THE COURT OF APPEAL

CIVIL

Record No.: 2022/28

Donnelly J. **Neutral Citation No: [2022] IECA 166**

Ní Raifeartaigh J.

Collins J.

H.A.

RESPONDENT

-AND-

THE MINISTER FOR JUSTICE

APPELLANT

JUDGMENT of Ms. Justice Donnelly delivered (*via* electronic delivery) on the 22nd day of July 2022

Introduction

1. The respondent to this appeal is a national of Somalia who has been granted refugee status by the appellant ("the Minister"). Her application for permission for her niece ("X") and nephew ("Y") to enter and reside in the State under the family reunification provisions of s. 56 of the International Protection Act, 2015 ("the 2015 Act") was refused by the Minister. The respondent's subsequent claim for judicial review of that decision resulted in the High Court (Ferriter J.) granting an order of *certiorari* quashing the Minister's decision to refuse her application and remitting the application to the Minister for reconsideration. It is against the judgment and order of Ferriter J. that the Minister appeals.

2. The right to family reunification of a sponsor (including a refugee) with her child is governed by the provisions of s. 56 of the 2015 Act. The Supreme Court, in *X v. Minister for Justice and Equality* [2020] IESC 30, delivered on the 9th June, 2020, held that "*a child of the sponsor*" can "*only mean a biological or adopted child*" (para. 107). In circumstances set out in more detail below, the respondent presented, in support of her application to the Minister, a Somali Court "*Declaration of Responsibility*"

in relation to the children, but her application was rejected without mentioning this Declaration. The first issue to be decided is whether the High Court was correct in holding that this was a matter which was not considered by the decision-maker. The remaining issues are somewhat intertwined; whether the Declaration was relevant and material to the matter before the decision-maker, and whether the High Court erred in granting *certiorari* where, the Minister alleges, it is futile having regard to the Declaration and the nature of the application made by the respondent.

Background facts

3. The respondent arrived in the State on the 6th April, 2018 as an asylum seeker. She applied for international protection and was subsequently declared a refugee by the Minister on the 9th July, 2019. On the 11th June, 2020, the respondent applied for permission to the Minister for Justice for her husband, her niece and her nephew to enter and reside in the State under s. 56 of the 2015 Act. She was a "*qualified person*" within the meaning of the section and as such she was entitled to make an application to the Minister for permission for certain specified members of her family to enter and reside in the State.

4. The respondent's niece and nephew, who are cousins, are orphans as their respective parents died during fighting in Somalia. The respondent had left Somalia on her own but before she left she was living with her husband, her mother, her niece and her nephew. On the 11th November, 2019, a Somali Court, having heard from two witnesses on oath and having heard that the respondent, who "*currently live (sic) in Ireland*", accepted responsibility for the two children, declared, after scrutiny, "*it's indispensable to transfer the children and (sic) taken care of having no other Parents to look after their career*".

5. On the 11th June, 2020, solicitors for the respondent applied, by a single letter, for family reunification pursuant to s. 56 in relation to the respondent's husband and the two children. The application in respect of the children expressly stated that they were "*non-biological*" and the

Declaration of Responsibility was one of a number of documents attached to the letter. The letter referred to the fact that children's parents were deceased and explained that the respondent "*has been granted responsibility for them as their closest surviving relative*." The letter referred to "*the recent judgment of the High Court (Mr Barrett J) which states that the term 'child' in s.56(9) is not defined, and that it can extend to non-biological children.*" The reference to the "*recent judgment*" of Barrett J. was a reference to his judgment in *X v. Minister for Justice and Equality* [2019] IEHC 284. In fact, two days before that letter was written, the Supreme Court had overturned the judgment of Barrett J. on appeal and had specifically rejected his holding that, given the "*wide diversity of family structures*", s. 56 family reunification applied to a wider cohort of children other than the biological/adopted child of the sponsor: [2020] IESC 30.

6. The application was supplemented with further documentation in July 2020. No reference was made to the Supreme Court decision in *X*. Receipt of the supplemental documents was acknowledged by letter of the 28th July, 2020. Three further letters were sent to the respondent on the 28th August, 2020. Receipt of the application in respect of the respondent's husband was acknowledged by the Minister, and that letter contained a list of documents received which included the Declaration of Responsibility. By separate letter, the Minister acknowledged receipt of a number of documents; these did not include the Declaration of Responsibility. The letter stated: "*Please find enclosed a decision letter to be forwarded to your client.*" The decision-maker was the same person who signed all three of these letters. In the decision letter, the decision-maker recited the three definitions of a member of the family for the purpose of family reunification pursuant to s. 56(9) of the 2015 Act: a "*spouse or civil partner*"; a "*child of the sponsor who is under the age of 18 and unmarried*" at the time of the application; and, where "*the sponsor was under 18 and unmarried*", their parents, and unmarried minor children. The letter then stated "*[a]s [X] and [Y] do not come within the definition of member of the family your application in respect of them cannot be accepted*."

7. The respondent's solicitors, by letter of the 9th October, 2020, sought a review of the decision as they believed that errors had been made. They pointed to their belief that the Declaration of Responsibility had been overlooked in respect of the children. The letter went on to say that the Declaration gave the respondent legal responsibility for the children and that they are therefore her children. The letter also stated "*[a]s you are no doubt aware, adoption procedures vary in different countries. In Islamic culture, 'adoption' is not a term that is generally used. However the effect is the same, and we submit that these children are 'members of the family' under s.56 of the [2015 Act].*"

8. Under the 2015 Act, there is no right of review; however, it seems that the Minister has been prepared on other occasions to enter into a review of a decision. On this occasion the Minister did not acknowledge or respond to the letter of the 11th October, 2002, nor did she respond to a further letter of the 12th November, 2020 asking for an update on the review application.

9. The respondent's application for family reunification with her husband was subsequently granted, but the Court was told by counsel that he cannot come to Ireland because this would involve leaving the children behind. Section 56(8) of the 2015 Act provides that an application for family reunification must be made within twelve months of the giving of a refugee declaration. Therefore, because more than a year has passed since the respondent was granted refugee status, she cannot make a new application in respect of the children.

The judicial review proceedings

10. It was against that factual backdrop that the respondent applied for judicial review of the decision refusing her family reunification. The two main grounds upon which *certiorari* of the refusal was sought were that the decision was bad in law (a) for failing to consider or have regard to relevant and material facts, namely the Declaration of Responsibility, and (b) for failing to provide reasons for the decision, in particular as to why the relevant relationship did not amount to adoption, having regard to the concept of adoption in the country of origin.

11. In opposing the application, the Minister relied upon an affidavit from Mr. Jeffrey Ward, a Higher Executive Officer within the Family Reunification Unit of the Department of Justice. Mr. Ward was not the decision-maker. Mr. Ward averred that, due to a clerical error, the Declaration of Responsibility was retained on the file in respect of the application concerning the respondent's husband rather than the application concerning the children. He said that, despite this clerical error, the decision-maker had sight of both files and all the documentation submitted by the respondent's solicitors in respect of the children and the respondent's husband when arriving at her decision. He said it was an error that the correspondence in relation to the review had not been acknowledged by the Family Reunification Unit. He said that because the documents were before the decision-maker and because there was no entitlement to review, no review was carried out and no review was required to be carried out.

The High Court judgment

12. Ferriter J. held that the Declaration of Responsibility was a core part of the grounds for family reunification advanced by the respondent and was therefore a material consideration to which regard should have been had. He held that the decision-maker had erred by not referencing or engaging with the Declaration of Responsibility. There was no evidence that it had been considered.

13. In rejecting the respondent's contention that the decision was inadequately reasoned, Ferriter J. accepted the Minister's point that the claimed ground "*fail[ed] to get out of the starting blocks in circumstances where there was no submission contained in the [respondent's original application] to the effect that the Declaration of Responsibility should be accepted as amounting to an adoption for the purposes of the Minister's consideration of the application.*" He held that, just as it was not open to the Minister to give an *ex post facto* justification, it was not open to the respondent to seek to challenge an alleged inadequacy of reasons in the original decision stemming from a submission which was not before the decision-maker at the time of the decision.

14. The High Court judge then addressed the Minister's submission that, in light of the decision in *X v. Minister for Justice and Equality* which held that the concept of child referred to a biological/adopted child, it would be futile for the High Court to grant an order of *certiorari*. The respondent submitted that the decision of the Supreme Court (*per* Dunne J.) in *X v. Minister for Justice and Equality* was not necessarily dispositive of the matter. She wished to make an argument that a refugee-sensitive approach to the concept of "adoption" should be taken. This, it was submitted, would be akin to the refugee-sensitive – and more expansive – approach taken to the concept of marriage by Cooke J. in *Hamza v. Minister for Justice* [2010] IEHC 427. Counsel submitted it would at least be open to argument that adoption could include the facts within the respondent's case *vis à vis* her niece and nephew.

15. Ferriter J. declined to determine whether the respondent's niece and nephew came within the "*restricted definition of 'child' articulated by the Supreme Court in X*" (see para. 44). While he said that the respondent may well face very difficult if not insurmountable problems in demonstrating that her niece and nephew are her children within the meaning of s. 56 of the 2015 Act, he held that she should be afforded an opportunity to tender such further evidence and submissions that she sees fit in support of her application under s. 56. He did not have before him the evidence or detailed submissions as a matter of Somali law or indeed of Irish law as to whether the situation came within the restrictive definition of child as articulated by the Supreme Court and that made him reluctant to pronounce a definitive view. He held that it was more appropriate that the Minister assess the application afresh in a process that complies fully with fair procedures.

<u>Issues on the appeal</u>

Was the Declaration of Responsibility taken into account by the Minister?

16. Prior to considering whether the Declaration of Responsibility was relevant to the issue under s. 56(9)(d) of the 2015 Act, the Court must adjudicate on whether the High Court judge was correct in

finding that there was no evidence before the court that the decision-maker had in fact considered the Declaration of Responsibility in arriving at her decision to refuse the family reunification application in respect of the two children. The Minister relied on the evidence of Mr. Ward who said in his capacity as head of the Family Reunification Unit that the document was before the decision-maker and that she had sent a letter acknowledging the document in the application concerning the husband on the same day that she made the decision in respect of the children. The respondent relied upon *MNN v. Minister for Justice and Equality* [2020] IECA 187 which, she submitted, determined it was impermissible for the Minister to rely upon second-hand evidence as to what the actual decision-maker may or may not have taken into account. Ferriter J. held that he did not have to resolve the question of whether the principle in *MNN v. Minister for Justice and Equality* applied to a situation such as the present one where the relevant material is said to be before the decision-maker in advance of the decision-maker making her decision. He found as a fact that there was no evidence put before the court from the decision-maker indicating whether she had in fact considered the Declaration of Responsibility in arriving at her decision.

17. The Minister submitted that it was entirely permissible for the civil servant, Mr. Ward, in charge of a decision-making unit, to make averments as to what was *before* a decision-maker in that unit and that "*[t]o the extent Ferriter J found otherwise, he erred in law.*" With due respect to that submission, I do not accept that it reflects what Ferriter J. found; he found that there was no evidence that the decision-maker had *considered* the file. On the facts of this case, Ferriter J. was entitled to find as he did so find: that there was no evidence that the decision-maker had considered the Declaration of Responsibility. The most important factor was that the decision did not refer to it at all. That was compounded by the fact that the letter accompanying that decision did not acknowledge that the Declaration had been received as part of the application. No amount of explanation from Mr. Ward as to what may have been before the decision-maker, or as to the files being split and the Declaration

being placed on the file of the husband's application could make up for the simple fact that there was no evidence that the Declaration had, as a matter of fact, been *considered* by the decision-maker.

18. The trial judge did not err in that regard.

Was the Declaration a relevant and material consideration?

19. The Minister submitted that the application as made by the respondent was based on the mistaken premise that non-biological children were members of the family for the purpose of s. 56 of the 2015 Act. At the oral hearing of this appeal, the Minister submitted that the purpose of the relief being sought was to require the Minister to make a decision on whether the children were the adopted children of the respondent; yet it had never been asserted in the application itself that the respondent's niece and nephew were adopted by her. Furthermore, the Minister pointed to the *dicta* of Cooke J. in *Hamza v. Minister for Justice and Equality*, in which, referring to the predecessor of s. 56, namely s. 18 of the Refugee Act, 1996, he said that the onus of establishing an entitlement lay with an applicant. In the present case, the High Court judge had stated that there was no reason to have addressed the adoption issue in giving reasons for rejecting the application because the application had not been made on that basis. Therefore, the Minister submitted, if the application had not been made on that basis, then it was entirely irrelevant to any issue that the Minister was obliged to address as the application acknowledged that the children were the non-biological children of the respondent.

20. The respondent submitted that Ferriter J. was demonstrably correct when he said that the Declaration of Responsibility was "*a core part of the grounds for family reunification advanced by [her]*". It was integral to her application. In responding to the Minister's submission that the application had not been made on the basis of adoption, counsel submitted that para. 33 of the High Court judgment which accepted relevance may not be easy to reconcile with para. 35 of his decision where he had gone on to reject the respondent's "reasons points"; in her submission, however, that was not sufficient to overturn the High Court decision. Counsel submitted that, while the letter of application had been short, the application had clearly been made with respect to a claim in relation to

a non-biological child and referenced the Declaration. It was for the Minister under s. 57(2) of the 2015 Act to investigate ("*shall investigate*") the relationship between the sponsor and the person who is the subject of the application. Counsel submitted that the Minister might have considered matters that were relevant in reaching a decision under s. 56(9)(d), as the Minister was apprised of a great deal of information concerning the nature of adoption law in countries such as Somalia.

21. In considering whether the trial judge was correct in holding that the Declaration of Responsibility was a relevant and material consideration that the Minister failed to take into account in reaching her decision, this Court must return to what the Minister was asked to consider in that application and to the statutory provisions underpinning the decision she was required to make. Section 56(9), as interpreted by the Supreme Court in *X v. Minister for Justice and Equality*, required the Minister to determine if the children were the biological or the adopted children of the respondent. The respondent's application was made on the basis that these were her children within the meaning of the Act and the application clearly signalled that she was claiming that they were her non-biological children (the application made it clear that the children were not her biological children). Her claim to a non-biological relationship with the children was based upon the Declaration of Responsibility. This, the letter stated, was based upon the decision of Barrett J. in *X v. Minister for Justice and Equality*. Objectively speaking this was a claim that she had a legal responsibility, as determined by a court in Somalia, to take care of the children.

22. A suggestion by the respondent that the Declaration of Responsibility was relevant merely because she had referred to, and relied on it, must be rejected. An assertion that a thing or an issue is relevant and therefore ought to have been addressed (or at least considered) by a decision-maker does not, of itself, make it relevant and material to an extent that judicial review must lie where it was not considered. On the other hand, the Minister's response, that the lack of consideration given to that Declaration of Responsibility does not make the decision unlawful because the Declaration was

irrelevant to the issue before her, will only have force if the Declaration was truly irrelevant to that issue.

23. In approaching the determination as to relevance, it is helpful to point to a number of factors which were of significance in the application before the Minister. The first was that the Supreme Court decision in *X v. Minister for Justice and Equality* had not ruled out entirely that non-biological children could not be considered the child of a sponsor; Dunne J. made specific reference to s. 18(d) of the Interpretation Act, 2005 which provides that where an Act refers to a child of a person this is to be read as including (statutorily defined) adopted children. The full provision is referred to below. To that extent at least, the assertion in the respondent's application letter of the 11th June, 2020 that the Act can extend to non-biological children was not an incorrect statement of the law. The fact that the decision of Barrett J., which was expressly referenced, had been overturned two days prior to the letter being written did not take from the legal case that was being made on behalf of the respondent; these were her non-biological children in respect of whom she was in *loco parentis*. In the particular circumstances of the present case, it was reasonable to expect that the Minister would have considered the case the respondent had made. This was reasonable to expect even if it was only so that there could have been certainty that the Minister had considered the relevant provision of the Act and the information provided, but nonetheless rejected her claim that her non-biological children were within that category of adopted children which could be considered the child of the sponsor. This is not the same as a "failure to give reasons" argument; it is a failure to give consideration to an issue which, in the particular circumstances of this application, required consideration. It could not therefore be said that the case she made, based upon the Declaration of Responsibility, was irrelevant.

24. Put another way, the respondent was at all times asserting that each of the children was her "*child*" for the purposes of s. 56 of the 2015 Act. She was not making the case on the basis that the children were her biological children. Her case was they were her children notwithstanding the fact that they were not her biological children. In making that case, she relied on the responsibility she had

been granted for the children as their closest surviving relative. That can only be understood as a reference to the Declaration of Responsibility enclosed in support of the application. While the application did not assert in terms that the children were the adopted children of the respondent, the assertion that they were the children of the respondent necessarily required the Minister to consider whether that was the case. In light of the Supreme Court's clarification of the meaning of "*child*" in section 56 as the biological or adopted child of the sponsor, the sponsor's claim here that the children were her children for the purposes of the section necessarily engaged the question of whether they were to be regarded as her adopted children and, in that context, required the Minister to have regard to the Declaration of Responsibility that had been submitted to her.

25. In my view, the position here is materially different to that considered by this Court in *FB v. Minister for Justice and Equality* [2020] IECA 89. There, Collins J. (Costello and Ní Raifeartaigh JJ. concurring) held that, in assessing a family reunification application that had at all times been advanced on the basis that the person whose admission was sought was the biological grandchild of the sponsor, the Minister was not obliged to consider *sua sponte* whether she might qualify as the "*ward*" of the sponsor. Here, the respondent at all times maintained that the children were qualifying children even though they were not her biological children on the basis of her responsibility for them. In the circumstances, the Minister was obliged to consider whether that satisfied the requirements of section 56 as construed by the Supreme Court in *X* and that in turn required a consideration of whether the legal relationship between the respondent and the children was capable of constituting a relationship of adoption.

26. The trial judge was therefore correct in holding that the Declaration of Responsibility was therefore a relevant and material matter, and in failing to consider it, the decision-maker fell into error.

Did the trial judge err in finding that it was not futile to remit the matter for consideration by the Minister?

27. The Minister urged upon the Court that the relationship asserted by the respondent – specifically that she has been granted legal responsibility for her niece and nephew – was not capable of coming with the terms of s. 56(9)(d) of the 2015 Act. As Dunne J. had said in *X v. Minister for Justice and Equality*, by virtue of the provisions of the Interpretation Act, 2005, an adopted child falls into the same category as child of the sponsor.

28. Section 18(d) of the Interpretation Act, 2005 provides:

> "*The following provisions apply to the construction of an enactment:*
>
> *[...]*
>
> *(d) Adopted child. A reference, however expressed, to a child of a person shall be read as including–*
>
>> *(i) in an Act passed after the passing of the Adoption Act 1976 a reference to a child adopted by the person under the Adoption Acts 1952 to 1998 and every other enactment which is to be construed together with any of those Acts, or*
>>
>> *(ii) in an Act passed on or after 14 January 1988 (the commencement of section 3 of the Status of Children Act 1987), a child to whom subparagraph (i) relates or a child adopted outside the State whose adoption is recognised by virtue of the law for the time being in force in the State;*"

29. The Minister points to the Adoption Act, 2010 as being the relevant extant legislation on this issue in the State. In essence the Minister submits that the children were not adopted because they do not come within any category of adopted child known to this jurisdiction. Leaving aside the obvious point that this is not a domestic adoption, the Minister submitted that (a) the Declaration of Responsibility cannot amount to a foreign adoption that can be recognised in this State, and (b) it is not an intercountry adoption.

30. The Minister acknowledges that complex issues regarding the recognition of foreign adoptions may arise in other cases but, she submits, it is "*abundantly clear*" that this "adoption" could not be

recognised as, or equivalent to, an adoption such as to bring the children within the provisions of s. 56 of the 2015 Act. The Minister submits that because the respondent was granted refugee status in July, 2019, she cannot have been habitually resident in Somalia at that time. Thus, according to the Minister, if the Declaration of Responsibility (which is dated the 11th November, 2019) was to be recognised in Ireland as an adoption, it could not be a foreign adoption which required habitual residence. The respondent would have to claim that it was an intercountry adoption within the meaning of s. 3 of the Adoption Act, 2010 which refers to a child habitually resident in one state, who has been, is being or is to be transferred into another State. Furthermore, the Minister submits, because the Declaration of Responsibility originates from outside the State, the purported adoption would have to fall within the definition of an "*intercountry adoption effected outside the State*" as defined by the Adoption Act, 2010 as follows:

> "*'intercountry adoption effected outside the State' means–*
>
> *(a) an adoption of a child effected outside the State at any time before the establishment day that, at that time, conformed to the definition of 'foreign adoption' in section 1 of the Adoption Act 1991,*
>
> *(b) an adoption, other than an intercountry adoption, of a child effected outside the State at any time on or after the establishment day that conforms to the definition of 'foreign adoption' in section 1 of the Adoption Act 1991 as it read on 30 May 1991, or*
>
> (c) *an intercountry adoption of a child effected outside the State at any time on or after the establishment day that, at that time, is in compliance with the applicable provisions of this Act and the Hague Convention;*"

31. The Minister submits that (a) cannot apply given the dates involved. Adoption in (b) cannot apply because the respondent was not habitually resident in the same State as the child at the time of the adoption and the Minister relies upon the decision of Barrett J. in *A v. Adoption Authority of Ireland* [2021] IEHC 784 at para. 17 in support of that contention. In relation to (c) the Minister submits this

does not apply as Somalia is not a Hague Convention country nor was this an adoption under the 2010 Act.

32. The Minister also referred to s. 57 of the Adoption Act, 2010 which provides:

"*(1) In this section, 'competent authority' includes a person serving in another state in the capacity of a competent authority for the purpose of an intercountry adoption effected outside the State.*

(2) Subject to subsections (3) and (4), an intercountry adoption effected outside the state that–

(a) if effected at any time before establishment day–

(i) […]

(ii) […]

(b) if effected on or after the establishment day, has been certified under a certificate issued by the competent authority of the state of the adoption–

(i) in the case of an adoption referred to in paragraph (b) of the definition of 'intercountry adoption effected outside the state' in section 3(1), as having been effected by an adopter or adopters who were habitually resident in that state at the time of the adoption under and in accordance with the law of that state, and

(ii) in any other case, as having been effected in accordance with the Hague Convention or with a bilateral agreement or with an arrangement referred to in section 81, as the case may be,

unless contrary to public policy, is hereby recognised, and is deemed to have been effected by a valid adoption order made on the later of the following:

(I) the date of the adoption;

(II) the date on which, under section 90, the Authority enters particulars of the adoption in the register of intercountry adoptions."

33. The Minister submits that the respondent was not habitually resident in Somalia at the time of the Declaration of Responsibility, and therefore cannot claim that the Declaration is a Somali *i.e.* foreign adoption that is capable of recognition. Further, as Somalia is not a Hague Convention country and there is no bilateral agreement, the Declaration of Responsibility cannot be recognised as an intercountry adoption.

34. The respondent submitted that the matter was not as clear cut as the Minister made out. Somalia is not a Hague Convention country, but the key issue in the context of refugee family reunification was the *lex loci*; the law of the country of origin. The key question therefore was whether these children could be considered to be "adopted children" for the purpose of refugee family reunification because the Declaration of Responsibility is equivalent in large part to a foreign adoption although it could never be recognised as such under the Hague Convention. Counsel relied on the decision in *Hamza v. Minister for Justice and Equality* to submit that, similar to recognition of marriage, a wide definition of adoption could be given which would come within the meaning of the Act. Counsel referred to s. 18 of the Interpretation Act, 2005 which states that a reference to a child of a person in an enactment "*shall be read as* <u>*including*</u>*...(emphasis added)*". In counsel's submission, this opened the door to a wider definition of the kind of relationships that might be accepted. Counsel submitted that the Supreme Court in *X v. Minister for Justice and Equality* had not dealt with the position of adopted children as they were not directly relevant in that case. Counsel submitted that the issue was one that had to be decided by the Minister and it was not entirely futile; in any event he submitted that there were other judicial reviews in which leave had been granted and that therefore it was an arguable point.

35. Counsel for the respondent relied upon *Talbot v. An Bord Pleanála* [2008] IESC 46 in which the Supreme Court had overturned the refusal by the High Court to grant leave to apply for *certiorari* of a refusal of planning permission; the refusal to grant leave had been based upon the view that no benefit would result to the applicants from the order sought. The Supreme Court allowed the appeal

on the basis that a "*judge is not entitled to presume in advance what the outcome of an application will be. That is exclusively a matter for the statutory bodies charged with those functions*."

36. The respondent agreed with the findings of the trial judge that it would be more appropriate for the Minister to consider the relevant evidence and legal argument on this issue, rather than have the High Court rule on the issue without detailed evidence and legal submissions as to Somali law and indeed Irish law.

37. In reply, counsel for the Minister submitted that the respondent's contention that there may be another route for recognition of these children as children of a sponsor other than as biological children or adoptive children (pursuant to s. 18 of the Interpretation Act, 2005) was an argument that was not open because it had been rejected by the Supreme Court. At para. 107 of her judgment in *X v. Minister for Justice and Equality*, Dunne J. stated that "*child of the sponsor*" was limited to the biological/adopted child of the sponsor. Dunne J. had recognised that this may give rise to certain anomalies and referred to two of the situations mentioned in submissions *i.e.* surrogate children and non-biological children of a spouse or partner. She held that the existence of anomalous situations did not affect the interpretation of the statute as there was only one clear interpretation. Furthermore, the Minister submitted that the decision in *Hamza v. Minister for Justice, Equality and Law Reform* was entirely different. In that case, the predecessor to section 56 – section 18 of the Refugee Act, 1996 – had not defined marriage or required it to be recognisable as valid in Irish law. No definition of marriage is found in the Interpretation Act either. All that was required by section 18, as Cooke J. said, was "*merely, that the refugee and spouse are married and that the marriage is subsisting at the date of the application. It does not define the term 'marriage'*".

38. *Prima facie* at least, the Minister's submission has a certain logic and cogency that lends force to her claim that remittal for reconsideration would be a futile exercise. By contrast, the argument against that, put forward with nuance and care on behalf of the respondent, is tentative and perhaps somewhat lacking in terms of its evidential foundation. That much was apparent to the High Court

judge even when he held that this was an appropriate case for remittal. In order to assess whether he was correct in so finding, it is necessary for this Court to engage with the burden of proof on a party to judicial review proceedings when asking that a court refuse to grant an otherwise appropriate order of judicial review on the grounds that to do so would be futile because even on a remitted consideration the same outcome would be achieved. In other words, what is the burden of proof where a party asks the court not to proceed to quash the order, even though there has been a breach on a procedural ground, because a remittal of the matter would not produce any benefit to the applicant for judicial review?

39. There may indeed be occasions where, despite an applicant successfully persuading a court that some error in the decision-making process vitiated the decision, nonetheless *certiorari* ought not to be granted because no benefit will or could obtain to the applicant. This situation may arise where the legal position is such that the decision-maker could never properly grant the relief claimed by the applicant.

40. In his book *Judicial Review* (Bloomsbury 2017, 3rd edn.), de Blacam points to the case of *State (Polymark (Ireland) Ltd) v. Labour Court* [1987] ILRM 357 as an early example of the High Court refusing the relief of *certiorari* where the decision, although tainted by procedural error, was otherwise correct. In that case, the High Court took the view that no right of the applicant required protection and no purpose would be served by granting review. It is that type of situation that the Minister submits obtains in the present case. The Minister's position is really that it is unarguable that the children in respect of whom the respondent, as sponsor, has applied for family reunification are "*the child[ren] of the sponsor*" within the meaning of s. 56(9)(d) of the 2015 Act. The reverse of that position is whether it is *arguable* that the respondent could succeed in making the case, based upon evidence and submissions as to Somali law and the effect, therefore, of the Declaration of Responsibility, that these children could come within the definition of adopted children with the meaning of the s. 56(9)(d) of the 2015 Act.

41. The case of *Talbot v. An Board Pleanála*, relied upon by the respondent in this case, demonstrates that the courts must be slow to presume the result in any given case. It is apposite to apply to this appeal, the words used by Megarry J. in the High Court of England and Wales in *John v. Rees* [1970] Ch 345 at 402, when he spoke of the importance of observing the rules of natural justice:

> "*'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.*"

42. It is worthwhile making reference to some of the principles set out by McKechnie J. in *Harrisrange Ltd v. Duncan* [2002] IEHC 14 concerning the issue of when a defendant ought to be given leave to defend in a summary judgment procedure. These can be adapted to the situation where a court is being asked to refuse to make an order by way of judicial review, despite having found that the order actually made was vitiated by legal error. From such a perusal and adaptation, the following principles may be helpful in determining these issues:

(i) The discretion to refuse relief by way of judicial review should be exercised with discernible caution;

(ii) Having already determined that a decision is vitiated by error of law, relief ought not to be refused on the ground of futility unless it is very clear that the granting of relief is futile in the sense of being incapable of benefitting the applicant for judicial review;

(iii) The onus of establishing that it is very clear that the granting of relief is futile remains on the party who makes that assertion;

(iv) In deciding upon this issue, the Court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;

(v) The Court must be mindful that it is decision-making bodies who have been charged by statute with the particular decision-making function;

(vi) The issue is whether the applicant for relief by way of judicial review has a case to make on remittal of the issue to the statutory decision-maker is to be judged by whether it is arguable that they may achieve a benefit in that procedure;

(vii) If it appears arguable that the moving party on the judicial review application may achieve a benefit for any reconsideration of their case by a decision, the low threshold for the grant of relief will have been reached;

(viii) Where truly there is no basis upon which the decision-maker could reach a different conclusion than the decision already reached but impugned in the proceedings, then it may be appropriate to exercise discretion to refuse relief;

(ix) Where, however, there are issues of fact upon which adjudication is required and which in themselves are material to success or failure, then their resolution must be left to the statutory decision-maker;

(x) Where there are issues of law which may be resolved by the Court, it may be appropriate to exercise the discretion to refuse to grant judicial review, but only if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(xi) The overriding determinative factor, bearing in mind the constitutional basis of the parties' right to fair procedures and the legal basis of the claim for relief being made by

> an applicant, is the achievement of a just result whether that is to grant or refuse *certiorari*.

43. In the present case, the High Court judge entered into consideration of whether he should exercise his discretion to refuse relief on the grounds of futility. He refused to so exercise his discretion in stating it was more appropriate for the Minister to hear and determine this matter on the basis of renewed evidence and submissions being made to her. As with any discretionary decision taken by the High Court, this Court should give significant weight to, and be slow to interfere with, the way that the High Court judge exercised his discretion here. The Court should not interfere unless it appears that it is very clear that there is no arguable case to be made before the Minister that these children are the child of the sponsor within the meaning of s. 56(9)(d) of the 2015 Act.

44. An important consideration is that, while *X v. Minister for Justice and Equality* held that the child of a sponsor meant solely the biological or the adopted child of the sponsor, the Supreme Court was not asked to, and did not consider, the precise meaning of "*[a]dopted child*" as set out in s. 18(d) of the Interpretation Act. That point did not arise in *X* and, as is frequently said, a point not raised is a point not decided. It is therefore not necessarily certain that the decision in *X v. Minister for Justice and Equality* was dispositive of the matter, given the argument that the respondent seeks to make. Of further particular significance is that the High Court has already – we have been told without demur from the Minister – granted leave in cases of sponsors of children in these types of situations (with Declarations of Responsibility or equivalent). Thus, the High Court has already accepted that it is at least arguable that there is a case to be made in respect of these types of situations.

45. It is also important to have regard to the overriding consideration of ensuring that a just result be obtained. The Minister erred in not having regard to the Declaration of Responsibility upon which the respondent had relied in her application. If the matter is referred back to the Minister, the respondent will have the opportunity to have that considered in a decision-making process which complies with fair procedures and the Minister will be able to consider the matter afresh based upon

any submissions made. This Court has been told that the children are still living in Somalia with the husband of the respondent who cannot travel to Ireland because he is now caring for those children. The Minister has not pointed to any particular harm that would be incurred if this matter was to be remitted, whereas the respondent would be shut out from any relief as of right under the s. 56 family reunification scheme if it is not (although the Minister has submitted that she is entitled to consider any further submissions under the Non-EEA Family Reunification Policy). The interests of justice therefore appear to weigh heavily in favour of remittal.

46. In those circumstances, I do not see any basis for overturning the exercise of the High Court judge's discretion in this case. I am not satisfied that the Minister has demonstrated that the refusal by the High Court to exercise its discretion to refuse relief was wrong or would bring about an unjust result. The respondent has demonstrated that arguably she may benefit from a renewed decision of the Minister.

Conclusion

47. The application for family reunification under s. 56(9)(d) of the 2015 Act made by the respondent in this case was on the basis that she was the non-biological mother of two children over whom she had a Declaration of Responsibility from a Somali court. The High Court judge correctly found that this Declaration had not been considered by the decision-maker on behalf of the Minister and that it was relevant and material to the issue of whether the child was a child of the respondent within the meaning of the statutory provision.

48. The Minister's argument that the trial judge incorrectly granted an order of *certiorari* on the grounds that to do so was futile as the remitted reconsideration of the respondent's case was in effect bound to fail and thus would confer no benefit upon her must be rejected. The onus was on the Minister to establish that it was very clear that the respondent had no case and that the trial judge had wrongly exercised his discretion to grant the relief and she has failed to discharge that onus. The respondent's

case has reached the level of arguability that is required before a court should decline the invitation to refuse to grant *certiorari* on the ground that the subsequent remittal would be a futile exercise. The Minister has not succeeded in establishing that it would be an unjust result to grant the order of *certiorari* in the present case.

49. Having said that the respondent's argument has reached the level of arguability, it is neither appropriate nor necessary to engage any further in the merits of the respective arguments made by the parties.

50. For the reasons set out above, the appeal is therefore dismissed.

51. As the respondent has been entirely successful in opposing this appeal, it would appear *prima facie* that she is entitled to the costs of this appeal. Should the Minister contend for a different order on costs, the Minister should contact the Registrar within 14 days of the delivery of this judgment to arrange a short hearing on costs.

As this judgment is being delivered electronically, Ní Raifeartaigh and Collins JJ. have authorised me to indicate their agreement with the judgment and the orders proposed.