Judgment Title: A.M.S. -v- Minister for Justice and Equality

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Neutral Citation: [2014] IEHC 57

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 858 J.R.]

BETWEEN

A. M. S.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 13th day of February 2014

1. Section 18 of the Refugee Act 1996, makes provision for declared refugees to be reunited with their families in Ireland. For some family members (spouse and children, for example) the process is practically automatic. For others (siblings, parents, etc.) dependency has to be established. This case is concerned with the interpretation of s.18 and, in particular, with the question as to whether the Minister was entitled to refuse dependent family members permission to enter and remain in the State because of the likelihood that they would rely on social welfare. (A complaint that the proportionality assessment was inadequate is also considered.)

Background

2. The applicant is a citizen of Somalia, born on 1st February, 1985. He was declared to be a refugee in Ireland on 8th January, 2009. By letter of 11th May 2009, he applied for family reunification in respect of his mother, wife, daughter, two sisters and two brothers. As explained below, the decision in suit is only concerned with the applicant's mother, born in 1950 and his living siblings, born in 1992, 1993 and 1997. He did not have the assistance of a lawyer for this application.

3. The Office of the Refugee Applications Commissioner ('ORAC') has an investigative function on behalf of the Minister when such applications are made. The applicant completed a questionnaire prepared by ORAC. The form posed questions about the applicant's immediate family (child and spouse) and separate questions in respect of other family members. Question 5 asked:

> "If any of your dependents, in this application, is dependent on you, on grounds other than medical, please explain in detail how/why each of them is dependent on you?"

The answer given to this question was as follows:

> "My family and I lived together all our life even when I was married and now my family are in a very dangerous miserable situation in refugee camp outside Mogadishu. The fighting in Mogadishu is endless and still continuing and my family are in a risk at any time."

Question 7 asks:

> "Since you left, with whom have they lived, and what was the person(s)' relationship to each dependent?"

Answer:

> "Since I left, my family fled into different areas where they could get shelter and most of them were getting help from local NGO."

Question 11 asked:

> "If any of your dependents, in this application, are under 18 years please state the full names and the full addresses of the natural parents."

Answer:

> "All my siblings are under 18 and still under the care of my mother living together in a refugee camp outside Mogadishu."

Question 12 asked:

> "If you are supporting dependent members included in this application, please provide evidence of such e.g. money transfer receipts and state and provide evidence of how you would support and accommodate them if they were to be granted family reunification."

Answer:

> "N/A"

Question 13 asked:

> "Are any of your dependent family members, included in this application, employed?"

Answer:

> "No"

4. A further section of the questionnaire asked questions about the sponsor refugee's personal circumstances including whether he is employed or where he lives, how much his habitation costs, if he receives a rent supplement.

Question B11 asks:

> "How do you propose to support and accommodate the dependent

> members in your application should they be granted family reunification? Please provide details."

Answer:

> "I am looking for a job and I will inform you as soon as I am employed."

Question A.4 asks:

> "If you are in receipt of Social Welfare benefits, please provide the following: name of pension benefit allowance of which you are currently in receipt and amount received per week."

This question was not answered.

5. The Office of the Refugee Applications Commissioner compiled a report pursuant to s. 18(2) of the 1996 Act dated September 1st 2009. The conclusion of the report is in the following terms:

> "The refugee asserts that his family members named above are dependent upon him but he did not provide proof of this dependency. The applicant stated on his questionnaire that he was unemployed. He did not state his source of income or how he supports his family members named above. The refugee states on his questionnaire that he lives in a one-bedroom flat and pays €530 in rent per month. He receives a rent supplement of €392 per month. A letter was sent to the refugee from this office on 18/08/2009 requesting that he provide this office with details of his current income. It also asked that he provide evidence of his support of his family and asked for Passports for each subject. The applicant replied in his letter of 21/08/2009 in which he did not give any information with regard to his current economic situation and he did not submit any further original documentation in support of his application. He stated that he was awaiting documents. He said that due to the war he has lost contact with his family and that the last information that he has had from them is that they had fled to the border area. He stated that he would inform this office of developments as soon as he receives information with regard to them."

6. It is apparent from this text that ORAC focussed exclusively on financial matters in assessing dependency though this was not the only form of dependency advanced. The applicant, when asked how the family was dependent on him, replied that the family had always lived together and that they were now in danger in the refugee camp in Mogadishu.

7. By February 2010, the applicant had retained Daly Lynch Crowe & Morris, Solicitors who informed the Department of Justice, Equality and Law Reform, Family Reunification Section, that the sponsor refugee's family had left Mogadishu due to escalating fighting, that he had lost contact with them during this time and that they had travelled south across the border to Ethiopia, eventually arriving in Addis Ababa where they made contact with the applicant again. It was explained that the applicant's 7-year old daughter, Saabrin, and his 15-year old brother had been killed in an explosion in south Somalia *en route* to Ethiopia in mid-January 2010, 6 months after the applicant had sought permission to bring them to Ireland.

8. In the same letter, the applicant's solicitors submitted details of financial transfers from the applicant to his family as well as other evidence in support of the reunification application.

9. By letter of 24th January 2011, the Minister's officials sought further information in respect of the applicant's marriage and information in respect of his mother and

siblings. The information sought was as follows:

> "1. Documentary evidence to establish that [the family members] are suffering from a mental or physical disability to such an extent that it is not reasonable for them to maintain themselves, if applicable. This should include up to date detailed medical hospital reports for the relevant subjects including a detailed prognosis, along with official translations of same.
>
> 2. Any further documentary evidence to establish that the above named subjects of the application are financially dependent on your client.
>
> 3. Details in relation to any State benefit payments and/or pension entitlements and/or allowances or NGO assistance that the above named subjects of the application may have, along with any supporting documentation you may have.
>
> 4. Clarification as to who owns and pays the rent or mortgage on the property in which the above named subjects of the application reside, along with any supporting documentation you may have.
>
> 5. A detailed statement from your client outlining who has supported, maintained and provided for the above named subjects of the application since your client arrived in the State on 5th May 2007."

The answers given to the Minister's officials were as follows:

> "1. Our client's siblings . . . are not suffering from mental or physical disabilities . . .
>
> 2. We enclose further evidence of the family members' financial dependency upon our client . . .
>
> 3. The family members have no entitlement to Social Welfare in Ethiopia, are undocumented refugees and do not receive NGO assistance, are not entitled to work or to access education or healthcare services.
>
> 4. The family rents a room in a house and used the money sent by the applicant to pay for the rent.
>
> 5. Our client instructs that he and his family became separated when their home was attacked by militia in 2007. He re-established contact with them in or around May 2009, at which time they were living in a refugee camp in Mogadishu. He instructs that the camp was under constant threat of attack and they were not safe there. They left Mogadishu in 2009 due to the escalated fighting there. They travelled south and across the border into Ethiopia. This journey took a number of months and, as advised previously, our client's daughter and brother were killed by an explosion en route. Upon their arrival in Ethiopia in or around January 2010, the rest of the family re-established contact with our client. From this time onwards, our client has been sending remittances to them. He instructs that he saves whatever he can from the Social Welfare payments to send to his family. He further instructs that they have no other means of financial

> support and are entirely reliant on the money he sends them. They use this money for food and shelter and would be destitute but for his remittance. We would ask you to note that the average annual [sic] in Ethiopia is approximately US$220 p.a. and the Gross Domestic Product per capita is US$364. We would submit, therefore, that the evidence furnished is supportive of our client's contention that his family is financially dependent upon him."

The letter then set out twelve remittances totalling €1,864 and further receipts to be submitted later.

10. In addition to the description of the circumstances and relationships of the family, the letter set out some general principles with respect to family reunification by reference to statements of the United Nations High Commissioner for Refugees. The letter said:

> "The United Nations High Commissioner for Refugees (UNHCR) has indicated that there are five guiding principles which underlie efforts to protect family unity and to promote and facilitate family reunification in the resettlement process. These are:
>
> *(a) the family is the natural and fundamental group of society, and is entitled to protection by States;*
>
> *(b) the refugee family is essential to ensure the protection and wellbeing of its individual members;*
>
> *(c) the principle of dependency entails flexible and expansive family reunification criteria that are culturally sensitive and situation-specific;*
>
> *(d) humanitarian considerations support family reunification efforts;*
>
> *(e) the refugee family is essential to the successful integration of resettled refugees.*
>
> Further guidance regarding the matters to be addressed in considering this case is provided by the following extracts of the UNHCR Resettlement Handbook:
>
> **On the issue of dependency:**
> *'There is no internationally recognised definition of dependency (. . .) the concept of dependent persons should be understood as persons who depend for their existence substantially and directly on any other person in particular because of economic reasons, but also taking emotional dependency into consideration . . .'*
>
> **On the issue of dependent parents of adult refugees:**
> *'Humanitarian and economic considerations weigh in favour of reunification for dependent parents who originally lived with the refugee or refugee family or who would otherwise be left alone or destitute'.*
>
> **On the issue of promotion of comprehensive family reunification:**
> *'In many cases, a refugee's next of kin remain behind in the country*

> *of origin, or in a country of first refuge, because they are not considered by the prospective country of reception to belong to what is known as the 'family nucleus', that is to say father, mother and minor children. While there is justification in giving priority to safeguarding this basic unit, the exclusion of members of a refugee household who have been deprived of their social and economic support as a result of the break up the family unit often results in hardship. While it may not always be possible to reunite entire groups which in the country of origin form part of a family in the broader traditional sense, governments should be encouraged to give positive consideration to the inclusion of those persons, whatever their age, educational level or material status, whose economic and social viability remains dependent on the family nucleus'."*

11. By letter of 21st April 2011, the applicant's solicitors submitted evidence of further remittances of approximately €550 and US$250.

12. The Minister's officials wrote again to the applicant's solicitor on 20th April 2011, for information of the applicant's income, details of how he proposed to maintain, accommodate and support the siblings and details of his current residential accommodation.

13. On 9th May 2011, the applicant's solicitor replied saying that the applicant was seeking employment and was in receipt of €188 *per* week in Job Seeker's allowance and €82 per week in rent allowance. His accommodation is indicated as being a two-bedroom apartment in Cork.

14. Evidence of attempts by the applicant to gain employment and education was submitted. He was registered with Foras Áiseanna Saothar (FAS). He received a Competency Certificate from FETAC for 'Level 4 Manual Handling' on 28th May 2010. He enrolled with Cork College of Commerce for a course in Computers, Business and English between September 2009 and May 2010.

The Minister's Decision

15. The Minister's first decision on the family reunification application was quashed by Cross J. in a judgment entitled *A.M.S. (Somalia) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 72. By letter of 5th April 2012, the applicant's solicitors renewed their application. On the date of the second application the mother was 62 and the applicant's siblings were 20, 19 and 15. The applicant's solicitor said:

> "All of the family members had been living together in a refugee camp outside Mogadishu at that time [May 2009, the date of the first application]. They are now in Addis Ababa in Ethiopia. The applicant's daughter and one of his brothers have since died in January 2010 in a bomb attack while attempting to get to Ethiopia. Mr. S. was the male head of household and responsible for his younger brothers and sisters, as well as his mother, because his own father had died in March 2007."

16. The Minister's decision accepts that the family members are financially dependent on the applicant and that his mother is suffering from a physical disability to such an extent that it is not reasonable for her to maintain herself fully. The decision is taken by reference to what is said to be a consideration of the provisions of Article 8 of the European Convention on Human Rights.

17. The decision, in part, is in the following terms:-

> **"The Lawful Operation of Immigration Control**
> A decision taken pursuant to the lawful operation of immigration control of a State will be proportionate in all save a minority of exceptional cases. The decision to refuse the application for family reunification in this case was taken pursuant to the lawful operation of the immigration control and it is proportionate.
>
> **Economic Wellbeing of the Country**
> Consideration was given to the economic wellbeing of the country under Article 8(2) in relation to admission of relatives of a person resident in a contracting state. In ***Omoregie v. Norway***[1996] 22 EHRR 93 the ECtHR found that protecting the "economic wellbeing of the country" constituted a legitimate aim under Article 8(2) of the ECHR (para. 56). Consideration was therefore given to the fact that the country was currently experiencing an economic downturn with high unemployment and a consequential burden on the welfare and education systems in the state. As a result of these facts, if [the family members in Ethiopia] are granted permission to enter the state it would be likely that they may become a burden on the State.
>
> **Health and Welfare Systems**
> Also of relevance is the impact of granting permission to [the family members in Ethiopia] to enter the state on the health and welfare system in the state. I note once again [the applicant's mother] suffers with hypertension, chronic liver disease, chronic rheumatism, dementia and depression and that it is recommended that she continue her medication, avoid salty diets, have a follow up every month and needs close family support for social and psychological care as she feels sad and depressed. I accept that the quality of care may be greater in Ireland but this is not a factor, for the purposes of Article 8, imposing an obligation on a contracting state to admit a family member who is ill save in exceptional circumstances (see ***D. v. the United Kingdom [1997] 24 EHRR 45, N. v. Secretary of State for the Home Department [2005] 2 A.C. 296, Agbonlahor v. the Minister for Justice, Equality and Law Reform [2007] IEHC 166*).***"**

The Statutory Provision

18. Section 18 of the Refugee Act 1996 (as amended) reads as follows:

> "18.—(1) Subject to section 17 (2), a refugee in relation to whom a declaration is in force may apply to the Minister for permission to be granted to a member of his or her family to enter and to reside in the State and the Minister shall cause such an application to be referred to the Commissioner and a notification thereof to be given to the High Commissioner.
>
> (2) Where an application is referred to the Commissioner under subsection (1), it shall be the function of the Commissioner to investigate the application and to submit a report in writing to the Minister and such report shall set out the relationship between the refugee concerned and the person the subject of the application and

the domestic circumstances of the person.

(3) (a) Subject to subsection (5), if, after consideration of a report of the Commissioner submitted to the Minister under subsection (2), the Minister is satisfied that the person the subject of the application is a member of the family or the civil partner within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 of the refugee, the Minister shall grant permission in writing to the person to enter and reside in the State and the person shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State.

(b) In paragraph (a), "member of the family", in relation to a refugee, means—

(i) in case the refugee is married, his or her spouse (provided that the marriage is subsisting on the date of the refugee's application pursuant to subsection (1)),

(ii) in case the refugee is, on the date of his or her application pursuant to subsection (1), under the age of 18 years and is not married, his or her parents, or

(iii) a child of the refugee who, on the date of the refugee's application pursuant to subsection (1), is under the age of 18 years and is not married.

(4) (a) The Minister may, at his or her discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State and such member shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State.

(b) In paragraph (a), 'dependent member of the family', in relation to a refugee, means 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 extent that it is not reasonable for him or her to maintain himself or herself fully.

(5) The Minister may refuse to grant permission to enter and reside in the State to a person referred to in subsection (3) or (4) or revoke any permission granted to such a person in the interest of national security or public policy ('ordre public').

(6) The Minister may, on application in writing in that behalf and on payment to the Minister of such fee (if any) as may be prescribed with the consent of the Minister for Finance, issue to a person in respect of whom a permission granted under subsection (3) or (4) is in force a travel document identifying the holder thereof as such a person."

The Nature of the Minister's Discretion

19. The applicant complains that the Minister has exceeded the s.18(4)(a) discretion. It was submitted that its limits may be found in s.18(5) of the Act which provides that the Minister may refuse to grant permission to enter and reside in the State in the interest of national security or public policy ('ordre public'). The applicant advances what his counsel describes as a narrow interpretation of s. 18, which is that once the Minister accepts that externally located family members are dependents then absent reasons of "national security or public policy ("ordre public")" the Minister is required to grant leave to enter.

20. No argument was advanced as to why a narrow interpretation of s.18 (4) and (5) should be adopted. The plain meaning of the words in s. 18(5) do not suggest that the Minister is confined to reasons of "national security or public policy ('ordre public')". The applicant invites the court to read section 18(5) as though it said "the Minister may o*nly* refuse to grant permission to enter and reside in the State in the interest of national security or public policy ("ordre public")". The word "only" does not appear in the subsection, nor does the context suggest this meaning. Adding words to a statute is generally impermissible and therefore I reject this argument.

21. The applicant's second argument is that the proper construction of the legislative provision precludes the likelihood of need social welfare support as a reason to refuse an application. This argument suggests that the question of dependency can only be addressed once. Where it is accepted that dependency exists, the applicant argues that the Minister cannot use that criteria again in deciding whether to exercise his discretion to permit or refuse entry. The argument posits that the Oireachtas had expressly contemplated and facilitated the admission of family members of a sponsor refugee who are dependent on him or on her. It is suggested that because a finding of dependency is a pre-condition to qualify for consideration for entry, such circumstance could not have a disqualifying effect.

22. In support of the proposition that the Minister was not entitled to rely on the economic impact in Ireland of permitting family reunification, reference is made to the decision of Clark J. in *Ducale v. Minister for Justice, Equality and Law Reform* [2013] IEHC 25[6] where she said:-

> "The cases which have come before this Court indicate a bewildering lack of clarity on the circumstances which trigger the benevolent application of that ministerial discretion. Anecdotal evidence indicates that only refugees who hold down full time jobs and are financially self sufficient will have a positive response to FRU [Family Reunification] applications made under s. 18(4). Such a policy would clearly militate against s. 18(4) applications made by Somali refugees as many have a poor command of English and have suffered years of deprivation and displacement in camps all of which has sapped their health, rendering their job prospects and financial independence extremely problematic. Country reports with which the Court is familiar suggest that many Somalis from minority tribes have been excluded from education unless such education is provided by humanitarian agencies in IDP camps in Somalia or in refugee camps in neighbouring countries. Somali IDP's and refugees are generally dependent on UN aid and/or the generosity of relatives who have already obtained refugee status in wealthier countries and who then, in turn, provide the funds for family members to travel and themselves seek asylum. A great many Somalis who live as squatters in neighbouring countries are, because of the fairly intractable nature of the conflict, unlikely to return home and are largely unwelcome and marginalised in their unwilling host countries. All of this information is

> generally available and it has to be supposed that these facts are well known to the Minister and to the civil servants in FRU sections of the Office of the Refugee Applications Commissioner and the Department of Justice."

I note what the learned judge says though I would be loath to refer to the Minister's discretion as a form of benevolence. If it were so, outcomes would be unpredictable and decisions could depend on the personal preferences of the Minister of the day and in my view no administrative decision making process could ever be so loosely framed.

23. The applicant refers to the words of Cross J. in *A.M.S. (Somalia) v. The Minister for Justice and Equality* [2012] IEHC 72 at para. 3.13, where he said:-

> "It is difficult to conceive in the real world of very many family member dependents of refugees not being a burden on the state, at least in their initial period of residence."

24. The applicant's submission is that if the Minister is entitled to use the likelihood of social welfare reliance (and economic wellbeing of the State) as criteria for refusing family reunification, then this effectively precludes family reunification for Somalis.

25. The nature of the Minister's discretion under s. 18(4) was considered by Cooke J. in *Hassan Sheekh Ali v. The Minister for Justice, Equality and Law Reform* [2011] IEHC 115. In that case, the sponsor refugee was seriously ill and severely disabled, with irreversible kidney disease. Having lost his wife, two of his children and his mother, he fled Somalia in 2007, leaving his remaining five children in the care of his sister who had three children of her own.

26. The Minister granted permission for the sponsor refugee's five children to enter the State. Application was made for family reunification in respect of his sister and her three children. This application was refused because the money transfers from the sponsor refugee to the family did not establish dependency and, of particular relevance to the issues in suit, because "the refugee has (not) sufficient income and resources to support and maintain the subject of the application in the State". Cooke J. quashed the Minister's decision, finding that the decision on dependency was irrational as the facts demonstrated that the foreign family did rely on the remittances made from Ireland. With respect to the second reason for the decision, Cooke J. said as follows:

> "On the other hand, if the ability of the refugee to support them in this country is a factor taken into account for the purpose of the exercise of discretion in the grant of permission for reunification, there is no error because it is clearly open to the Minister to take into account the ability of the refugee to continue to support and maintain the family members in question after their arrival in the State. That is, obviously, a crucial consideration for the Minister in this case, given the admitted inability of the applicant to gain employment, his reliance upon disability benefit and the fact that he already has his own children to look after. Thus, to the extent that it can be said that the refusal is based upon the exercise of discretion, it could not be said to be unreasonable or irrational for the Minister to conclude that family reunification in this case ought not to be extended to the sister and the three children."

The judge sought to emphasise:

> ". . .that in granting the relief sought, [the court] is not holding that the Minister is precluded from taking account of a refugee's inability

> to support dependents in the State as a factor in the exercise of the discretion. As pointed out earlier in this judgment, the Minister's discretion under s. 18(4) can only be exercised in respect of 'dependent members of the family'. Accordingly, in making a determination on an application based on s. 18(4) the Minister must first come to a decision as to whether subjects of the application come within that definition as a matter of fact. To do so he must be satisfied that the subjects of the application come within the scope of the specific relationships listed and are either dependent upon the applicant or suffering from mental or physical disability. It is only when one of those criteria has been met that the exercise of the discretion can arise. The Minister is not, however, precluded in exercising discretion from taking into account factors such as the ability of the refugee to support and maintain the family members in question having regard to his own personal, medical and financial position."

27. The points of contrast between this case and the facts in *Hassan Sheekh Ali* are that the sponsor refugee in *Hassan Sheekh Ali* was not only unemployed but also very seriously ill with irreversible kidney disease. There was no prospect of the refugee ever working or supporting his family from earned income. The Minister decided that the sponsor refugee was not in a position to support his family should they be permitted to enter the State. In this case, there is no suggestion that the sponsor refugee is under any comparable permanent disability, though he is, for the moment, dependent on Social Welfare. He has undertaken training and studies in Ireland and is actively seeking employment. Thus, the Minister's decision in this case was not that the sponsor refugee could never support the family members, but rather, that the family would need the support of the State. No assessment is made of how long the support will be needed. (I accept, of course, that the Minister's decision in this case infers that the sponsor refugee is not, as matters stand, able to support the family in Ireland).

28. In my view the *dicta* of Cooke J. in *Hassan Sheekh Ali* in respect of the Minister's discretion under s. 18(4) are *obiter* because the learned judge (notwithstanding the terms in which the grant of leave to seek judicial review was framed) was not reviewing an exercise of discretion by the Minister following a finding that the refugee's family, being dependent, qualified. There is no record in the case of competing submissions from counsel on the nature and extent of Ministerial discretion under section 18(4) or any sense that the core issue in the case was the nature of that discretion. That question was incidental to the decision of the court.

29. In *A.A.M. [Somalia] v. The Minister for Justice and Equality* [2013] IEHC 68, Clark J. reviewed a decision which refused family reunification on the basis that dependency had not been established. However, she also made *obiter* comments to the effect that the Minister was entitled, in exercising s. 18(4) discretion, to refuse permission on the basis that the migrant family would become dependent on the State. The learned judge said:

> "13. Under the terms of s.18(4), even for those whose relationship and dependency are established, there is no guarantee that they will in fact be granted permission to join the refugee in the State as the Minister is free to have regard to other factors which he considers important. The Minister is perfectly entitled to have regard to the education, health and employment prospects of those family members who wish to enter the State and the degree of likelihood that they will become a burden on the State. He cannot be criticised if, in Ireland's current difficult financial state, he refuses permission for persons who

> will immediately become social welfare dependent, provided that due consideration has been given to the circumstances of the refugee applicant and his dependent family members. Equally, he is perfectly free to exercise discretion on humanitarian grounds and grant such persons leave to enter and remain. The exercise of discretion under s. 18(4) is a matter for the Minister and absent any discriminatory or arbitrary behaviour it is not for the Court to interfere with the exercise of Ministerial discretion."

Later, Clark J. said as follows:

> "17 . . . . even if [the sponsor refugee] were to establish a blood relationship to his mother and siblings and to establish a high degree of financial and / or other form of dependency, his claim to family reunification is more likely than not to fail because he has insufficient resources to house and maintain his family, which are matters the Minister is perfectly entitled to consider when exercising his discretion under s. 18(4)."

The respondent, naturally, urges the court to follow the obiter comments in these cases which suggest that the Minister may refuse family reunification if the incoming family will need social welfare assistance.

Statutory Interpretation

30. The nature of the discretion conferred on the Minister in s.18(4) is to be understood by reference to the purpose of the legislative provision. In *East Donegal Co-Operative & Ors. v. Attorney General*[1970] 1 I.R. 317, the Supreme Court said:

> "All the powers granted to the Minister by s. 3 which are prefaced or followed by the words 'at his discretion' or 'as he shall think proper' or 'if he so thinks fit' are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will."

31. The Supreme Court has indicated the limits of seemingly unfettered executive discretion. Referring to the Minister's powers under s. 3(11) of the Immigration Act 1999, Fennelly J. in *T.C. v. The Minister for Justice* [2005] 4 I.R. 109, (Supreme Court) stated at para. 26:

> "26. On its face, this provision confers a broad discretion, to be exercised in accordance with general principles of law, interpreted in the light of the Constitution and in accordance with fair procedures. Otherwise, the respondent is at large."

Although the statutory discretion in s. 18(4) is not accompanied by criteria for its exercise and appears on its face to be absolute, *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59(at paras. 43–45) reiterates the well-established principle that even seemingly absolute discretions are subject to review by the courts.

32. In view of the decision in *East Donegal (supra)* I am required to identify the legislative intention in order to understand the nature of the discretion conferred by the Oireachtas by s.18(4). In *Howard v. Commissioners of Public Works* [1994]1 I.R.101, at 501, Blayney J. in the Supreme Court outlined how a court should approach the task of identifying legislative intention. He adopted the following passage from a leading text on statutory interpretation as representing the law in Ireland:-

> "The cardinal rule for the construction of Acts of Parliament is that

> they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. 'The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used.
>
> ***And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view***.' [per Lord *Blackburn in Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394]."
>
> *Craies on Statute Law* (1971) (7th Ed.) at page 65.
>
> This rule expressed in very similar terms in Maxwell on *The Interpretation of Statutes* (12th ed., 1976) at p. 28:—
>
> "The rule of construction is 'to intend the Legislature to have meant what they have actually expressed.' [per Parke J. in *R. v. Banbury (Inhabitants)* (1834) 1 Ad. & El. 136 at p. 142] The object of all interpretation is to discover the intention of Parliament, 'but the intention of Parliament must be deduced from the language used,' [per Lord Parker C.J. in *Capper v. Baldwin*[1965] 2 Q.B. 53, at p. 61] for 'it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law.' [per Lord Morris of *Borth-y-Gest in Davies Jenkins & Co. Ltd. v. Davies* [1967] 2 W.L.R. 1139 at p. 1156]." [Emphasis added]

33. In approaching the task of understanding the nature and extent of the discretion in s. 18(4) of this statute, I am guided by these decisions of the Supreme Court which direct me to understand the seemingly unfettered discretion in s.18(4) by enquiring into and considering the object of the provision (*per* Blackburn L.J. in *Direct United States Cable Co.* as approved by Blayney J. in *Howard (supra))*and by the more general proposition that I should identify the legislative intention by reference to the words of the text adopted by the Oireachtas. Speculation as to legislative intention not based on the words in question is impermissible.

34. I am aided in this task by the decision of Cooke J. in *Hamza v. The Minister for Justice, Equality and Law Reform* [2010] IEHC 427 where he considered the legislative purpose of s.18 of the Refugee Act 1996. (By way of background to that decision, the European Union adopted Council Directive 2003/86 on the Right to Family Reunification from which Ireland exercised an ‘opt out’ though the learned judge decided that s. 18 of the Refugee Act should be construed harmoniously with the Directive insofar as possible). He said:

> “Secondly, it appears reasonable to assume that that s. 18 has been incorporated into the Act in the interests of facilitating the reception of refugees and ensuring their personal wellbeing while in the State. The legislation is not enacted in discharge of any binding obligation of international law because family reunification, as such, is not provided for in the Geneva Convention of 1951, or the 1967 Protocol and Ireland has not opted into the European Union legislation in this area . . .

> The UNHCR, however, has, in various Instruments, over many years, encouraged the Contracting States to recognise and respect the 'essential right' of refugee families to unity and has encouraged them to facilitate its achievement (see, for example, the 'UNHCR Resettlement Handbook', (Geneva, November 2004); the 'UNHCR Guidelines on Reunification of Refugee Families 1983' and the 'Conclusions of the UNHCR Executive Committee on Family Reunification' of 21st October, 1981).
>
> The rationale of family reunification as an objective in this area is well expressed in Recital (4) to the Council Directive:
>
> > 'Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of Third Country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty'.
> >
> > Notwithstanding the non-binding nature of these sources, it is desirable in the view of the court, that the provisions of s. 18 should be construed and applied so far as statutory interpretation permits in a manner which is consistent with these policies and with the consensus apparent among the Member States of the Union in the objectives of the Council Directive."

35. I agree with the findings of Cooke J. that s.18 was enacted in the interests of facilitating the reception of refugees and ensuring their personal wellbeing while in the State.

36. Section 18(4) is not addressed to all refugees. Family reunification under s.18(4) is only available where dependency or disability is established. It is not available under the legislative scheme for family members who are not dependents but are simply desirous of being in Ireland with their relative. In my view, this difference is highly significant and it expresses the true purpose of s. 18(4).

37. To understand the nature of the Minister's discretion one must seek to understand why dependents might be admitted under s. 18(4) but not non-dependents. (Of course, there is nothing to prevent non-dependents from applying to enter and remain in the State should they wish to join their family member who is a refugee. They would be treated as ordinary entry applicants seeking visas and would not have access to the special regime which applies to refugees and their admitted family members. Admitted family members of refugees are entitled to all the rights and privileges of a refugee, including a right to work, social welfare on a par with a citizen *etc*.)

38. Where a refugee has dependents living outside the State, it may be impossible to discharge the moral obligations associated with such relationships and therefore it may be necessary to admit those dependents to the State so that the refugee can discharge his or her responsibilities. In my view this is the reason the statute facilitates the admission of dependent relatives but not non dependent relatives. For example, a refugee in Ireland might have an elderly healthy widowed mother living in a third country where there are no surviving relatives. She might have enough

money to survive in the third country and thus not need financial assistance there. The mother may be said to be dependent on her son for her happiness and security in her old age and need to live with him to avoid isolation and the obvious disadvantages faced by older people who have no family support. It might be said that in her advanced years the mother-son relationship is the most important circumstance in her life. In other words a relationship of dependency (not related to money) could readily be claimed. If one adds into this scenario the fact that the son is living on social welfare and that the mother will need financial support from the State on arrival, the discretion given to the Minister comes into sharper focus. Did the Oireachtas intend that the mother could be excluded because the son cannot afford to support her? Another example helps to illustrate the point. A refugee might have an orphaned younger sibling with no surviving family at origin. Emotional dependency could hardly be in doubt. Could the Oireachtas have intended to give the Minister the power to refuse entry for the child because the refugee lives on social welfare and because the child will need free education, health care and social welfare support? In my view this was not intended.

39. The Oireachtas has decided that certain dependent relatives of refugees can come to Ireland and in my view this was to enable the refugee to fulfil moral obligations which could not be achieved without the physical presence in the State of the persons in question. This explains the difference in treatment between dependent and non dependent family members. In the first example given, the mother should be permitted to enter and remain. If the same mother is only in need of financial support but does not need the society of her son in Ireland, it is hard to see how a case for admission under s.18(4) could be made out.

40. In my view s.18(4) is a recognition that some family relationships require personal proximity. To grant a person asylum but to refuse the family access required to meet moral obligations would be to fail to achieve the object of "facilitating the reception of refugees and ensuring their personal wellbeing while in the State" (the legislative purpose of s.18 per Cooke J. in *Hamza*).

41. In view of these comments it seems to me that the central and often exclusive focus placed on financial dependency in family reunification decisions is misplaced. After all, if the externally located family member only needs money, what would be the point of allowing such person to come to Ireland? Having said that, giving financial support to family members at origin is often an expression of the relationship of dependency which exists and it is hard to imagine a case where the giving of financial assistance will not be a highly relevant factor in establishing dependency but it is not necessary that financial assistance is given in order for dependency to exist.

42. The Oireachtas has (by enacting s. 18 of the Refugee Act 1996) acknowledged the benefit of facilitating family reunification for refugees where dependency is established. I cannot imagine that the legislators intended that such advantages would be available only for those lucky few refugees who have sufficient resources to support not only themselves but also their dependents in Ireland. It is inconceivable that the legislature was not aware that genuine refugees almost invariably arrive in Ireland penniless and with numerous disadvantages. Refugees are frequently poorly educated, suffering from the trauma of their persecution, unable to speak the local language and are generally ill-equipped to adjust to the social, cultural and economic life of the host state. How could such a person support a dependent in Ireland? In these circumstances it would make no sense to give the Minister the power to refuse family reunification because the dependents will need social welfare support, at least in the short term. (Recalling that two members of the applicant's family were killed 6 months after the initial application was made,

the facts of this case illustrate that there are circumstances where the need for family reunification is extremely urgent and cannot be postponed until the refugee becomes self sufficient). In my view the use of the discretionary power to exclude only those dependents who will need state assistance is an arbitrary use of power. Such a result does not accord with the principles of constitutional justice because it is manifestly unfair to accommodate those who need to be with their refugee relative in Ireland but to shut the door on those who equally need to be with their refugee relative just because they are poor and the refugee is on welfare support. This is the type of unfair arbitrary and discriminatory result arising from the exercise of statutory executive discretion precluded by the law as announced by the Supreme Court in *Mallak* and *East Donegal*and *TC* (see paras. 30 -31 above).

44. The purpose of s. 18(4) was to facilitate family reunification in Ireland where the sponsor proves the existence of relationships of dependency requiring the physical proximity of the family. Thus, when exercising discretion to permit or refuse family reunification, that discretion is governed by the legislative purpose of the sub-section and its exercise must not frustrate that purpose (save, perhaps, for grave reasons which are more pressing than the requirements of family reunification.) It should be recalled that the State could not refuse refugee status because the refugee needs social welfare. Once the State grants refugee status, it extends the support and protection of the State to the victim of persecution. In my view, by virtue of s. 18 it extends the same support to the refugee's proven dependents without reference to whether further cost to the State is thereby entailed. Self evidently, if the State is entitled to rely on the likelihood of the need for social welfare support to refuse family reunification applications, then the vast majority of such applications will be refused and the legislative intent will be avoided.

45. For these reasons I accept that the Minister may not refuse entry to the State to qualifying dependent family members of a declared refugee because of the likelihood that such persons will be dependent on the State for material support.

Failure to consider Constitutional Rights

47. The applicant argues that the respondent completely failed to consider the constitutional family rights of the applicant. In this regard, it is argued that the decision to refuse permission to enter and reside is one which "engages" the applicant's rights under Article 41 of the Irish Constitution. The family members have been found to be dependent/disabled members of the sponsor refugee's extended family.

48. The applicant commences this argument by submitting that the High Court has held that decisions of this kind are capable of engaging the provisions of Article 8 of the European Convention on Human Rights - see *A.M.S. (Somalia) v. The Minister for Justice and Equality* [2012] IEHC 72 [3.1] where the learned judge said:

> "3.1 It matters not whether Article 41 of the Constitution or Article 8 of the European Convention on Human Rights is engaged. As Cooke J. in *Isfof v. Minister for Justice, Equality and Law Reform (No. 2)* [2010] IEHC 457:-
>
> > 'In the judgment of the Court no material difference exists between the evaluation of proportionality as regards the interference with 'qualified rights' (as in the present case) and 'absolute rights' (as in the case of *Meadows*). If constitutional rights are in issue (whether absolute or qualified) it is the function and duty of the High Court to vindicate them. The same can be said for rights entitled to protection under the

> European Convention of Human Rights and the need for the High Court, in compliance with Article 13 of the Convention, to provide an effective remedy for that protection'.
>
> 3.2 In this case, the respondents accept that Article 8 of the European Convention has been engaged."

49. The applicant submits that on the authority of the decision in *O'Leary v. The Minister for Justice, Equality and Law Reform* [2012] IEHC 80, the applicant's rights under Article 41 are engaged by his application and efforts to reunite with extended family members. In that case, Cooke J. held, in the context of non-national parents of adult children, that there had been an inadequate consideration given to the proportionate balancing of the right of a State in maintaining the integrity of the immigration laws as against the entitlement of the applicants to invoke the protection of their family interests under Article 41 of the Constitution.

50. In response to these constitutional law arguments, the respondent relies on the decision of Cross J. in the first judicial review between the parties in these proceedings where he remarked that the constitutional protection of the family is confined to married persons and children and that "this has been established since the State *(Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 and has been repeated in a large number of cases since then, including cases of very recent vintage".

51. The respondent says that if rights under Article 41 of the Constitution arise, and the respondent submits that they do not, then those rights are not absolute and may be outweighed by the common good. In this regard, reference is made to the decision of Costello J. in *Pok Sun Shum v. Ireland* [1986] ILRM 593, and the decision in *Osheku v. Ireland* [1986] I.R. 773, where Gannon J. held that rights enjoyed by a citizen arising from marriage or family with respect to choice of residence are not absolute.

52. In response to the argument that there was no consideration whatsoever of constitutional rights - an allegation which is borne out by the facts - the respondent says that a consideration of the application under Article 8 of the Convention was equivalent to a lawful consideration under Article 41 of the Constitution and the fact that Article 41 is not referred to is not significant. The respondent submits that the co-extensive nature of Article 41 and Article 8 was expressly recognised by Cross J. in *A.M.S.,* Cooke J. in *Isof* and Hogan J. in *R.X. v. Minister for Justice, Equality and Law Reform*[2010] IEHC 446.

53. I note what Hogan J. says in respect of the crossover between provisions of the European Convention on Human Rights and the Constitution. He said in *R.X.*:

> "32. I would pause here to add that the references in asylum and immigration case law to Article 8 ECHR have such a commonplace, that it is perhaps easy to overlook the fact that even in this area, the ECHR merely supplements or enhances the role of the Constitution. Such is made clear by the Long Title to the European Convention on Human Rights Act 2003, but in any event, the Supreme Court has confirmed that where there is an overlap between constitutional rights and the rights deriving from the Convention, it is the former which, generally speaking at least, must be considered first: see e.g. *Carmody v. Minister for Justice, Equality and Law Reform* [2009] IESC 71. The Convention comes into play only where the Constitution does not provide an adequate remedy in its own right.
>
> 33. Certainly in cases involving questions of the constitutionality of a

> statute or common law rule, s. 5(1) of the European Convention of Human Rights Act 2003, makes it clear that the Convention can only come into play only where it has been established that the Constitution does not provide an adequate remedy in its own right, a point which, in any event, is put beyond doubt by *Carmody*. But it seems to me that this principle must also apply by analogy where the issue concerns the application of a fundamental right and where the right in question is protected by both the Constitution and the Convention. As Murray C.J. observed in *Carmody*:
>
> > 'It hardly needs to be said that the provisions of the Act of 2003 cannot compromise in any way the interpretation or application of the Constitution, a principle which is acknowledged in the long title to the Act which states that the effect of the Act is 'subject to the Constitution'."

With respect to this argument, the applicant does not argue that had the relevant constitutional rights been considered, a different outcome would have been achieved. I am not of the view that the failure of the Minister to mention constitutional rights in his assessment of the claim is a sustainable ground of challenge. The State is entitled to balance family rights against State rights whether the source of the right is the Convention or the Constitution. In accordance with the decisions in *Carmody* and *R.X.*, the constitutional rights should have been considered first but the applicant has not established any injustice requiring remedy which has resulted from this failure. No stronger rights have been argued to exist under the Constitution and thus the failure to expressly weigh the competing rights by reference to Article 41 thereof was harmless error. I do not think it is necessary for me to decide whether a refugee seeking family reunification under section 18(4) is asserting or is entitled to the protections of Constitutional rights under Article 41 or any other provision of the Constitution. I accept of course that the refugee has a statutory right to seek family reunification and any decision on such application must not exceed the statutory scheme or offend the public law rules on decision making.

Inadequate Proportionality Assessment

54. The next argument advanced by the applicant is that no lawful proportionality exercise was undertaken.

55. It appears that two main reasons were stated for the refusal. The first is associated with the requirements of the lawful operation of the immigration system of the State. There was very little discussion of this reason in the case. It need hardly be said that the State is entitled to refuse entry to foreign nationals in accordance with immigration law and policy. I am not satisfied that when assessing a family reunification request under s. 18(4) which involves balancing family rights and state rights, a statement to the effect that family reunification is refused because the State is entitled to say 'no' is either a proper reason or an adequate proportionality exercise.

56. The second reason given for the refusal is based upon the economic well-being of the country, given the current economic circumstances in Ireland and the likelihood that the subjects of the application would become a burden on the State. (A third reason relates to the state of the applicant's mother's health and the implication that she will be reliant on the health system. This third reason is effectively a particularisation of the second economic well-being reason).

57. The State's interests are clearly set out in the assessment of the application. It

is difficult to see in what way the real interests and particular circumstances of the sponsor refugee have been weighed, must less identified. In fairly bald terms, the Minister states:

> "Having weighed and considered the facts of this case, it is not accepted that any interference with the applicant's right to family life will have consequences of such gravity as to constitute a violation of Article 8."

58. The Minister then proceeds to describe the circumstances of the individual members of the extended family. Any balancing of rights and interests in a context such as this must identify the circumstances of the person asserting them and in this case the rights to be balanced are those of the sponsor refugee and those of the State.

59. The most important circumstance in an application for family reunification under s. 18(4) is that the person seeking permission for family members to enter the State is a refugee. The exercise to be undertaken when a declared refugee seeks to obtain family reunification in accordance with s. 18 of the Act is not the same as a standard visa application for someone who wishes to join a family member in Ireland, not being a refuge because a refugee has no real choice of residence and cannot live with his family in his country of origin. It may be the case that the only way the applicant refugee can fulfil moral obligations to his dependents is for them to be in Ireland. It seems to me that these realities ought to have been carefully weighed against the lawful State interests. Such balancing of rights as took place identified the State's right to avoid the burden of supporting the dependents but as I have said earlier in this decision, that was unlawful. On that basis alone, no lawful proportionality assessment took place.

60. No attempt was made to evaluate for how long the family might need assistance. In addition, I accept as correct the argument, often overlooked in the balancing exercise, that in order for a proper proportionality exercise to be carried out, the decision maker must attempt to impair an identified right as little as possible. As Denham J. said in *Meadows v. Minister for Justice* [2009] IESC 3, "When a decision-maker makes a decision which affects rights then, on reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective." It is not the function of this court to suggest what methodologies might be applicable to achieve that end. It is possible that having attempted to restrict the right as little as possible, the result is that absolute restriction is unavoidable. That such might be the result is no excuse for failing to conduct this leg of a proportionality exercise.

61. Facts of central importance to this application for family reunification have not been identified in the Minister's assessment. It is clear from the application that at all times, the applicant, his wife, his daughter, his mother and his siblings lived together as a family unit. In addition, it was clear that following the outbreak of violence in Somalia that they remained living together in a refuge camp in Mogadishu and that the family (excluding the applicant) fled to Ethiopia together and again remained a unified family unit when they took up residence in Ethiopia. It is apparent from the application that the applicant was the male head of household for this family unit. He was, it would appear, the father figure in his own marital family and in the family of his birth. These facts were advanced in support of the claim that dependency existed. It is a striking feature of the assessment that theses circumstances are given no apparent weight and the only manifestation of dependency considered by the respondent was the transfer of money. No lawful

consideration of dependency can be said to have taken place where all of the manifestations of dependency are not considered. This frailty in the assessment cannot be said to be cured by the fact that the Minister found that financial dependency existed. In effect, the Minister came to exercise his discretion in circumstances where the only dependency he accepted was of the financial variety to the exclusion of any of the other important aspects of dependency which were advanced by the applicant and his solicitor. These failures indicate the absence of consideration of all the relevant facts and therefore the absence of a lawful proportionality assessment.

62. I have suggested some of the special features of the life of a refugee which ought to have been weighed against legitimate State interests. These factors are not exhaustive and each case will require a careful assessment of the actual circumstances of the sponsor refugee and how he or she can fulfil duties to dependents. It will always be necessary to consider the nature of the family relationships because the mere existence of kinship is not enough to establish dependency. This, I think, must be the reason the Oireachtas established, by section 18(2), the Office of the Refugee Applications Commissioner as the investigator of the family relationships.

63. I uphold the complaint as to the inadequacy of the proportionality assessment

The Razgar Questions

64. The first two paragraphs of the Minister's consideration of the application under Article 8 of the European Convention are in the following terms:

> ""*Everyone has the right to respect for his private and family life, his home and his correspondence*." If the Minister refuses the applicant's application for family reunification in respect of [the family members], this decision would engage the applicant's right to respect for family life under Article 8(1) of the ECHR.
>
> **Family Life**
> Having weighed and considered the facts of the case, it is not accepted that any interference with the applicant's right to family life will have consequences of such gravity as to constitute a violation of Article 8. As a result, the decision to refuse the application for family reunification herein does not constitute a breach of the right to respect for family life under Article 8 of the ECHR."

65. These paragraphs do not reflect a lawful approach to the assessment ECHR rights. It is difficult to comprehend, in the absence of stated reasons, the conclusion that any interference with the applicant's right to family life would not have consequences of such gravity as to constitute a violation of Article 8. The interference could only be assessed if the nature of the dependency had been fully described. As indicated, the only form of dependency assessed was financial dependency. As the application for reunification argued, the family, involving what might be regarded as two nuclear families with deep bonds had always lived together. The interference with those family bonds caused by a negative decision was required to be identified and assessed. This did not happen.

66. In any event, the phrase "consequences of such gravity" is derived from the jurisprudence of the European Court of Human Rights and has been explained by the Court of Appeal in England and Wales. Contrary to common usage in administrative decisions, the phrase does not mean that there must be grave consequences arising from a negative decision before Convention rights are

engaged. Decision makers are on the wrong path if they are in search of 'grave consequences' of a negative decision. In *V.W. (Uganda) v. The Secretary of State for the Home Department* [2009] EWCA Civ. 5, Sedley L.J. pointed out that:

> "22. As this court made clear in *AG (Eritrea)* [2007] EWCA Civ 801, ss. 26-28, the phrase 'consequences of such gravity' in question (2) posits no specially high threshold for art. 8(1). *It simply reflects the fact that more than a technical or inconsequential interference with one of the protected rights is needed if art. 8(1) is to be engaged*." [emphasis added]

The language used in the assessment quoted above indicates that the author was attempting to follow the suggested approach set out by Bingham L.J. in *R. (Razgar) v Secretary of State for the Home Department* [2004] ULHL 27. The sequence of questions he advised in approaching an Article 8 assessment is as follows:

> "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

67. As can be seen from the passage quoted from the decision in suit, the author commences the assessment by indicating that a negative decision by the Minister would engage the applicant's rights. He then proceeds to ask whether any interference with family rights might have consequences of gravity.

68. Such an approach to an Article 8 assessment is not in accordance with law. The analysis should start by asking whether a negative decision on family reunification would interfere with article 8 rights and then ask whether that interference would have consequences of such gravity as to potentially engage Article 8 rights, bearing in mind the proper meaning of 'consequences of such gravity'. Following that analysis, the decision maker may decide that the interference is justified notwithstanding the engagement of rights. I should also note that in order for the interference caused by the negative decision to be justified, it must, in accordance with Lord Bingham's fourth question, be *necessary* in the interests of the economic well-being of the country, *inter alia*. No part of the Article 8 assessment in this case establishes that it is necessary to refuse the application for economic reasons. If, for example, the state were overwhelmed by applications, one could see how a decision maker might say that refusal is economically necessary. For all of these reasons I uphold the complaint that no lawful proportionality assessment was conducted.

70. I grant an order of *certiorari* in respect the decision in suit.