unknown*" but does not really address the specific grounds of challenge to the Minister's decision or otherwise address the relationship between E.S. and the Applicant.

30. The Minister opposed the application in its entirety and sought to stand over his decision of 5 September 2017 in respect of both E.L. and ES. In addition, the Minister pleaded that the Applicant was debarred from relief on the ground of lack of candour: para 2 of the Minister's Statement of Opposition.

THE HIGH COURT DECISION

31. The Judge gave a detailed and considered judgment. As regards E.L., he considered that the decision to refuse her permission to entry on the basis stated in the FRU Consideration (that it was not in the best interests of E.L. to permit her to come to Ireland and to be reunited with the Applicant) was vitiated by a fundamental error of law in the manner and basis upon which the decision purported to identify the best interests of E.L. (para 52) and was also bad in law for failure to give reasons and for *O' Keefe* unreasonableness (para 53). The fact that E.L. might be expected to provide care and companionship for the Applicant did not lead to the conclusion that it would not be in her best interests to be permitted to enter and reside in the State. Insofar the decision might give rise to an inference that the Minister considered that the level of care and companionship expected from E.L. might be such as to be excessive, and hence exploitative, there was, in the Judge's view, no basis for any such inference. As already noted, the Minister has not appealed this aspect of the High Court's judgment.

32. As regards E.S., the Judge referred to discussion in G. Shannon, *Child Law* (Thomson, 2nd ed, 2010) ("*Shannon*") concerning DNA testing (para 54), referred also to a Separate Child in Europe Programme (SCEP) Position Paper on the use of bio-metric data which had been referenced by *Shannon* (para 55) and then noted that section 18(4) of the 1996 Act extended the definition of "*dependent member of the family*" beyond a family member, such as a grandchild, to include a ward of the refugee (para 56). Having referred to a passage from the judgment of Clark J. in *Ducale* (para 57), the Judge set out his conclusions as follows:

> *"58. In the case of E.S., the limited evidence before the Court of the results of the DNA tests concerning her does not seem to me to justify the summary refusal of permission for her to enter and reside in the State as a dependent family member of the applicant, particularly in light of the rationale of the objective of family reunification that underlies the enactment of s. 18 of the Refugee Act, which is to help create socio-cultural stability by facilitating the integration of third country nationals in the State, thereby also promoting economic and social cohesion.*
>
> *59. It will be remembered that, concerning the applicant and E.S., the Cellmark report brusquely states the result of the relevant DNA test as 'no relationship determined', without providing any accompanying statistical analysis and without explaining the import of that phrase, beyond the summary that the DNA evidence does not support the claimed relationship. It will also be remembered that the report on the further DNA testing of E.L. and E.S. carried out at some unspecified time between July 2016 and September 2017 showed weak support for a half-sibling relationship, before concluding that the most likely relationship between them was*

that of half siblings or persons more distantly related.

60. In brief summary then, the scientific evidence before the Minister is that the most likely relationship between the applicant and E.L. is that of grandmother and grandchild and that the most likely relationship between E.L. and E.S. is that of half-siblings.

61. As the SCEP position paper points out, families are not strictly biological constructs and there is a danger in applying a narrow definition or concept of the family unit of failing to appreciate the cultural importance within some communities of the extended family or of failing to allow for difficult personal circumstances such as the consequences of rape, infidelity or intra-familial deceit. As Clark J has pointed out in Ducale v Minister for Justice, already cited, s. 18(4)(b) of the Refugee Act addresses this problem by extending the definition of dependent family member to include a dependent ward.

62. For that reason, I cannot accept the Minister's argument that the DNA test results, whether alone or in conjunction with the discrepancies between the various accounts of her family circumstances provided by the applicant, are sufficient to establish a lack of candour on her part that would disentitle her to any relief in these proceedings.

63. In adopting a narrow view of the application for permission for [ES][12] to enter and reside in the State, i.e. that it must be considered solely by reference to the

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[12] I have substituted E.S. for E.L. here as the reference to E.L. appears clearly to be a typographical error.

> *specific family relationship asserted, that of grandparent and dependent grandchild, instead of by reference to the broad terms of s. 18(4)(b), the Minister was ignoring the refugee family reunification policy underlying the relevant provision and, thus, fell into error."*

33. It appears to me that this part of the judgment needs to be read together with the Judge's earlier discussion of Constitutional family rights and the right to respect for family life under the ECHR: para 35 and following. In particular, at paras 40-42 the Judge emphasises the importance of "*de facto family ties*" and, at para 41, expresses the view that *"it was incumbent on the Minister to consider the concrete reality of the relationship between the persons concerned and the extent to which it was one of "de facto family ties", protected by the right to family life under Article 8 of the Convention",* going on to note that there was no evidence in the decision that the Minister ever embarked on such a consideration. Even if the Minister had done so, it was incumbent on him to set out his reasoning in the decision: para 42.

THE APPEAL

34. The Minister's Notice of Appeal sets out a number of grounds of appeal, including that the Judge had erred in granting relief on a basis not pleaded by the Applicant; that he had inappropriately relied on information (the extract from *Shannon* and the SCEP Position Paper) which had not been the subject of any submissions; that he had erred in his treatment of the DNA evidence and that he had erred in failing to take account of the fact that the Applicant had at all times claimed that E.S. was her granddaughter *"and never claimed that there was any other relationship between them, whether as guardian and ward or otherwise."* The Notice of Appeal also asserts that the High Court erred in holding or suggesting that the Minister ought to have "*construed*" E.S. as a ward of the Applicant for the purposes of determining the application under section 18(4).

35. The Respondent's Notice takes issue with all of these contentions, asserting that the High Court was entitled to reach the conclusions it did in relation to the limitations of the DNA evidence and denying that the High Court erred in finding that the Minister had discretion to have regard to the evidence of the Applicant's role in the lives of E.L. and E.S. and that, as a result, those minors might properly be considered as her wards, notwithstanding that the Applicant had not expressly claimed to be a guardian of them or that they were her wards. In addition, the Respondent's Notice relies on the fact that the High Court's decision in respect of E.L. was not the subject of appeal to contend that the High Court order in respect of E.S. should be affirmed on the basis that the Minister had failed to have regard to "*constitutional family rights and to the right to respect for family life*" under the ECHR and also to contend that it is irrational for the Minister to appeal the decision in respect of E.S.

given that the unappealed order in respect of E.L. was *"to a considerable extent, based on common evidence and reasoning"*.

36. In her submissions to the Court, Ms Moorhead emphasised that the application in respect of E.S. had always been made on the basis that she was the biological granddaughter of the Applicant and a full sibling of E.L. and that the Minister had never been asked to consider the application on any other basis, such as that E.S., while not a biological relative of the Applicant, was nonetheless her "*ward*" in the sense in which that term was used in section 18(4) of the 1996 Act. That continued to be the position even after the DNA test results became available which (according to the Minister) clearly established that E.S. was not the granddaughter of the Applicant. Even at that stage, the Minister was not invited to consider the application in respect of E.S. in the manner or on the basis subsequently suggested by the High Court Judge. At no stage was the Minister asked to permit the entry of E.S. on the basis that the Applicant and E.S. constituted a "*de facto family*". At no stage (even before this Court) had the Applicant offered any explanation as to how successive applications had been made by her in respect of E.S. on the basis that she was her granddaughter when the DNA evidence contradicted that. Counsel also referred the Court to another decision of Keane J. in the High Court, *G.J. v. Minister for Justice* [2019] IEHC 98 which, it was submitted, illustrated the approach that ought to have been adopted in these proceedings.

37. While the Minister did not have any real difficulty in principle with the statements from *Shannon* and the SCEP Position Paper that were recited by the Judge, Counsel submitted that they simply had no relevance or application here, given the basis on which the application had been made to the Minister and the grounds on which judicial review of the

Minister's refusal in respect of E.S. was sought. Furthermore, the basis for the Judge's decision in respect of E.S. had not been argued before him by the Applicant.

38. Counsel for the Applicant, Ms Leader SC, submitted that the Judge was entitled to conclude that, given the evidence that had been furnished to the Minister as to the relationship between the Applicant and E.S., and notwithstanding that the DNA evidence appeared to indicate that E.S. was not in fact the granddaughter of the Applicant, Article 41 of the Constitution and/or Article 8 of the ECHR obliged the Minister to consider whether the relationship was such that E.S. could be regarded as the Applicant's ward. She submitted that the case that the Minister had such an obligation was one within the scope of the grounds set out in the Statement of Grounds, particularly ground B.2 (though Counsel conceded that those grounds were in very general terms and effectively permitted the Applicant to argue "*anything*") and was one made to the High Court, with Counsel bringing the Court's attention to certain paragraphs in the Applicant's written submissions to the High Court which I shall refer later in this judgment.

39. Counsel for the Applicant did not dispute that, in light of the DNA evidence, E.S. was not the (biological) granddaughter of the Applicant. She accepted that there was no necessary inconsistency between the position disclosed in the Cellmark Report and the later results indicating a relationship between E.S. and E.L. She submitted that the DNA evidence would lead one to the conclusion that E.S. and E.L. shared a father and not a mother. She accepted that successive applications had been made to the Minister on the basis that E.S. was in fact the Applicant's granddaughter. Counsel was not in a position (and this is not intended as any criticism of her) to offer any explanation as to how these applications had been made on the

basis that they were or what was the actual connection between the Applicant and E.S.

DISCUSSION

40. There was little or no difference between the parties as to effect of section 18 of the 1996 Act. The points of divergence and dispute arise from the particular facts.

41. While section 18(4) entry is ultimately discretionary, for that discretion to arise two statutory pre-conditions must first be established by the applicant, namely:

- That the person whose entry is sought is a *"member of the family*" of the applicant within the meaning of section 18(4)b); and

- That person is "*dependent"* on the applicant as that term has been explained in the case-law.

42. Here, we are concerned with the first of these two conditions. There is, as I understand the submissions of the parties, no dispute that, if E.S. is not *"a member of the family*" of the Applicant within the meaning of section 18(4)(b) of the 1996 Act, the application for her to be permitted to enter and reside in the State pursuant to section 18 must fail as a matter of law. The Minister has neither a discretion to waive that requirement nor any competence to expand the category of persons who may be granted permission beyond those specified by the Oireachtas and no argument to the contrary was advanced to this Court.

43. Whereas Keane J. referred in his judgment to "*the broad terms of section 18(4)(b)",* it

appears to me that that provision is very specific in its terms and, at least on its face, limited in its scope. Six specific family relationships are identified which - subject to a showing of dependency or disability – will constitute the relevant relation of the refugee as *"a dependent member of the family*". As for the reference in section 18(4)(b) to a "*ward or guardian*" of the refugee, it does not appear to me to be correct to read this as if it were a broad residual category. In context, it appears to me that "*ward or guardian*" must be taken as referring to someone who, though not a child or parent of the refugee, is or was effectively in some equivalent relationship with the refugee. Such a relationship is not, in my opinion, established merely by demonstrating dependency – section 18(4)(b) requires the requisite family relationship *and* dependency and the first requirement is not satisfied simply by establishing the second. That is particularly so given the broad way in which "*dependency*" has been interpreted in the caselaw.

44. Whether and to what extent section 18(4)(b) properly extends beyond *biological* relationships (other than by way of encompassing wards and guardians) are not issues arising on this appeal. No doubt relationships based on formal adoption will come within the sub-section and, even in the absence of formality, may give rise to a guardian/ward relationship, as was found to be the case in *Ducale.* The form of questionnaire used by the Minister specifically contemplates that nieces/nephews/siblings/step-children may be wards and it can readily be understood how that might be so. In any event, it was not argued here that E.S. could or should be regarded as the Applicant's granddaughter even in the absence of a biological relationship between them. Equally, although Article 41 of the Constitution and Article 8 of the ECHR were invoked in a general way by the Applicant, it was not contended that these permitted or required an expansive interpretation of section 18(4)(b) so as to

encompass additional categories of family relationship not within its express terms.

45. Here, as Counsel for the Minister emphasises, the applications in respect of E.S. were at all times made on the basis that E.S. was the Applicant's granddaughter, the daughter of her daughter, T.B., and her daughter's partner, D.G. (as E.L. was also). E.L. (but not E.S.) had been identified by the Applicant as her dependant in her application for refugee status in 2006, an omission subsequently explained by the Applicant by reference to the fact that she was talking about the granddaughter living with her at the time she left Nigeria (E.L.) whereas at that time E.S. was living with her (E.S.'s) father. In any event, the first reference to E.S. in the papers before the Court appears to be a letter of 22 February 2011 from the Applicant to the FRU section in which E.L. and E.S. are identified as the daughters of T.B. and her daughter's partner, D.G. In the affidavit sworn in these proceedings by the Applicant's solicitor, Mr Oyiki, - sworn on 29 September 2017, some 6½ years later – it is once again stated that the E.L. and E.S. were the granddaughters of the Applicant, whose mother was deceased and whose father's whereabout were unknown. In the intervening period, the Applicant had completed a significant number of formal application documents in which she identified E.S. as her granddaughter, the daughter of her deceased daughter and D.G. and had also submitted a birth certificate for E.S. which recorded T.B and D.G as her parents in support of the renewed application to the Minister made in August/September 2012.

46. As Counsel for the Minister also emphasises, even after the Cellmark Report was made available to the Applicant, it was not suggested to the Minister that the relationship between the Applicant and E.S. was other than that of grandmother/granddaughter nor was the

Minister invited to consider the application in respect of E.S. on the basis that, while not a granddaughter of the Applicant, E.S. was her ward and/or that the Applicant and E.S. ought to be regarded as a *de facto* family.

47. That would, of course, have required the Applicant to offer an alternative narrative of her connection to E.S., as well as an explanation of how the Applicant had come to assert repeatedly that E.S. was the daughter of her daughter in circumstances where – so the Cellmark Report indicated – E.S. was not in fact a biological relation of the Applicant. No such narrative or explanation was offered to the Minister at any stage during the application process, or to the High Court or to this Court at any stage during these proceedings.

48. This is in circumstances where it seems reasonable to suppose that, whatever the scope for uncertainty/misunderstanding/mistake/deception as to the *paternity* of a child, there is less scope for such as regards the issue of *maternity*. There might well be an explanation of course but a striking feature of this case and of this appeal is that the Applicant has elected to remain silent in the face of the DNA evidence which indicates that E.S. is not (as the Applicant had repeatedly asserted) the daughter of her daughter, T. B. The Applicant was either aware of that fact (prior to receipt of the Cellmark Report in April 2016) or she was not but she has elected not to say which is the case.

49. In his judgment (at para 61) Keane J. refers to the dangers of adopting too narrow an approach to the concept of the family unit and thus failing to *"allow for difficult personal circumstances such as the consequences of rape, infidelity or intra-familial deceit*." No doubt, the Judge was speaking at the level of general principle and, on that basis, it is difficult

to disagree with his observations. But it is nonetheless important to emphasise that the Applicant did not put any such circumstances before the Minister at any stage; no suggestion of rape, infidelity or intra-familial deceit was ever made to the Minister here.

50. In any event, the relevant application that came before the Minister for determination (so far as this appeal is concerned) was one expressly made on the basis that E.S. was the granddaughter of the Applicant and it was on that basis that it was said that E.S. was a *"member of the family*" of the Applicant. While aspects of the DNA evidence are the subject of criticism in the High Court judgment, I do not understand the Judge to have found that the Minister was not entitled to conclude that that evidence meant that E.S. was not the Applicant's (biological) granddaughter. Rather, the burden of the Judge's analysis appears to be that in refusing the application on that basis, the Minister took an unduly narrow approach and ought instead to have had regard to what the Judge refers to as *"the broad terms of s.18(4)(b)"* and to the *"refugee family reunification policy underlying the relevant provision"*: at para 63.

51. If I have misunderstood the judgment, and if the Judge was indeed holding that the Minister was not entitled to conclude that that evidence meant that E.S. was not the Applicant's granddaughter, I respectfully disagree with that conclusion. It appears to me that the Minister was entitled, on the basis of the material before him, including all of the DNA material (including the later test results which indicated that the most likely relationship between E.L. and E.S. is that "*of half sibling or more distantly related")* to conclude that the Applicant had failed to establish the relationship asserted between her and E.S., i.e., the relationship of grandmother and granddaughter. There was no contrary DNA evidence nor was there any

expert evidence before the High Court or this Court that sought to cast doubt on the Cellmark Report. As I have noted, the Applicant did not at the hearing of this appeal seek to make the case that the Minister ought to have concluded that E.S. was the granddaughter of the Applicant or that his conclusion to the contrary was vitiated by any error. Therefore – subject to the Minister's objection that the issue is not properly within the scope of these proceedings at all and the further though related objection that it was not argued before the High Court – the real question appears to be whether, in the circumstances, the Minister was obliged to consider whether E.S. had some different relevant relationship to the Applicant and, in particular, whether it was proper to regard her as a ward of the Applicant.

52. Before addressing that question, however, it is necessary to consider the Minister's objections at this stage. I have already set out in their entirety the grounds set out in the Statement of Grounds for the reliefs sought in relation to E.S. These were the grounds on which leave to seek judicial review was granted by the High Court and they fix the parameters within which the application for judicial review then proceeds. As was stated by the Supreme Court (per Denham J.) in *AP v Director of Public Prosecutions* [2011] IESC 2, [2011] 1 I.R. 729:

> *"[17] When an applicant seeks leave to apply for judicial review he does so on specific grounds stated in the statement required. On the ex parte application for leave the High Court Judge may grant leave on all, or some, of the grounds sought or may refuse to grant leave. The order of the High Court determines the parameters of the grounds upon which the application proceeds. The process requires the applicant to set out precisely the grounds upon which the application is to be*

> *advanced. On any such application the High Court has jurisdiction to allow an amendment of the statement of grounds, if it thinks fit. Once an application for leave to appeal has been granted the basis for the review by the court is established.*
>
> ..
>
> *[19] …. A court, including this court, is limited in a judicial review to the grounds ordered for the review on the initial application, unless the grounds have been amended. In this case the grounds for review are limited, essentially that a fourth trial would be an abuse and unfair, and were not amended."*

53. It does not appear to me that, on any fair reading of the relevant grounds here, they would or could be understood as advancing a claim that, even if E.S. was not the granddaughter of the Applicant, the Minister was nevertheless obliged to consider whether E.S. was the Applicant's ward and/or a member of a *de facto* family with her and, on that different basis, ought to have concluded that she was a *"member of the family"* of the Applicant.

54. The first of the grounds clearly cannot be so understood, in my opinion. It complains of the Minister's alleged failure "*to answer submissions made by the Applicant*" and refers to a number of issues said to have been raised in that correspondence. However, no issue had been raised in any pre-action correspondence to the effect that the Minister could and/or should consider the application made in respect of E.S. on any basis other than she was the Applicant's granddaughter.

55. The second ground – advancing as it does a complaint that the Minister had failed to consider the application of Article 41 of the Constitution and Article 8 of the ECHR – may appear to

have greater promise from the Applicant's perspective and it was this ground that was relied on before this Court, it being said to be very wide and potentially capable of "*supporting anything*". However, as I already observed, this ground is advanced in respect of both E.S. and E.L., and in my view that presents a very significant obstacle to it being interpreted as it is now suggested it should be, as making a very specific claim in relation to E.S. that E.L. could not and did not make. A further problem from the Applicant's point of view is that this ground expressly links back to the decision of McDermott J. However, as I have already explained, that decision was given on the basis that both E.L. and E.S. were the granddaughters of the Applicant - subject to the caveat about the need for DNA testing - and was concerned only with the issue of dependency. Nothing in that decision could be read as indicating any view that Article 41 and/or Article 8 might require the Minister to do what it is now said he ought to have done, namely to consider the application made in relation to E.S. on a basis wholly different to the basis on which that application had been made to him.

56. It must also be recalled in this context that no such case had been articulated in correspondence prior to the application for leave nor was it advanced in the affidavits grounding the application. While Order 84 requires that the relevant grounds be specified in the Statement of Grounds, there may be some scope for having regard to connected material in the case of ambiguity or doubt. However, even that if that is so, it does not avail the Applicant here.

57. The courts have repeatedly stressed the need for applicants for relief in judicial proceedings to set *"out clearly and precisely each and every ground upon which relief is sought*": per Murray C.J. in *A.P. v. Director of Public Prosecutions* at para 5, as well as the Supreme

Court's decision in *McDonncha v. Minister for Education v Skills* [2018] IESC 50, at para 27 (per McMenamin J). Here, if the Applicant intended to make the case that the Minister ought to have considered ES's position on a basis different to that expressly advanced in the application made to the Minister, it was incumbent on her to plead that case clearly and specifically in her Statement of Grounds. In reality, there is not a hint of such a case in the Statement of Grounds, a fact due not to any inadvertent omission by the drafter but, rather, because in fact that case was not one that was being made by the Applicant. Furthermore, no application to amend the Statement of Grounds was made at any stage by the Applicant.

58. In these circumstances, I agree with the Minister that the ground on which the decision in relation to E.S. was quashed by the High Court was one which was outside the scope of the grounds and outside the parameters of the grant of leave and which, accordingly, ought not to have been considered by the High Court Judge.

59. The Minister also submits that, pleadings aside, the ground on which the Minister's decision in relation to E.S. was quashed in the High Court was not the subject of argument before that Court and complains that the material relied upon by the High Court – the extract from Shannon and the SCEP Paper – were not opened to him in the course of the hearing and were not the subject of submissions.

60. Counsel for the Applicant before this Court did not appear in the High Court. However, she pointed to a passage in the Applicant's written submissions to the High Court which, it was suggested, provided a basis for the argument that was ultimately accepted by the High Court. That part of the submissions was directed to the first of the two relevant grounds in the

Statement of Grounds (that relating to the Minister's alleged failure to respond to submissions made by the Applicant), not to the second ground which was relied on in argument before this Court as providing a basis for the Judge's decision. In any event, having referred to the decision of the Supreme Court in *DPP v. Wilson* [2017] IESC 54 (which concerned issues of reliability/methodology in relation to DNA evidence in the criminal law sphere), the submissions referred to the *"considerable evidence of the family relationship between the Applicant and the two sisters"* that had been provided to the Minister, and asserted that where the Minister would rely on the DNA tests to reject to the reunification application "*he was obliged to place the outcome of those tests in context and to consider their quality. There was, at a minimum, much prior evidence to confirm a close relationship between the Applicant and both girls and in addition the particularly vulnerable condition of the Applicant."* The submissions go to state that *"these matters also demanded that any decision include consideration of the application of rights, under the European Convention on Human Rights and of the Constitution of Ireland was also raised in the submissions but also received no response."*

61. I do not read these parts of the Applicant's High Court submissions as raising the issue on which the application was ultimately decided by Keane J. Rather, it seems to me that they are making a point also made in the earlier correspondence to the Minister, namely that the DNA evidence was unreliable and/or ought not to outweigh the other evidence of familial relationship that had previously been provided to the Minister, such as the passports and birth certificates that had been submitted by the Applicant.

62. That impression is confirmed by the DAR of the High Court hearing which I listened to

subsequent to the hearing of this appeal (no transcript of the High Court hearing being available). As regards E.S., complaint was made of the Minister's failure to respond to the submissions made to him; of the Minister's failure to explain the basis on which the DNA samples were tested; of the adequacy of the Cellmark Report in terms of what it said about the relationship between the Applicant and E.S. and of the weight given by the Minister to the DNA evidence in circumstances where (it was argued) there was substantial other evidence, procured at the request of the Minister, which (it was said) pointed to the conclusion that E.S. was indeed the granddaughter of the Applicant. It was not suggested by the Applicant at any stage during the hearing before the High Court that E.S. might not be the Applicant's granddaughter or that the Minister had erred in failing to consider the application in relation to E.S. on the basis that, though not a granddaughter of the Applicant, she was a ward of the Applicant or otherwise was a member of a *de facto* family with the Applicant. On the contrary, the essential thrust of the case made by the Applicant before the High Court was that E.S. was the granddaughter of the Applicant and that the DNA evidence did not provide a reliable basis for the Minister's conclusion to the contrary. As already noted, the Applicant did not seek to make that case before this Court.

63. It follows, therefore, that I would also accept the Minister's submission that the ground on which the High Court held that the Minister's decision in respect of E.S. was not one properly before him, not simply because it was not a pleaded ground but also because no such ground was advanced by the Applicant at the hearing in the High Court. On this basis also, the decision of the High Court cannot stand.

64. However, I do not think it would be satisfactory simply to set aside the order of *certiorari*

made by High Court on this basis, without examining the substance of the High Court Judge's criticisms of the Minister's decision-making.

65. It is necessary in this context to refer in more detail to the decision of the High Court (Clark J.) in *Ducale*. The Applicants in *Ducale* were a married couple of Somali origin. Ms Ducale had been declared a refugee and subsequently her husband and two children were, on her application, granted permission to come to Ireland pursuant to 18(3) of the 1996 Act. She had also applied for permission to enter for two other children, a niece and nephew of hers who had been raised by her as her own children from an early age. She had explained the position regarding those children in her application for asylum and (Clark J. noted) her account had never varied. All four children had lived with the Applicant for many years before she was forced to flee Somalia and, at the time of the Applicant's first FRU application, were living with her husband in Ethiopia. As part of the application process, Ms Ducale explained that it had not been possible for her husband and her to adopt the children. However, the Minister declined to permit the niece and nephew to come to Ireland on the basis (*inter alia*) that they did not come within the meaning of "*dependant member of the family*" in section 18(4) of the 1996 Act. That decision was not challenged.

66. Shortly after her husband and two children arrived in the State, Ms Ducale applied again for permission for her niece and nephew to join her. Again, that application was refused, this time on the basis that financial dependency had not been established. Clark J. was highly critical of the manner in which the application had been processed. The decision was challenged on the basis that the Minister should have treated Ms Ducale's niece and nephew as her *children* and thus decided the application by reference to section 18(3). The court

accepted that the application had not been made on that basis and that, therefore, that issue did not properly arise. However, the court was persuaded that the Minister had failed to properly consider the issue of dependency and quashed the refusal on that basis. In the course of her discussion of that issue, Clark J. observed:

> *"45. There is no doubt however that on the issue of dependency, the case was certainly made that Luul and Adan were the wards of the refugee for the purposes of s. 18(4) in circumstances where legal adoption or fostering was simply not an available option. The case made was one of a close parent/child relationship deriving from guardianship and informal adoption since early infancy. It is known that the political realities of war and persecution in countries like Somalia do not allow for the formal appointment of a "ward" or declarations of guardianship. It is inconceivable that the relationship between a guardian and an unmarried, minor relative who is in his/her care and who is dependent upon him could in those circumstances be considered to fall outside of the Minister's discretion under s. 18(4). The term "ward" as used in the list of wider family members must surely be interpreted as sufficiently flexible to encompass such a relationship of dependency. It seems to the Court that the inclusion of the relationship of "ward" or "guardian" in s. 18(4) must to a great extent be recognition by the legislature of the breakdown of normal nuclear family relationships in time of conflict when children's very survival depends on the compassion and altruism of adults who are not their parents. Unfortunately, the strength of the family ties between the applicants, their biological children, and the niece and nephew who could have been considered "wards" was never investigated, considered or evaluated by the Minister, either for the purposes*

> *of deciding whether the niece and nephew were statutory family members or in the context of the assessment of dependency which was restricted to the narrow issue of financial dependency."* (my emphasis).

Part of this passage was, of course, cited by the High Court Judge in the concluding part of his judgment.

67. It is clear from the judgment in *Ducale* that Ms Ducale had at all times explained the full extent of her relationship with her nephew and niece and had *"unwaveringly represented them as her wards and she as their guardian/de facto adoptive or foster parent."* That was the undisputed evidence before the Minister which was relevant both to the issue of family relationship and dependency. The Minister did not (so Clark J. found) have proper regard to that evidence. That finding was not based on any holding that the Minister was obliged to consider the application on a basis different to the basis on which it had been made. On the contrary, the Applicants' contention that the Minister should have effectively decided the application on the basis of section 18(3), even though made on the basis of section 18(4), was not accepted by the Court.

68. I would also note that the relationship between the applicant and her nephew and niece in *Ducale* was materially different to the relationship between the Applicant and E.S. as disclosed by the evidence here. At no stage, it seems, did the Applicant have care and custody

of E.S.[13] Furthermore – again in contrast to the position in *Ducale* – it does not appear to have suggested by the Applicant that there were any legal or other obstacles to her seeking to become the legal guardian of E.S., if that was something considered to be appropriate.

69. In any event, *Ducale* provides no support for the contention that, on the facts here, the Minister was not entitled to refuse the application in relation to E.S. on the basis that the asserted family relationship had not been established and was obliged, on his own initiative, to consider whether some other relationship was disclosed such as might qualify E.S. as a "*member of the family*" of the Applicant. The decision of the High Court (Keane J.) in *G.J. v. Minister for Justice and Equality* [2019] IEHC 98 is also relevant. There the Court rejected an argument that the Minister was wrong to refuse an application under section 18(3) of the 1996 Act on the basis that it had not been established that the subject of the application was the son of the applicant and ought to have gone to consider whether the person concerned

[13] Though it should be observed that a number of different accounts have been given by the Applicant which are difficult to reconcile. In the asylum application completed in March 2006, the Applicant made no reference to E.S. at all and identified E.L. (and only E.L.) when asked to give details of "*any other dependants whatsoever".* In her section 11 interview she again referred only to one granddaughter who, she said, had been living with her for some unspecified time before she (the Applicant) left Nigeria. In the questionnaire completed by her in March 2011, the Applicant appears to state that both E.S. and E.L. had been living with her up to 2005 (when she left Nigeria). However, in a letter dated 29 August 2011 the Applicant explained her earlier failure to make any mention to E.S. by reference to the fact that, when the Applicant left Nigeria, E.L. was living with her but E.S. was living with her father. In the questionnaire completed by the Applicant in or around September 2012, the Applicant again stated that E.S. had lived with her father, until her mother (the Applicant's daughter) had died but added that E.S. "*occasionally paid visits with her mother*" to the Applicant's family farm. A very different account was then given by the Applicant's solicitor in a letter of 8 November 2012 in which he appears to suggest that E.S. was essentially living with the Applicant and was going to the local primary school in 2005 when the Applicant left Nigeria. The latter account appears to directly contradict the explanation offered by the Applicant for her failure to make any reference in E.S. in her initial asylum application. None of these accounts were given or verified on affidavit.

should be regarded as his ward (though that case had never been made).

70. It appears to me that there may well be situations, both in the specific area of immigration law and more generally, where a decision-maker may be under an obligation to look beyond the four corners of the application before them. An example might be where international protection is sought on the basis of one form of asserted persecution but where the position disclosed by the available evidence, properly characterised, goes to a different basis. The same evidential material may be open to different characterisations and where the material before a decision-maker satisfies statutory requirement (b) rather than (a), the fact that the application was made by reference to (a) may be of little or no import and would not warrant the refusal of the application.

71. This is not such a case, in my opinion. Here, as already explained, the Applicant at all times asserted that E.S. was her granddaughter. Even when it was evident that, on the basis of the Cellmark Report, the Minister considered that the relationship of grandmother and granddaughter was not established, the Applicant (who was legally represented) maintained that position. She did not ask the Minister at that stage to consider the application on a different basis or offer any alternative account of her relationship with E.S. In these circumstances, how was the Minister to consider the application on any other basis? The assertion that E.S. was the Applicant's granddaughter was the cornerstone of the FRU application so far as it related to her, not some minor or incidental element of it. In the absence of any such suggestion by the Applicant, I do not readily see how the Minister could properly have proceeded on the basis that the Applicant was somehow mistaken as to E.S.'s relationship to her. Even if he had, on what basis could he possibly have concluded that E.S.

was the ward of the Applicant? Quite apart from the fact that the narrative that had been offered by the Applicant did not suggest any relationship of sufficient closeness with E.S. as could sensibly be so characterised, I do not see how that narrative could have been regarded by the Minister as providing a reliable basis for decision at all.

72. In his judgment, the Judge laid stress on the policy of family reunification underlying section 18 of the 1996 Act and indicated that, in his view, the Minister had ignored that policy and had failed to consider the *"concrete reality of the relationship between the persons concerned and the extent to which it was one of 'de facto family ties' protected by the right to family life under Article 8 of the Convention."* There are, I think, several difficulties about that criticism. In the first place, "*the concrete reality*" that had been presented to the Minister as the basis for permitting E.S. to enter the State was that E.S. was the Applicant's granddaughter, the daughter of her daughter T.B., *not* that there were other *"de facto family ties"* between the Applicant and E.S. warranting protection under Article 8. With respect to the Judge, he never squarely addresses that fundamental fact.

73. Secondly, while there is no doubt that a policy of family reunification underlies section 18 of the 1996 Act, the invocation of that policy, and of Article 8, in this context rather begs the question. As already explained, the parties here were agreed that it was a statutory pre-condition for the granting of permission to enter to establish that the person whose entry was sought was "*a member of the family*" of the applicant within the meaning of section 18(4)(b). That is, in essence, a matter of fact. If the required relationship is established as a matter of fact, the policy favouring family re-unification and/or the Article 8 caselaw may well be very material to the assessment of dependency and/or the exercise of the Minister's discretion but

I do not think that such considerations (which are premised on the existence of a familial connection) may legitimately be invoked to dilute or bypass the need to establish the necessary familial connection in the first place.

74. Accordingly, while I do not think that it is either possible or desirable to set down any hard and fast rule of general application, it seems to me that, in the particular circumstances here, the Minister was not under any obligation to go beyond the identified basis of the application that had been made to him in relation to E.S.

75. Having regard to that conclusion, it is not necessary to consider whether any lack of candour on the part of the Applicant would justify the denial of relief to her.

76. Before concluding, I would observe that, by the time these proceedings came on for hearing before the High Court Judge, the Minister had refused the Applicant's application based on a conception of dependency that the High Court had held to be erroneous and, after the application had been remitted and the Cellmark Report had come to hand, the Minister's initial decision was again to refuse E.L.'s application on the basis that the DNA evidence – which Cellmark itself had said supported the claimed relationship between the Applicant and E.L. – did not do so "*conclusively*." After the Minister was persuaded to re-open that decision, and ultimately accepted that E.L. was indeed the granddaughter of the Applicant (on the basis of the same DNA evidence) an entirely new reason was advanced for refusing the application in respect of E.L., namely that it would not be in her best interests to enter and reside in the State. The Judge was, it is fair to say, sharply critical of that decision and it is notable that the Minister has not appealed that aspect of the High Court judgment and

therefore must be taken to accept the correctness of the Judge's conclusions. In these circumstances, it is unsurprising – and entirely appropriate - that the Judge approached the Minister's decision in relation to E.S. with a degree of scepticism and that he subjected it to close scrutiny. However, for the reasons set out in this judgment, I disagree with the approach taken by the Judge as to the extent of the Minister's obligations in the circumstances presented to him here and I would therefore allow the Minister's appeal, set aside the order of *certiorari* made by him and substitute for that order an order dismissing these judicial review proceedings insofar as they relate to the FRU application made in relation to E.S.

77. It will, of course, be open to E.S. to apply for permission to enter the State pursuant to the provisions of the Immigration Act 2004 and the fact that E.S. appears to be a half-sibling of E.L., who is now resident in the State, will no doubt be a consideration to which the Minister will have regard in the event that such an application is made.

As this judgment is being delivered electronically, Costello J. and Ní Raifeartaigh J. have authorised me to record their agreement with it.