High Court of Ireland Decisions

Judgment

Title: V.B. v The Minister for Justice and Equality & ors

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[2019] IEHC 55

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 632 JR]

BETWEEN

V.B.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice David Keane delivered on the 1st February 2019

Introduction

1. This is the judicial review of the decision of the Minister for Justice and Equality ('the Minister'), implicit in a letter of 30 May 2017 from the Irish Naturalisation and Immigration Service ('the INIS') to V.B. ('the applicant'), a declared refugee, that the applicant's request by letter dated 18 May 2017 to be permitted to revive an application

that she had made in a letter dated 26 June 2014, under s. 18(4) of the Refugee Act 1996, as amended (‘the Refugee Act'), for permission for her mother to enter and reside in the State with her as a dependent family member, the refusal of which had been communicated to her by the Irish Naturalisation and Immigration Service (‘INIS') in a letter dated 7 July 2015, could not be considered because the Refugee Act had been repealed and replaced by the International Protection Act 2015 (‘the International Protection Act') with effect from 31 December 2016 and the applicant's mother fell outside the specific definition of ‘member of the family' under the equivalent section - s. 56 - of that Act.

Procedural history

2. The application is based on an amended statement of grounds dated 17 August 2017, supported by an affidavit of the applicant, sworn on 26 July 2017.

3. By order made on 31 July 2017, Humphreys J granted the applicant leave to seek an order of *certiorari* quashing the Minister's decision, as well as various declarations concerning the status and effect of s. 56(8) and (9) of the International Protection Act, on the grounds set out in that amended statement.

4. The Minister delivered a statement of opposition dated 20 October 2017. It is supported by an affidavit of verification, sworn on 18 October 2017 by Declan Crowe, an assistant principal officer in the Department of Justice and Equality (‘the department').

5. The applicant filed both written legal submissions and, without the leave of the court, supplemental written legal submissions on 26 April 2018. Both are undated. The respondent filed written legal submissions dated 2 May 2018 on that date.

6. The hearing of the application commenced on 4 May 2018 and, having considerably exceeded the time allotted, resumed and concluded on 11 July 2018.

Background

7. The Minister gave the applicant a statement in writing, dated 6 March 2008, in accordance with s. 17(1)(a) of the Refugee Act, declaring her to be a refugee.

8. Six years later, the applicant wrote a letter dated 26 June 2014 to the family reunification section of the INIS applying for permission for her mother to enter and reside in the State as a member of the applicant's family (‘the family reunification application').

9. Section 18(4)(a) of the Refugee Act empowered the Minister, at his or her discretion, to grant permission to a dependent member of the family of a refugee to enter and reside in the State. Under s. 18(4)(b), a ‘dependent member of the family', in relation to a refugee, included a parent of the refugee who was dependent on the refugee or who was suffering from a mental or physical disability to such extent that it was not reasonable for him or her to maintain himself fully.

10. The applicant lays particular emphasis on the fact that the Minister's declaration of her refugee status, dated 6 March 2008, includes an express acknowledgement of her entitlement to apply for permission to be granted to a member of her family to enter and reside in the State in accordance with s. 18 of the Refugee Act but, of course, every recognised refugee had the right to apply under that section whether or not the existence of that right had been expressly drawn to his or her attention by the Minister.

11. The only details provided in the applicant's letter of 26 June 2014 were her mother's

name, date of birth and address in the Russian Federation.

12. The Minister referred the family reunification application to the Refugee Applications Commissioner (‘the Commissioner') in accordance with the requirement to do so under s. 18(4)(a) of the Refugee Act. On 5 August 2014, the Office of the Refugee Applications Commissioner (‘ORAC') wrote to the applicant, enclosing a questionnaire for her to complete and submit, together with any other information that she may wish to provide in support of her application, ‘no later than 26/08/14'. The applicant was asked to note that failure to reply to the ORAC letter on or before the date specified may have an adverse effect on the outcome of her application.

13. Under s. 18(2) of the Refugee Act, it was the function of the Commissioner to investigate the family reunification application and to submit a report in writing to the Minister, addressing the relationship between the refugee concerned and the person the subject of the application, as well as the domestic circumstances of that person.

14. In a subsequent undated letter to ORAC, the applicant requested an extension of time to October 2014 for the submission of her completed questionnaire and supporting documentation on the basis that her mother had yet to obtain unspecified documents from the Russian authorities that, once obtained, would have to be translated into English. ORAC wrote in reply on 26 August 2014, granting an extension of time and fixing a new deadline of 1 October 2014.

15. The applicant never submitted a completed questionnaire or any documentation in support of her application. Nor did she engage in any further correspondence with ORAC or the Minister prior to the Minister's determination.

16. The Commissioner submitted a report dated 30 December 2014 to the Minister. It recorded that the family reunification application had been made to the Minister on 24 July 2014 and referred to ORAC for investigation on 5 August 2014. There is an obvious discrepancy between the date of the applicant's letter (26 June 2014) and the date recorded by ORAC as that upon which her application was made (24 July 2014). It is one that I cannot resolve on the affidavits before me, although nothing appears to turn on it.

17. The Commissioner's report recorded that the applicant had not returned a completed questionnaire or submitted any documents, despite requesting, and receiving, an extension of time to 1 October 2014 for that purpose, before concluding, in short summary, that no meaningful information had been provided concerning the relationship between the applicant and the person concerned or the domestic situation of that person beyond the scant details provided in the letter of application and that this precluded any further investigation by the Commissioner.

18. Six months later, on 7 July 2015, the INIS wrote to the applicant to inform her that the Minister had decided to exercise her discretion under s. 18(4) of the Refugee Act, not to grant permission to the applicant's mother to enter and reside in the State.

19. The applicant did not acknowledge receipt of that letter nor did she respond to it.

20. Approximately 18 months later, by operation of the International Protection Act (Commencement) (No. 3) Order 2016 (S.I. No. 663 of 2016), the Refugee Act was repealed by the International Protection Act with effect from 31 December 2016, subject to the transitional provisions contained in Part 11 of the latter statute.

21. One of the transitional provisions contained in Part 11 of the International Protection

Act is s. 69(1) which states:

> 'A declaration given to a person under section 17 of the Act of 1996 that is in force immediately before the date on which this subsection comes into operation shall be deemed to be a refugee declaration given to the person under this Act and the provisions of this Act shall apply accordingly.'

22. Under s. 56(4) of the International Protection Act, the Minister is required to grant permission to a member of the family of a refugee to enter and reside in the State, subject to restriction under s. 56(7) in limited circumstances, primarily in the interest of national security or public policy. However, the only parents who fall within the definition of 'member of the family' under s. 56(9)(c) of the International Protection Act are those of an unmarried refugee under the age of 18 years. Thus, the applicant's mother is ineligible for permission to enter and reside in the State under that Act.

23. Over four months after the repeal of the Refugee Act, the applicant wrote a letter dated 18 May 2017 to the INIS, the text of which was as follows:

> 'I would like to ask for your permission to re-open investigation of my previous case regarding my mother [-], under Section 18 of the Refugee Act, 1996. I would like to apologise that I never sent any of the documents to support my opened case in 2014. Due to my college years, working and looking after my son, as I am a single mother, I found very hard to find time for collecting all required document. But I just pass my last exams and I have collected all required document to support my case.
>
> After my brother and father passed away my mother really needs me as she has no other family in Russia, except me and my son also she is in her age now so she needs my full support.
>
> Please, I would be very thankful if you let me to re-open the case under the section above.'

24. The applicant did not submit either a completed questionnaire or any documentation with that letter. Nor did she do so subsequently. The applicant did not provide any details or evidence of her studies, her employment or her personal and family circumstances beyond the bare assertions that she made in the letter just quoted.

25. An official of the INIS replied to the applicant by letter dated 30 May 2017, stating:

> 'I am directed by the Minister for Justice and Equality [to] refer to your correspondence received in this office on 22 May 2017.
>
> The Refugee Act 1996 ceased operation on 31/12/2016. The International Protection Act 2015 came into force from 31/12/2016. I regret to inform you that your mother is an ineligible family member under the new aforementioned legislation.'

This is the decision that the applicant challenges in these proceedings. I will refer to it as 'the Minister's decision.'

26. From the papers before me, it would appear that the applicant did not respond to that letter or engage in any further communication with the Minister before seeking, and

obtaining, leave to bring these proceedings on 31 July 2017.

27. In the affidavit that she swore on 26 July 2017 to ground these proceedings, the applicant avers broadly as follows. She resided with her parents and brother in the Russian Federation until she left school there at sixteen when she went to Georgia to stay with her grandmother. There she met and married a man with whom she travelled to Ireland where their marriage broke up. While in Ireland she made remittances to her family in Russia whenever she could afford to. Her brother died in 2006 and her father in 2011. Her mother is completely financially dependent on her and has no remaining family other than the applicant and the applicant's son.

28. The applicant goes on to aver that 'due to the pressure of studying and working and looking after [her] son as a single parent, while all the time remitting money to [her] mother', she could not return the family reunification questionnaire or submit any of the necessary accompanying documentation at any time between August 2014 and May 2017, over two and a half years later. Indeed, the applicant still has not done so to date.

29. The applicant exhibits copies of reports from a child psychiatrist, dated 17 February 2014, and an educational psychologist, dated 26 June 2013, confirming that the applicant's son, born in Ireland in 2006, has been diagnosed with Autistic Spectrum Disorder. The applicant does not explain why she did not furnish that information or those reports to the Minister at any material time.

30. The applicant avers that she does not meet the financial criteria under the department's existing general immigration policy on family reunification (dealt with in more detail below) and expresses the belief that any application she might make to have her mother join her on that basis would not be successful. The applicant goes on to aver that, due to the unspecified studies she is pursuing and her son's condition, she can only work minimum hours and is currently on an unspecified internship from which she receives just €50 per week, rendering it unlikely that she will be able to meet those financial criteria in the foreseeable future.

31. Section 4 of the Immigration Act 2004 contains the general power conferred on an immigration officer on behalf of the Minister to authorise a non-national to land or be in the State or to refuse permission to that non-national to do so.

32. On behalf of the Minister, Mr Crowe has exhibited a copy of the INIS *Policy Document on Non-EEA Family Reunification* (December 2016) ('the policy document'). That document endeavours to set out a comprehensive statement of Irish immigration policy in the area of family reunification. It points out that family reunification must be seen in a wider context where there are often competing social and particularly economic interests, before continuing (at para. 1.7):

> 'Thus, the fact that it may be to the benefit of a family with non-EEA family members to reside together in Ireland does not necessarily mean that the correct public policy response is to facilitate that request. In considering applications from family members INIS must, of course, establish at the outset that there is a genuine family relationship in existence. In relation to considering the interests of the community as a whole INIS must ensure, as far as possible, that there is no threat to public policy, public security or public health, that there is no abuse of family reunification arrangements and that there is not an undue burden placed on the taxpayer by family members seeking to reside in the State.'

33. The policy document goes on to state (at para. 1.8):

> 'It is intended however that family reunification with an Irish citizen or

certain categories of non-EEA persons lawfully resident will be facilitated as far as possible where people meet the criteria set out in this policy. It is considered as a matter of policy that family reunification contributes towards the integration of foreign nationals in the State. Special consideration will also be given to cases where one of the parties concerned is an Irish citizen child.'

34. That section of the policy document concludes (at para. 1.12):

> 'While this document sets down guidelines for the processing of cases, it is intended that decision makers will retain the discretion to grant family reunification in cases that on the face of it do not appear to meet the requirements of the policy. This is to allow the system to deal with those rare cases that present an exceptional set of circumstances, normally humanitarian, that would suggest that the appropriate and proportionate decision should be positive.'

35. Part 18 of the policy document is headed 'Elderly Dependent Parents.' It states in material part:

> '18.1 The issue of elderly dependent parents has arisen in a number of cases involving both Irish and non-EEA national sponsors. This form of migration can, however, be hugely problematic and is subject to considerable restriction in many jurisdictions, in some cases with extreme waiting times. It is of course, entirely understandable that an Irish citizen or non-EEA national lawfully resident in the State would wish to have his or her elderly parent residing with them so as to ensure their wellbeing as they get older and for the general enrichment of family life. However, it must also be acknowledged that the potential financial liability for the State of providing medical treatment, perhaps nursing home care and other services to an elderly person who is unable to support themselves is very considerable.
>
> 18.2 The Irish State is simply not in a position to take on financial responsibilities of this nature, nor should it be expected to do so. Moreover, even where the family in Ireland is willing to assume the initial responsibility of providing for their relative and has a good faith intention to continue to do so, circumstances can change. If the family becomes unable or unwilling to assume the costs of maintenance, then the State could be faced with an invidious choice between assuming the financial burden from the public purse of seeking to deport an elderly person who cannot provide for him/herself. This is not to say that there should be an absolute bar on all such applications but rather that a highly restrictive approach should be taken. Ultimately emigration, including that by Irish people, is undertaken with no legitimate expectation of ever being joined by parents.
>
> 18.3 The issue of dependency was referred to earlier and these principles will apply also in the case of dependent elderly relatives. The onus of proof is entirely on the sponsor and the dependant and the default position for such migration, given the financial risk to the State is refusal. However, each case must be viewed on its particular merits to see if there are exceptional circumstances that would warrant a positive decision. The onus must however be on the family to show that there is no viable alternative to the parents coming to Ireland. In reality, such alternatives are very often available, for example, where the parent has the financial resources to meet their needs and is physically capable of independent living; where other family members are in the country and capable of providing support or where homecare can be funded by the Irish residenct through remittances. Moreover, the option of family members leaving Ireland to care for their elderly dependent relative in the country of origin cannot be discounted merely on the basis that it is not the option

preferred by the family.

18.4 Given the level of risk, which cannot be fully mitigated by undertakings of financial support by family members, the financial thresholds for earnings to support an elderly dependent relative must be high enough to meet the foreseeable expense. Therefore a sponsor of an elderly dependent relative will be required to have earned in Ireland in each of the 3 years preceding the application an income after tax and deductions of not less than €60k in the case of one parent and €75k where 2 parents are involved. Where the elderly dependent relative has a guaranteed income into the future this can be used to partially offset the financial limits (bearing in mind however that a person with a sufficient personal income for their needs cannot reasonably be regarded as financially dependent).'

36. At paragraph 11 of her affidavit sworn on 26 July 2017, the applicant incorrectly identifies the financial criteria just quoted as those which must be met in order to apply for family reunification with a dependent parent, rather than as those ordinarily applied in considering such an application, subject to the discretion to grant family reunification in cases where they cannot be met, and expresses the belief, on the basis of that incorrect understanding, that an application for permission for her mother to enter and reside in the State would not succeed.

The arguments

i. the effect, if any, of s. 27 of the Interpretation Act 2005

37. The first and, as far as I can gather, the principal ground upon which the applicant was given leave to seek judicial review of the Minister's decision is that it is wrong in law because, by operation of s. 27 of the Interpretation Act 2005 (‘the Act of 2005'), the repeal of that provision by s. 6 of the International Protection Act 2015, does not affect the right she had ‘acquired, accrued or incurred' to apply for family reunification with her mother under it.

38. Section 27 of the 2005 Act provides, in material part:

‘(1) Where an enactment is repealed, the repeal does not-

…

(c) affect any right, privilege obligation or liability acquired, accrued or incurred under the enactment….'

39. As O'Donnell J observed in *Minister for Justice v Tobin (No. 2)* [2012] 4 IR 147 (at 350):

‘This provision does not stand alone. It must be read alongside the provisions of s. 4 of the Act of 2005 which make it clear that the presumptions and rules set out under that Act apply to any enactment "except in so far as the contrary intention appears in this Act, in the enactment itself, or where relevant in the Act under which the enactment is made". Accordingly s. 27(1)(c) of the Act of 2005 creates a presumption against the removal of any right, privilege, obligation or liability, which presumption can be rebutted by demonstrating that the Oireachtas did indeed intend to remove the right, privilege, or obligation in question.'

40. In the earlier case of *Minister for Justice v Bailey* [2012] 4 IR 1 (at 120), O'Donnell J had noted that the presumption under s. 27(1)(c) of the Act of 2005 - that legislation is

not intended to affect vested rights unless the contrary intention clearly appears - is closely related to, though distinct from, the presumption that legislation does not have retrospective effect, which is to some extent a constitutional rule in Ireland under Article 15.5 of the Constitution of Ireland 1937.

41. In the original written legal submissions filed on her behalf in these proceedings, the applicant seeks to rely on both presumptions in arguing that her entitlement to rely on s. 18(4) of the Refugee Act is unaffected by its repeal. On the presumption in Irish law that retrospective legislation which affects vested rights is *prima facie* unjust, the applicant cites the decision of the Supreme Court in *Dublin City Council v Fennell & Ors* [2005] 1 IR 604 and quotes extensively from the judgment of O'Higgins CJ for that Court in *Hamilton v Hamilton* [1982] IR 466 (at 473-5).

42. The essential question in *Fennell* was whether the coming into force of the European Convention on Human Rights Act 2003 on 31 December 2003, required the Circuit Court, in considering an appeal against an order for possession in favour of a landlord that had been made by the District Court under s. 62 of the Housing Act 1966 on 12 December 2003, to retrospectively apply s. 2 of the Act of 2003 in interpreting and applying s. 62 of the Act of 1966 for the purpose of that appeal. The Supreme Court held that it did not, in reliance upon the presumption against retrospective effect.

43. In *Hamilton* , the central issue was whether an entitlement to specific performance of a contract for the purchase of certain property including a family home, asserted in an action commenced prior to the enactment of the Family Home Protection Act 1976, was subject to the retrospective application of the requirement under that Act for the vendor's spouse to consent in writing to that sale. In reliance upon the same presumption, the Supreme Court held that it was not.

44. In this case, the applicant sought, in her own words, the Minister's 'permission to re-open the investigation of [her] previous case regarding [her] mother, under Section 18 of the Refugee Act', on 18 May 2017, more than four months after the repeal of that provision on 31 December 2016. The applicant had made a s. 18 application on 26 June 2014 but the Minister had refused it on 7 July 2015, almost eighteen months prior to that repeal.

45. Thus, in contrast to the retrospective redefinition of the scope of the right of possession at issue in *Fennell* or the retrospective qualification upon the right to specific performance contended for in *Hamilton* , it is difficult to identify the impermissible retrospective effect that the applicant contends for in this case, since the Minister's decision on her original application predated the relevant repeal and the request contained in her letter of 18 May 2017 (whether characterised as one for a review of that decision or one for permission to make a new application) plainly postdated it. If there had been a 'live' application on behalf of the applicant before the Minister on 31 December 2016, the position would have been different because s. 70(14) of the International Protection Act provides:

> 'Where, before the date on which this subsection comes into operation, a person has made an application under section 18(1) or (4) of the Act of 1996 and, by that date, the Minister has not made a decision under that section in respect of the application—
>
> (a) the Act of 1996 shall continue to apply in respect of the application, and
>
> (b) where the Minister decides under that section to grant a permission to the person who is the subject of the application to enter and reside in the State, the permission shall be deemed to

be a permission given to the person under section 56 and the provisions of this Act shall apply accordingly.'

46. Turning to the presumption under s. 27(1)(c) of the Act of 2005, the applicant faces three insurmountable difficulties in asserting that the repeal of s. 18(4) of the Refugee Act did not affect her vested right to make an application under that provision to the Minister to exercise his or her discretion to grant or withhold permission to the applicant's mother to enter and reside in the State.

47. The first obvious difficulty with the assertion of such a vested right is that flagged by O'Donnell J in *Minister for Justice v Tobin (No. 2)* (at 352-3):

> `In identifying what can be said to be "vested" rights which trigger the presumption in s. 27 of the Act of 2005 there is I think much useful guidance to be gained in Bennion, *Statutory Interpretation* (4th ed. Butterworths, 2002) which states at p. 259 that "the right must have become in some way vested by the date of a repeal, i.e. it must not have been a mere right to take advantage of the enactment now repealed". A similar point was made in the 9th edition of *Craies on Legislation* (Sweet & Maxwell, 2008) at para. 14.4.12:-
>
> > "The notion of a right accrued in s. 16(1)(c) requires a little exposition. In particular, the saving does not apply to a mere right to take advantage of a repealed enactment (clearly, since that would deprive the notion of a repeal of much of its obvious significance). Something must have been done or occurred to cause a particular right to accrue under a repealed enactment."'

48. In *S.G. (Albania) v Minister for Justice* [2018] IEHC 184 (Unreported, High Court, 23 March, 2018), Humphreys J expanded on the point (at para. 34):

> `Bennion's phrase quoted by O'Donnell J. in turn cites, at p. 259, n.5, three cases on the subject:
>
> > (i). The first is *Abbott v. Minister of Lands* [1895] AC 425. Lord Herschell L.C. said at p. 431 that *'It has been very common in the case of repealing statutes to save all rights accrued. If it were held that the effect of this was to leave it open to any one who could have taken advantage of any of the repealed enactments still to take advantage of them the result would be very far reaching. It may be, as Windeyer J. observes, that the power to take advantage of an enactment may without impropriety be termed a 'right.' But the question is whether it is a 'right accrued' within the meaning of the enactment which has to be construed. Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words 'obligations incurred or imposed.' They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment* .' The reference to acts done towards availing of the 'right ' does not I think mean that merely doing anything to rely on a statute creates a shadow ongoing existence for that statute after its repeal. The act done must be such as to make it unjust not to apply the Act. In the present context, merely to disappoint an applicant by changing the law does not constitute injustice such that making

representations under the former Act constitutes an accrued right that cannot be interfered with.

(ii). Secondly, Bennion cites *Hamilton-Gell v. White* [1922] 2 K.B. 422 at 431, which appears to be a reference to the comment of Atkin L.J. as he then was that *'the tenant in this case has acquired a right to claim compensation under the Act of 1908 on his quitting his holding* '. That instances the sort of property-type right that is intended by the reference to accrued rights in s. 27.

(iii). The third case cited is *Chief Adjudication Officer v. Maguire* [1999] 1 WLR 1778; [1999] 2 All E.R. 859 , where the Court of Appeal held that a claimant who before the repeal of social welfare legislation satisfied all the preconditions to entitlement to the benefit save only that of making the requisite claim, such claim then being made within the prescribed period, albeit after repeal, had an accrued right preserved notwithstanding the repeal. Again that is the sort of property-type financial entitlement to which s. 27 is directed. Clarke L.J. (as he then was) commented at 1791 that *'It is surely far better for the statute to state clearly what rights are to survive and what rights are not, so that fine distinctions and the costs of endless debate as to whether a particular alleged right has been acquired or not can be avoided .'*

49. In my judgment, the right asserted by the applicant here, if accepted as a vested right, would deprive the repeal of the relevant provision of any meaningful effect in respect of the entire cohort of persons who had been eligible to apply under it, thus depriving the notion of its repeal of much of its obvious significance.

50. In considering the second difficulty with this argument, it must be borne in mind that the applicant is necessarily contending for the survival of a composite right both to apply for and to obtain the exercise of the Minister's discretion under s. 18(4) of the Refugee Act. To concede that the Minister's power to exercise the discretion conferred under s. 18(4) of the Refugee Act 1996 stands repealed while contending that a separate though sterile entitlement to apply to the Minister to exercise that discretion has survived that repeal by operation of the presumption, would result in an absurdity.

51. Citing the decision of the Supreme Court in *McKone Estates Ltd v Dublin County Council* [1995] 2 ILRM 283, amongst others, the author of Dodd, *Statutory Interpretation in Ireland* (Dublin, 2008) concludes (at para. 4.53) that no vested right accrues under s. 27(1)(c) of the Act of 2005 to have a statutory process of application determined in accordance with repealed law merely because it was commenced prior to that repeal. It seems to me that, *a fortiori* , no vested right accrues merely because a statutory application could have been commenced prior to a repeal but was not. As Dodd explains in the same paragraph:

> 'Where the conferring of a statutory benefit is discretionary, the benefit may not be acquired. In such a case, such provisions may be beyond the saving provision on the premise that the applicant can only have a hope that the discretion be exercised in their favour [see the New Zealand case of *Wellington Diocesan Board of Trustees v Wiaraprapa Market Buildings Ltd* [1974] 2 NZLR 562]. In [the] Privy Council decision of *Director of Public Works v Ho Po Sang* [1961] AC 901, it was held that a builder in compliance with a statutory procedure to obtain a rebuilding certificate, who had taken most of the necessary steps, had not obtained any acquired right, or right to have the procedure completed, because whether the certificate was awarded depended on the discretion of the

> final decision maker. The Privy Council drew a distinction between a pending investigation to see whether a right existed, which was covered by their equivalent of s. 27(1)(c), and a pending investigation into whether a right should be given or not.'

51. The passage I have just quoted seems to me to be a correct statement of the law. Under s. 18(4) of the Refugee Act, the issue would have been whether the applicant's mother should be given permission to enter and reside in the State or not; it would not have been whether the applicant's mother had an existing right to enter and reside in the State. Thus, the applicant can have had no vested right to a decision under that sub-section, even if an application for one had been pending at the time of its repeal. It is, I assume, for precisely that reason that an express transitional provision, in the form of s. 70(14) of the International Protection Act, was necessary to permit pending applications under s. 18(4) of the Refugee Act to proceed to a determination notwithstanding the repeal of that provision.

52. The third reason why, in my view, the applicant's argument on this point cannot succeed is that, even if the applicant had a vested right to apply for, and obtain, the exercise of the Minister's discretion under s. 18(4) of the Refugee Act (although I have found that she did not), the clear words of s. 6 and s. 70 of the International Protection Act would have operated to rebut the presumption that the repeal of that section did not affect that right.

ii. alleged breaches of Article 41 of the Constitution of Ireland; Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights of the European Union

53. The applicant seeks declarations that s. 56(8) of the International Protection Act is: 'in breach of the principles of non-retro-activity of laws and legal certainty'; incompatible with the State's obligations under Article 8 of the European Convention on Human Rights ('the ECHR'); and incompatible with Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter').

54. The applicant also seeks declarations that s. 56(9) of the International Protection Act is; in breach of the Constitution of Ireland; incompatible with the State's obligations under Article 8 of the ECHR; and incompatible with Article 7 of the Charter.

55. Section 56 of the International Protection Act provides, in material part:

> '(1) A qualified person (in this section referred to as the "sponsor") may, subject to *subsection* (8), make an application to the Minister for permission to be given to a member of the family of the sponsor to enter and reside in the State.
>
> …
>
> (8) An application under *subsection* (1) shall be made within 12 months of the giving under *section 47* of the refugee declaration or, as the case may be, subsidiary protection declaration to the sponsor concerned.
>
> (9) In this section and *section 57,* "member of the family" means, in relation to the sponsor—
>
> > (a) where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date the sponsor made an application for international protection in the State),

(b) where the sponsor is a civil partner, his or her civil partner (provided that the civil partnership is subsisting on the date the sponsor made an application for international protection in the State),

(c) where the sponsor is, on the date of the application under *subsection (1)* under the age of 18 years and is not married, his or her parents and their children who, on the date of the application under *subsection (1),* are under the age of 18 years and are not married, or

(d) a child of the sponsor who, on the date of the application under *subsection (1),* is under the age of 18 years and is not married.'

56. It would be a clear breach of the *ius tertii* rule to permit the applicant to challenge the validity of s. 56(8) of the International Protection Act or its compatibility with the ECHR or the Charter in these proceedings; see, for example, *A v Governor of Arbour Hill Prison* [2006] 4 IR 88 at 187. That is because there is no hint or suggestion, much less any direct or indirect statement, in the Minister's decision that the Minister considered the application to be out of time by operation of that provision. Indeed, in argument, the Minister adopted the position that, by operation of s. 69(1) of the International Protection Act, whereby the refugee status declaration that had been given to the applicant under the Refugee Act was deemed to be a refugee status declaration given to the applicant under the Act of 2015 from the date upon which that provision came into operation (31 December 2016), the applicant had a period of 12 months from that date to make any application she might wish under s. 56(1) of the International Protection Act in respect of any member of her family eligible under the Act of 2015. Whether that argument of law is correct or not, it does not arise on the evidence before me in this case.

57. It is plain on the evidence - and the Minister acknowledges - that the Minister's decision was based on the ineligibility of the applicant's mother to be considered as a 'member of the family' of the applicant under the specific definition of that term contained in s. 56(9) of the International Protection Act.

58. The applicant contends that the non-inclusion of a dependent parent of an adult refugee amongst the various categories of 'member of the family' in respect of whom an application for family reunification can be made under s. 56 is in breach of her right to the protection of her family under Article 41 of the Constitution and her right to respect for her private and family life under both Article 8 of the ECHR and Article 7 of the Charter.

59. However, the applicant's written legal submissions completely disregard her mother's entitlement to apply for permission to land and reside in the State under s. 4 of the Immigration Act 2004 pursuant to the terms of the policy document. While the applicant tersely avers, albeit without providing any supporting documentary evidence, that she cannot meet the financial requirements imposed on the sponsor of an elderly dependent parent under paragraph 18.4 of the policy document, she does not acknowledge, much less address, the discretion, clearly identified at paragraph 1.12 of that document, to grant family reunification in exceptional circumstances in cases that do not meet such requirements.

60. There is no reason to suppose, much less conclude, that the relevant discretion would be exercised in disregard of the applicant's status as a refugee or of her rights under the Constitution, the ECHR or the Charter (insofar as the latter is applicable, more

on which below).

iii. A breach of Charter Rights?

61. The supplemental written legal submissions that were filed on behalf of the applicant without the leave of the court, include the laconic assertion that the provisions of the Charter are engaged in this case because, in considering an application by a refugee for family reunification, the Minister is implementing EU law. As authority for that proposition, the applicant cites a passage from the dissenting judgment of Murray J in the Supreme Court case of *T.D. v Minister for Justice* [2014] 4 IR 277 at 286-7 (referred to with approval in the judgment of Fennelly J for the majority (Denham CJ, O'Donnell and McKecnie JJ concurring) (at 341)).

62. That submission is, at best, misconceived.

63. As both Murray J and Fennelly J made clear in *T.D* ., it is the specific right to asylum (with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees ('the Refugee Convention') and in accordance with the Treaty on European Union ('TEU') and the Treaty on the Functioning of the European Union ('TFEU') (together, 'the Treaties')) that is now guaranteed by Article 18 of the Charter - not the right of a declared refugee to family reunification.

64. On the Refugee Convention, the position is succinctly summarised in Symes and Jorro, *Asylum Law and Practice* , 2nd edn. 2010 (at para. 12.34):

> 'The Refugee Convention does not contain any principle of family unity. However, the Final Act of the Conference of States adopting the Convention recommended governments to take the necessary measures to ensure that the unit of a refugee's family is maintained. The UNHCR Handbook states that, subject to the member of the family being a national of a state other than that of feared persecution, once the head of the family is recognised as a refugee, family members are normally accorded refugee status. The 'family' in this context extends to the spouse and minor children and in practice, on occasions, to other dependants living in the same household.'

65. There is a Council Directive 2004/83/EC 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, O.J. L 304/12, 30th September, 2004, ('the Qualification Directive'). There is also a Council Directive 2005/85/EC on minimum standards on procedures in member states for granting and withdrawing refugee status, O.J. L 326/34, 13th December, 2005 ('the Procedures Directive'). It is the right to seek asylum or refugee status in the State in accordance with those instruments that is now anchored in the law of the European Union, rather than national law, not the right of a refugee to family reunification.

66. Article 23(1) of the Qualification Directive imposes an obligation upon the Member States to ensure that the family unity of a refugee is maintained. More specifically, under Article 23(2), Member States are obliged to ensure that family members of refugees are entitled to claim various benefits, including a residence permit as envisaged under Article 24. However, 'family members' are defined under Article 2 to include only the spouse or equivalent partner of the refugee and any unmarried dependent minor children of that couple, insofar as that family already existed in the country of origin. That definition does not extend to a dependent parent of a refugee. Article 23(5) provides that Member States may decide to apply the benefits concerned to 'other close relatives who lived together as part of the family at the time of leaving

the country of origin, and who were wholly or mainly dependent on the beneficiary of [refugee status] at the time', but there is no obligation on a Member State to do so as a matter of EU law.

67. The more apposite authority, to which the applicant did not refer in either the written or oral submissions made on her behalf, is the case of *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC 427 (Unreported, High Court, 25 November, 2010), in which Cooke J addressed the legislative intent behind s.18 of the Refugee Act in the following way:

> "31. …. [I]t appears reasonable to assume that s. 18 has been incorporated into the Act in the interests of facilitating the reception of refugees and ensuring their personal wellbeing while in the State. The legislation is not enacted in discharge of any binding obligation of international law because family reunification, as such, is not provided for in the Geneva Convention of 1951 or the 1967 Protocol and Ireland has not opted into the European Union legislation in this area, namely, Council Directive 2003/86/EC of 22nd September, 2003, on the right to family reunification (O.J.L. 251/12 of 3rd October, 2003) (see Recital 17).
>
> 32. The UNHCR, however, has, in various instruments, over many years, encouraged the Contracting States to recognise and respect the 'essential right' of refugee families to unity and has encouraged them to facilitate its achievement (see, for example, the " *UNHCR Resettlement Handbook (Geneva, November 2004)' ; the "UNHCR Guidelines on Reunification of Refugee Families 1983" and the "Conclusions of the UNHCR Executive Committee on Family Reunification of 21st October, 1981)" .*
>
> 33. The rationale of family reunification as an objective in this area is well expressed in Recital (4) to the Council Directive:
>
> > *'Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.'*
>
> 34. Notwithstanding the non-binding nature of these sources, it is desirable in the view of the Court, that the provisions of s. 18 should be construed and applied so far as statutory interpretation permits in a manner which is consistent with these policies and with the consensus apparent among the Member States of the Union in the objectives of the Council Directive."

68. It should be pointed out that, even under Council Directive 2003/86/EC of 22nd September, 2003, on the right to family reunification (O.J. 2003 L. 251/12) ('the Family Reunification Directive'), from which, as Cooke J noted, Ireland has opted out, a refugee has no strict entitlement to family reunification with a dependent parent. Rather, under Article 4(2), a Member State may (not must), by law or regulation, authorise the entry and residence of a dependent parent of the refugee or his or her spouse, where that parent does not enjoy proper family support in the country of origin.

69. I draw two conclusions from the foregoing analysis.

70. The first is that the manner in which the State approaches a family reunification application made by an adult refugee in respect of a dependent parent is not a matter

involving the implementation of EU law and, in consequence, not one to which the provisions of the Charter can apply. Article 51.1 of the Charter states: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.'

71. The second is that there is no reason to suppose that, in dealing with any application for permission to land and reside in the State that the applicant's mother may choose to make under s. 4 of the Act of 2004, the Minister would do so without appropriate regard to the applicant's position as a refugee, unable to avail herself of the protection of her country of nationality; the policies on refugee family reunification promoted by the UNHCR and the European Union; and the requirements of Article 41 of the Constitution of Ireland and Article 8 of the ECHR, insofar as they are applicable to whatever evidence the applicant may present.

iv. Alternative arguments

72. In the supplemental written legal submissions, filed on behalf of the applicant without leave, an argument was advanced for the first time that the applicant's letter to the Minister of 22 May 2017 (wrongly described as one of 30 May 2017) should have been considered as 'an internal appeal from the initial refusal' of the application for family reunification under s. 18(4) of the Refugee Act, rather than as a further application under that provision.

73. In the course of oral argument, counsel for the applicant submitted for the first time, as a further alternative, that the applicant's original family reunification application, made on 26 June 2014, was still extant when she wrote to the Minister on 22 May 2017, on the basis that the INIS letter of 7 July 2015 on behalf of the Minister did not represent a definitive determination of that application.

74. These submissions drew an immediate objection from counsel for the Minister on the basis that, in clear breach of the requirements of O. 84, r. 20 of the Rules of the Superior Courts, neither ground had been stated, either precisely or at all, in the applicant's statement of grounds and, in consequence, no leave had been granted to advance either of them.

75. The first ground relied upon by the applicant in her statement of grounds is that, in material part, 'the repeal of the [Refugee Act] by [the International Protection Act] does not affect the [applicant's] right to apply for family reunification.' While I believe there is considerable force in the Minister's submission that, insofar as that statement is capable of covering either of the novel propositions now advanced (and the Minister contends it is not), the applicant has certainly contravened the requirement under O. 84, r. 20(3) of the RSC that 'it shall not be sufficient for an applicant to give as any of his grounds...an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.'

76. While I find the Minister's argument in that regard persuasive, I would prefer to leave the question over, as it seems to me that each of the new grounds advanced is more easily disposed of on the merits.

77. The first argument is that the applicant's letter of 22 May 2017 was, properly considered, a request for an internal review of the Minister's decision of 7 July 2015 not to grant permission to the applicant's mother to enter and reside in the State and that the Minister was obliged to accede to that request.

78. In *RX v Minister for Justice* [2010] IEHC 446 (Unreported, High Court, 10th December, 2010), Hogan J concluded that the Minister did have an extra-statutory jurisdiction or power to conduct an internal review of a decision made under s. 18(4) of the Refugee Act. But that cannot avail the applicant here precisely because the conduct of an internal review is, or was, an extra-statutory power of the Minister and not a vested or statutory right of the applicant. In this case, the applicant faces the additional obstacle that, in circumstances where she had not as much as completed a questionnaire much less submitted any evidence in support of her application, whether in June 2014 or May 2017, or at any time in between, it is difficult to see how there would have been anything to review, lending considerable weight to the argument that the applicant's letter of 22 May 2017 could only properly be characterised as a request to make a fresh application, rather than as a request to be permitted to challenge an earlier adverse decision on a substantive application previously made.

79. The second argument is that that the applicant's application of 26 June 2014 was still extant when she wrote to the Minister on 22 May 2017 because the contents of the INIS letter of 7 July 2015 did not represent a definitive determination of that application by the Minister. Of course, if the application of 26 June 2014 was still extant when the International Protection Act came into force on 31 December 2016, it would be entitled to the benefit of the saver in s. 70(14) of that Act, whereby the provisions of the Refugee Act and, in particular, s. 18(4) of that Act, would continue to apply. However, that argument is simply unsustainable on the facts. On 7 July 2015, the INIS wrote: 'Following consideration of your application the Minister has decided not to exercise his discretion, pursuant to s. 18(4) to grant the application.' There is no hint or suggestion in that correspondence that the Minister's decision not to exercise her discretion to grant the permission sought is in any way provisional or conditional.

Conclusion

80. The application is refused.