Judgments

Judgment Title: Ducale & Anor -v- Minister for Justice & Ors

Neutral Citation: [2013] IEHC 25

High Court Record Number: 2012 142 JR

Date of Delivery: 01/22/2013

Court: High Court

Composition of Court:

Judgment by: Clark J.

Status of Judgment: Approved

Neutral Citation [2013] IEHC 25

THE HIGH COURT

JUDICIAL REVIEW

Record Number 2012/142 J.R.

Between:

CASHA DIGALE DUCALE and ABDULLAHI JAMA

APPLICANTS

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 22nd day of January 2013

1. The applicants are a married couple of Somali origin. The wife Ms. Ducale was declared a refugee in 2004. In 2007 the husband Mr. Jama and the couple's two biological children were granted permission to enter and reside with Ms. Ducale in Ireland pursuant to s. 18(3) of the Refugee Act 1996. The applicants also claim to be the *de facto* parents of Ms. Ducale's niece and nephew who were orphaned as

infants and have been part of the applicants' family ever since. The niece and nephew are nationals of Somalia and they are currently living in abject poverty in Ethiopia. Ms. Ducale has twice applied for permission for them to be reunited with her and her husband and their two biological children in Dublin. The respondent Minister has refused on both occasions, and in his second refusal which is challenged in these proceedings he found that Ms. Ducale had failed to establish that the niece and nephew are dependent on her as is required under s. 18(4) of the Refugee Act 1996. The applicants seek an order of certiorari quashing the decision of the Minister dated 17th October 2011. Cooke J. granted leave on 27th February 2012 on an ex parte basis on the following grounds:

> *1. The first named Respondent erred in law in holding that on the evidence before him the niece and nephew of the first named Applicant, the subject of her application for family reunification, were not "dependent members of her family" within the meaning of section 18 (4) (b) of the Refugee Act 1996 (as amended).*
>
> *2. Having regard to the evidence before him including as to the absence of any system of civil administration in the country of origin, the Minister erred in law in failing to consider that the said niece and nephew qualified for family reunification within the meaning of Section 18(3) of the Refugee Act as amended.*

General observations

2. Cases such as this one come with increasing frequency before the asylum and immigration division of the judicial review courts especially in relation to the family reunification of refugees from Somalia who have fled their country in vast numbers. Relative to the numbers travelling to other EU Member States, the numbers seeking asylum in Ireland are not large but Somalis nevertheless tend to make up a significant proportion of those refugees who come before the Courts having been declared to be refugees and having sought and been refused family reunification. Somali refugees also tend to have extended families arising from laudable cultural obligations to raise the children of deceased family members as their own and to care for elderly parents. The civil war of more than 30 years' duration, the persecution of minority tribes and famine have all created a catastrophic humanitarian disaster with many orphans and separated families and millions of displaced persons living in abject poverty in neighbouring countries. The total breakdown of civil society and the rule of law and the absence of a normal and functioning civil service or legal institutions outside small areas of Mogadishu render it extremely difficult for refugees, or indeed the Refugee Applications Commissioner or the respondent Minister, to establish the legitimacy of claimed extended family ties. However, the exodus of Somalis in huge numbers from their failed State is well documented and the courts have frequently considered reliable country of origin information confirming that minority tribes have particularly badly affected by the war in that the strong majority clans have taken advantage of the breakdown of law and order to divest minority clans of their lands, livestock and property. They are vulnerable to being abducted and used as unpaid labour and worse by these stronger clans who have formed their own militia. The first applicant Ms. Ducale belongs to a persecuted minority tribe and was recognised as a refugee for that reason.

3. The difficulties in obtaining identity documents from a failed State has made it frequently necessary for DNA testing to be carried out in relation to persons who are claimed to be the children and other family members of Somalis refugees. The Court is aware from previous family reunification (FRU) applications that the Somali

Embassy in Addis Ababa has in the past issued certificates of birth, marriage and death on the mere say-so of an applicant. Not surprisingly, these certificates are of no evidential value although desperate refugees have spent scarce and valuable resources in obtaining such documents in a fruitless attempt to appease the authorities in the Minister's FRU Section.

4. Section 18 of the Refugee Act 1996 regulates the circumstances in which the family members of a refugee may be granted permission to enter the State and reside with the refugee in Ireland, commonly known as "family reunification of refugees". The details of s. 18 have been referred to at length in many previous cases (see e.g. *R.X. v. The Minister* [2010] IEHC 446; *Shariff & Anor v. The Minister* [2012] IEHC 72, *Ali v. The Minister* [2011] IEHC 115 and *M. & Ors v. The Minister* [2009] IEHC 500) and it is unnecessary therefore to do more than briefly outline the position. Where the refugee is an adult, s. 18(3) obliges the Minister to grant permission to his or her spouse and unmarried children under 18 to join the refugee in Ireland. Where the refugee is under 18 years of age, s. 18(3) obliges the Minister to grant permission to his or her parents to join the refugee in Ireland. The operative date for considering whether a family member is a child under s. 18(3) is the date on which the FRU application was made.

5. In general, major difficulties do not arise under s. 18(3) and once the relationship is recognised by DNA or otherwise, the Minister grants leave to enter and reside as of right. Most of the problems which have come before this Court have related to FRU applications under s. 18(4) of the Refugee Act 1996 which affords the Minister a discretion to permit reunification with specified dependent family members other than the spouse and unmarried minor children of the refugee. Under s. 18(4), a "*dependent member of the family*" 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*." The Minister has no discretion under s. 18 of the Refugee Act 1996 to grant family reunification to persons who do not fall within this category.

6. 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 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 IDPs 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 the FRU sections of the Office of the Refugee Applications Commissioner and the Department of Justice.

Background

7. The first applicant Ms. Ducale is a woman in her late 30s. She is a national of Somalia and she is also a naturalised Irish citizen. She came to Ireland in October 2003 seeking the protection of the Irish State. The Refugee Applications Commissioner (ORAC) recommended that she should be declared a refugee and she was so declared by the Minister in June 2004. The notice of her declaration as a refugee informed her that she could apply to the Minister for permission to be granted to members of her family to enter and reside in the State in accordance with s. 18 of the Refugee Act 1996.

8. Ms. Ducale told ORAC when she applied for asylum that when she fled Somalia she had become separated from her mother, her husband and four surviving children who, she was told, had gone to Ethiopia. Two of those children are her niece and nephew, the children of her late brother who was killed during the civil war in 1991. He was survived by a one year old daughter Luul who was born in late December 1989 and by his widow who was expecting their second child. Unfortunately, his widow died three months after the birth of her second child Adan in October 1991. The two infant orphans were then raised by the applicants as their own children. This account has never varied since Ms Ducale first made contact with the Commissioner. She has always stated that she had four children: two surviving biological children together with her nephew and niece. She consistently stated that she had been unable to legally adopt her niece and nephew because of the situation in Somalia and she has unwaveringly represented them as her wards and she as their guardian / *de facto* adoptive or foster parent.

The first FRU application

9. Very soon after she was recognised as a refugee in 2005, Ms Ducale applied without legal assistance for family reunification with her husband, her mother and her four children. She described her niece and nephew as her wards and dependent family members and she reiterated the circumstances of how she came to be their *de facto* mother. She said she had been sending them money and was in regular phone contact with them. She provided documentary evidence from a Somali resident in Ireland who had travelled to Ethiopia and made contact with her family in Addis Ababa. She had given him money to give to her family and he arranged for medical care for her mother who was in poor health. Ms Ducale described her mother as a widow who was disabled insofar as she had been attacked in the head, arm and leg and had problems standing and walking. A medical report of the 18th May 2005 from an Ethiopian doctor supported her account of her mother's situation insofar as it described her mother as "*old and can't take care of herself and suffering from hypertension, degenerative osteoarthritis at the right knee with patellar cartilage erosion and an old skull fracture."*

10. Unfortunately, Ms Ducale's mother died in March 2006 before any decision was made in relation to the FRU claim. Her death was notified to the FRU Section of the Minister's Department and her death certificate was furnished. The same doctor in Addis Ababa who had prepared the medical report in 2005 certified her death from a hypertensive stroke and a brain tumor. In an accompanying letter Ms Ducale advised the Minister that "*my mother's death has left the family in a difficult situation and my husband finds it extremely difficult to look after the four children alone*."

11. In December 2006 Ms. Ducale's husband and her two biological children (born in 1990 and 1992), who were very similar in age to her niece and nephew, were granted permission to join her in Ireland and they did so in March 2007. The niece and nephew were refused permission to travel to Ireland with the family. It is apparent that the FRU Section had not considered the death certificate furnished as

the refusal also extended to Ms. Ducale's (now deceased) mother. The Minister found that the grandmother, niece and nephew did not qualify as dependant family members under s. 18(4) because (i) insufficient evidence had been provided of their financial dependency on Ms Ducale; (ii) insufficient evidence had been submitted that they suffered from a mental or physical disability to such extent that it was not reasonable for them to maintain themselves fully; and (iii) the niece and nephew did not come within the meaning of "*dependant member of the family*" as set out in s. 18(4) of the Refugee Act 1996. No consideration seems to have been given to the fact that these children had been raised as the refugee's own children since 1992, that lawful adoption or guardianship was not possible and that the decision would sever the family and leave two minors without family in an unofficial camp in Ethiopia. Moreover, the notification that their grandmother had died simply did not register in the FRU Section.

The second FRU application

12. In July 2007, four months after her husband and children arrived in Ireland, Ms. Ducale, who does not speak English fluently and who is totally reliant on social welfare benefits, re-applied through a solicitor for permission for her niece and nephew to join her under s. 18(4). The basis for her second application was essentially the same as the first. She reiterated that she was in *loco parentis* to her niece and nephew in that she was their guardian and their sole surviving relative. Her husband, now living with her in Ireland, was also their guardian and had been their "*acting father*". Her husband, her mother and another distant relative had provided for their care while she was absent but her mother had died and the others had all left Ethiopia so the niece and nephew were now alone. They had lived with the applicants' family since 1992. Ms. Ducale indicated, not for the first time, that she had been unable to legalise her position as their parents or guardians due to the civil and political position in Somalia. Letters and statements from third parties in Ethiopia were furnished to the FRU Section, attesting to the children's poor living conditions and Luul's vulnerable position as an unsupervised 17-year old girl.

13. All of this information was recited in the statutory report prepared by the Commissioner for the Minister pursuant to s. 18(2) of the 1996 Act, which merely restated the information provided by Ms. Ducale in her FRU questionnaire. The s. 18(2) report contains no additional information apart from commenting that the information in the questionnaire was not consistent with the initial application for refugee status as her niece and nephew were previously described as her son and daughter. The Commissioner did not conduct any investigation into the domestic circumstances of Luul and Adan - their exact whereabouts, how they survived, whether they were registered by the UNHCR, or how the UNHCR or other states treat orphaned Somali children who have been adopted informally. As will become apparent, the Court has serious concerns as to the adequacy of such a report.

14. At later stages of the process, Ms. Ducale furnished copy receipts of money transfers to her niece and nephew in Ethiopia but at no stage claimed that these were the only payments made. She also supplied a statutory declaration from her husband who confirmed that Luul and Adan were orphans and had been raised by the applicants since 1992. Details of Ms. Ducale's social welfare payment book[1] and her social services card were also furnished.

Correspondence 2010-2011

15. It is at this stage necessary to point out that the second FRU application was made in July 2007. At that stage, Luul and Adan were both under 18. The Commissioner's s. 18(2) report was furnished to the Minister in October 2008.

However, the Minister made no contact with the applicants until late January 2010, almost two and a half years after the application had been filed, by which time Luul had turned 20 and Adan was 18. That significant period of delay is unexplained and the Court will return to its possible significance in due course.

16. In its letter of January 2010 the FRU Section sought original birth certificates for Adan and Luul, death certificates for their parents and court documents confirming their lawful adoption by the applicants. It also sought information in relation to Ms. Ducale's mother who was by then deceased. The letter then went on to recite a formulaic warning that even if the sought documents were forthcoming, DNA evidence and further documentation might be required.

17. In light of what is known about life in Somalia and more particularly in the light of the information already furnished by Ms. Ducale with regard to the civil and political situation in Somalia and the unavailability of official documents, the queries raised in January 2010 were an inappropriate time-wasting exercise. It should have been patently clear to the FRU Section that if certificates had been available relating to the births of Adan and Luul and their parents' deaths, such documents would have been produced earlier. Similarly, if proof was available that they had been legally adopted, they would almost certainly have qualified as "children" of the refugee under s. 18(3) of the Refugee Act 1996 and it must been assumed that they would have been admitted as children of the refugee with their siblings and father arising from the first FRU application for family reunification. It is incomprehensible that six years after the separation of Ms. Ducale from her niece and nephew and five years after she first sought to be reunited with them, the FRU Section would persist in raising issues dealt with by Ms. Ducale in her first FRU questionnaire and again in her second questionnaire, both of which were detailed in the Commissioner's s. 18(2) report dated two years earlier. The questionnaires clearly stated that no birth or death certificates could ever be produced.

18. The applicants' solicitor responded on 25th March 2010 stating:-

> *"We are at a loss to understand why your Department continues to demand Passports, birth certificates, death certificates and official documentation regarding the adoption of the above named subjects of the application for family reunification. The situation in Somalia is well known, there is no effective government in power and we have as far back as June 2008 furnished you with our client's Statutory Declaration concerning her inability to obtain said documents […]. It is not reasonable that documentation that does not exist and cannot be obtained be insisted upon by the Department."*

19. The letter continued:-

> *"We therefore request that in the interests of justice a DNA test be carried out, my client's niece and nephew can attend at the Irish Embassy to establish the familial relationship between my client Casha Digale Ducale and her niece Luul and nephew Adan. We also request that an interview be convened at the Irish Embassy at Addis Ababa with the subjects of this application [...] so the Minister can satisfy himself that my client raised these children and that they have depended and continue to depend on my client and her husband as if they were their own children. Should the Minister wish to interview my client further in respect of her relationship with her niece and nephew please advise".*

20. The only response elicited by this letter was that the Minister had not received a substantive response to his earlier letter and threatening that "*if a substantive response was not received within 28 days that the application will be deemed*

withdrawn."

21. By way of reply, the applicants' solicitors reiterated the applicants' inability to provide the documents sought, referring the Minister to earlier documentation. They also furnished further money transfer receipts and repeated Ms. Ducale's request that DNA tests be carried out and /or that interviews be conducted with the niece and nephew.

22. The Minister's response curtly stated that DNA testing was a decision which would only be made in appropriate circumstances by the Minister. Quite ominously as it subsequently turned out, the letter warned that "*DNA is only required in cases where the subjects are proven to be dependent relatives as set down under the Act but the relationship has not been established […]."*

23. Alarmed, the applicants' solicitors replied expressing their concern at the Minister's approach. Country of Origin information was furnished which supported the claim that documents such as ID cards, passports and other official documents including death certificates were unobtainable in Somalia since 1991. The Minister was asked to clarify how he proposed to address the application. Ten days later they wrote again reiterating all the information already supplied and again seeking clarification on the Minister's intended approach. It was stated that:-

> *"Ms Ducale continues to provide Luul and Adan with the primary monetary assistance they have to survive on […]. This level of financial dependency goes far beyond a welcome extra income to improve the conditions in which Luul and Adan are living but is financial dependency in the sense that Adan and Luul are reliant upon it and it is necessary for their basic day to day survival."*

24. The Minister was referred to the decision of Edwards J. *in M and others v. The Minister* [2009] IEHC 500 and to numerous UNHCR policy statements on the importance attached to family reunification, and the applicant's concerns for Luul and Adan's prospects in Ethiopia and their long term separation from their family were repeated.

25. In reply, on the 6th December 2010 the Minister again sought information on the circumstances of the deaths of Luul and Adan's parents so that *"the Minister can be satisfied that your client is in loco parentis of the subjects of her application*" (the Court's emphasis). It is a matter of regret that it is necessary for the Court to repeat that this information had been supplied by Ms. Ducale to the Minister at least four times over the previous six years. The FRU Section seemed to attach little, if any, importance to the personal facts and circumstances described by a worried guardian separated from the children in her care. Instead it sought further detailed information relating to payments made to the niece and nephew including the weekly / monthly amounts and how the money was utilised. The FRU Section enquired as to whether any additional money transfers had been made during the previous twelve months and whether any additional evidence was available "*which demonstrates the continual dependence on the applicant*".

26. The Court harbours a strong suspicion that the phrase "*continual dependence*" signalled that the Minister's agents in the FRU Section were fully aware that the niece and nephew had long since become adults and that this may explain a change of attitude to the niece and nephew. It seems to the Court that wards under 18 must enjoy a certain presumption of dependency on their guardians. However, after a ward reaches the age of majority, unless mentally or physically incapacitated, he or she loses the presumption of dependency which attaches to a minor dependency requires a higher degree of proof. The significance of a ward "ageing out" during the

FRU process depends on the appropriate date on which the fact of dependency is to be assessed. While s. 18(3) expressly states that the date of assessment is the date of the FRU application, s. 18(4) is silent in that regard. If the FRU Section acted on the basis that these asserted wards were no longer minors, then the Section's concentration on knowingly seeking unobtainable and non-existent identification documents to satisfy the Minister that the applicants were in *loco parentis* to the subjects may have been little more than a charade. What is more, the correspondence makes it increasingly clear to the Court that the default position for refusal was inevitably going to be inability to establish financial dependency, irrespective of whether the niece and nephew were part of a close family or whether they were wards of the refugee.

27. Returning to the correspondence : in its letter of December 2010, the FRU Section again set out the formulaic warning that the Minister might not rely solely on the requested documentation and that DNA evidence might be required completely disregarding that Ms. Ducale had offered herself and her wards for DNA testing six months earlier and that her offer had been rejected with the prickly response that DNA testing was a matter solely for the Minister who first had to decide on dependency.

28. Matters lay dormant during the early months of 2011 until the FRU Section sent a reminder letter in May 2011. The applicants' solicitor responded promptly outlining difficulties which she had in obtaining instructions as the applicants' daughter had just given birth and Ms. Ducale had been in the UK for an extended period.[2] It was stated that Ms. Ducale was trying to gather up as many money transfer receipts as she could, but in general she sent $70 to $100 to her niece and nephew each month. The niece and nephew were said to be reliant on this money for their basic survival and used the money for food and clothes. There was no change in their legal status - they were not permitted to work and they lived in poor circumstances in a Somali occupied area in Addis Ababa with no other regular means of support. Four receipts for $100 each were furnished to the Minister; two from 2010 and two from 2011. It was stated that Ms. Ducale had also made regular payments to her niece and nephew throughout 2009 and 2010. The Minister was reminded that in addition to financial dependence, there was an emotional dependence between the applicants and the niece and nephew. Twenty one phone cards were attached as evidence of the applicants' regular contact with Luul and Adan. The close nature of their relationship and the emotional dependency of the niece and nephew on Ms. Ducale, akin to that of a mother and her children, was reiterated and the circumstances of the deaths of Luul and Adan's parents were repeated. Finally the Minister was informed that Ms. Ducale was hopeful that her son and daughter in Ireland, who were attending courses, would soon be able to support the family financially.

29. On 23rd August 2011, the FRU Section wrote to Ms. Ducale in quite extraordinary terms. It will be recalled that no birth or death certificates had ever been furnished to the Minister in relation to the niece and nephew and it was consistently reiterated that no such documents could be obtained. That information notwithstanding, the FRU Section informed Ms. Ducale that the Minister had difficulties with identity documents emanating from Somali embassies and therefore required DNA evidence confirming the refugee's relationship to the subjects of an FRU application. It was stated that it was "*imperative that the Minister is satisfied, in all cases involving the entry of children into the State that the identities of such children have been verified. As you can appreciate, this is in order to prevent any potential risks to children who may be entering the State, particularly the risk of trafficking*.[3]" While that letter indicated a formulaic approach inappropriate to any of the facts of this particular application, it raised a cruel false dawn for Ms. Ducale

who promptly consented to DNA testing.

30. On 9th September 2011, the FRU Section replied that Ms. Ducale's consent was noted and in a heartless turnaround her solicitor was asked to:

> *"Please note that it is now proposed to proceed to examine the question of dependency and the appropriate exercise of the Minister's discretion on the assumption that they are members of the refugee's family as alleged, without prejudice to the requirement that this be verified by DNA evidence if the Minister considers that this may be an appropriate case to grant permission."*

31. The applicants were given 10 further days to provide any additional information.

32. The final letter sent by the applicants' solicitor dated 21st September 2011 repeated the unhappy situation of Luul and Adan in Ethiopia and provided several letters of support. The School Head of Pearse College confirmed that the two biological children were full time students in Junior Certificate courses. A letter from a money transfer agent in Dorset Street (whose name appears frequently on money transfers to Ethiopia) confirming that "*Ms. Ducale transfers money every month to Luul and Adan Warsame Digale in Ethiopia"* was also furnished together with a letter from Ms. Ducale which can only be described as a *cri de coeur* to be reunited with Luul and Adan.

The Impugned Decision

33. On 17th October 2011 Ms. Ducale was informed that her application was refused. A copy of a submission made by a member of the FRU Section in relation to her claim was enclosed. The reason for refusal was that Ms. Ducale had not satisfactorily established that Luul and Adan were financially dependent on her. The receipts sent were totted up to €828.57 over four years which was deemed to constitute insufficient financial assistance to establish dependence. No allowance was made for any sums claimed to have been sent for which there were no receipts and the letter from the money transfer agency outlining the regular sums sent to Luul and Adan was not referred to.

Submissions on s. 18(3)

34. The applicants make two main submissions on the legality of the decision refusing family reunification. First, it is argued that the Minister should have treated Adan and Luul as the lawful children of the applicants and should have permitted them to join their *de facto* parents in this State as a matter of right under s. 18(3) of the Refugee Act 1996. The applicants argue that the Minister must be fully aware that it was impossible for the applicants to formally adopt Adan and Luul and he should therefore have accepted that they were in all respects the lawful parents of Adan and Luul. As domestic law treats adopted children as the lawful children of the adoptive parents, the Minister ought to have done likewise. The Court was urged to interpret the word "*child*" expansively in accordance with the views expressed in by Cooke J. in *Hassan & Anor v. The Minister* [2010] IEHC 426 and *Hamza & Anor v. The Minister* [2010] IEHC 427 and by this Court in D.M. v. C.F. [2011] IEHC 415 where the term "*spouse*" was given a purposive interpretation in the context of an enduring family relationship rather than one limited to matrimonial status under Irish law. In those cases, the distinction was made between marriages recognised for the purpose of family reunification and marriages entitling the parties to relief under the various matrimonial and family law statutes. The applicants argue that a similar distinction can be made in relation to a "child".

35. The Minister forcefully disputes the relevance of this argument to this case as

family reunification was always sought under s. 18(4) and the Minister was never asked or required to consider Adan and Luul as Ms. Ducale's *children* under s. 18(3). The Minister stresses that Luul and Adan were not refused entry on the basis that they were not family members but rather because there was insufficient evidence of their dependency. The Minister relies on Ms. Ducale's first FRU application which was set out as follows in a letter dated 11th October 2010 from the applicants' solicitors:

> *"For the avoidance of doubt, we wish to clarify and confirm herein that our client's* ***application for family reunification with her niece and nephew pursuant to Section 18 (4) of the Refugee Act 1996, as amended, is based upon her*** *status as their guardian and their dependence upon her which is to such an extent that it is not reasonable for them to maintain themselves fully…… Although our client and her husband have acted as guardians of our Adan and Luul since 1992, due to the conditions in Somalia during and after that time, there have been unable to legalise this position and thus it is unreasonable, having regard for all the above outlined for the Minister to seek any further documentary evidence of this relationship." (Emphasis added).*

36. The Minister asserts that it is untenable to make the case at this stage that Luul and Adan were the applicants' children for the purposes of s. 18(3). In any event, a "*child*" means a natural child or a formally adopted child and not otherwise.

Submissions on s. 18(4)
37. The applicants' second argument relates to the interpretation of *dependency* under s. 18(4). It was submitted that the Minister erred in law insofar as he considered that dependency turned solely on financial dependency. His assessment therefore excluded any examination of the facts put before him including Ms. Ducale's account of having reared Adan and Luul since infancy and the fact that they remain in a perilous situation in Ethiopia where they are without family support. It is argued that the Minister should have given consideration to the conditions of the illegal camp in Ethiopia where they are now living and he should have acted on the information that Luul (who at the time of the FRU application had just turned 17) and Adan (then 15) had been left without emotional support after three members of their family were granted permission to enter and reside in Ireland and especially after Ms. Ducale's mother, their grandmother, had died. Since then, they were without any adult moral guidance or care and were fending for themselves in very difficult conditions.

38. It was submitted that the second FRU application made it clear that Luul and Adan were the wards of Ms. Ducale who acted in *loco parentis* to them and considered them to be her children. Their relationship was stated to be one of emotional and financial dependency evidenced by Ms. Ducale's concern for their plight, her constant telephone contact with them and the sending of funds for their support in circumstances where they were undocumented in Ethiopia, not permitted to work and had no other means of support. The Minister ignored all evidence of emotional dependency and relied simply on the money transfers receipts furnished, which he deemed to be inadequate.

39. The respondents argue that the Minister did consider all relevant factors and concluded that the nephew and niece could not have been dependent on the applicants having regard to the inadequacy of the financial contributions made over the years. They argue that the applicants have been unable to establish anything more than normal emotional ties to a niece and nephew who do not have medical problems giving rise to physical dependency and who are now 21 and almost 23 years of age respectively. The respondents rely on *Z.M.H (Somalia) v. The*

Minister [2012] IEHC 221 where Cooke J. held that the onus is at all times on the person seeking family reunification to establish dependency. In this case there was no evidence of any remittances prior to the three sums of approximately €35 each in 2007. The total sent between 2007 and 2010 was €828.57. For a period of 18 months including the entire year of 2009 there was no evidence of any financial remittances of any kind. The applicants were fully on notice since 2007 that they were on proof of the niece and nephew's financial dependency.

Decision

40. The Court is satisfied that the first of the two grounds on which leave was granted has been made out and that the Minister's refusal to grant family reunification to the niece and nephew must be quashed. Moreover the process by which the FRU Section of the Department of Justice arrived at the decision was inexcusably protracted, careless and directionless and the Court finds that the only inference which can be drawn from that process was that whatever direction was taken, the destination of refusal was inevitable.

41. The decision challenged in these proceedings cannot be seen in isolation. It was the second of two FRU applications made by Ms. Ducale and must be viewed as a continuum of the first application which resulted in part of the family being granted permission to enter and reside in the State and the refusal of the same privilege to two other children of almost identical age in the same family. The reasons given for that refusal were basically threefold: (1) the niece and nephew were not financially dependent on the applicants; (2) insufficient evidence had been submitted to show that the subjects of the application suffered from a mental or physical disability to such an extent that it was not unreasonable for them to maintain themselves fully; and (3) nieces and nephews are not statutory dependent relatives.

42. It is and continues to be unfortunate, in the opinion of the Court, that Ms. Ducale who was not legally represented at the time did not challenge the legality of the first FRU decision. This view is informed by the manner of the first refusal to the other three members of the family and in particular the manner of the grandmother's refusal. Ms. Ducale's mother was a widow who was said to have been attacked in the head, arm and leg and had problems standing and walking and was described in a medical report of the 18th May 2005 to be "*old and can't take care of herself and suffering from hypertension, degenerative osteoarthritis at the right knee with patellar cartilage erosion and an old skull fracture*". She was stated to have endured the civil war and the death of family members and was forced to flee her homeland and live in an illegal camp in neighbouring Ethiopia. The finding that she was fully capable of maintaining herself has the appearance of manifest unreasonableness. The fact that she died in March 2006 from a hypertensive stroke and a brain tumour serves only to underline the unreasonableness of the original decision. The perception of unreasonableness does not end there: it is further compounded by the fact that, even though the FRU Section was furnished with the elderly mother's medical report and then the death certificate, the decision maker disregarded that information and continued to treat her as though she was still alive. That degree of carelessness and insensitivity is simply unacceptable.

43. Before refusing the second FRU decision, the Minister enquired as to the legal status of the niece and nephew and he invited Ms. Ducale to make herself and the two children available for DNA testing, which she promptly did. These steps indicate that the Minister was at that stage prepared to treat the relationship of Ms. Ducale, Adan and Luul as a family relationship capable of engaging the Minister's discretion under s. 18(4) if dependency was established. However, he subsequently changed direction and thereafter focused on evidence of financial dependence on Ms. Ducale. The Minister's legal representatives submitted that the decision to refuse was not

because they were NOT the niece and nephew of the applicant but because dependence was not proved. The question for the Court is whether the Minister erred in law in the manner in which he conducted that assessment both of familial relationship and dependence..

44. The Court is satisfied that this question must answered in the affirmative. Before setting out the basis for this conclusion, it should be noted that the Court accepts the respondents' contention that the Minister was not specifically requested to consider Luul and Adan as the *de facto* adopted children of the refugee and hence her "children" for the purposes of s. 18(3). The FRU application was undoubtedly brought under s. 18(4) and not under s. 18(3). This was effectively accepted by the applicants' counsel at the hearing of the application for judicial review. In the view of the Court, it follows that the question of whether the Minister erred in law in the manner in which he interpreted the term "child" does not strictly arise in this case and the Court will offer no opinion on that issue. A suitable case will undoubtedly arise where the interesting arguments made with respect to the meaning of the term "child" under s. 18(3) can be fully ventilated and considered.

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

46. The Court is therefore satisfied that the Minister failed to consider the material which was put before him which might have been capable of establishing dependency. It will be recalled that in July 2007 when the second FRU application was made, Adan (born December 1991) and Luul (born October 1989) were still under the age of majority and both were unmarried. It seems to the Court that the appropriate date for the assessment of whether or not they were dependent family members should have been the date of that application, when the minor wards would have enjoyed a presumption of dependency on their guardians. In other words, in light of their age, very light proof would have been required to establish their emotional and financial dependency on the applicants, their guardians. The Court considers that these were highly relevant matters which should have been considered in assessing whether Adan and Luul were dependent on Ms. Ducale. The Minister's agents in the FRU Section appeared to stop considering them as family members when they had become adults and erred in law in excluding their age at

the time of the second Family Reunification Application from their assessment.

47. The word “dependent” is not defined in the Refugee Act 1996. As noted above, s. 18(4) provides that “*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*.” There is nothing in that definition to suggest that dependency is measured by the size and frequency of financial contributions nor is it suggested that the dependency is confined merely to economic reliance on those financial contributions. The Court was not referred to any judgments which provide assistance with regard to the definition of dependency in the context of family reunification of refugees. It is noted that although the concept of dependency is central to the discretionary powers of Member States established under *Directive 2003/86/EC on the right to family reunification* (to which Ireland is not a party), the Directive contains no definition of the term.

48. The UNHCR Resettlement Handbook (reissued in 2011) advocates a wide interpretation of the term “*dependent*” in the context of family reunification of refugees states at pp 178-179:

> *“Dependency infers that a relationship or a bond exists between family members, whether this is social, emotional or economic. For operational purposes, with regard to the active involvement of UNHCR offices in individual cases, the concept of dependant should be understood to be someone who depends for his or her existence substantially and directly on any other person, in particular for economic reasons, but also taking social or emotional dependency and cultural norms into consideration.*
>
> *The relationship or bond between the persons in question will normally be one which is strong, continuous and of reasonable duration. Dependency does not require complete dependence, such as that of a parent and minor child, but can be mutual or partial dependence, as in the case of spouses or elderly parents. Dependency may usually be assumed to exist when a person is under the age of 18 years, but continues if the individual (over the age of 18) in question remains within the family unit and retains economic, social and emotional bonds. Dependency should be recognized if a person is disabled and incapable of self-support, either permanently or for a period expected to be of long duration. Other members of the household may also be dependants, such as grandparents, single/lone brothers, sisters, aunts, uncles, cousins, nieces, nephews, grandchildren; as well as individuals who are not biologically related but are cared for within the family unit.” (The Court’s emphasis)*

49. At p. 273-4 of the Resettlement Handbook the UNHCR specifically recommends consideration of dependent persons who the refugee family has taken in and cared for, such as unaccompanied children or elderly neighbours with whom there is no blood relation. At p. 276 the Handbook deals with the requirement for documentary evidence which, it states, may be difficult or even impossible for the refugee and it encourages governments to take a flexible approach within legislation and practice on family reunification which will enable alternative proof of relationships.

50. This approach is echoed by the European Council on Refugees and Exiles (ECRE) in an Information Note on Directive 2003/86/EC published in 2003 which expressed

the view that "*the dependence of an adult unmarried child on its parents should not be assessed only in terms of their state of health and ability to materially sustain themselves, but should be seen in its financial, as well as psychological and cultural aspects*".

51. Guidance may also be taken from a UNHCR Background Note *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, prepared for the Annual Tripartite Consultations on Resettlement in 2001. The UNHCR set out the five guiding principles that sustain its efforts to protect family unity and to promote and facilitate family reunification in the resettlement process. The third of those principles was set out as follows:-

> *"The principle of dependency entails flexible and expansive family reunification criteria that are culturally sensitive and situation specific. Given the disruptive and traumatic factors of the refugee experience, the impact of persecution and the stress factors associated with flight to safety, refugee families are often reconstructed out of the remnants of various households, who depend on each other for mutual support and survival. These families may not fit neatly into preconceived notions of a nuclear family (husband, wife and minor children). In some cases the difference in the composition and definition of the family is determined by cultural factors, in others it is a result of the refugee experience. A broad definition of a family unit – what may be termed an extended family—is necessary to accommodate the peculiarities in any given refugee situation, and helps minimize further disruption and potential separation of individual members during the resettlement process. The principle of dependency requires that economic and emotional relationships between refugee family members be given equal weight and importance in the criteria for reunification as relationships based on blood lineage or legally sanctioned unions." (The Court's emphasis)*

52. The Background Note continues:

> *"A proper application of the dependency principle allows States to interpret the concept of the family as broadly as the specific circumstances may dictate. While the nuclear family is clearly the core, the principle of dependency allows for operational flexibility to address specific needs for other family members, considering financial physical, emotional as well as spiritual elements balanced with the narrower objective factors of direct blood lineage and the protection needs of other relatives that need to be kept as part of the same family unit. At the same time, it is important that the principle of dependency be used in an inclusive and not in an exclusive manner."*

53. A similarly expansive approach was advocated in a discussion paper entitled "*Family Unity and Refugee Protection*" commissioned by UNHCR in preparation for an expert roundtable discussion on family unity organised as part of the Global Consultations on International Protection in the context of the 50th anniversary of the Refugee Convention. That paper suggests the following approach:

> *"Refugee families, more so than many others, are likely to be melded from the remnants of 'real' families. The trauma of persecution and flight, the frequency of family separation, and the exigencies of life in exile create many families of choice or circumstance. These groupings should not be assumed to exist for convenience or for immigration purposes only. International humanitarian law recognizes that a family consists of those who consider themselves and are considered by each other to be part of the family, and who wish to live together. Economic and emotional ties should be given the same weight in*

reunification as relationships based on blood ties or legally sanctioned unions."

54. The Court has also had regard to Regulation 16 of the *ECs (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006), which establishes the right to family reunification of persons granted subsidiary protection in Ireland. The mandatory and discretionary categories applicable to refugees under ss. 18(3) and (4) of the Refugee Act 1996 are essentially reflected in Regulation 16(3) and (4) of the 2006 Regulations. Regulation 16(4) (b) which involves the application of Ministerial discretion defines the "*dependent member of the family*" in terms identical to s. 18(4) (b) but the recited category of family member must be shown to be "*wholly or mainly dependent*" whereas s. 18(4) (b) simply refers to a family member who is "*dependent*". It is inconceivable therefore that s. 18(4) (b) should be interpreted as implying a heavier burden on refugees when seeking family reunification than for subsidiary protection.

55. Finally, the Court notes that in its 2011 Response to a Green Paper prepared by the European Commission on Directive 2003/86/EC, the UNHCR expressed its concern that some Member States have adopted a very strict interpretation of dependency and have required a "*very high level*" of proof. It urged that "*the element of dependency among family members, physical and financial, as well as psychological and emotional, should find its appropriate weight in the final determination*[4]".

56. There is thus objective support for the contention that "dependency" is not confined to total financial dependence but involves a wider concept taking account of all relevant economic, social, personal, physical, familial, emotional and cultural bonds between the refugee and the family member who is the subject of the FRU application. Moreover there is support for the contention that financial dependency must be seen as a flexible state of affairs which is not necessarily determined by the size of a contribution but rather on its effect in the context of the specific country of residence and personal circumstances of the person in receipt of the contribution. Much must depend on what the contribution provides when received in the hands of the recipient. €50 a week may be pocket money for an eighteen year old in Dublin but may be a princely sum on which a young person in an illegal camp in Addis Ababa may live either wholly or substantially.

57. The Minister was informed that although Ms. Ducale could not find all of her receipts, she regularly sent $70 to $100 monthly to her niece and nephew. She repeatedly informed the FRU Section that the living conditions were very poor in the named part of Addis Ababa where Adan and Luul reside and where they were not permitted to work. The FRU Section was informed that the money sent to them was all the money they had. 21 phone cards were furnished as evidence that Ms. Ducale and her husband had a strong parental relationship with Adan and Luul and rang them regularly. It cannot be an appropriate measure of dependency to simply add up a selection of receipts and declare that such total cannot approximate to dependency for two adults. If a more generous approach had been taken, giving Ms. Ducale the benefit of the doubt, and if it was accepted that $70 was sent faithfully every month totaling $3,360 for two people over four years, would the FRU Unit Section still say that $35 per month for each person was not enough to establish dependency? If so, then on what basis was this decision made and where did the information come from?

58. No discernible objective yardstick by which the measure of dependency was assessed was identified. The Commissioner did not carry out any investigation into the domestic circumstances of Luul and Adan in Addis Ababa before preparing his s. 18(2) report. As far as it can be ascertained, the Irish Embassy did not conduct any

investigation into the cost of living in an illegal camp in Addis Ababa. No country of origin information was consulted with regard to the cost of living in an illegal Somali refugee in Ethiopia or whether the residents received humanitarian food or clothing aid. In those circumstances, the Minister's assessment seems to be no more than an arbitrary evaluation based on no identified criteria.

59. The Refugee Act 1996 provides that it is for the independent Refugee Applications Commissioner to investigate each FRU application and to set out the relationship between the refugee concerned and the person the subject of the application and the domestic circumstances of the person. Unlike Regulation 16 of S.I. No. 518 of 2006 which places the burden of investigation on the Minister in FRU claims made by subsidiary protection beneficiaries, the 1996 Act does not provide for the Minister or his agents to conduct the investigation into the legitimacy of FRU claims made by refugees. Relevant to this claim is the want of any evidence of any investigation by the Commissioner into the availability of legal adoption or fostering in Somalia. No information was put before the Minister on how foster parents can adjust the legal status of their wards in a failed state. There is no evidence of how UN run refugee camps treat such situations where grandparents are frequently the only surviving adults rearing orphans. Although it was the Commissioner's statutory function and duty to investigate the domestic circumstances of Adan and Luul in 2004 and again in 2006, there is no evidence that such investigation was conducted. There is no information from the Commissioner on where the children were living, how they were fed and clothed, whether they had access to education or health facilities, whether they received humanitarian aid or whether the occasional remittances or steady sums from Ms. Ducale whichever version is accepted, translated into a sufficient sum to survive or simply exist or whether the money was a welcome extra income to buy luxuries or otherwise.

60. In the context of frequent advertisements from humanitarian organizations to the effect that a €5 monthly contribution can keep a child in the developing world in school for a month, €828 for two children over four years may not be so paltry. Moreover there is objective support for the contention that s. 18 (4) does not require proof of total financial dependency before the Minister's discretion might be engaged. The reality is that the Court or Ms. Ducale simply does not know how financial dependency is established generally nor does it know what was made of the asserted emotional dependency, as an unduly narrow interpretation of dependency was adopted by the FRU Section.

61. For the reasons above, the Court is satisfied that the Minister erred in law in holding that on the evidence before him, the niece and nephew of Ms. Ducale were not dependent members of her family within the meaning of s. 18 (4) of the Refugee Act 1996. The second FRU decision of 17th October 2011 will be quashed and the application will be remitted for fresh consideration by the FRU Section of the Department of Justice.

[1.] She was in receipt of disability allowance.

[2.] It is known to whom the solicitor was referring.

[3.] Luul was now almost twenty two years old and Adan almost twenty.

[4.] Ireland has the lowest level of admission of family members of refugees. British Council and *Migrant Policy Group, Migrant Integration Policy Index III (Brussels, 2011)*