Judgment Title: AMS v Minister for Justice and Equality

Neutral Citation: [2014] IESC 65

Supreme Court Record Number: 89/14

High Court Record Number: 2012 858 JR

Date of Delivery: 11/20/2014

Court: Supreme Court

Composition of Court: Denham C.J., Murray J., Hardiman J., Clarke J., Dunne J.

Judgment by: Clarke J.

Status of Judgment: Approved

THE SUPREME COURT

[Appeal No: 89/2014]

Denham C.J.
Murray J.
Hardiman J.
Clarke J.
Dunne J.

Between/

A.M.S. (Somalia, Family Reunification)

Applicant/Respondent

and

The Minister for Justice and Equality

Respondent/Appellant

Judgment of Mr. Justice Clarke delivered the 20th November, 2014.

1. Introduction

1.1 Irish law makes provision for the possibility of family reunification in cases where a member of the family concerned has successfully obtained refugee status in the State. Two classes of family member are described in the relevant legislation which is s.18 of the Refugee Act, 1996 ("1996 Act"). Under s.18(3) of the 1996 Act spouses, unmarried minors and parents of minor refugees are given an automatic entitlement to reunification. Under s.18(4) a discretion exists in respect of a wider range of family members. This case is concerned with an application which relates to members of that wider group.

1.2 The applicant/respondent ("Mr. S") was born in 1985 and is a citizen of Somalia. He came to Ireland as an asylum seeker in May 2007 and was declared to be a refugee on the 8th January, 2009.

1.3 An initial decision to refuse permission to enter the state, in respect of a number of persons said to be members of Mr. S's family, was made in July 2011. That refusal was quashed by the High Court (Cross J.) in *A.M.S. (Somalia) v. Minister for Justice and Equality* [2012] IEHC 72. Thereafter, a second application was followed by a second decision to refuse made on the 20th July, 2012. Judicial review proceedings were brought seeking to quash that second refusal. Those second judicial review proceedings were concerned only with the mother of Mr. S and his youngest sister. The proceedings were successful in the High Court (*A.M.S. v. Minister for Justice and Equality* [2014] IEHC 57). The respondent/appellant ("the Minister") has appealed to this Court against that decision. Two main sets of issues arose on the appeal. The first concerned the determination of the trial judge as to the proper interpretation of section 18. A number of separate questions potentially arise under that heading. Second, the question of the proportionality of the decision of the Minister in refusing family reunification in the circumstances of this case was brought into question.

1.4 In order to properly understand the issues in detail it is necessary to turn first to the background facts in more detail.

2. Background Facts

2.1 Mr. S, having been granted refugee status on the 8th January 2009, applied to the Minister, under s.18 of the 1996 Act, by letter dated 11th May 2009, for family reunification in respect of his wife, mother, daughter, two sisters and two brothers. Mr. S completed the questionnaire (as required of a refugee seeking reunification with his family) without the assistance of a lawyer. In response to questions posed in the questionnaire, Mr. S explained that he had lived as a unit with all of the named family members while in Somalia and that his family were, at the time of his application, in a refugee camp outside Mogadishu. The siblings of Mr. S were all minors at that time. Mr. S did not respond to a question seeking information on financial dependency on the part of the relevant family members towards him. Mr. S responded "*no*" to a question as to whether any family members were employed. Mr. S stated that he was looking for a job in response to a question asking how he proposed to support the relevant family members if granted reunification. Mr. S failed to respond to a question concerning social welfare benefits. As is normal practice under the requirements of the 1996 Act, the questionnaire and any other relevant materials are considered by the Office of the Refugee Applications Commissioner ("ORAC") and a report prepared for the Minister. The report, in this case, was forwarded by ORAC to the Minister on the 1st September 2009 but was not made available to Mr. S at that point.

2.2 In February 2010, Mr. S. received the tragic news that his daughter and one of his brothers had been killed in a bomb attack, in January 2010, while the family were making their way from the refugee camp outside Mogadishu across the border to Ethiopia.

2.3 Mr. S engaged the assistance of solicitors who came on record on the 18th February, 2010. The solicitors for Mr. S entered into correspondence with the Minister and provided documentation and further information in support of Mr. S's application. The Minister was informed that the family were now residing in rented accommodation in Addis Ababa with the financial assistance of Mr. S. The family are undocumented in Ethiopia and have no permission to reside there. The family members are all unemployed and rely on remittances from Mr. S. The Minister was also informed of health issues concerning Mr. S's mother, including hypertension, chronic liver disease, chronic rheumatism, dementia and depression.

2.4 Almost one year later, solicitors for Mr. S wrote to the Minister, on 10th January, 2011, requesting a decision within twenty-eight days. In response the Minister requested further information to assist in the decision-making.

2.5 Thereafter, the application of Mr. S for reunification with his wife, under s.18(3) of the 1996 Act, was granted on the 4th May, 2011. However, a decision to refuse the applications in respect of the remaining family members was issued, under s.18(4) of the 1996 Act, on the 6th July, 2011.

2.6 As noted earlier, that later decision (of the 6th July, 2011) was quashed by Cross J. for the reasons set out in a judgment entitled *A.M.S. (Somalia) v. Minister for Justice and Equality* [2012] IEHC 72, on the 14th February, 2012. On the 5th April, 2012, Mr. S renewed his application for reunification with his mother and remaining siblings (one brother and two sisters), and in this respect, made additional submissions to the Minister.

2.7 The second decision concerning Mr. S's application for reunification issued on the 20th July, 2012, and again contained a refusal. It is this decision to refuse which was the subject of judicial review proceedings before MacEochaidh J. and which is now before this Court. Those judicial review proceedings were confined to seeking orders designed to quash the refusal in respect of the mother of Mr. S and one of his female siblings who was a minor.

2.8 In that particular context it is necessary to turn to the reasons given by the Minister for that second refusal. It is accepted that the Minister's reasons can be found in a document entitled "Family Reunification Consideration", prepared by Mr. Barry McGreal of the Family Reunification Unit of the Irish Naturalisation and Immigration Service ("the reasons document").

3. The Reasons Given

3.1 The reasons document acknowledges that the first decision to refuse was successfully challenged and that Mr. S's application for family reunification was to be reconsidered in the light of that fact. The document noted that the Minister expressed concern as to identity in his earlier decision. The Minister was unable to verify the authenticity of the documentation submitted and would require DNA evidence to prove that the relevant persons were members of Mr. S's family.

3.2 The reasons document proceeded, thereafter, to consider the application on the presumption that the individuals were in fact who they are said to be (with proof being required if a positive decision was ultimately issued).

3.3 A section of the reasons document, which is entitled "Consideration under article 8 of the European Convention on Human Rights (ECHR)", acknowledges that, if the Minister were to refuse the application, Mr. S's right to respect for family life under article 8(1) of the ECHR would be engaged. In the following paragraph the document states that "[h]aving 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." The document then goes on to consider the circumstances, qualifications and skills of each individual the subject of the application and the financial situation of Mr. S. The document accepts that a refusal of the application would constitute an interference with Mr. S's right to respect for family life within the meaning of article 8 of the ECHR. However, it is stated that any interference with the relevant article 8 right is in accordance with law (s.18(4) of the 1996 Act) and pursues the legitimate aims of the State:

> *"(i) to maintain control of its own borders and operate a regulated system of control, processing and monitoring of non-national persons who wish to enter the State;*
>
> *(ii) to ensure the economic well-being of the State."*

3.4 The cases of: *Nunez v. Norway* [2011] ECHR 1047 ; *Abdulaziz & ors v. UK* [1985] 7 E.H.R.R. 471; *Antwi v. Norway* [2012] ECHR 259; *Omoregie v. Norway* [2008] ECHR 761; *D v. United Kingdom* [1997] 24 E.H.R.R. 423; *N. v. Secretary of State for the Home Department* [2005] 2 A.C. 296; *Agbonlahor v. Minister for Justice, Equality and Law Reform* [2007] 4 I.R. 309, are cited in support of the position of the State under the headings "*The lawful operation of immigration control"*, "*Economic well-being of the country*" and "*Health and Welfare Systems*".

3.5 The reasons document notes that "the State is currently experiencing an economic downturn with high unemployment and a consequential burden on the welfare and education systems in the State" and that if the family members of Mr. S "*are granted permission to enter the State it would be likely that they may become a burden on the State*." Further, it is noted that, due to her health condition, Mr. S's mother would be reliant on the health and welfare systems of the State.

3.6 In considering the individual position in respect of the relevant family members and having accepted that the financial dependency of those family members on Mr. S "*may demonstrate an additional element of dependence so as to establish family life between Mr. S and his adult siblings*", it was not accepted that an interference with any such article 8 rights, by reason of a refusal, would be disproportionate. With respect to the sister of Mr. S, who is a minor, it was not accepted that the best interests of the child "*upset the fair balance under article 8*."

3.7 The decision to refuse the application is then set out with the following reasoning under the heading "*Conclusion*", which, for the purposes of this judgment, it is necessary to set out in full:

> *"The Applicant and each of the subjects of the application have been given an individual consideration and due process in all respects. The rights of each of the subjects of the application have been balanced in a fair and proportionate manner against the rights of the State.*
>
> *Having weighed and considered all of the factors outlined above in relation to the family, as well as the factors relating to the rights of the State, it is submitted that the factors relating to the rights of the State are weightier than those factors relating to the family rights of the applicant and each of the subjects of the application.*
>
> *Therefore, it is submitted that a decision of the Minister to exercise his discretion refusing the application for family reunification whilst constituting an interference with the right to family life under Article 8 of the Convention on Human Rights, is in accordance with law, necessary in a democratic society, pursues a legitimate [sic] and is proportionate."*

3.8 It was, of course, in respect of that decision that the judicial review proceedings in the High Court were brought. As noted earlier, those proceedings were successful and in that context it is next necessary to turn to the reasoning of the trial judge.

4. The High Court Judgment

4.1 Having set out the background to the application and the substance of the Minister's decision, MacEochaidh J. turned to consider the "Nature of the Minister's Discretion". As per the judgment of this Court in *East Donegal Co-operative & Ors v. Attorney General* [1970] I.R. 317, MacEochaidh J. determined that 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 concerned. Noting the fact that the statutory discretion in

s.18(4) is not accompanied by express criteria governing its exercise, the trial judge nonetheless considered that even "*seemingly absolute discretions are subject to review by the courts*" (*Mallak v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297). It was held that the legislative intention should be identified by reference to the words of the text adopted by the Oireachtas.

4.2 Relying on the decision of Cooke J. in *Hamza v. Minister for Justice, Equality and Law Reform* [2010] IEHC 427, MacEochaidh J. agreed that s.18 of the 1996 Act was enacted "*in the interests of facilitating the reception of refugees and ensuring their personal wellbeing while in the State*." Considering that reunification pursuant to s.18(4) is only available where dependency or disability is established, in the view of MacEochaidh J., this distinction expresses the "*true purpose of s.18(4)*." He went on to hold that such true purpose was to enable refugees to discharge the "*moral obligations*" which they may owe to dependent relatives; obligations which could not be met "*without the physical presence in the State of the persons in question*." As such, in his view, it was not intended by the Oireachtas that an application for family reunification under s.18(4) could be refused on the grounds that such person or persons would likely be dependent on the State for material support; that, in the trial judge's view, would be an arbitrary use of discretion. This aspect of the trial judge's decision gives rise to the first major point of controversy on this appeal. As noted, the trial judge was of the view that the fact that family members might be financially dependent on the State should family reunification be granted was not a factor which could properly be taken into account by the Minister at all. It will be necessary, in due course, to consider the question of whether the trial judge was correct in construing s.18 in that way.

4.3 MacEochaidh J. then turned to the question of proportionality and, under that heading, came to the view that the Minister's consideration was inadequate. With regard to the first stated reason for the refusal – the lawful operation of the immigration system of the State – the trial judge was not satisfied that, in a decision involving the balancing of family rights with those of the State, "*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*." Considering the second stated reason for the refusal – the economic well-being of the country – the trial judge noted that the interests of the State in this respect were fully set out, but also found that the interests of Mr. S were not so fully weighed, "*much less identified*". The trial judge held that, in a case involving family reunification of a refugee with his or her family members under s.18(4), the fact that a refugee has "*no real choice of residence and cannot live with his family in his country of origin*" ought to be weighed against the State's lawful interests. MacEochaidh J. also noted that the list of factors to be weighed against the legitimate State interests in any proportionality consideration is not exhaustive and "*will require a careful assessment of the actual circumstances of the sponsor refugee*". On the basis of the finding that the State does not have a right to "avoid the burden of supporting the dependents", MacEochaidh J. held that no lawful or proper proportionality assessment had taken place.

4.4 MacEochaidh J. then went on to address the Minister's consideration of the application under article 8 of the European Convention on Human Rights, where the reasons documents states:-

> *"'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."*

4.5 MacEochaidh J. expressed the view that these paragraphs do not reflect a lawful approach to the assessment of ECHR rights. There had not, in his view, been a full assessment of dependency (outside of financial dependency) sufficient to lead to the conclusion that interference with family life would not have consequences of such gravity as to constitute a violation of article 8. He considered that, while the reasons document had attempted to follow the authority of *R. (Razgar) v. Secretary of State for the Home Department* [2004] 3 All E.R. 821 in its assessment of article 8 rights, in so doing an approach had been taken to the article 8 assessment which was "*not in accordance with law" and was a misunderstanding of the phrase "consequences of such gravity*" as used by the House of Lords in *Razgar*. MacEochaidh J. held that the phrase in question does not mean that that there must be grave consequences arising from such a negative decision before the Convention rights of the applicant are engaged. In that regard the trial judge relied on the clarification of *Razgar* by Sedley L.J. in *V.W. (Uganda) v. The Secretary of State for the Home Department* [2009] EWCA Civ. 5 in which it was stated that the reference to "*consequences of such gravity*" 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*". Having determined that the decision maker commenced the assessment of article 8 rights by indicating that a negative decision by the Minister would engage Mr. S's rights and then proceeded to ask whether any interference with family rights might have consequences of gravity, MacEochaidh J. held such an approach is not in accordance with law. He went on to state:-

> *"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."*

4.6 As noted earlier, there are two broad areas of dispute on this appeal arising out of that judgment. The first concerns the proper interpretation of s.18 of the 1996 Act to which I now turn.

5. Section 18

5.1 Section 18, in relevant part, provides as follows:-

> *"(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").

..."

5.2 As already noted, this case is concerned with subsection (4). It is clear, therefore, that the statutory scheme in respect of such a case is that a person may apply to the Minister who is required to refer the matter to the Commissioner. The Commissioner reports on the relationship between the refugee concerned and the person the subject of the relevant application under subsection (2). Nothing turns on the application or that report on the facts of this case.

5.3 It is clear that, in the case of family members other than those in respect of whom an automatic right arises under subs. (3), the Minister has under subs. (4) a discretion. First the relevant family member must be "*a dependent member*" of the family concerned. There was no dispute but that, subject to the identity point, the relevant persons in this case were dependent on Mr S. However, the Minister took issue with the interpretation placed on the term "*dependent*" by the trial judge. In that context, in the written submissions filed, the Minister suggested that the trial judge erred in law by holding that that the concept of dependency under s.18(4) included "*moral dependency*" and a need for "*personal proximity*". The Minister suggested that the concept of dependency was not in issue at the hearing before the High Court and that no submissions or argument had been heard on the matter before that court.

5.4 Given that the relevant persons were accepted as being dependent, it does not seem to me that the question of the breadth of the definition of dependency arises on the facts of this case. I would, therefore, leave to a case where the question of whether a relevant person was or was not dependent turned on the breadth of that definition, the questions of interpretation raised by the Minister under this heading.

5.5 However, there were other questions raised by the Minister on this appeal in respect of the proper interpretation of section 18. As noted earlier, the trial judge had found that the Minister was not entitled to regard the potential financial dependency of the members of Mr. S's family on the State, in the event of family reunification being granted, as a factor which could weigh against the granting of family reunification. The Minister argued that the section conferred on him a broad discretion to manage and control the immigration system of the State. In that regard, it was argued that an interpretation which sought to exclude the possibility of taking into account financial consequences was contrary to that broad discretion and was, thus, an inaccurate interpretation of section 18.

5.6 In response, Mr. S submitted, as a starting point, that there is a presumption against unfettered statutory discretion (*East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317). This point was accepted by the Minister. It was next suggested by Mr. S that there is no requirement to be found in s.18 to the effect that the refugee and his family members must be financially self-sufficient, either on a literal or a purposive interpretation of the statutory regime.

5.7 On the question of the literal interpretation of s.18(4), Mr. S placed reliance on the fact that there is, in s.18(4)(b), a definition of a "*dependent member of the family*". It follows that, in order for a proposed reunification to be permitted, the person in respect of whom the application is made must be "*dependent*" in that sense in order for that person to come within s.18(4)(a). On that basis it was accepted on behalf of Mr. S that dependency is a "*qualifying*" criteria without which family reunification under s.18(4)(a) of the 1996 Act cannot be granted. However, it was argued that there was no reference otherwise to dependency and in particular no reference to the fact that a potential dependency on the State could be regarded as a disqualifying or exclusionary factor. It was submitted by Mr. S that, had the legislature intended to make financial dependency relevant to the exercise of the Minister's discretion, then express provision should have been made for same. In support of this argument, Mr. S pointed the Court to the fact that, under s.18(4)(a), a family member of a refugee to whom reunification is granted, is entitled, under s.3(2)(a)(ii), to receive the same social welfare benefits as those to which Irish citizens are entitled. On that basis it was said that, if the Minister were permitted to refuse reunification to a family member due to the fact that they would require recourse to social welfare benefits, the effect would be to nullify section 3.

5.8 In the alternative, Mr. S submitted that, on a purposive interpretation of s.18, and in agreement with the findings of MacEochaidh J., the legislative intent would be avoided if

the Minister were entitled to rely on the likelihood of the need for social welfare support to refuse family reunification applications. It was submitted by Mr. S that the nature of the criteria which govern the statutory discretion of the Minister under s.18(4) must be ascertained by reference to the legislation as a whole, including the legislative scheme underlying the Refugee Act, 1996. In this respect it was submitted that, in line with the findings of the trial judge, the legislative purpose of s.18 is to facilitate the reception of refugees and to ensure their personal wellbeing while in the State.

5.9 The Court was also referred to s.4 of the Immigration Act, 2004 (as amended) ("2004 Act") and similar earlier provisions. That Act makes general provision for the granting of permission to enter and reside in the State. It was pointed out that, under s.4(3) and s.4(10) of the 2004 Act, the ability of an applicant to support himself or herself, within the State, is a relevant consideration on such applications. Similarly, it was noted that the right of an EU citizen to reside in Ireland for more than three months is subject to an express statutory requirement that he or she have sufficient resources to support himself or herself. Following on from this, it was suggested that the very existence of s.18 indicates that the legislature intended to make special provision for family reunification in the case of refugees, both distinct and separate from applications for permission to enter and reside pursuant to s.4 of the 2004 Act or its predecessors. In that context it is also of some relevance to refer to the general power which the Minister had to allow persons to enter the State at the time of the enactment of the 1996 Act. That regime was to be found in the Aliens Order, 1946, article 5 of which dealt with leave to enter and the conditions attached to same. Of particular relevance is the requirement that an applicant must be in a position to support himself and any dependents. Article 5 of the Aliens Order was subsequently amended by S.I. No. 24/1999. Those provisions were replaced by the 2004 Act.

5.10 Given that specific statutory measures were included in s.18 of the 1996 Act for the purpose of permitting entry into the state by family members of a refugee, counsel for Mr. S argued that the position of such parties must have been intended to have been enhanced above and beyond the entitlement of an ordinary person, not being a member of the family of a refugee, to enter the State.

5.11 The real issue under this heading is, therefore, as to whether the trial judge was correct in determining that the Minister was not entitled to have any regard to the fact that the two family members concerned would be likely to have been a cost to the state in the form of social welfare payments and health provision. I turn to that question.

6. Discussion

6.1 There can be no doubt but that s.18(4) confers a wide discretion on the Minister in deciding whether to allow family reunification in respect of those family members who do not enjoy an automatic entitlement. As was argued on behalf of Mr. S, and accepted on behalf of the Minister, that discretion is not absolute. The legislation is, as the trial judge correctly pointed out, sparse as to the criteria to be applied by the Minister. It seems to me that the proper inference to draw from the absence of detailed criteria is that the Oireachtas was mindful of the fact that the range of circumstances which might properly be taken into account in any individual case could vary enormously from one situation to another. Any attempt to impose specific criteria would run a real risk of unintended consequences which could have unfortunate and unanticipated results both for the State and for meritorious applicants.

6.2 On the basis that the Oireachtas has conferred a wide discretion on the Minister, it would be necessary, in order that a factor might be ruled out from the Minister's proper consideration, for such a factor to be outside the scope of matters which could properly be taken into account, under the statute, in a family reunification application. I cannot see that the legitimate economic interests of the State can be so classified. Those

interests are real. Scarce state resources have to be applied carefully not least in times when those same resources are stretched in making provision for those already within the country be they citizens, those who have been granted refugee status or others, within the State, who have entitlement to state benefits. In my view it would require clear language in the legislation which either expressly provided or necessarily inferred that such economic interests were not to be taken into account in order that it would be proper to interpret s.18 in a way which prevented the Minister from having regard to such economic interests in reaching an overall conclusion in an application under section 18(4). It must be recalled that, unlike the position under s.18(3), the less immediate family members covered by s.18(4) do not have an automatic entitlement to family reunification. I agree both with the trial judge and with Cooke J. in his decision in *Hamza* that s.18 is designed in the interests of facilitating the reception of refugees and ensuring their personal wellbeing while in the State. However, it must also be taken into account that the section distinguishes between those on whom an automatic entitlement is conferred and those in respect of whom the Minister is entitled to exercise a discretion. While weight, and indeed significant weight, must thus be placed on the undoubted statutory intention to facilitate family reunification, the fact that the discretion under s.18(4) exists at all clearly implies that there may be countervailing factors which must also be taken into account.

6.3 While the trial judge was correct, therefore, to identify that the principal purpose of the relevant provisions of the 1996 Act is to facilitate the position of refugees by enabling them to be unified both with those close members of their family on whom automatic rights are conferred and other dependent relatives, nonetheless the Act does not confer an automatic right of reunification in respect of those more remote family members even though they be dependent. The 1996 Act, therefore, contemplates the possibility that persons, even though they may be dependent on a refugee, may not succeed in obtaining reunification. I cannot, therefore, agree that the trial judge was correct to infer from the general purpose of the 1996 Act that the Minister could never have regard to financial considerations involving the State in determining how lawfully to exercise the discretion conferred by section 18(4).

6.4 However, that is not an end to the questions which arise as to the proper interpretation of section 18. It seems to me that counsel for Mr. S was correct when arguing that significant regard must be had to the fact that the section as a whole is clearly intended to confer, as the trial judge correctly pointed out, a benefit on a refugee, and through the refugee on dependent family members, in the form of an enhanced possibility of persons being permitted into the State as a result of a family reunification application being successful. As was argued by counsel, there would be little point in making elaborate provision for family reunification unless it were intended that those to whom the discretionary family reunification provisions applied would be in a better position than those to whom it did not. The various statutory regimes, to which reference has been made, which have applied over time to general applicants, do make express provision for evidence of sufficient finance for support. The family reunification provisions make no such reference. The obvious inference to draw is that absence of financial support is to be an exclusionary factor in respect of general applicants but is only to be a factor to be taken into account amongst others in the case of those to whom the family reunification provisions apply. Likewise, as counsel again argued, the fact that the legislation expressly provides that persons who have the benefit of a successful family reunification application are to qualify for state benefits is inconsistent with an interpretation which suggests that, by itself, the fact that particular family members might be a burden on the State can be an exclusionary factor.

6.5 It follows that the question of the potential cost to the State of meeting its obligations to members of the family of a refugee is a factor which can properly be taken into account in the overall assessment of the case. It equally follows, however, that

some significant weight has to be given to the fact that the Oireachtas has chosen to confer a special entry status on dependent members of the extended family of a refugee and has also determined to confer, on such persons if they are admitted into the State, the same social welfare and health benefit entitlements as apply to a citizen of the State. In that context it is difficult to see how, without more, the mere fact that there may be some limited cost to the State of admitting a dependent member of the extended family of a refugee to enter the State could be decisive. Against the background of that interpretation it is next necessary to turn to the question of proportionality.

7. Proportionality

7.1 As already noted I am satisfied that, while the economic consequences for the State of the admission of persons as a result of a successful family reunification application is a factor which can be taken in to account, nonetheless significant weight must also be attached to the statutory policy which favours giving special admission status to such family members. It is against that background that the question of proportionality needs to be considered.

7.2 There may, of course, on the facts of other cases, be a whole range of different factors which might come into play in the consideration of a family reunification application. However, in substance, the only factors put forward for refusal on the facts of this case were the general entitlement of the State to maintain orderly control over immigration matters and the particular likelihood that the relevant family members in this case would be a burden on the State both in respect of social welfare and, in one case, health services.

7.3 In the course of argument, counsel for the Minister was questioned as to whether the relevant economic issues were to be considered solely in respect of the family members in question in this case or from a broader perspective of the economic consequences for the State generally of family reunification applications outside the automatic class being acceded to. Counsel expressly disavowed any reliance by the Minister on a broader consideration of economic considerations which went beyond the specific consequences of admitting into the State the individuals with whom this appeal is concerned.

7.4 I should say that I do not consider that it would be illegitimate for the Minister to have regard to such broader circumstances. But in order for the Minister to have regard to such broader circumstances it would be necessary that there would be materials available analysing what the relevant costs would be. There do not appear to have been any materials available which indicated the number of persons who would come within the definition of a dependent member of a family for the purposes of s.18(4) and who would thus be persons who potentially might be the subject of applications for discretionary family reunification. Doubtless such calculations could not be carried out with great precision but it is hard to envisage that some reasonable estimate could not be arrived at. Likewise, it should be possible to reach some broad view on the number of such persons who, if an application were successfully made on their behalf, might be a cost to the State and also what the likely average cost would be. At least some realistic overview, therefore, could be taken of the cost to the State generally of allowing discretionary family reunification applications.

7.5 In that context it is of some relevance to look at the analysis which was carried out in a recent United Kingdom decision. As appears from that case the situation in the United Kingdom is significantly different. However, it is clear that a detailed consideration of the overall financial consequences of family reunification was engaged in by the relevant UK authorities and scrutinised, under judicial review principles, by the courts for its validity.

7.6 In the United Kingdom sections 1(4) and 3(2) of the Immigration Act 1971 recognise that it is for the Secretary of State for the Home Department to lay down rules which set out the practice to be followed to regulate entry and residence in the United Kingdom for people who do not have a right of abode. In *R (MM) v. Secretary of State for the Home Department* [2013] EWHC 1900 (Admin) three claimants challenged a significant amendment to the Immigration Rules on the basis that certain provisions of the amended rules relating to non- European Economic Area spouses were unlawful. It was claimed that the provisions (contained in Appendix FM: Family Members, Section E-ECP Eligibility for entry clearance as a partner) constituted a disproportionate interference with the claimants' rights under article 8 of the ECHR. The amended rules governing applications made from 9th July, 2012 impose a mandatory income requirement, for the admission of a spouse without children, of a minimum gross income of £18,600 per annum. The claimants could not meet that threshold and so their non-EEA partners were unable to reside in the United Kingdom.

7.7 Blake J. in the High Court concluded that, while a wide margin of appreciation was to be accorded to the Secretary of State's policy in respect of immigration, the maintenance requirements of paragraph E-ECP.3.1 of Appendix FM to the Immigration Rules constituted a significant interference in the article 8 rights of the claimants and that such interference was disproportionate and unjustifiable. He further held that the income requirements were "beyond a reasonable means of giving effect to the legitimate aim". He did not strike down the financial requirements or make a formal declaration.

7.8 The Court of Appeal subsequently overturned the decision of Blake J., stating that the judge's analysis and conclusion that the amended Immigration Rules were, in principle, incapable of being compatible with the article 8 rights of the claimants was not correct (*R (MM) v. Secretary of State for the Home Department* [2014] EWCA Civ 985). The Court of Appeal held that, unless the decision of the Secretary of State was wholly unreasonable, the court should not interfere with the judgment of the executive in deciding where the level of income requirements should be drawn. From the materials which were before the United Kingdom courts it is clear that the relevant authorities had engaged in a detailed analysis of the financial consequences of allowing spouses to reside in the United Kingdom. There is, of course, no reason in principle why a similar exercise could not be conducted in this jurisdiction.

7.9 Against the background of costs estimates of allowing reunification in cases where the State might have to bear a financial burden, it might be possible to form a judgment as to whether a particular approach, which might be restrictive of allowing such applications, might not be justified on the basis of the economic consequences for the State of allowing most or many applicants, who met the requirement of "*dependency on a refugee*" criteria, to enter the State. But no such analysis was carried out by the Minister in this case.

7.10 The Court is, therefore, faced with assessing the proportionality between, on the one hand, depriving persons who are acknowledged to be dependent on Mr. S from the opportunity of family reunification, and the exposure of the State to what would, in the overall circumstances of this case, be the extremely limited costs of meeting the welfare and health requirements of that very small number of persons.

7.11 Against that background it is necessary to turn to a review of the proportionality of the Minister's decision. As this Court pointed out in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, part of the proper role of the courts in judicial review is to assess the proportionality of the exercise of an administrative adjudication power or discretion. As Fennelly J. put it at p. 827 of his judgment:-

> *"This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J."*

7.12 Thus the proper approach in this case is to assess whether, having regard to the extent of any interference with the rights or interests of Mr. S and his family members, such interference is justified on the basis of the legitimate aims sought to be advanced. Obviously many decisions taken in the administrative field involve the exercise of a judgment which involves a balancing exercise. In such cases the Court, in recognising that the law has conferred on the relevant decision maker the primary power to exercise the relevant adjudicative function, should accord a reasonable margin of appreciation to the views of that decision maker. However, where an applicant discharges the burden of demonstrating that the proportionality judgment of the decision maker was unreasonable in the sense identified by Fennelly J. in Meadows, then the courts must intervene. On that basis it is appropriate to turn to the reasons given by the Minister for refusing family reunification in this case for the purposes of assessing whether that decision involves an assessment of proportionality which is outside the margin of appreciation conferred on the Minister and, thus, unreasonable in the judicial review sense of that term.

7.13 Insofar as the general state entitlement to exercise control over immigration is concerned, it must be noted that, whatever may be the strength of that factor in general applications to enter the State, the persons who are, in substance, the potential beneficiaries of the application in this case are persons who are expressly identified in legislation passed by the Oireachtas as having an enhanced application status. In the absence of any specific factors relating to these applicants, it is difficult to see how the weight to be attached, in the context of family reunification, to the general right of the State to control immigration, could outweigh the factors which favour family reunification in this case.

7.14 In addition, for the reasons already analysed, the burden on the State of admitting just two persons to Ireland could not be regarded as attracting great weight in balancing the rights and interests involved in this case. As already noted the only case made on behalf of the Minister in that regard was confined to the burden of admitting just those persons rather than any greater burden which might arise in the context of family reunification generally.

7.15 The Minister must, of course, as pointed out, enjoy some reasonable margin of appreciation in weighing the factors which favour and oppose the grant of discretionary family reunification. The Court should only interfere where the Minister's consideration of that balancing exercise is clearly wrong so that it is demonstrated that the Minister could not reasonably have come to the view that the balance should be proportionately exercised in the way in which it was. However, I am satisfied that the Minister's balancing exercise in this case was clearly wrong. In light of the fact that special and enhanced application status is given to dependent family members, the weight to be attached to the general entitlement of the State to exercise immigration control must be significantly less in a case such as this than in an ordinary case. Likewise, in the absence of any consideration of the broader economic consequences of family reunification applications, the financial consequences for the State on the facts of this case are extremely limited. In those circumstances it does not seem to me that it could reasonably be held that those factors outweigh, in a proportionate fashion, the family and other rights which must be balanced on the other side.

8. Conclusions

8.1 For the reasons set out in this judgment I am, therefore, satisfied that the trial judge was incorrect in forming the view that the potential financial consequences for the State of allowing a discretionary family reunification application cannot be taken into account in the overall assessment as to how the Minister's discretion under s.18(4) of the 1996 Act should be exercised.

8.2 However, again for the reasons set out in this judgment, I am satisfied that MacEochaidh J. was correct to conclude that the decision of the Minister to refuse family reunification in respect of the mother and the minor sister of Mr. S was disproportionate on the facts of this case. No wider financial consequences other than those applicable to just those persons were taken into account. In the light of the special and enhanced application status expressly conferred by s.18 on dependent family members, the overall undoubted entitlement of the State to regulate immigration access must, in cases such as this, have significantly less weight than in other cases. In those circumstances I am satisfied that a decision to refuse reunification was, notwithstanding the significant margin of appreciation conferred on the Minister by the legislation in that regard, outside of the range of proportionate decisions which were open to the Minister on the facts of this case.

8.3 In those circumstances I would dismiss the appeal and affirm the order of the trial judge.