H547

Judgment

Title:	A v The Minister for Justice and Equality & ors; S & anor v The Minister for Justice and Equality & ors
Neutral Citation:	[2019] IEHC 547
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[2019] IEHC 547

THE HIGH COURT

(1)

2018 No. 891 JR

Between:

A

Applicant

- and -

THE MINISTER FOR JUSTICE AND EQUALITY,

THE ATTORNEY GENERAL, IRELAND

Respondents

- and -

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Notice Party

(2)

2017 No. 915 JR

Between:

S AND S

Applicants

- and -

THE MINISTER FOR JUSTICE AND EQUALITY,

THE ATTORNEY GENERAL, IRELAND

Respondents

- and -

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Notice Party

JUDGMENT of Mr Justice Max Barrett delivered on 17th July, 2019.

A. MR A'S CASE

Part 1

Background

1. In his affidavit evidence, Mr A avers, *inter alia* , as follows:

> *"4. I was born in Afghanistan on 5 February 1990. Owing to the situation in Afghanistan, I was forced to flee on account of a well-founded fear of persecution. I arrived in this State on 27 July 2015 and applied for asylum. My application was granted at first instance on 27 July 2015 pursuant to the Refugee Act 1996.*
>
> *5. The second named applicant herein was born on 25 March 1998 in Pakistan. She is my second cousin. I say that I have known my wife since birth and we grew up together in Afghanistan. I say that we decided to marry one another last year and we were married on 3 April 2017 in Pakistan.*
>
> *6. Upon my return home, I consulted with my solicitor about submitting an application for family reunification to allow [my wife]…come to live with me so that we could start our married life together. On or about 19 April 2017 I submitted an application for family reunification to the respondent….*
>
> *7. By letter dated 12 October 2017: the respondent refused to accept the application on the basis that our marriage was not subsisting at the time I applied for international protection (applying section 56(9)(a) of the 2015 Act)."*

2. These facts are undisputed. It is common case that the Minister correctly applied s.56(9)(a) of the International Protection Act 2015. Mr A's key complaints are that s.56(9)(a) is repugnant to the Constitution/incompatible with the European Convention on Human Rights (ECHR).

Part 2

Legislation

3. Section 56 of the Act of 2015 provides, *inter alia* , as follows:

> *"(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.*

(2) The Minister shall investigate, or cause to be investigated, an application under subsection (1) to determine - (a) the identity of the person who is the subject of the application, (b) the relationship between the sponsor and the person who is the subject of the application, and (c) the domestic circumstances of the person who is the subject of the application….

(4) Subject to subsection (7), if the Minister is satisfied that the person who is the subject of an application under this section is a member of the family of the sponsor, the Minister shall give permission in writing to the person to enter and reside in the State and the person shall, while the permission is in force and the sponsor is entitled to remain in the State, be entitled to the rights and privileges specified in section 53 in relation to a qualified person….

(7) The Minister may refuse to give permission to enter and reside in the State to a person referred to in subsection (4) or revoke any permission given to such a person - (a) in the interest of national security or public policy ('ordre public'), (b) where the person would be or is excluded from being a refugee…(c) where the person would be or is excluded from being eligible for subsidiary protection…(d) where the entitlement of the sponsor to remain in the State ceases, or (e) where misrepresentation or omission of facts, whether or not including the use of false documents, by the person was decisive in the decision to give the person the permission….

(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)…".

Part 3

Prematurity

4. The respondents contend that this action is premature, that although Mr A cannot proceed with his statutory reunification application, he can make application under a non-statutory, discretionary reunification scheme that the Minister has separately established. But when it comes to Mr A's claim that, insofar as it impacts on him, s.56(9)(a) is repugnant to the Constitution/incompatible with the ECHR, it is no answer to that claim that there is some separate discretionary administrative process outside the statutory realm of which Mr A might seek to avail and under which he might benefit. That is, with respect, and to use a colloquialism, the 'reddest of red herrings'; it but distracts from the true issues in play.

5. In passing, and without prejudice to the generality of the preceding paragraph, the court does not accept that application could have been made under s.4 of the Immigration Act 2004: s.4 concerns applications for permission to land or be in Ireland and thus is engaged at the State's frontiers after a visa has issued.

Part 4

Constitutional Arguments

6. Article 40.1 of the Constitution states that " *All citizens shall, as human persons, be held equal before the law* ". As Denham C.J. observes in *D(M) (a minor) v. Ireland* [2012] 1 IR 697, 714, " *The principle of equal treatment of citizens, indeed all human persons, is implicit in the free and democratic nature of the State. It permeates the Constitution* ". Article 40.3.1 ° of the Constitution states that " *The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen* ". The right to marry is protected by Art.40.3 (*Ryan v. Attorney General* [1965] IR 294). Article 41 of the Constitution provides, *inter alia* , that: the Family is " *a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law*" (Art.

41.1.1 °); the State " *guarantees to protect the Family in its constitution"* (Art. 41.1.2 °); and the State pledges itself " *to guard with special care the institution of Marriage* " and " *to protect it against attack* " (Art. 41.3.1 °). In short, the provisions of Art.41 create a State obligation to protect the family (*O'B v. S* [1984] IR 316, 338). At this time the definition of the family for the purposes of Art.41 continues (disappointingly) to be limited to the family based on marriage (*State (Nicolaou) v. An Bord Uchtala* [1966] IR 567).

7. Mr A claims, *inter alia* , that: (i) he is a member of a marital family within the meaning of Art.41, yet for the purposes of s.56(9)(a) his wife is (unlawfully) not treated as a member of his family; (ii) thanks to s.56(9)(a), his marriage is (unlawfully) treated less favourably than, *inter alia* , refugees who married before applying for international protection; (iii) although the court has been offered reasons by the Minister for treating differently a marriage made pre-/post- application for refugee status, the reasons are generalised, unsupported by objective empirical evidence and seem to be informed by a mistaken sense that all refugees apply for international protection when they arrive in Ireland (when in fact they do not always so apply); and (iv) the difference in treatment of Mr A's marriage is unconstitutional in that it fails to treat Mr A as equal before the law to, *inter alia* , the other refugees referred to in (ii) and/or fails " *to guard with special care the institution of Marriage* " in breach of Art. 41.3.1 °of the Constitution.

8. Four reasons have been advanced by the Minister as explaining why s.56(9)(a) provides as it does, all of these reasons being identified by way of bare averment from a Department official. None of them holds up to scrutiny.

Reason 1: Section 56(9)(a) enables a refugee or person who has been granted subsidiary protection, and who was separated from his or her spouse by the persecution or serious harm which gave rise to a successful application for a declaration of refugee status or subsidiary protection, to re-unite with the spouse from whom that refugee or person had been involuntarily and forcibly separated.

> Leaving aside the complete absence of any objective evidence to support the averment which proffers Reason 1, at first glance Reason 1 seems like a rational and proportionate reason: s.56(9)(a) is intended to be invoked by refugees and those granted subsidiary protection whose pre-departure marriages have been ruptured by virtue of coming here as refugees. But, on closer look, s.56(9)(a) goes further: it can also be invoked by refugees *sur place* whose post-departure marriages pre-date their international protection application. So Reason 1 fails to explain why s.56(9)(a) provides differently *vis-Ã -vis, e.g* ., Mr A, a refugee who married after he came to Ireland, versus a person who married after he came to Ireland and then became a refugee *sur place* (or indeed why a difference is drawn between refugees *sur place* who marry before they make an international protection application and those who do so afterwards). What confronts the court, therefore, are differences of treatment without any apparent rationality or proportionality, which is another way of stating that the said differences are arbitrary.

Reason 2: Section 56(9)(a) enables family reunification, and finality in relation thereto, to occur speedily.

> Leaving aside the complete absence of any objective evidence to support the averment which proffers Reason 2, Reason 2 is in effect an ancillary reason to the other reasons proffered. Only if any of those other reasons is lawful is this speediness lawful.

Reason 3: Section 56(9)(a) enables the Minister to carry out more careful consideration of marriages entered into after the making of an application for international protection, having regard to the need for, and requirements of, immigration control, whether in respect of marriages of convenience or human trafficking or other such matters, which are known to the Minister to occur. This enables the Minister to grant permission to genuine spouses of such persons in line

with normal immigration policy of the State.

> Leaving aside the complete absence of any objective evidence to support the averment which proffers Reason 3, at first glance Reason 3 seems like a rational and proportionate reason. But on closer analysis it breaks down. Section 56(1) does not entitle an applicant to bring his spouse into the State; it entitles an applicant to make application to the Minister to bring a member of the family into the State; s.56(2) requires the Minister to investigate the application or cause it to be investigated; and s.56(7) provides that the Minister may refuse/revoke permission, *inter alia* , in the interest of national security or public policy (*ordre public*). So the Minister is always free under s.56 to undertake as careful a consideration as he wants, having regard to such concerns as he may have, *e.g.,* regarding marriages of convenience, human trafficking (both of which raise clear public policy issues), and to ensure that only genuine family members get into Ireland. Hence Reason 3 fails to explain why s.56(9)(a) provides as it does *vis-Ã -vis* Mr A. Reason 3 also goes nowhere towards explaining the (in truth, unexplainable and irrational) differentiation of treatment whereby the State arbitrarily distinguishes between, on the one hand, (a)(i) refugees and those granted subsidiary protection whose pre-departure marriages have been ruptured by virtue of coming here as refugees, and (a)(ii) refugees *sur place* whose post-departure marriages pre-date their international protection application (and so whose marriages are not ruptured by the application), and, on the other hand, (b)(i) refugees who get married after their international protection application succeeds (and so whose marriages are not ruptured by the application), and (b)(ii) refugees *sur place* whose post-departure marriages post-date their international protection application (and so whose marriages are likewise not ruptured by the application). Again, therefore, what confronts the court are differences of treatment without any apparent rationality or proportionality, which is another way of stating that the said differences are arbitrary.

Reason 4: to comply with the State's international obligations.

> Not a single international obligation has been cited to the court in support of Reason 4. There is in any event no international obligation upon the State arbitrarily to distinguish between, on the one hand, (a)(i) refugees and those granted subsidiary protection whose pre-departure marriages have been ruptured by virtue of coming here as refugees, and (a)(ii) refugees *sur place* whose post-departure marriages pre-date their international protection application (and so whose marriages are not ruptured by the application), and, on the other hand, (b)(i) refugees who get married after their international protection application succeeds (and so whose marriages are not ruptured by the application), and (b)(ii) refugees *sur place* whose post-departure marriages post-date their international protection application (and so whose marriages are not ruptured by the application). Plus, as will be seen hereafter, s.56(9)(a) is not in compliance with the European Convention on Human Rights, so in fact s.56(9)(a) yields *non* -compliance with the State's international obligations.

9. Provisions of Acts of the Oireachtas are presumed to be constitutional. The burden of proof and onus of persuasion lies on the party making a claim of unconstitutionality. Mr A has pointed convincingly to what he claims is unconstitutional treatment of him/his marriage. The rationales offered in support of the constitutionality of s.56(9)(a) fail for the reasons stated. Regrettably, therefore, the court must conclude that s.56(9)(a) is unconstitutional.

Part 5

Convention Arguments

i. Overview.

10. So far as the ECHR is concerned, the respondents' response in the within application flounders in the face of the decision of the European Court of Human Rights in *Hode and Abdi*

v. the United Kingdom [2013] 56 EHRR 27. The court is mindful when it comes to the ECHR dimension of proceedings that in *RC v. MJE* [2019] IEHC 65 the court there declined to follow the decision of the Court of Human Rights in *Hode and Abdi* . However, the court is also mindful in this regard of the binding appellate court precedent in *DPP v. O'Brien* [2010] IECCA 103, 14-15, (a decision of the Court of Criminal Appeal that is not referenced in RC) that:

> "[1] *The obligation on the Irish courts to consider the case law and rulings of the European Court of Human Rights is clearly set out in law.* [2] *Under s.2 of the European Convention on Human Rights Act 2003 the courts are obliged to interpret and apply any statutory provision or rule of law, insofar as possible, subject to the rules of law relating to such interpretation and application, in a manner compatible with the State's obligations under the provisions of the Convention* . [3] *Section 4(a) of the Act requires the courts to take judicial notice of the judgments of the European Court of Human Rights* . [4] *The courts will therefore interpret provisions of national law…having regard to relevant judgments, and will generally apply the interpretation of the Convention adopted by the European Court of Human Rights* . [5] *This principle is subject only to the proviso that any such interpretation must not be inconsistent with the Constitution* ".

11. The court does not see any inconsistency between the interpretation given to the ECHR in *Hode and Abdi* and the provisions of the Constitution. In the absence of such inconsistency, it seems to this Court that the effect of the decision in *O'Brien* , a binding decision of an appellate court, is that this Court ought to follow the decision of the European Court of Human Rights in Hode and Abdi.

ii. The European Convention on Human Rights Act 2003

12. Before proceeding to a consideration of *Hode and Abdi* (and certain decisions referred to therein), it is worth pausing to consider in a little more detail certain provisions, and the effect of those provisions, of the European Convention on Human Rights Act 2003. Sections 2, 4 and 5 of that Act provide, *inter alia* , as follows:

> *"2(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….*
>
> *4 Judicial notice shall be taken of the Convention provisions and of - (a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction…and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments….*
>
> *5(1) In any proceedings, the High Court…may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as 'a declaration of incompatibility') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions."*

13. Some observations might be made:

> (a) s.2(1) is a step-up from the *O'Domhnaill v. Merrick* [1984] IR 151 -style presumption of compliance with the ECHR that had previously influenced statutory interpretation in Ireland, with the courts now under a statutory obligation to interpret statute and common law in a manner consistent with Ireland's ECHR obligations " *in so far as is possible, subject to the rules of law relating to such interpretation and application* ".
>
> (b) s.2(1) is a liberating provision, requiring courts " *in so far as possible* " to do as it prescribes; the just-quoted text is a notably permissive turn of phrase.

(c) s.2(1) is also constrained in its application through its being made "subject to the rules of law relating to such interpretation and obligation"; however, it cannot be that the courts are so restricted that they cannot apply s.2 in such a manner as to arrive at a different interpretation/application of the law than would arise under the rules of law aforesaid; if that were the reading given to s.2 it would render s.2 effectively meaningless and the provision must be read as having been intended to have real effect.

(d) s.2(1) is both helpfully and unhelpfully vague, granting a certain licence to the courts, subject always to constitutional constraint, in particular the reservation of law-making power to the Oireachtas under Art.15.2.1 ˚of the Constitution; for the court to engage in the unconstitutional would be to do what is not " *possible* ".

(e) s.2 cannot be (or at least ought not to be) read in isolation from s.4 and the " *judicial notice* " requirement therein contained, the intended effect of the Act, it would seem from a reading of even these provisions, being generally to increase the extent to which the courts have regard to the ECHR when interpreting and applying the law.

(f) where a statute cannot be interpreted in a manner that makes it compatible with the ECHR " *and where no other legal remedy is adequate and available",* a declaration of incompatibility under s.5(1) may be made.

(g) once a declaration of incompatibility is made it falls to the Oireachtas to decide whether and how the incompatibility is to be remedied (a position that sits somewhat oddly with the general performative obligation under s.3).

(h) one of the consequences of the decision of the Supreme Court in *Carmody v. MJE* [2009] IESC 71 (a binding decision that is consistent with the unusual approach that the Irish courts have routinely adopted since the enactment of the Act of 2003 whereby the correct interpretation of statute is taken to be the traditionally arrived-at interpretation, free of human rights considerations, with an ECHR-informed interpretation having, in effect, to trump same), is that: *"If…a Court decides that…statutory provisions impugned are not inconsistent with the Constitution then it is open to the Court to consider the application for a declaration pursuant to s. 5 if the provisions of the section including the absence of any other legal remedy, are otherwise met", i.e.* in essence the ECHR comes into play only when it is clear that the impugned legislation is not unconstitutional. As the court has concluded above that s.56(9)(a) is unconstitutional, it may seem not strictly necessary for it to consider Mr A's ECHR-related arguments. However, it does so to demonstrate that Reason 4 does not hold good and also to show that and why, even if the court is wrong (and it does not consider that it is wrong) in its conclusion as to the unconstitutionality of s.56(9)(a), that provision is in any event incompatible with the ECHR.

iii. The Decision in *Hode and Abdi* .

a. Background.

14. Mr Hode was a Somali national resident in the UK. Ms Abdi was a Djiboutian national resident in Djibouti. The key facts of their case can be stated by way of summary chronology:

18.02.2004 Mr Hode arrives in UK and claims asylum.

March 2006 Asylum granted; Mr Hode given initial five years' leave to remain.

June 2006 Mr Hode introduced to Ms Abdi.

05.04.2007 Mr Hode and Ms Abdi marry and live together in Djibouti for a time.

15.05.2007 Mr Hode returns to the United Kingdom. Thereafter Ms

and after Abdi applies for a visa to join Mr Hode in the UK. Although Mr Hode was a refugee, the applicants did not qualify for family reunion under the UK Immigration Rules HC 395 (as amended) because paragraph 352A of those Immigration Rules only applied to spouses who formed part of the refugee's family unit before s/he left the country of permanent residence. Ms Abdi therefore applied for leave to enter the UK under paragraph 281 of the UK Immigration Rules, as the spouse of a person present and settled in the UK.

18.11.2007 Entry Clearance Officer refuses Ms Abdi's application on

and after the ground that Mr Hode, having only been granted five years' leave to remain, was not a person present and settled in the UK for the purposes of paragraph 281. Ms Abdi brings failed appeal against decision. Ms Abdi applies for reconsideration of decision.

17.02.2008 Ms Abdi gives birth to a son. Mr Hode named as father on birth certificate.

28.08.2008 Asylum and Immigration Tribunal refuses to order reconsideration.

24.10.2008 Administrative Court dismisses application for reconsideration.

16.03.2011 Mr Hode's leave to remain in UK expires. He is subsequently granted indefinite leave to remain.

April 2011 UK Immigration Rules amended to permit refugees to be joined in UK by post-flight spouses during initial period of leave to remain, provided certain conditions met.

17.07.2011 Ms Abdi gives birth to applicants' second child.

b. Two UK Decisions

I. *A (Afghanistan) v. Secretary of State for the Home Department*

[2009] EWCA Civ 825

15. A, an Afghan national resident in Pakistan, was refused leave to join her husband, a refugee, in the UK because the marriage had taken place after the husband left his country of permanent residence. The Court of Appeal considered that the interference with family life which would result from not allowing a husband and his heavily pregnant wife in a genuine and subsisting marriage to cohabit had consequences of such gravity as potentially to engage the operation of Article 8. It therefore fell to the Court of Appeal to consider whether or not there was a public interest in refusing to grant the appellant leave to enter. As the Government had submitted its skeleton argument on the public interest point at a late stage, the Court of Appeal held that it was estopped from re-opening the issue. Although it went on to allow the appellant's appeal against the refusal of entry clearance, the Court of Appeal stated that its decision could be of no authority if and when the issue arose again.

II. *FH (Post-flight spouses) Iran v. Entry Clearance Officer*

[2010] UKUT 275

16. The appellant was an Iranian national resident in Iran who was refused leave to join her husband, also an Iranian national, who had been granted refugee status in the UK. The Upper Tribunal noted that, with regard to the admission of post-flight spouses, refugees in the UK were in a particularly disadvantageous position compared to, *inter alia* , students and persons working in the UK. In particular, the Tribunal stated that:

"[T]he appellant's situation…arises from provisions of the Rules for which there appears to be no justification. Unless there is some justification, of which we have not been made aware, of the Rules' treatment of post-flight spouses, we think that the Secretary of State ought to give urgent attention to amending the Rules….In the meantime, it seems to us that although a decision based on Article 8 does have to be an individual one in each case, it is most unlikely that the Secretary of State or an Entry Clearance Officer will be able to establish that it is proportionate to exclude from the United Kingdom the post-flight spouse of a refugee where the applicant meets all the requirements of paragraph 281 save that relating to settlement."

c. Arguments Made.

17. In the circumstances described under heading a. above (" *Background* "), Mr Hode and Ms Abdi complained of a violation of their rights under Art 8 ECHR, and under Art.8 ECHR read with Art.14 ECHR. In this regard, they made, *inter alia* , the following contentions:

- they were treated differently in respect of their enjoyment of their rights under Art.8 ECHR from other persons (and the spouses of those persons) with temporary leave to remain in the UK. In particular, they relied on the example of students and workers, both of whom had been entitled to be joined in the UK by their spouses, regardless of whether the marriage took place before/after they were granted leave to remain.

- refugees were in an analogous position to students and workers because in each case the person had established an entitlement to temporary residence in the UK, and the difference in treatment between refugees versus students and workers could not be objectively and reasonably justified.

- they had been treated differently, without objective and reasonable justification, from refugees (and the spouses of refugees) married at the date of flight.

- the decisions in *A* and *FH* appeared to find no public interest justification for distinguishing between pre-/post-flight spouses, especially when students and workers were entitled to be joined by their spouses regardless of when the marriage took place.

18. The UK Government submissions included, *inter alia* , the following:

- the decision to refuse Ms Abdi entry clearance did not violate Art.14 ECHR read in conjunction with Art.8 ECHR.

- refugees had not been in an analogous situation to students and workers. The UK faced international competition to attract students and workers. It therefore sought to encourage applications from the latter groups. One incentive it offered to prospective applicants was the assurance that they could be joined by their spouse, regardless of whether or not they were married when they first came to the UK.

- although the UK Government was committed to honouring the UK's international obligations with respect to refugees, it had not sought to encourage refugees and asylum seekers to choose to travel to the UK by offering additional incentives.

- even if a refugee who married after leaving the country of his former habitual residence could be considered to be in an analogous position to a student or worker, the difference in the UK Immigration Rules had pursued a legitimate aim.

- *A* and *FH* offered no support to the applicants because, *inter alia* , in both cases there was no safe third country in which the applicants and their spouses could have lived together on a long-term basis.

- the opportunity to be joined by a spouse once the refugee had become settled

in the UK (usually after five years) had reflected a reasonable relationship of proportionality between the means employed and the aim sought to be realised, namely the desire to meet the UK's obligations to refugees, while at the same time providing an incentive to other applicants to choose to study and work in the UK. In any event, these choices had been a matter of social and economic policy which fell well within the UK's margin of appreciation.

- any difference in treatment had not been based on any personal or immutable characteristic.

19. The third party intervener (the Equality and Human Rights Commission) made the following points:

- where a State makes national provision in a field covered by an ECHR guarantee, it has to do so without discrimination.

- here there had been no reasonable relationship of proportionality between the aim of immigration control and the differential treatment enshrined in the UK Immigration Rules between refugees, on the one hand, and other classes of immigrant who had been entitled to be joined by their families.

- the said difference in treatment was more striking in light of the particularly vulnerable position of refugees.

d. The Decision in *Hode and Abdi* .

20. In its judgment the Court of Human Rights makes, *inter alia* , the following observations:

(A) Art.14 ECHR complements the other substantive provisions of the ECHR and its Protocols; it has no independent existence (para.42).

(B) the prohibition of discrimination in Art.14 ECHR applies also to additional rights, falling within the general scope of any Article of the ECHR, for which a Contracting State has voluntarily decided to provide (para.42).

(C) there is no obligation on a Contracting State under Art.8 ECHR to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country (para.43).

(D) however, if domestic legislation confers a right to be joined by spouses on certain categories of immigrant, it must do so in a manner which is compliant with Art.14 ECHR (para.43).

(E) when it came to Mr Hode and Ms Abdi, the UK Immigration Rules affected their home and family life, so the case came within Art.8 (para. 43).

(F) the Court of Human Rights has established in its case-law that only differences in treatment based on an identifiable characteristic or status can amount to discrimination within the meaning of Art.14 ECHR (para.44).

(G) Art. 14 ECHR lists specific grounds which constitute status; however, that list is illustrative, not exhaustive, as is apparent from the inclusion in the list of the phrase " *any other status* " (para.44).

(H) for an issue to arise under Art.14 ECHR there must be a difference in the treatment of persons in " *analogous, or relevantly similar* " situations (para.45);

(I) such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (para.45).

(J) a Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment; the scope of this margin varies according to the circumstances, the subject-matter and the background (para.45).

(K) the treatment of which Mr Hode complained did not fall within one of the specific grounds in Art.14 ECHR; so he had to demonstrate that he enjoyed some " *other status* " for the purpose of Art.14 ECHR, with the words " *other status* " having generally been given a wide meaning; the protection conferred by Art.14 ECHR is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent (para.46).

(L) the fact that immigration status is a status conferred by law, rather than one inherent to the individual does not preclude it from amounting to an " *other status* " for the purposes of Art.14 ECHR; the argument in favour of refugee status amounting to "other status" is even stronger, as (unlike immigration status) refugee status does not entail an element of choice (para.47).

(M) Mr Hode, as a refugee who married after leaving his country of permanent residence and Ms Abdi, as the spouse of such a refugee, enjoyed " *other status* " for the purpose of Art.14 ECHR (para.48).

(N) the requirement to demonstrate an " *analogous situation* " does not require that comparator groups be identical. What applicants must demonstrate is that, having regard to the particular nature of their complaints, they had been in a relevantly similar situation to others treated differently (paras.49-50).

(O) the applicants were complaining that at the relevant time the UK Immigration Rules did not permit a refugee to be joined in the UK by a spouse where the marriage took place after the refugee had left the country of permanent residence. The Court considered that a refugee who married before leaving the country of permanent residence was in an analogous position, being in receipt of a grant of refugee status and a limited period of leave to remain in the UK. The only relevant difference was the time at which the marriage took place (para.50).

(P) as students and workers, whose spouses were entitled to join them, were usually granted a limited period of leave to remain in the United Kingdom, they too were in an analogous position to the applicants for the purpose of Art.14 ECHR (para.50).

(Q) as to whether or not the difference in treatment was objectively and reasonably justified, (i) a difference in treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised, (ii) a Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, (iii) the scope of this margin varies according to the circumstances, subject-matter and background, (iv) a wide margin is usually allowed to the State under the ECHR when it comes to general measures of economic or social strategy and the Court will generally respect a legislature's policy choice unless it is manifestly without reasonable foundation; (v) offering incentives to certain groups of immigrants may amount to a legitimate aim for the purposes of Art.14 ECHR, (vi) this justification had not been advanced in *A* or *FH* and, tellingly, the UK Immigration Rules had been amended so as to extend them to the spouses of those with limited leave to remain as refugees, (vii) in all the circumstances, the Court did not consider that the difference in treatment between the applicants, on the one hand, and students and workers, on the other, was objectively and reasonably justified (para.51-54)

(R) the Court saw no justification for treating refugees who married post-flight differently from those who married pre-flight (para.55).

(S) where a measure results in the different treatment of persons in analogous positions, the fact that it fulfilled the State's international obligation will not in itself justify the difference in treatment (para.55).

(T) there had been a violation of Art.14 ECHR read together with Art.8 ECHR (para.56).

iv. Applying *Hode and Abdi.*

21. The court turns now to apply Hode and Abdi to the case at hand:

(A) Art.14 ECHR complements the other substantive provisions of the Convention and the Protocols; it has no independent existence.

Noted.

(B) the prohibition of discrimination in Art.14 ECHR applies also to additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide.

Ireland voluntarily elected to introduce s.56(9)(a).

(C) there is no obligation on a State under Art.8 ECHR to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.

Noted.

(D) however, if domestic legislation confers a right to be joined by spouses on certain categories of immigrant, it must do so in a manner which is compliant with Art.14 ECHR.

Noted. This is the issue at the heart of these proceedings so far as the ECHR-related arguments are concerned.

(E) when it came to Mr Hode and Ms Abdi, the Immigration Rules obviously affected their home and family life, so the case came within Art.8.

Application of s.56(9)(a) has affected the married/family life of Mr A.

(F) the Court of Human Rights has established in its case-law that only differences in treatment based on an identifiable characteristic, or status can amount to discrimination within the meaning of Art.14 ECHR.

Noted.

(G) Art. 14 ECHR lists specific grounds which constitute status but that list is illustrative, not exhaustive, as is apparent from the inclusion in the list of the phrase " *any other status* ".

Noted.

(H) for an issue to arise under Art.14 ECHR there must be a difference in the treatment of persons in " *analogous, or relevantly similar* " situations.

Noted. Here such a difference presents. The court has identified in Part 4 the differences of treatment that present under s.56(9)(a) between married refugees in analogous or relevantly similar situations and the absence of any objective and reasonable justification for this difference in treatment.

(I) such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Noted. The court has identified in Part 4 the differences of treatment that present under s.56(9)(a) between married refugees in analogous or relevantly similar situations and the absence of any objective and reasonable justification for this difference in treatment. Legitimacy of aim does not countenance arbitrariness of treatment.

(J) a Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment; however, the scope of this margin varies according to the circumstances, the subject-matter and the background.

Noted. The court has identified in Part 4 the differences of treatment that present under s.56(9)(a) between married refugees in analogous or relevantly similar situations and the absence of any objective and reasonable justification for this difference in treatment.

(K) the treatment of which Mr Hode complained did not fall within one of the specific grounds in Art.14 ECHR; so he had to demonstrate that he enjoyed some " *other status*" for the purpose of Art.14 ECHR, with the words " *other status* " having generally been given a wide meaning; the protection conferred by Art.14 ECHR is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent.

Likewise the treatment complained of in this case does not come within any of the specific grounds of discrimination expressly identified in Art.14 ECHR (" *sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth* "). So it is necessary for Mr A to show that he comes within the words " *other status* ", those words having generally being given a wide meaning and not being limited to treatment based on innate/inherent personal characteristics.

(L) the fact that immigration status is a status conferred by law, rather than one inherent to the individual does not preclude it from amounting to an " *other status* " for the purposes of Art.14 ECHR; the argument in favour of refugee status amounting to " *other status* " is even stronger, as (unlike immigration status) refugee status does not entail an element of choice.

Noted.

(M) Mr Hode, as a refugee who married after leaving his country of permanent residence and Ms Abdi, as the spouse of such a refugee, enjoyed " *other status* " for the purpose of Art.14 ECHR.

Mr A, as a refugee who married after leaving his home country, enjoys " *other status*" for the purpose of Art.14 ECHR.

(N) the requirement to demonstrate an " *analogous situation* " does not require that the comparator groups be identical. What applicants must demonstrate is that, having regard to the particular nature of their complaints, they had been in a relevantly similar situation to others treated differently.

Noted. The court has identified in Part 4 the differences of treatment that present under s.56(9)(a) between married refugees/applicants for international protection in analogous or relevantly similar situations and the absence of any objective and reasonable justification for this difference in treatment.

(O) the applicants were complaining that at the relevant time the UK Immigration Rules did not permit a refugee to be joined in the UK by a spouse where the marriage took place after the refugee had left the country of permanent residence. The Court considered that a refugee who married before leaving the country of permanent residence was in an analogous position, being in receipt of a grant of refugee status and a limited period of leave to remain in the UK. The only relevant difference was the time at which the marriage took place.

The court notes the conclusion of the Court of Human Rights that a refugee who marries before leaving a country of permanent residence is in an analogous position to a refugee who seeks to marry after s/he has left the country of permanent residence.

(P) as students and workers, whose spouses were entitled to join them, were usually granted a limited period of leave to remain in the United Kingdom, they too were in an analogous position to the applicants for the purpose of Article 14 ECHR.

Noted, though this seems not to be of relevance in the within case where the contrast is drawn between the respective positions of purported classes of refugee, rather than some differentiation between some or all refugees and some other class of persons such as students/workers.

(Q) as to whether or not the difference in treatment was objectively and reasonably justified,

(i) a difference in treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised,

Noted. The court has identified in Part 4 the differences of treatment that present under s.56(9)(a) between married refugees in analogous or relevantly similar situations and the absence of any objective and reasonable justification for this difference in treatment.

(ii) a Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment,

Noted. The court has identified in Part 4 the differences of treatment that present under s.56(9)(a) between married refugees in analogous or relevantly similar situations and the absence of any objective and reasonable justification for this difference in treatment.

(iii) the scope of this margin varies according to the circumstances, subject-matter and background,

Noted. It is perhaps worth noting too that the margin of appreciation 'cuts both ways', *i.e* . it is not an invariably negative concept, in the sense of allowing Convention signatories, e.g., to adopt a restrictive view of rights;

the margin exists to acknowledge legitimate differences across signatory states, subject to a common minimum standard.

(iv) a wide margin is usually allowed to the State under the ECHR when it comes to general measures of economic or social strategy and the Court will generally respect a legislature's policy choice unless it is manifestly without reasonable foundation,

Noted. The court has identified in Part 4 the differences of treatment that present under s.56(9)(a) between married refugees in analogous or relevantly similar situations and the absence of any objective and reasonable justification for this difference in treatment.

(v) offering incentives to certain groups of immigrants may amount to a legitimate aim for the purposes of Art.14 ECHR,

Noted. There is no suggestion in the case at hand of State incentivisation of the type that presented in *Hode and Abdi* .

(vi) the incentivisation justification had not been advanced in *A* or *FH* and, tellingly, the UK Immigration Rules had been amended so as to extend them to the spouses of those with limited leave to remain as refugees,

Again, there is no suggestion in the case at hand of State incentivisation of the type that presented in *Hode and* Abdi.

(vii) in all the circumstances, the Court did not consider that the difference in treatment between the applicants, on the one hand, and students and workers, on the other, was objectively and reasonably justified.

Noted, though this seems not to be of relevance in the within case where the contrast is drawn between the respective positions of purported classes of refugee, rather than some differentiation between some or all refugees and some other class of persons such as students/workers.

(R) the Court saw no justification for treating refugees who married post-flight differently from those who married pre-flight.

The court has identified in Part 4 the differences of treatment that present under s.56(9)(a) between married refugees in analogous or relevantly similar situations and the absence of any objective and reasonable justification for this difference in treatment, with the result that the differentiation that afflicts Mr A under s.56(9)(a) falls to be perceived as but a differentiation based on time of marriage, which is precisely the form of differentiation that the Court of Human Rights finds objectionable in *Hode and Abdi* , para.55.

(S) where a measure results in the different treatment of persons in analogous positions, the fact that it fulfilled the State's international obligation will not it itself justify the difference in treatment.

Noted. Here, of course, it yields a breach of the ECHR, being an international obligation of great legal (and moral) importance.

(T) there was a violation of Article 14 ECHR read together with Art.8 ECHR.

For all of the various reasons stated, when it comes to s.56(9)(a) the court likewise concludes in the case at hand.

Part 7

Conclusion

22. The key issue for determination in these proceedings is whether s.56(9)(a) is unconstitutional/incompatible with the ECHR. For the various reasons aforesaid, the court will grant: (1) a declaration that s.56(9)(a) of the Act of 2015 is repugnant to the provisions of the Constitution; (2) an order of *certiorari* quashing the decision of the Minister, as notified by letter of 14.09.2018, to refuse Mr A's application for family reunification. Had the court not made its finding as to the unconstitutionality of s.56(9)(a), with the result that the said provision is invalid and does not have the force of law, the court would have granted a declaration pursuant to s.5 of the Act of 2003 that s.56(9)(a) is incompatible with the State's obligations under Art.14 ECHR read in conjunction with Art.8 ECHR.

23. It was contended by the respondents that to grant the reliefs aforesaid is futile. The court respectfully does not accept this contention. Mr A has had a decision issue against him under legislation that he has rightly contended to be repugnant to the Constitution/incompatible with the ECHR. It does not seem to the court, in the proper exercise of its discretion, that such a decision can be allowed to stand against him; moreover, the declaration as to unconstitutionality (with the declaration of incompatibility with the ECHR which would have been granted but for the granting of the declaration as to unconstitutionality) is but a natural conclusion to the reasoning of the court in the foregoing pages.

24. In passing, it is clear from the pleadings that Mr A is aggrieved that the reunification regime operating under s.56(9)(a) is not as generous to him as the regime that pertained under the now-repealed s.18 of the Refugee Act 1996. However, the Oireachtas is entitled to change statute-law. The court has therefore confined itself in the within judgment to the issue of whether s.56(9)(a), in and of itself, is repugnant to the Constitution/incompatible with the ECHR.

25. To the extent that the within judgment departs from *RC or VB v. MJE* [2019] IEHC 55, the court is satisfied by reference to the *Worldport/Kadri* ([2005] IEHC 189/[2012] IESC 27) line of case-law so to do.

(B) THE S CASE

Under s.16 of the Act of 1996, Mr S was granted, on 29.06.2016, a (still extant) declaration of refugee status. Mr S married his wife, an Afghan national resident outside Ireland, on 03.04.2017. A family reunification application was made on 19.04.2017. By letter of 12.10.2017, the Minister refused that application by reference to s.56(9)(a) of the Act of 2015. It is common case that the Minister correctly applied s.56(9)(a). The primary relief that the applicants seek is an order of *certiorari* in respect of the refusal aforesaid. Also sought are, *inter alia* , certain declarations as to the validity of s.56(9)(a) by reference to the Constitution/ECHR. For the reasons identified in the case of Mr A, the same reliefs as are to be granted to Mr A will likewise be granted in the S case.