

THE SUPREME COURT

Record No. 2019/137

Between:

X

Applicant

-and-

**THE MINISTER FOR JUSTICE AND EQUALITY,
IRELAND AND THE ATTORNEY GENERAL**

Respondents

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Amicus Curiae

**REDACTED WRITTEN SUBMISSIONS
ON BEHALF OF THE AMICUS CURIAE**

A. Introduction¹

1. The Office of the United Nations High Commissioner for Refugees ('UNHCR') was granted leave on 29 November 2019 to intervene as *amicus curiae* in these proceedings. This case raises the important question of who may qualify as a child for the purposes of family reunification with beneficiaries of international protection under the International Protection Act 2015.² These proceedings will have broad implications for the rights of refugees and subsidiary protection beneficiaries above and beyond the parties themselves. UNHCR's application for leave to appear as *amicus curiae* was based on the organisation's supervisory mandate and duty to promote durable solutions for refugees and other persons of concern, including ensuring respect for their right to family unity.

¹ This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly (UNGA), Convention on the Privileges and Immunities of the United Nations, 13 February 1946, available at: <https://www.refworld.org/docid/3ae6b3902.html>

² Ireland: *International Protection Act 2015* [Ireland] (International Protection Act 2015), N. 66, 30 December 2015, available at: <https://www.refworld.org/docid/56ded0f24.html>.

B. UNHCR's Mandate

2. UNHCR is a global humanitarian and non-political organisation. As a subsidiary organ of the United Nations ('UN'), UNHCR has been entrusted by the General Assembly with the mandate to provide international protection to refugees and, together with governments, to seek solutions to the problem of refugees.³ Paragraph 8(a) of the 1950 Statute of the Office of the United Nations High Commissioner for Refugees ('Statute') and the Preamble of the 1951 Convention confer responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees,⁴ whereas Article 35(1) of the 1951 Convention obliges State Parties to cooperate with UNHCR in the exercise of its functions. Similar obligations for States are laid down in Article II(1) of the 1967 Protocol relating to the Status of Refugees ('1967 Protocol').⁵

3. In the years following adoption of UNHCR's Statute, the UN General Assembly and the UN Economic and Social Council extended UNHCR's competence *ratione personae*, empowering UNHCR to protect and assist particular groups of people whose circumstances did not necessarily meet the definition.⁶ In addition, UNHCR has adopted the usage of a wider refugee definition, based on the definitions in regional instruments such as the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa⁷ and the Latin American Cartagena Declaration on Refugees 1984⁸ as well as the definition of

³ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html>.

⁴ According to Article 8(a) of the Statute, 'The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto' UN High Commissioner for Refugees (UNHCR), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, September 2011, available at: <https://www.refworld.org/docid/4ec4a7f02.html>.

⁵ The 1967 Protocol Relating to the Status of Refugees, 606 UNTS 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

⁶ See UNHCR, *Note on International Protection*, submitted to the 45th session of the Executive Committee of the High Commissioner's Programme, UN Doc. A/AC.96/830, 7 September 1994, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f0a935f2>, paragraphs 31-32 and note 8.

⁷ Convention Governing the Specific Aspects of Refugee Problems in Africa (of the Organisation of African Unity (now African Union)), 10 September 1969, 1001 UNTS 45, available at: <http://www.unhcr.org/refworld/docid/3ae6b36018.html>.

⁸ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, available at: <http://www.unhcr.org/refworld/docid/3ae6b36ec.html>.

subsidiary protection under the European Union's asylum *acquis*.⁹ In practice, this has extended UNHCR's mandate to a variety of situations of forced displacement.

4. In the European context, UNHCR's mandate has enabled it to seek solutions for all beneficiaries of international protection.¹⁰ UNHCR's supervisory responsibility has also been acknowledged in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union ('TFEU').¹¹ Secondary European Union legislation also emphasises the role of UNHCR. For instance, Recital 15 of Directive 2004/83/EC, (the Asylum Qualification Directive) in which Ireland participates, states that consultations with UNHCR 'may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.'¹² The supervisory responsibility of UNHCR is specifically articulated in Article 21 of Directive 2005/85/EC (the Asylum Procedures Directive),¹³ in which Ireland also participates.

C. Outline of UNHCR's Position

5. UNHCR notes that the issue in this appeal is of equal significance to refugees and subsidiary protection beneficiaries seeking family reunification under the International Protection Act 2015. In summary, UNHCR submits:

- a) Refugees and other beneficiaries of international protection have a right to family unity. Family reunification is a mechanism for giving effect

⁹ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at: <https://www.refworld.org/docid/4f197df02.html>.

¹⁰ The term beneficiaries of international protection encompassing both persons granted refugee status and subsidiary protection.

¹¹ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, [OJ C 115/47, 9.05.2008], available at: <http://www.refworld.org/docid/4b17a07e2.html>.

¹² European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC, available at: <http://www.refworld.org/docid/4157e75e4.html>.

¹³ European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326; 13 December 2005, pp. 13-34, available at: <http://www.refworld.org/docid/4394203c4.html>.

to this right. It is an essential element in enabling persons who have fled persecution and serious harm to resume a normal life.

- b) The bond between parents and children is a central aspect of family life. International human rights law obliges States to take a broad and flexible approach to the interpretation of family life and assessment of family relationships, recognising cultural variations, social norms and economic and emotional dependency factors as part of the evolving concept of family. In individual cases, the existence of family life is a question of fact.
- c) Reflecting this broad and flexible approach, the definition of ‘child’ in section 56 of the International Protection Act 2015 should be interpreted so as to be capable of embracing all children who are part of a family as a matter of fact, whether or not they are related to the qualified person by blood; and
- d) DNA testing should be considered as a method for verifying biological family relationships only in the absence of other evidence, where such evidence has proven insufficient, or where there are strong indications of fraud. Where a non-biological relationship is asserted, DNA testing is of no value.

D. The Right to Family Unity and Family Reunification

- 6. While neither the 1951 Convention nor 1967 Protocol contain a provision on the right to family reunification, the Final Act of the Conference of Plenipotentiaries at which the Convention was adopted, affirmed ‘that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee’, and adopted a strongly worded recommendation that States ‘take the necessary measures for the protection of the refugee’s family, especially with a view to

ensuring that the unity of the refugee's family is maintained....[and for] the protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.'¹⁴ It is important to note, in this context, the recognition that the refugee family was considered to be wider than just parents and their biological children.

7. UNHCR's governing Executive Committee has repeatedly highlighted the need to protect the unity of the refugee family. The Executive Committee is elected by the UN Economic and Social Council and consists of representatives of Member States and of specialist agencies.¹⁵ It has adopted a series of Conclusions that reiterate the fundamental importance of family reunification.¹⁶ While not legally binding on State Parties, these Conclusions are adopted by consensus by the States which are Members of the Executive Committee of UNHCR and represent statements of opinion that are broadly representative of the views of the international community. They are, therefore, useful subsidiary means for the determination of rules of international protection law. In Conclusions adopted in 1981, the Executive Committee stated:

*It is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.*¹⁷

¹⁴ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <https://www.refworld.org/docid/40a8a7394.html> See also Annex I of the UNHCR Handbook and para 182 of the Handbook Now in Annex I of the Refugee Convention and para 182 of the Handbook.

¹⁵ At present, 102 States are Members of the Executive Committee, including Ireland, which has been a member since 1996: <https://www.unhcr.org/excom/announce/40112e984/excom-membership-date-admission-members.html>.

¹⁶ UNHCR Executive Committee of the High Commissioner's Programme (ExCom), *Family Reunification No. 24 (XXXII) - 1981*, 21 October 1981, No. 24 (XXXII), available at: <https://www.refworld.org/docid/3ae68c43a4.html> UNHCR ExCom, *Family Reunion No. 9 (XXVIII) - 1977*, 12 October 1977, No. 9 (XXVIII), available at: <https://www.refworld.org/docid/3ae68c4324.html> UNHCR ExCom, *Refugee Children and Adolescents No. 84 (XLVIII) - 1997*, 17 October 1997, No. 84 (XLVIII), available at: <https://www.refworld.org/docid/3ae68c68c.html> ExCom, *Conclusion on International Protection No. 85 (XLIX) - 1998*, 9 October 1998, No. 85 (XLIX), available at: <https://www.refworld.org/docid/3ae68c6e30.html> ExCom, *General Conclusion on International Protection No. 87 (L) - 1999*, 8 October 1999, No. 87 (L), available at: <https://www.refworld.org/docid/3ae68c6ec.html> UNHCR ExCom *Conclusion on Children at Risk No. 107 (LVIII) - 2007*, 5 October 2007, No. 107 (LVIII), available at: <https://www.refworld.org/docid/471897232.html>.

¹⁷ UNHCR ExCom, *Family Reunification No. 24 (XXXII) - 1981*, 21 October 1981, No. 24 (XXXII), available at: <https://www.refworld.org/docid/3ae68c43a4.html>.

8. In a further set of Conclusions adopted in 1998, the Executive Committee exhorted States:

*[I]n accordance with the relevant principles and standards, to implement measures to facilitate family reunification of refugees on their territory, especially through the consideration of all related requests in a positive and humanitarian spirit, and without undue delay;*¹⁸

9. UNHCR's approach is informed by the recognition in public international law of a broader human right to family unity.¹⁹ Article 16(3) of the 1948 Universal Declaration of Human Rights, recognises the family as 'the natural and fundamental group unit of society...[e]ntitled to protection by society and the State.'²⁰ This universal right is given binding effect by Article 23 of the International Covenant on Civil and Political Rights ('ICCPR'), to which Ireland is a State Party.²¹ The Human Rights Committee, which monitors compliance with the ICCPR and publishes authoritative commentaries on its provisions, has declared that the right to found a family in Article 23 ICCPR implies, in principle, the possibility to live together.²²

¹⁸ UNHCR ExCom, *Conclusion on International Protection No. 85 (XLIX) - 1998*, 9 October 1998, No. 85 (XLIX), available at: <https://www.refworld.org/docid/3ae68c6e30.html>.

¹⁹ The right to family unity of parents and children is also protected in regional human rights law. For example, Article 11 of the American Convention on Human Rights protects the family against arbitrary or abusive interference while Article 17 states that 'the family is entitled to protection by society and the State. See further *Advisory Opinion OC-17/2002, "Juridical Condition and Human Rights of the Child"*, OC-17/2002, Inter-American Court of Human Rights (IACrHR), 28 August 2002, available at: https://www.refworld.org/cases/IACRTHR_4f59d6432.html See also Article 18 of the Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html>. See also OAU, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <https://www.refworld.org/docid/3ae6b38c18.html>.

²⁰ UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III), available at: <https://www.refworld.org/docid/3ae6b3712c.html>. Other international law provisions include Article 10(1) *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html>; Article 10, 16, 22 and the Preamble of the *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>; Article 14 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, available at: <https://www.refworld.org/docid/3ae6b3980.html>; Article 74 of the International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html>, and in the preamble of the 2006 *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106, available at: <https://www.refworld.org/docid/45f973632.html> (Convention on the Rights of Persons with Disabilities).

²¹ UNGA, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>.

²² UN Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, available at: <https://www.refworld.org/docid/45139bd74.html>.

10. Article 10 of the UN Convention on the Rights of the Child (‘UNCRC’), which has also been ratified by Ireland, provides that applications for family reunification concerning children shall be dealt with in a positive, humane and expeditious manner.²³
11. Further, the UN Committees on the Rights of the Child and on Migrant Workers have jointly advised that ‘preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.’²⁴
12. On 19 September 2016, the UN General Assembly adopted the New York Declaration for Refugees and Migrants to address the question of large movements of refugees and migrants. The States which voted for the Declaration — including Ireland — declared their ‘profound solidarity with, and support for, the millions of people in different parts of the world who, for reasons beyond their control, are forced to uproot themselves and their families from their homes’ and that they would consider the adoption of ‘flexible arrangements to assist family reunification.’²⁵
13. In Europe, the right to respect for family life is protected by Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights of the EU.²⁶ The European Court of Human Rights recognised the

²³ UNGA, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>.

²⁴ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, available at: <https://www.refworld.org/docid/5a12942a2b.html> para 32. The Committees also went on to state that “countries should facilitate family reunification procedures in order to complete them in a expeditious manner, in line with the best interests of the child. It is recommended that States apply best interest determination procedures in finalizing family reunification.”

²⁵ UNGA, *New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, available at: <https://www.refworld.org/docid/57ceb74a4.html>.

²⁶ Provisions related to family life are also present in the 1996 Revised European Social Charter and within the EU context, the EU Charter of Fundamental Rights. Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at: <https://www.refworld.org/docid/3ae6b3678.html>; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html>; European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: <https://www.refworld.org/docid/3ae6b3b70.html>. See also the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification but note that Ireland is not a party to that Directive (Family Reunification Directive).

importance of family unity for beneficiaries of international protection in *Tanda-Muzinga v. France*, *Mugenzi v. France* and *Senigo Longue v. France*, saying:

The Court reiterates that the family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life. It further reiterates that it has held that obtaining such international protection constitutes evidence of the vulnerability of the parties concerned (see Hirsi Jamaa and Others v. Italy [GC], no. 27765/09, § 155, ECHR 2012). In this connection, it notes that there exists a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens, as evidenced by the remit and the activities of the UNHCR.... In this context, the Court considers that it was essential for the national authorities to take account of the applicant's vulnerability and his particularly difficult personal history, to pay close attention to his arguments of relevance to the outcome of the dispute, to inform him of the reasons preventing family reunification, and, lastly, to take a rapid decision on the visa applications.²⁷

14. Recognising that international protection beneficiaries have rights to family life and family unity, UNHCR submits that family reunification procedures are important mechanisms to ensure respect for these rights in a way that is safe and legal.²⁸ A generous approach to family reunification helps to ensure the protection, emotional well-being and economic support of beneficiaries of international protection. Reuniting separated family members also ensures sustainable and durable solutions

²⁷ ECtHR, *Tanda-Muzinga c. France*, Requête no 2260/10, Council of Europe: European Court of Human Rights, 10 July 2014, available at: [https://www.refworld.org/cases,ECHR,53be80094.html](https://www.refworld.org/cases/ECHR,53be80094.html); ECtHR, *Mugenzi c. France*, Requête no 52701/09, Council of Europe: European Court of Human Rights, 10 July 2014, available at: [https://www.refworld.org/cases,ECHR,53be81784.html](https://www.refworld.org/cases/ECHR,53be81784.html); ECtHR, *Senigo Longue et. Autres c. France*, Requete no. 19113/09, 10 July 2014 available at: <http://hudoc.echr.coe.int/eng/?i=001-145355>.

²⁸ For example family reunification enables many women and children to access protection in Europe and reduces their exposure to exploitation by smugglers or human traffickers in countries of transit or first asylum as noted in UNHCR, *Position on Safe and Legal Pathways*, 8 February 2019, available at: <https://www.refworld.org/docid/5ce4f6d37.html> para 24.

and enhances the integration of beneficiaries of international protection in their host societies.²⁹

E. The Need to Adopt a Broad and Flexible Approach to Family Life

16. Although international human rights law has not defined what a family is, international human rights bodies have taken a broad inclusive approach to the question of family life. There is an implicit understanding that the term ‘nuclear family’ is a narrow construction bearing little resemblance to the realities of family composition.³⁰ The UN Human Rights Committee has held that Article 17 ICCPR protecting family life should be given a ‘broad interpretation to include all those comprising the family as understood in the society of the State party concerned.’³¹ In *Ngambi and Nebol v. France*, the Human Rights Committee determined that:

*The protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations.*³²

17. In a similar vein, the UN Committee on the Rights of the Child has held that the term family ‘must be interpreted in a broad sense to include biological, adoptive or foster parents, or, where applicable, the members of the extended family or community as provided for by local custom.’³³ In *YB and NS v. Belgium*, the

²⁹ UNHCR, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, available at: <https://www.refworld.org/docid/4ae9aca12.html>.

³⁰ Hathaway, *The Rights of Refugees Under International Law*, Cambridge University Press, January 2010 p. 537.

³¹ UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at: <https://www.refworld.org/docid/453883f922.html>

³² HRC, *Benjamin Ngambi and Marie-Louise Nébol v. France*, CCPR/C/81/D/1179/2003, 16 July 2004, available at: <https://www.refworld.org/cases,HRC,4162a5a46.html> para. 6.4. See also HRC, *Nimo Mohamed Aden and Liban Muhammed Hassan v. Denmark*, CCPR/C/126/D/2531/2015, 20 November 2019, available at: <https://www.refworld.org/cases,HRC,5de7c43f4.html>.

³³ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html>. See also CRC, *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev.1, available at: <https://www.refworld.org/docid/460bc5a62.html>. The Committee

Committee considered whether States Parties were required by Article 10 UNCRC to recognise a right to family reunification between children and adults with whom they were in *kafalah* arrangements.³⁴ In Islamic legal systems, *kafalah* is a fostering arrangement whereby an adult commits to take responsibility for the protection, education and maintenance of an abandoned child. It does not however entail a parent-child relationship or any inheritance rights. The Committee found that while Article 10 UNCRC did not oblige State parties to recognise the right to family reunification of a child in a *kafalah* arrangement, it was nevertheless incumbent on Belgium to take into account the *de facto* ties between the child and his or her sponsor that had developed on the basis of *kafalah* in assessing and determining the best interests of the child for the purpose of deciding whether to grant family reunification. The Committee noted:

*[I]n assessing the preservation of the family environment and the maintenance of ties as factors that need taking into account when considering the child's best interests, "the term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art. 5)."*³⁵

18. In the European context, the European Court of Human Rights has on numerous occasions ruled that the 'existence or non-existence of "family life" ...is essentially a question of fact depending on the real existence in practice of close personal ties.'³⁶ For instance, this can include a demonstrable interest and commitment by a

on the Rights of the Child – para 15 “recognises that “family” here refers to a variety of arrangements that can provide for young children’s care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children’s rights and best interests.”

³⁴ CRC, *Y.B. and N.S. v. Belgium*, no 12/2017, 27 September 2018, available at: https://www.refworld.org/cases_CRC_5c5ab7494.html.

³⁵ *Ibid*, para 8.11. See also CRC, General comment No. 14 (2013) para 59.

³⁶ ECtHR, *L. v. the Netherlands*, Application no. 45582/99, 1 June 2004, available at: https://www.refworld.org/cases_ECHR_5852a7e54.html; ECtHR, *Paradiso and Campanelli v Italy*, Application no. 25358/12, 24 January 2017, para. 140. See also ECtHR *Keegan v. Ireland*, 16/1993/411/490, 26 May 1994, available at: https://www.refworld.org/cases_ECHR_3ae6b6ff8.html where, in para 44 the Court recalled that the notion of family is not confined solely to marriage-based relationships and may encompass other *de facto* “family” ties where the parties are living together outside of marriage.

father to a child both before and after birth.³⁷ Other relevant factors include whether a parent subsequently recognises their children and makes contributions to the child's care and upbringing along with ensuring regular contact.³⁸

19. In *Nazarenko v. Russia*, a failure to examine the best interests of the child in the case of a termination of paternity on account of not being the biological father was held to be a violation of Article 8 ECHR.³⁹ The Strasbourg Court considered that Article 8 ECHR obliged Contracting States to examine on a case-by-case basis whether it is in the child's best interests to maintain contact with a person, whether biologically related or not, who has taken care of him or her for a relatively long time. Similarly, in the absence of a biological tie, the European Court of Human Rights has found that family life existed between foster parents and a child who was temporarily in their care on account of the close personal ties between them among other factors.⁴⁰ An analogy can also be drawn from the case of *X, Y and Z v. the United Kingdom* where the Court recognised there was family life without the existence of blood ties.⁴¹

20. Analysis of regional jurisprudence is also instructive insofar as it illustrates the many forms that families take when considered across different cultures. In the Americas, the Inter-American Court of Human Rights has recognised that family is capable of including persons with no biological connection among whom there are close personal ties. In its 2014 *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, the Inter-American Court of Human Rights observed:

³⁷ ECtHR, *L. v. the Netherlands*, Application no. 45582/99, 1 June 2004 available at: https://www.refworld.org/cases/ECHR_5852a7e54.html.

³⁸ ECtHR, *Onur v. United Kingdom*, Application no. 27319/07, 17 February 2009, available at: https://www.refworld.org/cases/ECHR_49b153742.html.

³⁹ ECtHR, *Nazarenko v Russia*, Application no. 39438/13, 16 July 2015, available at: <http://hudoc.echr.coe.int/eng/?i=001-156084>.

⁴⁰ ECtHR, *Moretti et Benedetti c. Italie*, Requête no 16318/07, 27 April 2010, available at: https://www.refworld.org/cases/ECHR_5852a94d7.html p.48. ECtHR, *Kopf and Liberda v Austria*, Application no. 1598/06, 17 January 2012, available at: <http://hudoc.echr.coe.int/eng-press/?i=003-3808924-4365823> para.37.

⁴¹ ECtHR, *X, Y and Z v. The United Kingdom*, 75/1995/581/667, 22 April 1997, available at: https://www.refworld.org/cases/ECHR_3ae6b69010.html This case concerned a female-to-male transsexual, his partner and their child born by artificial insemination.

[T]he family to which every child has a right is, above all, her or his biological family, including extended family, and which should protect the child and also be the priority object of the measures of protection provided by the State. Nevertheless, the Court recalls that there is no single model for a family. Accordingly, the definition of family should not be restricted by the traditional notion of a couple and their children, because other relatives may also be entitled to the right to family life, such as uncles and aunts, cousins, and grandparents, to name but a few of the possible members of the extended family, provided they have close personal ties. In addition, in many families the person or persons in charge of the legal or habitual maintenance, care and development of a child are not the biological parents. Furthermore, in the migratory context, “family ties” may have been established between individuals who are not necessarily family members in a legal sense, especially when, as regards children, they have not been accompanied by their parents in these processes.⁴²

21. In *Riffo v. Chile*, the Inter-American Court of Human Rights noted that social, cultural, and institutional changes were taking place in the framework of contemporary societies, which aimed to be more inclusive of their citizens’ different lifestyles. The Court noted that this was evident in the social acceptance of interracial couples, single mothers or fathers and divorced couples, which at one time were not accepted by society. On this basis of these societal changes, the Court held:

[T]he American Convention does not define a limited concept of family, nor does it only protect a ‘traditional’ model of the family. In this regard, the Court reiterates that the concept of family life is not limited only to

⁴² Inter-American Court of Human Rights (IACrHR), *Advisory Opinion OC-21/14, “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection”*, OC-21/14, 19 August 2014, available at: <https://www.refworld.org/cases/IACRTHR.54129c854.html>.

*marriage and must encompass other de facto family ties in which the parties live together outside of marriage.*⁴³

22. Similarly, in *Fornerón v. Argentina*, the Inter-American Court observed:

*The Court has stated previously that the American Convention does not establish a closed concept of family and, in particular, it does not protect only a “traditional” model of the family. In addition, the Inter-American Court has established that the term “family members or next of kin” should be understood in its broadest sense, including all those persons connected by a close relationship. There is nothing to indicate that single-parent families cannot provide children with care, support and affection. Every day, the reality shows that not every family has a maternal or paternal figure, and this does not prevent the family from providing the necessary well-being for a child’s development.*⁴⁴

23. In UNHCR’s respectful submission, there is, therefore, an established body of international jurisprudence which suggests that the question of the existence or non-existence of a familial bond is essentially a question of fact, which must be determined on a case-by-case basis, and which must be capable of embracing family members — including children — beyond those united to their sponsor by blood or by law. In line with global and regional jurisprudence, UNHCR submits that in assessing relationships between adults and children in the context of applications for family reunification by beneficiaries of international protection, the different lived realities and particular situations of those forced to flee their homes need to be considered. Forced displacement, persecution and serious harm may mean that separated families reform and/or are reconstituted in different combinations over

⁴³ IACrTHR, *Atala Riffo and Daughters v Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239, available at: https://www.refworld.org/cases/IACRTHR_4f840a122.html, paras 142-143.

⁴⁴ IACrTHR, *Fornerón and daughter v. Argentina*. Merits, Reparations, and Costs. Judgment of April 27, 2012. Series C No. 242, available at: https://www.refworld.org/cases/IACRTHR_5de7c33e4.html para 98.

time, as family members are separated, go missing, are absent, reunited, die or are killed.⁴⁵

24. UNHCR's own procedures for refugee status determination and resettlement operations are informed by the principles of international and regional human rights law outlined above. It is for this reason, for example, that the term 'close family members' is preferred over 'nuclear family' to better embrace family relationships based on *de facto* ties.⁴⁶ Generally, UNHCR presumes a relationship of social, emotional or economic dependency between close family members, and requires it to be shown where other family members are involved.⁴⁷ A flexible approach to family life is adopted which is capable of taking account of cultural variations, economic and emotional factors.⁴⁸ In its operations, UNHCR recognises the different cultural roots and societal norms along with varied experiences that result in the variety of definitions of the family unit. For instance, sometimes families have taken in and cared for other unattached persons, such as friends or foster children, to whom they are not actually related by blood. Non-biological children including nieces, nephews and cousins may become part of the family as a result of conflict and/or persecution. UNHCR's Resettlement Handbook indicates why a flexible approach to family is necessary:

UNHCR recognizes the different cultural dimensions and societal norms that result in the variety of definitions of the family unit. It therefore promotes a path of cultural sensitivity combined with a pragmatic approach as the best course of action in the process of determining the parameters of a given refugee family. The nuclear family is clearly the core, but the element of dependency among family members, physical and

⁴⁵ UNHCR, *The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied*, January 2018, 2nd edition, available at: <https://www.refworld.org/docid/5a9029f04.html>.

⁴⁶ UNHCR, *UNHCR RSD Procedural Standards - Processing Claims Based on the Right to Family Unity*, 2016, available at: <https://www.refworld.org/docid/577e17944.html>.

⁴⁷ *Ibid.*

⁴⁸ Cambridge University Press, *Summary Conclusions: Family Unity*, June 2003, available at: <https://www.refworld.org/docid/470a33bed.html>; UNHCR, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification*, January 2018, 2nd edition, available at: <https://www.refworld.org/docid/5a902a9b4.html>.

*financial, as well as psychological and emotional, should find its appropriate weight in the final determination. This culturally sensitive understanding of the family is important for refugees who have been forced to flee due to persecution and civil conflict. The refugee family is often severely reduced due to violence and flight, and extended relations may be the last line of defence for individuals who rely exclusively on the family unit for survival, psychological support, and emotional care.*⁴⁹

25. In the resettlement context, UNHCR promotes the reunification of parents with socially, economically or emotionally dependent unmarried children, regardless of age, who were living with the parents in the country of origin.⁵⁰ This includes adopted children, whether adopted legally or on a customary basis.⁵¹
26. In the context of its refugee status determination mandate and its power to grant derivative status to family members of refugees, UNHCR considers children under the legal or customary care of a refugee as being ‘close family members’ of that person. UNHCR’s guidelines on assessing and determining the best interests of the child also acknowledge that a flexible approach to family reunification is required, noting that adoptive parents, as well as other legal or customary caregivers should be considered for reunification.⁵²
27. In its 2007 *Conclusions on Children at Risk*, UNHCR’s Executive Committee recommended that States and decision-makers within UNHCR:

[W]here appropriate, take a flexible approach to family unity, including through consideration of concurrent processing of family members in different locations, as well as to the definition of family members in recognition of the preference to protect children within a family

⁴⁹ UNHCR, Resettlement Handbook, 5.1.2, p. 178.

⁵⁰ UNHCR, Resettlement Handbook 6.6.2.1. p. 272.

⁵¹ Ibid.

⁵² UN High Commissioner for Refugees (UNHCR), *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, available at: <https://www.refworld.org/docid/5c18d7254.html> 4.2.5 p. 84.

*environment with both parents; and recognize UNHCR's role in the determination of the best interests of the child which should inform resettlement decisions including in situations where only one parent is being resettled and custody disputes remain unresolved due to the unavailability or inaccessibility of competent authorities, or due to the inability to obtain official documents from the country of origin as this could jeopardize the safety of the refugee or his/her relatives;*⁵³

28. Families are sometimes formed when people take in and care for others more vulnerable than themselves. These may be unaccompanied children or elderly neighbours, relatives and people with no blood connection whatsoever. UNHCR considers such families eligible for assistance with reunification.⁵⁴ Of course, particular care is taken to verify the accurate situation and circumstances of such persons so as to guard against fraud and abuse and to prevent trafficking in human beings. With respect to children, in the absence of formal legal recognition, UNHCR conducts a ‘best interest determination’ to determine whether reunification is in the child’s best interests.⁵⁵ Thus, under UNHCR’s mandate, non-biological children may be granted family reunification where they form part of a family unit *de jure* or *de facto*, and where reunification is in their best interests. This applies with respect to UNHCR’s refugee status determination processes and resettlement procedures. UNHCR respectfully submits it would be potentially inconsistent if a narrower and more rigid approach were adopted in the context of family reunification procedures under the International Protection Act 2015.
29. UNHCR respectfully submits that section 56(9) of the International Protection Act 2015 should be interpreted so that it is sufficiently broad and flexible to take account of the many and various cultural dimensions and societal norms across the world

⁵³ UNHCR Excom *Conclusion on Children at Risk No. 107 (LVIII) - 2007*, 5 October 2007, No. 107 (LVIII), available at: <https://www.refworld.org/docid/471897232.html>.

⁵⁴ Such an approach is also considered within UNHCR, *RSD Procedural Standards - Processing Claims Based on the Right to Family Unity*, 2016, available at: <https://www.refworld.org/docid/577e17944.html> where other family members and certain other individuals may also be eligible for derivative refugee status under the right to family unity if it is established, on balance, that a relationship of social, emotional or economic dependency exists between them and the Refugee Status Applicant.

⁵⁵ For more on Best Interests Procedure, see UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, available at: <https://www.refworld.org/docid/5c18d7254.html>.

concerning the relationships of love and affection between children and the people who care for them.

30. If interpreted in this way, section 56(9) will be capable of being applied in a manner consistent with Ireland's obligations under international and European human rights law with respect to the right of beneficiaries of international protection to family unity and family reunification. These are obligations Ireland has undertaken to perform with respect to persons subject to its jurisdiction in good faith in accordance with the principle *pacta sunt servanda*: that international agreements must be kept. The Supreme Court established in *O'Domhnaill v. Merrick* that statutes must be construed, so far as possible, so as not to be inconsistent with established rules of international law, and that the courts should avoid a construction which will lead to a conflict between domestic and international law.⁵⁶
31. Further, this interpretation will be consistent with Ireland's obligations under the European Convention on Human Rights, and in particular, Article 8 thereof. UNHCR recalls that the European Court of Human Rights has identified, on the part of refugees, a right in Article 8 to family unity and family reunification. In assessing whether family life exists for the purposes of Article 8, the Strasbourg Court looks not at whether people are related by blood but whether, in practice, close personal ties exist. In this regard, UNHCR notes the obligation on the courts in section 2 of the European Convention on Human Rights Act 2003 to interpret and apply statutory provisions, subject to other rules of interpretation, insofar as possible in a manner compatible with the State's obligations under the Convention.
32. UNHCR further notes that section 58(2) of the International Protection Act provides that in the application of sections 53 to 57 in relation to a person who has not attained the age of 18 years, the best interests of the child shall be a primary consideration. This obligation derives, ultimately, from the State's obligations under Article 3(1) UNCRC, which provides:

⁵⁶ *O'Domhnaill v. Merrick* [1984] 1 IR 151, 159.

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*⁵⁷

33. On the basis that the Committee on the Rights of the Child adopts a broad and flexible approach to relationships between parents and children, a broad and flexible interpretation of the term ‘child’ in section 56(9) is required if the Act of 2015 is to be internally consistent —with ‘child’ having the same meaning in section 56(9) as it does in section 58(2) — as well as compatible with Ireland’s treaty obligations.
34. For all of these reasons, UNHCR submits that the word ‘child’ in section 56(9) should be construed so as to be capable of embracing non-biological children who form a genuine family unit with the qualified person, even where they have not been legally adopted.

F. UNHCR’s Approach to DNA Testing

35. Guidance as to the approach taken by UNHCR to DNA testing is outlined in UNHCR’s *Note on DNA Testing to Establish Family Relationships in the Refugee Context*.⁵⁸
36. DNA testing may be applied to establish relationships among individuals related by blood through a comparison of their respective DNA material on the basis that all persons with blood relations share a similar sequence of DNA. UNHCR notes that DNA testing is limited to establishing genetic links, and that it may therefore be performed to confirm biological parent-child relationships. Clearly, where a family

⁵⁷ For more information on this principle see CRC, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html>.

⁵⁸ UNHCR, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, available at: <https://www.refworld.org/docid/48620c2d2.html>.

relationship other than a biological one is asserted, DNA testing is of no assistance in confirming it.

37. UNHCR recognises that DNA testing potentially has serious implications for the right to privacy. At the same time, UNHCR acknowledges that States have a legitimate interest in ensuring that there is proper and accurate identification of persons claiming family relationships with beneficiaries of international protection. Accordingly, where DNA testing is required, in order to be lawful it must be shown to be necessary, so that any interference in the right to privacy is proportionate to the legitimate purpose the testing pursues.
38. In UNHCR's view, for DNA testing to be necessary and proportionate, other means of verification of family links must first have proven to be insufficient. This means that interviews with the individuals concerned and documentary evidence such as birth certificates and registration records should normally be relied on first, before DNA testing is pursued.⁵⁹ In UNHCR's view DNA testing should only be resorted to where serious doubts remain after all other types of proof have been examined, or where there are strong indications of fraudulent intent and DNA testing is considered as the only reliable recourse to prove or disprove fraud.⁶⁰
39. Accordingly, UNHCR respectfully submits that DNA testing should be considered as a method for verifying biological family relationships in the absence of other evidence, where such evidence has proven insufficient, or where there are strong indications of fraud. Furthermore, where a family relationship other than a biological one is asserted, DNA testing is of no value.

⁵⁹ UNHCR, *Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, available at: <https://www.refworld.org/docid/48620c2d2.html>

⁶⁰ *Ibid.*

G. Conclusion

40. UNHCR submits that international human rights law requires States to take a broad and flexible approach to the assessment of family relationships in the context of family reunification for beneficiaries of international protection, recognising cultural variations, social norms and economic and emotional dependency factors as part of the evolving concept of family.
41. Reflecting this broad and flexible approach, UNHCR submits that the definition of ‘child’ in section 56 of the International Protection Act 2015 should be interpreted so as to be capable of embracing all children who are part of a family as a matter of fact, whether or not they are related to the qualified person by blood or recognised as part of his/her family by law.
42. On the issue of whether a requirement to undergo DNA testing may be imposed in the context of an application for family reunification, UNHCR submits that DNA testing should be resorted to only as a method of verifying biological family relationships in the absence of other evidence, where such evidence has proven insufficient, or where there are strong indications of fraud.

Colin Smith BL
Michael Lynn SC
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