An Chúirt Achomhairc 15 OCT 2018 Court of Appeal

THE COURT OF APPEAL
(CIVIL)

Court of Appeal Record No 2018/141

Between:-

MAM

Appellant

and

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

and

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

-AND-

Court of Appeal Record No 2018/138

Between:-

KN, EM,
FM (a minor suing by her grandmother and next friend KN) and
YM (a minor suing by her grandmother and next friend KN)

Appellant

and

THE MINISTER FOR JUSTICE

Respondent

and

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

OUTLINE SUBMISSIONS OF THE AMICUS CURIAE

A. INTRODUCTION

1. The Irish Human Rights and Equality Commission ('IHREC') was granted liberty to appear in these appeals as *amicus curiae* in accordance with section 10(2)(e) of the Irish Human Rights and Equality Commission Act 2014 by Order dated 28th June 2018.

2. Under section 10(2)(e) of the Act of 2014, IHREC's statutory functions include making application for liberty to appear as *amicus curiae* in proceedings 'that involve or are concerned with the human rights or equality rights of any

person.' The role of an *amicus curiae* is to assist the Court in determining the issue before it: see *HI v. Minister for Justice, Equality and Law Reform* [2003] 3 IR 197, 203.

B. THE JUDGMENT UNDER APPEAL

3. On 26th February 2018, the High Court (Humphreys J.) delivered judgment in the challenges by the Appellants in these appeals to decisions of the Respondent refusing to process their applications for family reunification pursuant to section 18 of the Refugee Act 1996. Section 18(1) provides:

> *(1) Subject to section 17(2), a refugee in relation to whom a declaration is in force may apply to the Minister for permission to be granted to a member of his or her family to enter and to reside in the State and the Minister shall cause such an application to be referred to the Commissioner and a notification thereof to be given to the High Commissioner.*

4. Section 18(2) provides for an investigation of the application by the Refugee Applications Commissioner and the submission of a report to the Minister on the relationship between the applicant and the subject. Section 18(3) provides for a right of family reunification in respect of the applicant's spouse and minor children, or, if the applicant is a minor, his or her parents. Section 18(4) confers a discretion on the Minister to grant permission to enter and reside in the State to other dependent family members, meaning any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully. The Supreme Court has held that section 18(4) gives an 'enhanced possibility' of family reunification and conferred 'a special entry status on dependent members of the extended family of a refugee': *AMS v. Minister for Justice* [2015] 1 ILRM 170, 186-190. Section 18(5) provides that family reunification may be refused for national security reasons.

5. Between the commencement of the Refugee Act in 2001 and 2010, the Respondent did not entertain applications from naturalised Irish citizens. This policy changed in 2010 and, between then and 2017, refugees who naturalised were deemed eligible for family reunification under section 18. The Respondent's interpretation of section 18 changed again in 2017, reverting to the narrower view that naturalisation rendered a person ineligible for family reunification under the 1996 Act. Even applications pending at the time of naturalisation were cancelled.

6. In both *MAM* and *KN*, the Respondent's principal rationale in refusing the family reunification applications was that, upon acquiring the nationality of the State, a refugee ceases to have a well-founded fear in a country of his or her nationality, and that he or she is therefore no longer a refugee within the meaning of section 2 of the 1996 Act.

7. In the *MAM* case, the Respondent expressly relied on section 47(9) of the International Protection Act 2015 in support of his decision to refuse family reunification to MAM's husband. Section 47(9) expressly provides that a declaration of refugee or subsidiary protection status ceases to be in force when the person to whom it has been given becomes an Irish citizen. The Act of 1996 contained no such provision and the Act of 2015 was not in force when the application was made. In his Statement of Opposition, the Respondent resiled from the position expressed in the refusal letters and accepted that section 47(9) did not have retrospective effect. The High Court held that the Respondent had not applied section 47(9) to MAM.

8. A third case, *IK*, in which judgment was delivered concerned a refusal by the Respondent to revoke a deportation order. Leave to appeal to this Court was refused by the High Court, and the Supreme Court declined to accept a leapfrog appeal.

9. In its judgment, the High Court identified as the main issue in all three cases the question of whether a refugee continues to be a refugee after acquiring Irish citizenship by naturalisation. The learned trial judge found that because refugee

status is declaratory, its cessation must also be declaratory, and endorsed the Respondent's argument that a person cannot be a refugee if he or she has acquired Irish nationality, relying on section 21(1)(c) of the Act in support of this interpretation of section 2.

10. Section 21 of the Act deals with revocation, and provides for revocation of refugee status in cases where a refugee has 'acquired a new nationality (other than the nationality of the State) and enjoys the protection of the country of his or her new nationality.' The Court held that this provision only makes sense if acquisition of Irish citizenship automatically cancels refugee status, and observed that there is no injustice to applicants because naturalisation is a volitional act.

11. The Court also referred to statements of the UNHCR that its understanding of the position in international law is that where a refugee acquires the nationality of the country of asylum, refugee status will cease, and found that EU law did not require an express provision for the revocation or automatic cessation of refugee status.

12. On the subject of the Respondent's change of policy in 2017 after seven years of accepting applications by naturalised refugees, the Court held that the decision to change position did not amount to discrimination, and that the applicants had no legitimate expectation that their applications would be granted because, he found, they could not demonstrate any positive injustice. For the same reason, the appellant's arguments that the Respondent had acted unfairly, arbitrarily and in breach of fair procedures was rejected.

13. Considering whether the family reunification refusals involved breaches of substantive family rights, the Court observed that while the applicants could not apply under section 18 of the 1996 Act, it was open to their family members to apply for permissions to enter the State under the Immigration Act 2004. The Court held:

It is suggested that such family members would not comply with the normal criteria, but that is not hugely relevant. If, and which I am by no means deciding, the applicants are correct in their contention that they would have some constitutional right to reunification arising from substantive family rights, the Minister would have to operate the 2004 Act and the policy document discretion in a constitutional manner.

14. The Court concluded that the answer to the question of whether a refugee continues to be a refugee after acquiring Irish citizenship by naturalisation was negative and that this position was fully consistent with the position taken in EU and international law. Accordingly, the applications for judicial review were dismissed.

C. QUESTIONS PRESENTED

15. The Appellants in both cases make detailed submissions on the correct interpretation of section 18 of the 1996 Act by reference to the classical canons of interpretation, the revocation of protective status in EU law, the doctrine of legitimate expectation, and the alleged unfairness and arbitrariness of the Respondent's refusal to accepts their applications for family reunification. MAM makes additional submissions on the alleged error on the part of the Respondent in the application of section 47(9) of the 2015 Act to her case.

16. As *amicus curiae*, IHREC seeks to offer an independent perspective on human rights issues arising for consideration by the Court. Our focus is on issues which merit additional argument above and beyond the submissions the Court has already received, and every effort is made to avoid duplicating the submissions of the parties.

17. Having considered the submissions of the Appellants, IHREC has respectfully concluded that the Court may benefit from additional submissions on two issues:

(a) whether Article 8 ECHR confers a right (albeit qualified) to family reunification to refugees and similarly situated persons, and, if so, what effect such a right would have on the interpretation of the relevant provisions of the Act of 1996 having regard to the obligation in section 2 of the ECHR Act 2003 to interpret and apply statutory provisions in so far as possible in a manner compatible with the State's obligations under the Convention; and

(b) whether constitutional rights are also engaged, and what the interpretative implications of a finding in this regard would be.

18. IHREC has not yet received the submissions of the Respondents, and must therefore respectfully reserve the right to make oral submissions in respect of any additional issue arising out of them.

D. FAMILY REUNIFICATION AND ARTICLE 8 ECHR

19. Article 8 ECHR provides:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

20. For the European Court of Human Rights, the existence or non-existence of 'family life' is 'essentially a question of fact depending upon the real existence in practice of close personal ties': see *K. and T. v. Finland,* [GC] App No 25702/94, ECHR 2001-VII, § 150. To this end, the Commission notes with approval that s.56(2) of the International Protection Act 2015 requires the

Minister to investigate the relationship between the sponsor and the subject of the application and the domestic circumstances of the subject of the application. The Court has identified relationships amounting to 'family life' in cases involving married couples, unmarried cohabitants, same-sex couples, parents and children irrespective of the parents' marital status, and even between parents and adult children where elements of dependence were demonstrated: see for example *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94, § 62; *Schalk and Kopf v. Austria*, App No 30141/04, ECHR 2010-IV, §§ 94-95; *Keegan v. Ireland*, App No 16969/90, 26 May 1994, §§ 44-45; *Maslov v. Austria,* [GC] App No 1638/03, ECHR 2008-III, § 62.

21. The Appellant in the MAM appeal applied for family reunification in respect of her husband. The Appellants in the KN appeal are a mother, her adult daughter, and her two granddaughters. On the evidence before the Court, IHREC submits that the applications for family reunification made under section 18 of the Refugee Act 1996 by the Appellants in these appeals engaged their rights to respect for their family life as guaranteed by Article 8 ECHR.

22. Of course, the Strasbourg Court has consistently recognised that Article 8 ECHR does not impose on the Contracting States any general obligation to authorise family reunion in its territory: see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cited above, § 67 and *Berisha v. Switzerland*, App No. 948/12, 30 July 2013, § 49.

23. Nevertheless, in cases which concern family life as well as immigration, the extent of a State's obligations will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties of the persons concerned in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned, and whether there are factors of immigration control or considerations of public order weighing in favour of exclusion: see *Rodrigues da Silva and Hoogkamer v. the Netherlands*, App No 50435/99, ECHR 2006-I, § 39 and *Antwi and Others v.*

Norway, App No. 26940/10, 14 February 2012, §§ 88-89. IHREC submits that in these cases MAM and KN's family life has been ruptured for several years, and will continue to be ruptured unless the State permits reunification with the subjects of their applications.

24. Importantly for the purpose of these appeals, the Strasbourg Court has, in three cases arising out of applications for family reunification by refugees in France - *Tanda-Muzinga v. France*, App No 2260/10, *Mugenzi v. France*, App No 52701/09, and *Senigo Longue v. France*, App No 19113/09, all 10 July 2014 – identified within the scope of Article 8 ECHR a right on the part of refugees to family unity and family reunification.

25. The case of *Tanda-Muzinga v. France* is illustrative of the approach adopted in all three cases. It concerned an application for family reunification made by a Congolese refugee in respect of his wife and children. Mr. Tanda-Muzinga alleged that the consular authorities' prolonged refusal to issue the visas to his family – a delay of three and a half years – had infringed his right to respect for his family life as guaranteed by Article 8 ECHR. The Court held that because family reunification had already been granted and the delay was in obtaining the necessary visas, the case concerned not an interference in the exercise of the applicant's right to respect for his family life but rather an alleged failure on the part of France to comply with a positive obligation to give effect to that right. The Court also noted that although Article 8 ECHR contains no explicit procedural requirements, the decision-making process affecting Article 8 rights must be fair and such as to afford due respect to the interests safeguarded.

26. The Court observed that the applicant's family life had been discontinued purely as a result of his decision to flee his country of origin out of a genuine fear of persecution and that the applicant could not be held responsible for the separation from his family. The arrival of his wife and children in France was thus the only means by which family life could resume.

27. The Court then held that '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 noted 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.

28. Considering the procedural delays encountered by Mr. Tanda-Muzinga, the Court noted that the accumulation and protracted nature of the numerous hurdles he encountered in the course of the proceedings had left him in a state of severe depression. The Court found that the French authorities had not given due consideration to the applicant's specific situation, and concluded that the decision-making process did not offer the guarantees of flexibility, promptness and effectiveness required in order to secure his right to respect for family life under Article 8 ECHR. Concluding that France had failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration on the other, the Court found a violation of Article 8 ECHR. The same conclusion was reached in *Mugenzi* and *Senigo Longue*.

29. In IHREC's respectful submission, the judgments of the Strasbourg Court in *Tanda-Muzinga*, *Mugenzi* and *Senigo Longue* are authority for the following propositions:

   (a) Article 8 ECHR protects the right to family unity of refugees;

   (b) Article 8 ECHR requires that applications for refugee family reunification must take account of the special circumstances of refugees and their families if they are to strike a fair balance between the applicant's interests on the one hand and a Contracting State's own interest in controlling immigration on the other. This means taking account of the fact that refugee family separation is usually involuntary, that reunification in the country of origin is not possible, and that arrival of the refugee's family members in the Contracting State is the only means by which family life can resume.

(c) Refusal of refugee family reunification may amount to an interference in the Article 8 ECHR rights of the refugee. Equally, where family reunification is frustrated by procedural obstacles, there may be a violation of the positive and procedural obligations imposed.

30. IHREC submits that there is no reason in principle why Article 8 ECHR would have ceased to protect Mr. Tanda-Muzinga's right to family unity if he had taken up French nationality. After all, an application for family reunification made by a naturalised refugee would necessarily raise identical considerations as regards reasons for family separation and obstacles to reunification in the country of origin, and the same balance would have to be struck between the applicant's interests on the one hand and the State's own interest in controlling immigration on the other. It is therefore submitted that Article 8 ECHR protects the family reunification rights of naturalised refugees just as it does those of refugees who retain the nationality of their country of origin, or those who are stateless, for that matter.

31. In this regard, IHREC notes that the Appellant in the MAM case was separated from her husband during the armed conflict in Somalia in 2007. We note too that the First Named Appellant in KN was separated from her children when she fled Uzbekistan in 2008, having been subjected to a campaign of violence and harassment by the authorities because of suspicions about her husband's political opinions. In both cases, the family separations suffered were involuntary, and in both cases, family reunification in the country of origin is impossible. Nothing in the process of becoming an Irish citizen altered these facts in any way. Why then ought the result of that process – the acquisition of Irish citizenship – interfere so gravely in the process of an application for family reunification which was already underway? Why ought that application be diverted into a system which is substantially less advantageous? In this regard, IHREC notes (a) that section 4 of the Immigration Act 2004 contains no right to family reunification for spouses, children and parents comparable to section 18(3); and (b) that section 4 affords the Respondent wide discretion as to the terms and conditions of permissions granted under the section,

whereas permissions granted under section 18 are on the basis of the same rights and privileges enjoyed by refugees in accordance with section 3.

32. IHREC respectfully submits that a system which would treat the application for family reunification of a naturalized refugee differently to that of a refugee who has not naturalised would make a distinction on the grounds of nationality where in fact there is no difference in respect of the nature of the application. To do so would therefore be to discriminate in the enjoyment of the right guaranteed by Article 8 ECHR on the basis of nationality without objective justification in violation of Article 14 ECHR: see *Belgian Linguistic Case* (merits), Series A no 6, 23 July 1968, § 10. In this regard, IHREC respectfully disagrees with the learned trial judge's observation that 'if a refugee remained entitled to operate section 18 after acquiring citizenship, that could constitute discrimination against other Irish citizens under the applicant's logic.' On the contrary, IHREC submits that the appropriate comparator for a refugee who has acquired Irish citizenship by naturalisation is not a natural born Irish citizen but a refugee, because their experiences and needs as regards family separation and reunification are so much more similar.

33. IHREC therefore concludes that Article 8 ECHR guarantees a right to family reunification to refugees whether or not they have acquired Irish citizenship. In the context of applications for family reunification, the State must take account of their special circumstances if it is to comply with its obligations under Article 8 ECHR. In circumstances where reunification in the country of origin is not possible, and the arrival of the applicant's family members in the Contracting State is the only means by which family life can resume, refusal of family reunification is likely to amount to an interference in the applicant's Article 8 ECHR rights. Equally, where family reunification is frustrated by procedural obstacles, there may be a violation of the positive and procedural obligations imposed.

34. IHREC submits that this conclusion has implications for the Court's interpretation of section 18 of the 1996 Act, having regard to section 2 of the ECHR Act 2003. Section 2 of the 2003 Act provides:

(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.

35. In *McCauley v. Judge Fergus and Another* [2018] IECA 30, Hogan J, 7 February 2018, the Court of Appeal held, with regard to section 2:

> *It is clear from the language of the section that the interpretative obligation to render an interpretation of the domestic statute which is ECHR compatible is 'subject to the rules of law relating to such interpretation and application.' In effect, the court is called upon to apply a form of double construction test to the domestic statute in order to render it ECHR compatible, provided, of course, such an interpretation is, to adapt the words of Walsh J. in* McDonald v. Bord na gCon *[1965] IR 70 'reasonably open.'*

36. In these appeals, the Court is confronted with two competing interpretations of section 18 of the 1996 Act. Analysis of the interpretation of section 18 adopted by the Respondent and the Court below raises concerns in relation to the compatibility of the provision with Articles 8 and 14 ECHR. In particular:

(a) If interpreted in the manner suggested, section 18 required the Minister, upon the receipt of an application for family reunification, to satisfy himself not only that the applicant has a declaration of refugee status but that the applicant still meets the refugee definition in section 2 in order that the application should be admissible. This would require the Minister to examine afresh whether all the elements of the refugee definition are still satisfied. The entire claim would have to be reopened, with all of the guarantees of fair procedures that that would

entail. In IHREC's submission, such an onerous and duplicative procedure would be contrary to the scheme of the section itself – which envisages only an investigation by the Refugee Applications Commissioner into the familial relationships – and would constitute a substantial procedural obstacle to family reunification such that it would likely be incompatible with the positive and procedural obligations imposed by Article 8 ECHR;

(b) If interpreted in the manner suggested, section 18 envisages the automatic revocation of refugee status upon acquisition of Irish citizenship. Because the 1996 Act contains no express provision to this effect comparable to section 47(9) of the Act of 2015, refugees could not be expected to be aware of the negative implications of naturalisation. Given the well-established importance of the right to family reunification for refugees, a procedure which could have allowed, effectively, for the loss of this right by accident could not be compatible with Article 8 ECHR, either substantively or procedurally;

(c) The Respondent's practice with respect to the operation of section 18 between 2010 and 2017 makes his preferred interpretation doubly problematic: it adversely affects not only naturalised applicants who have been refused family reunification, but also naturalised applicants granted family reunification during that period. A situation in which members of this latter group could be subjected to disruptive review or revocation of their permissions on the basis that they were issued unlawfully, or that those granted family reunification under section 18(3) between 2010 and 2017 will not now lose their entitlement to it as of right, might well result in them either having to make applications for international protection and/or being subjected to deportation orders. IHREC submits that any interpretation of section 18 capable of interfering to this extent in the family life of such a vulnerable cohort without objective justification cannot be compatible with Article 8 ECHR; and

(d) If interpreted in the manner suggested, section 18 would establish a mechanism for family reunification for refugees which excludes those who have acquired Irish citizenship without any objective justification. In order to achieve family reunification, such persons would be constrained to apply under section 4 of the Immigration Act 2004, a mechanism which, as has already been said, is not appropriate to refugee family reunification. In failing to treat like cases alike on the basis of nationality without any legitimate legislative purpose, the provision would be incompatible with Articles 8 and 14 ECHR.

37. The Appellants' interpretation of section 18 admits of applications by refugees who have acquired Irish citizenship. This interpretation, subject, as it must be to the rules of law relating to interpretation and application, acknowledges the special circumstances of refugees who, though they have naturalised, are still in need of family reunification, and recognises that their situation is much closer to that of refugees than to that of natural-born citizens. At the same time, it avoids the undesirable consequences for naturalised refugees which have been identified above in connection with the interpretation of section 18 adopted by the Court below and by the Respondent. For these reasons, IHREC believes that, if interpreted in this way, the provision is compatible with Article 8 ECHR alone and in conjunction with Article 14.

38. Accordingly, IHREC agrees with the interpretation of section 18 urged on the Court by the Appellants, and believes that because it is compatible with the State's obligations under the ECHR, it should be preferred over the incompatible interpretation adopted by the Respondent and approved by the Court below.

39. IHREC is acutely aware that its submissions have implications for the compatibility of current rules for family reunification under the Act of 2015 with the Convention. While IHREC has addressed these in a report published in June 2018 entitled *The Right to Family Reunification for Beneficiaries of International Protection*, they are not directly relevant to the determination of these appeals.

E. FAMILY REUNIFICATION AND THE CONSTITUTION

40. Just as the European Court of Human Rights takes a 'dynamic and evolutive' approach to the interpretation of the ECHR as a 'living instrument which must be interpreted in the light of present day conditions and situations', so the Irish Constitution has been held by our Courts to be 'a living document' which 'falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores': *Goodwin v. United Kingdom*, [GC] App No 28957/95, ECHR 2002-VI, § 75; *Sinnott v. Minister for Education* [2001] 2 IR 454, 680; *MX v. Health Service Executive* [2012] 3 IR 254, 279-282.

41. The interpretation of the Constitution should be informed by, and have regard to, relevant international conventions, including, in particular, the ECHR: *MX v. Health Service Executive* [2012] 3 IR 254, cited above, 281-282

42. As a general proposition, IHREC's considered view is that the personal rights provisions of the Constitution should be interpreted as providing a level of protection for human rights, equal to or greater than the level of protection provided by the ECHR.

43. The family protected by the Constitution remains the family based on marriage: *The State (Nicolaou) v. An Bord Uchtála* [1966] IR 567, 622 and *MR v. An tArd Chláraitheoir and Others* [2014] 3 IR 533, 560-561. The Supreme Court has however acknowledged that this interpretation is not necessarily fixed for all time, and may arise for reconsideration in future cases: see *IRM and Others v. Minister for Justice and Equality and Others* [2018] 2 ILRM 81 and the dissenting judgment of Clarke J (as he then was) in *MR*, cited above, at 701-705.

44. The recognition and guarantee of protection given to the marital family unit in Article 41.1 creates rights for the family as a unit: *L v. L* [1992] 2 I.R. 77, 108. Even where such a family unit comprises non-nationals as well as Irish citizens, it will nevertheless attract the protection of Article 41: *Fajujonu and Others v*

Minister for Justice, Equality and Law Reform and Others [1990] 2 IR 151, 162. The Courts have also found that constitutional protection can extend beyond the nuclear family to include within its rubric other dependent members, including grandparents and adult children: see *RX and Others v. Minister for Justice, Equality and Law Reform* [2010] IEHC 446, Hogan J, 10 December 2010, paras 39-41; *O'Leary and Others v. Minister for Justice, Equality and Law Reform* [2011] IEHC 256, Hogan J., 5 July 2011, paras 21-27 (granting leave) and [2013] 1 ILRM 509, 526 (granting substantive relief).

45. The Courts have also recognized that the personal rights guarantee in Article 40.3 confers on the family's individual members' rights to respect for their respective personal rights to each other's' care and society: see *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] 3 IR 795, 815. In the cases of non-marital families, the recognition of family rights under the Article 40.3 will depend on the circumstances of the individual case. For example, constitutional protection for a non-marital mother's relationship with her child will be guaranteed, whereas similar protection for a non-marital father will not: see *McD v. L* [2010] 2 IR 199, 308.

46. The rights of children, at least, are less dependent on marital status. Even before the insertion into the Constitution of Article 42A, which recognises the constitutional rights of all children, the courts had expressed the view that all children have the right to the care and company of their parents: see *Chigaru and Others v. Minister for Justice and Equality and Others* [2015] IECA 167, Hogan J., 27 July 2015, paras 29 and 39.

47. In the individual circumstances of the present appeals, the applications for family reunification made by MAM and KN both concerned marital families (or families originally based on marriage), and in KN, evidence of emotional and financial dependency was included. It is possible, then, to identify on the part of the Appellants and their families' rights to mutual care, society and protection which are guaranteed by Article 40.3 and Article 41 of the Constitution. IHREC notes, in this regard, that Article 41 provides a level of

protection to marital families greater than that afforded by Article 8 ECHR: see *Gorry v. Minister for Justice and Equality* [2017] IECA 282, Hogan J., 27 October 2017, paras 11-30.

48. In this regard, IHREC notes that in *Gorry v. Minister for Justice and Equality* [2017] IECA 282, Finlay Geoghegan J., 27 October 2017, the Court of Appeal stopped short of identifying on the part of Irish citizens a right to cohabit in Ireland with their non-national spouses. However, the Court went so far as to indicate that the State was obliged, in considering the applications for residence permissions of non-national spouses of Irish citizens, to have due regard to their rights to cohabit, their decision to do so in Ireland, and the almost absolute right of the Irish citizen to live in Ireland as part of the Irish Nation.

49. In the present appeals, there is an even stronger case for the identification in Article 41 of a right on the part of the families of naturalized refugees to reunification in Ireland, in that they bear no responsibility for their separation, and unification in the country of origin is, because of an established well-founded fear of persecution, impossible.

50. Equally, it is submitted an interpretation of section 18 which cannot treat refugees and naturalized refugees with due regard to the similarities of their needs offends against the constitutional guarantee of equality before the law in Article 40.1. As O'Donnell J noted in *Murphy v. Ireland* [2014] 1 IR 198, 227-229.

> *The principle of equality in general terms requires that like persons should be treated alike, and different persons treated differently, by reference to the manner in which they are distinct.*

51. IHREC notes that section 18 must be interpreted having regard to the presumption of constitutionality. This presumption itself was set out by Walsh J. for the Supreme Court in *East Donegal Co-op v. Attorney General* [1970] IR 317, at 340:

An Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they may both appear to be open but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt.

52. IHREC submits that any interpretation of section 18 of the Act of 1996 which would have the apprehended effects set out at paragraph 38above on refugee families in Ireland would necessarily be repugnant to Article 40.1, Article 40.3 and Article 41 of the Constitution.

53. For these reasons, the contrary interpretation of section 18 urged by the Appellants should, in IHREC's submission, be preferred by the Court in these appeals.

F. CONCLUSION

54. IHREC has sought to confine its submissions to the narrow issues of whether the ECHR or the Constitution confer a right to family reunification to refugees and similarly situated persons; and, if so, what effect such a right would have on the interpretation of section 18 of the Refugee Act of 1996.

55. For the reasons set out above, IHREC submits that the interpretation adopted of section 18 by the Court below and urged now on this Court by the Respondents would be incompatible with the State's obligations under Article 8 ECHR alone and in conjunction with Article 14, and potentially repugnant to the State's obligation to protect the rights of the family and its members under Article 40 and 41 of the Constitution.

56. Accordingly, IHREC respectfully submits that the interpretation urged on the Court by the Appellants should be preferred, and that on this basis, the appeals should be allowed.

Colin Smith BL

Michael Lynn SC

15 October 2018

5,900 words