THE SUPREME COURT

[Record No. 2019/000200]

Clarke CJ.
O'Donnell J.
Dunne J.
Charleton J.
Baker J.

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

[Record No. 2019/000201]

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

[Record No. 2019/000209]

BETWEEN

I. I. (NIGERIA)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY
THE ATTORNEY GENERAL AND
IRELAND

RESPONDENTS

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

Judgment of Ms. Justice Dunne delivered the 8th day of December 2020

Introduction

1. This appeal concerns three cases, hereinafter referred to as "A", "S" and "I". For ease of reference, the Minister for Justice and Equality, the Attorney General and Ireland shall be hereinafter referred to as "the Minister" and this should be understood to refer to the parties collectively, unless from the context, the meaning appears otherwise. The three applicants in the High Court cases shall be referred to as "Mr. A", "Mr. S" and "Ms. I" in these proceedings. This is to avoid any confusion because the Minister is the appellant in the matters of "A" and "S", and is the respondent in the matter of "I".

2. In the matter of "S", leave to appeal to this Court was granted in a Determination dated 19th December, 2019. In the matter of "A" and in the matter of "I" leave was granted in both cases, by way of separate Determinations, on 21st January, 2020. It was directed by the Court that all three cases would be heard jointly, with the cases of "A" and "S" being dealt with together, followed sequentially by "I". As will be seen, this is primarily because of the issue of vested rights, which occurs as an issue in the "I" case, but not in the other two related cases. For ease of reference, this section of the judgment proposes to deal with an overview of the background of the three cases in the same sequence as they were heard, namely "A" and "S" together, followed by "I".

3. In the "A" and "S" cases, Barrett J. delivered a written judgment in *A. v. Minister for Justice and Equality*; *S and S v. Minister for Justice and Equality* [2019] IEHC 547, and a second judgment concerning the form of the order, *A. v. Minister for Justice and Equality No. 2*; *S and S v. Minister for Justice and Equality No. 2* [2019] IEHC 588. "I" concerns an appeal against the order and judgment of Humphreys J. of 29th October, 2019.

4. "A" and "S" deal with appeals against the High Court's declaration that s. 56(9)(a) of the International Protection Act 2015 ("the 2015 Act") is repugnant to the Constitution and incompatible with the European Convention on Human Rights insofar as it limits the application for family reunification with a spouse to the spouse of a marriage subsisting on the date the sponsor made an application for international protection in the State.

5. "I" concerns the question of whether s. 56(8) of the 2015 Act is contrary to the Constitution, and if not, whether it is incompatible with the ECHR. It also concerns the question of whether the proceedings were premature because Ms. I had not submitted an application for a visa for her family pursuant to the first named respondent's Policy Document on Non-EEA Family Reunification and the issue of whether she had a vested right to family reunification, pursuant to s. 18(3) of the Refugee Act 1996.

Background

6. The case of "S" concerns the Minister's leapfrog appeal directly to this court from the decisions of the High Court (Barrett J.) of the 17th of July, 2019 ([2019] IEHC 547), and 29th of July, 2019 ([2019] IEHC 588). Barrett J. found that the provisions of s. 56(9)(a)

of the International Protection Act 2015 (hereinafter "the 2015 Act") were inconsistent with the Constitution. The High Court declared that certain words should be severed from the terms of s. 56(9)(a). The words which the Court determined should be severed are "…provided that the marriage is subsisting on the date the sponsor made an application for international protection in the State". The court also declared that the relevant provision was incompatible with the provisions of Article 14 of the European Convention on Human Rights.

7. The case of "S" was one in which the parties both agreed a leapfrog appeal to this Court was appropriate in the circumstances and in the Determination the Court noted at para. 4 that:

> "While the agreement of the parties is always of value to the court, nevertheless the court must itself be satisfied that the constitutional threshold has been met before permitting an appeal to be brought to this court."

8. The Determination went on to state that the particular case involved an issue of law of general public importance, and/or that it is in the interests of justice that an appeal be brought to the Supreme Court, but also that there exist exceptional circumstances justifying a direct appeal from the High Court to the Supreme Court. The Court made reference to the submissions that a determination of the invalidity of the provisions of s. 56(9)(a) of the 2015 Act (as well as the determination of its incompatibility with the ECHR) is of "general effect". Reference was also made to the submission that Barrett J., in making the order which he did, declined to follow another High Court decision in *R.C. (Afghanistan) v. Minister for Justice & Equality & Ors* [2019] IEHC 65, and the Determination at para. 4 said that "…the judgment therefore raises questions as to the circumstances in which a High Court judge may depart from the decision of another judge of the same court." At para. 5, the Determination therefore concluded that because the issue raised is confined to a net issue of law and "…in all the circumstances, by reason of the uncertainty that is created in relation to a significant provision of law of general application pending the final resolution of the question raised…" it was appropriate to grant leave to appeal directly to this Court.

9. The "A" case also deals with a leapfrog appeal to this Court against the same decisions of Barrett J. of 17th July, 2019 and 29th July, 2019. As mentioned, the appeal concerns the High Court's declaration that s. 56(9)(a) of the International Protection Act 2015 is repugnant to the Constitution and, insofar as it limits the application for family reunification with a spouse to the spouse of a marriage subsisting on the date the sponsor made an application for international protection in the State, is incompatible with the European Convention on Human Rights.

10. In making their application for leave to appeal to this Court in "A", the Minister argued that the matter met the threshold for an appeal to this Court in that the High Court decision found that the relevant section of the 2015 Act discriminates unlawfully and unjustifiably between so called "pre- and post-flight marriages" (that is, between international protection beneficiaries who were married when they applied for

international protection and those who were not married when they applied) and that the declaration of incompatibility with the Constitution and European Convention on Human Rights is an issue which meets the Constitutional threshold for a direct appeal to this Court.

11. This Court agreed that the threshold was met and granted leave to appeal by way of a leapfrog appeal, noting at para. 10 the relationship of the "A" case to the case of "S":

> "…where leave to appeal has already been granted in respect of the very same judgment, where the grounds of appeal are identical, and similar conclusions and reasoning are found in the written judgments of the trial judge."

12. The "I" case concerns a leapfrog appeal against the High Court judgment and order of Humphreys J. of 29th October 2019. In granting leave to appeal in "I", this Court, in its Determination dated 21st January, 2020 noted that the first of the three grounds of appeal in "I" concerns s. 56(8) of the International Protection Act 2015, which provides for an absolute 12-month time limit for an application for family reunification. In the High Court, Humphreys J. found this was not in breach of the Constitution and that the provision is compatible with the European Convention on Human Rights. On this point, the Determination noted at para. 12 that some "…divergence of views is found between the judgment of Humphreys J. which is said to be in line with those expressed in *V. B. v. Minister for Justice and Equality* [2019] IEHC 55 (Keane J.), *R.C. (Afghanistan) v. Minister for Justice and Equality* [2019] IEHC 65 (Humphreys J.) and *I. H. (Afghanistan) v. Minister for Justice and Equality* [2019] IEHC 698 (Humphreys J.), and that of Barrett J. in *A. v. Minister for Justice and Equality; S v. Minister for Justice and Equality* [2019] IEHC 547" with which this appeal is concerned.

13. In respect of the second ground of appeal in "I", the question arises whether Ms. I had a vested right to family reunification pursuant to s. 18(3) of the Refugee Act 1996 (hereinafter the "Act of 1996"). The Act of 1996 was the applicable statute at the time the asylum application was made.

14. In respect of the third ground in "I", the issue is whether the proceedings are premature in circumstances where Ms. I has not submitted an application for a visa for her family. The Determination of this Court noted in relation to this ground of appeal at para. 15 that:

> "Divergent views are found…: in *A. v. Minister for Justice and Equality*; *S v. Minister for Justice and Equality* Barrett J. refused to follow the judgments of Keane J. in *V. B. v. Minister for Justice*, and of Humphreys J. in *R.C. (Afghanistan) v. Minister for Justice,* and *I. H. (Afghanistan) v. Minister for Justice*. The later judgment of Humphreys J. in *I. H. (Afghanistan) v. Minister for Justice and Equality* [2019] IEHC 698 also is said to conflict with that of Barrett J. in *A. v. Minister for Justice and Equality; S v. Minister for Justice and Equality*."

15. There is therefore an interrelationship between the three cases which this appeal is concerned with, as well as a number of other cases which deal with the issues raised herein.

Factual background in "A" and "S"

16. In his judgment dated 17th July 2019 (at para. 1), Barrett J. quoted from what is said to be Mr A's affidavit:

> "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 (sic) 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)."

17. In fact, those passages are contained in the Affidavit of Mr. S.

18. The crux of the issue is described by Barrett J. in para. 2 of his judgment where he said:

> "2. …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)."

19. In the same judgment, Barrett J. summarised the factual background of 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".

20. The background described above appears to refer correctly to Mr. S. There is no description in the judgment of the factual background in the case of Mr. A. It does however appear that the legal issues which the High Court dealt with are equally applicable to the situations in the cases of "A" and "S".

21. For the purposes of this case, there is no dispute between the parties regarding the facts, and the joint submissions furnished on behalf of "Mr. A" and "Mr. S" set out a chronology of the key occurrences in "A":

> "Both applicants are Iraqi Kurds, who have suffered in armed conflict in Iraq, and who were in a relationship before Mr. A fled from there, and are now a married couple:
>
> (i) Mr. A applied for refugee status in the State in 2016;
> (ii) he was granted a declaration of refugee status on 15th December 2016 (following a positive recommendation at first instance from the then Refugee Applications Commissioner, pursuant to the Refugee Act 1996);
> (iii) the International Protection Act 2015 came into force on 31st December 2016 (repealing the Refugee Act 1996);
> (iv) the couple married in Turkey on 25th July 2018;
> (v) Mr. A applied for family reunification for his wife, pursuant to the statutory scheme under section 56 on 4th September 2018;
> (vi) the first appellant refused the application by decision dated 14th September 2018 on the basis that the marriage did not exist at the time Mr. A applied for refugee status, applying s.56(9)(a)."

22. Similarly in "S", there is no dispute between the parties regarding the facts, and the joint submissions furnished on behalf of "Mr. A" and "Mr. S" set out a chronology of the key occurrences in "S":

> "Mr. and Mrs. S are nationals of Afghanistan, and are a married couple:
>
> (i) Mr. S applied for refugee status in the State on 27th July 2015;
> (ii) he was granted a declaration of refugee status on 29th June 2016 (following a positive recommendation at first instance, by the Refugee Applications Commissioner);
> (iii) the International Protection Act 2015 came into force on 31st December 2016;
> (iv) the couple married in Pakistan on 3rd April 2017;
> (v) Mr. S applied for family reunification for his wife, pursuant to the statutory scheme under section 56 on 19th April 2017;

(vi) the Minister refused the application by decision dated 12th October 2017 on the basis that the marriage did not exist at the time Mr. S applied for refugee status, applying s.56(9)(a)."

The High Court judgment in "A" and "S"

23. Part 2 of Barrett J.'s judgement set out the relevant legislative provisions, namely Section 56 of the Act of 2015.

24. On the submission by the Minister that Mr. A's action was premature (because of the existence of a "separate discretionary administrative process" under which Mr. A could make an application in the circumstances in which he was unable to proceed with his statutory reunification application), Barrett J. at para. 4 stated "(t)hat is, with respect, and to use a colloquialism, the 'reddest of red herrings'; it but distracts from the true issues in play." At para. 5, Barrett J. also said that:

> "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."

25. Part 4 of the High Court judgment dealt with constitutional arguments. Para. 7 of the judgment summarises Mr. A's key contentions with regards to the alleged unconstitutionality of the relevant provision:

> "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."

26. The Minister in response, advanced four reasons in support of the relevant provisions, in relation to which Barrett J. (at para. 8) held that "(n)one of them holds up to scrutiny." The four reasons advanced by the Minister were:

> "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.

…

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

…

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.

…

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

27. In rejecting the Minister's four reasons in support of the constitutionality of the relevant provision, the learned High Court judge said in relation to the first reason:

> ". . . Reason 1 fails to explain why s.56(9)(a) provides differently vis-à-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."

28. In relation to the second reason, Barrett J. said:

> "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."

29. In relation to the third reason, it was stated:

> "… Reason 3 fails to explain why s.56(9)(a) provides as it does vis-à-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."

30. Lastly, in relation to the fourth reason, the learned High Court judge said:

> "Not a single international obligation has been cited to the court in support of Reason 4…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."

31. Therefore, and in conclusion on the point relating to the constitutionality of the relevant provision, Barrett J. held at para. 9 that s.56(9)(a) is unconstitutional.

32. Part 5 of the judgment then dealt with the Convention arguments. Paras. 10 and 11 of the judgment referenced inter alia the cases of *Hode and Abdi v. the United Kingdom* [2013] 56 EHRR 27 and *DPP v. O'Brien* [2010] IECCA 103:

> "10. So far as the ECHR is concerned, the [Appellants]' 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*."

33. An in-depth analysis of *Hode and Abdi* followed, with the High Court extracting some twenty-one key findings from the European Court of Human Rights in that case and applying them to the matter before it. At para. 20 of his judgement, the learned High Court judge made the following observations about *Hode and Abdi*:

"(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)."

34. The Court also considered *inter alia* the UK decisions of *A (Afghanistan) v. Secretary of State for the Home Department* [2009] EWCA Civ. 825 and *FH (Post-flight spouses) Iran v. Entry Clearance Officer, Tehran* [2010] UKUT 275 IAC. Ultimately at para 22 and in connection with the Convention arguments, it was concluded that:

"22. …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."

35. In a judgment delivered on 29th July, 2019 concerning the form of the final orders to be made following the first decision (the principal judgment), Barrett J. at para. 9 said that nine principles guide the correct approach of the Court in deciding what the appropriate order would be following the finding in the principal judgment:

"9. …

(a) The courts are obliged to keep the operation of declaring a law unconstitutional within a minimum extent (Kelly).
(b) If a provision is held to be unconstitutional, and that provision is independent of and severable from the rest, only the offending provision will be declared invalid (Maher).
(c) It must be borne in mind in all cases that Art.15.2.1° of the Constitution provides that 'The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State' (Maher).

(d) Partial 'deletions' are carried out when this can be done cleanly and without violence to the presumed legislative will (Kelly).

(e) The courts will not (i) patch or mend a provision which a simple excision would render futile, (ii) by way of partial deletion turn a provision into something which the legislature never envisaged, (iii) sever language where the result would be to expose the Exchequer to an unanticipated financial burden (Kelly).

(f) What is at play is essentially a matter of interpreting the intention of the legislature in the light of the relevant constitutional provisions (Maher)."

36. In making the final order in the terms of the declaration sought and in the terms set out above, the Court held at para. 10 that:

"10. …

(1) the declaration most consistent with those principles and with the principal judgment in the above-titled proceedings is one that severs the unconstitutional portion of s.56(9)(a) of the Act of 2015, i.e., the portion that restricts the definition of "member of the family", in the case of a married sponsor, to a spouse whom the sponsor had married prior to making his international protection application…"

37. In their submissions to this Court, the Minister frames the issues for consideration on appeal in the following manner:

(a) whether the conditions for departing from the judgments of the High Court in *RC (Afghanistan) and VB v Minister* were met;

(b) whether section 56(9)(a) of the 2015 Act is repugnant to the Constitution insofar as it defines a sponsor's spouse as confined to the spouse of a marriage which is subsisting on the date the sponsor made an application for international protection in the State;

(c) was the learned trial judge correct in finding that section 56(9)(a) was incompatible with the Convention, particularly as he had already determined that it was repugnant to Article 40.1 of the Constitution?

(d) did the learned trial judge err in the manner in which he considered and applied the judgment of the European Court of Human Rights in *Hode & Abdi v. United Kingdom* (Case 22341/09)?

(e) were the within proceedings premature, having regard to the entitlement of the Applicants to make an application under the Non-EEA Policy Document and the presumption that any decision which would be made by the Minister would be made in accordance with the Constitution and the Convention? Such rights as the Applicants and their spouses have under the Constitution and the Convention can

be protected by the obligation on the Minister to act lawfully in determining any application made under the Non-EEA Policy Document;

(f) Whether the declaration granted by the High Court the 29" July 2019 conflicts with the principle of the separation of powers.

38. To each of the identified issues, the Minister contends *inter alia* that:

(a) The conditions for departing from the judgments of the High Court in *RC (Afghanistan) and VB v. Minister* were not met.

(b) Section 56(9)(a) of the 2015 Act is not repugnant to the Constitution.

(c) The learned trial judge erred in considering whether, and finding that, section 56(9)(a) was incompatible with the Convention, particularly as he had already determined that it was repugnant to Article 40.1 of the Constitution.

(d) The learned trial judge erred in the manner in which he considered and applied the judgment of the European Court of Human Rights in *Hode & Abdi v. United Kingdom* (Case 22341/09).

(e) The Applicants are not precluded from having their wives join them in the State by section 56(9)(a). They have not applied for permission under the Non-EEA Policy Document, which applications are open to them, and which applications can vindicate such rights as they have under the constitution and Convention. In the circumstances, the within proceedings are premature, particularly having regard to the presumption that any decision made by the Minister in response to such applications would be made in accordance with the Constitution and the Convention.

(f) The terms of the declaration granted infringe the principle of the separation of powers. If, which is denied, section 56(9)(a) is unconstitutional, it would be open to this Court to declare section 56(9)(a) in its entirety invalid, or to refrain from doing so on the ground that such a declaration would not benefit the Applicants, but would deprive those refugees who were married prior to making their applications for international protection of the right to make an application under section 56 or 57 in respect of their spouse.

39. In their written submissions, Mr. A and Mr. S submit that the trial judge did not err in law in the declaration that he made, for the reasons explained in his judgment but in the alternative, they submit that if this Court finds that s.56(9)(a) is unconstitutional, and that the consequence of that is that no married couples can benefit from Part 8 of the 2015 Act, they request that no such declaration is made, but that a declaration of incompatibility with the ECHR is made.

40. In their submissions to this Court, Mr. A and Mr. S contend that the learned trial judge did not err in respect of his findings in relation to the administrative scheme, the issue of

constitutionality, the issue of compatibility with the ECHR and the appropriate reliefs. In relation to the issue of "judgments of co-ordinate jurisdiction", they relied on the principles referred to at para. 14 of *Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, and upheld by the Supreme Court in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, where it was stated that "a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong". Mr. A and Mr. S thereafter submitted that the learned High Court judge in the present case was clearly of the view that the judgment in *RC (Afghanistan) v. Minister for Justice and Equality* [2019] IEHC 65 was wrong for several reasons, including its reliance on the administrative scheme, and its refusal to follow the reasoning of the European Court of Human Rights in *Hode and Abdi*. They submitted that the trial judge stated expressly that he was satisfied that he could depart from *RC (Afghanistan)* in accordance with *Worldport/Kadri* and they submit that he did not err in this regard.

41. In relation to the administrative scheme, Mr. A and Mr. S contend *inter alia* that no justification has been provided by the Minister as to why the family members of Irish citizens or other categories of migrants receive preferential treatment compared to declared refugees who might apply under the said administrative scheme. They say that these proceedings challenge the exclusion of a particular category of person from the statutory scheme for spousal reunion for declared refugees and that the option of applying under an alternative non-statutory, administrative and discretionary scheme, which is aimed at migrants in general is a far inferior option for reasons they go on to discuss. On the issue of constitutionality, Mr. A and Mr. S say *inter alia* that the learned trial judge did not err in his assessment of constitutionality (briefly set out above), especially when he concluded at para. 9 that:

> "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."

42. On the issue of Convention compatibility, Mr. A and Mr. S contend *inter alia* that no objective and reasonable justification was advanced by the Minister for the difference in treatment in spousal reunion between pre-application and post-application declared refugees. They also contend that no justification has been mounted by the Minister as to why certain migrants in the administrative scheme (e.g. the spouses of Irish citizens, or particular types of workers) deserve more favourable treatment in respect of spousal union compared with declared refugees – thus, there is no legitimate aim, or objective justification offered, such that the discrimination is contrary to Article 14 in conjunction with Article 8.

Background in "I"

43. "I" concerns an appeal against the order and judgment of Humphreys J. of 29th October, 2019. The facts are not contested. The applicant is a Nigerian national who was born on 15th May, 2001. She was abandoned in Ireland by her mother on 15th October, 2011, aged 10. A care order was granted in respect of her, pursuant to section 18 of the Child Care Act 1991, on 21st June, 2012. She was granted refugee status by Ministerial declaration on 25th September, 2014. The International Protection Act 2015 came into force on 31st December, 2016, repealing the Refugee Act 1996. In 2018, the applicant recommenced contact with her mother and younger sister via phone. The social work department made an application on her behalf for family reunification with her mother in July 2018. On 8th August, 2018 the Department of Justice requested the full name and dates of birth of all family members in respect of whom family reunification was sought. On 27th August, 2018 the social work department replied setting out the requested information in respect of the applicant's mother, father and sister. On 3rd September, 2018, the Department of Justice and Equality refused the application in respect of the applicant's mother, father and sister on the basis that it was not submitted within 12 months of the grant of refugee status, as required by s. 56(8). The applicant was 17 years of age on the date of that refusal. Proceedings were then commenced and the High Court (Humphreys J.) granted leave on 15th February, 2019, the proceedings having been instituted through the applicant's next friend and social worker.

44. The primary reliefs sought were *certiorari* of the decision to refuse family reunification and a declaration that the Act is contrary to the Constitution, the ECHR and EU law, as well as other related reliefs. The only basis of the challenge to the decision in question, apart from a challenge to the legislation, was that Ms. I had a vested right to apply under the Act of 1996. It was argued that the vested right should apply without any time limit and that she carried this right forward for an unlimited period notwithstanding the repeal of the 1996 Act by the 2015 Act.

45. Humphreys J. held that the "vested rights" argument, relying on a very wide interpretation of s. 27 of the Interpretation Act 2005, would deprive the concept of repeal of much of its meaning and would create intolerable uncertainty. He held that Ms. I had not established the evidential basis for the case and that she had alternative remedies available to her. He held that it was not a breach of any particular constitutional right to have a twelve-month time limit for family reunification or even to have a time limit that legal guardians must exercise on behalf of a person who is a minor at the time.

46. The learned High Court judge also held that the fact that this application fell outside art. 23 of Council Directive 2004/83/EC (the Qualification Directive) had the consequence that the State was not implementing EU law in deciding on this family reunification application and therefore the EU Charter on Fundamental Rights was simply not engaged.

47. He held that, given that the time limits for application under the ECHR itself are non-extendable no matter what extenuating circumstances might exist, it seemed implausible that Strasbourg would condemn a generous fixed time limit of one year for family

reunification (even longer in transitional cases such as that of Ms. I), especially where a non-time-limited, non-statutory application process as a fallback is available.

48. Regarding the claim that Ms. I has a vested right under a repealed enactment, Humphreys J. said at para. 13 that:

> "This "vested rights" argument, relying on a very wide interpretation of s. 27 of the Interpretation Act 2005, would deprive the concept of repeal of much of its meaning, creating intolerable uncertainty and giving the Refugee Act 1996 a ghostly after-life such that years or even decades after its repeal, it could violently jerk back into life without warning at the whim of an applicant such as this one."

49. On the same point, and at para 18, the Court said:

> "18. The conclusion is that here, all that the applicant had was a right to take advantage of an enactment. That right ended on repeal, and was not the sort of vested right preserved by s. 27 of the 2005 Act."

50. On the contention that Ms. I had not laid the evidential basis for the challenge mounted, Humphreys J. said at para. 19 that the challenge to the legislation "does not arise here because that challenge is premised on the assertion that the applicant was simply unable to comply with the legislation." He then said that there was no admissible evidence of such inability.

51. Humphreys J. went on to consider the merits of the case, in the event that his assessment in para. 19 were to be wrong. Firstly, considering the argument that Ms. I has available alternative remedies, he said at para. 23:

> "It would be a breach of the separation of powers to strike down a statute if an applicant can obtain the substance of what he or she is looking for through some other reasonably available procedure… It would be an improvident use of the power to strike down legislation to embark on consideration of a challenge to that legislation where the applicant has not even applied under that separate procedure, let alone been refused."

52. In addressing the question of the constitutionality of the Act, the High Court held at para. 25 that:

> "It is not a breach of any particular constitutional right to have a twelve-month time limit for family reunification or even to have a time limit that legal guardians must exercise on behalf of a person who is a minor at the time… In the absence of a substantive constitutional entitlement to family reunification, the Act is not a breach of Article 40. 3 or 41. Even if there is such a right, a generous twelve-month time limit is not disproportionate and thus no breach of substantive rights arises, and is well within the margin of appreciation of the Oireachtas so it is not contrary to Article 40.1, nor in any event does it relate to the human personality. Every time limit is to some extent arbitrary, so unless and until the day comes when the

appellate courts decide that there can be no such thing as a fixed time limit, the possibility of people falling marginally outside the line has to follow as a consequence."

53. On the contention that the State is not implementing EU law in making the impugned decision, the Court held at para. 26 that the type of family reunification sought does not come within art. 23 of the Qualification Directive and therefore the Charter is simply not engaged.

54. Regarding the claim relating to the breach of the ECHR, the Court said at para. 28 that "…the alleged disproportionality of the provision in art. 8 terms has not been made out. There was a time window to apply which was not availed of." It was also held at para. 29 that *inter alia*:

> "It is worth adding that the exhaustion of remedies argument is particularly potent in the Strasbourg context: see art. 35 of the ECHR. Here the applicant's failure to even apply under the non-statutory scheme means she has not exhausted all remedies….Given that the time limits for application under the ECHR itself are non-extendable no matter what extenuating circumstances might exist, it seems implausible that Strasbourg would condemn a generous fixed time limit of one year for family reunification (even longer in transitional cases such as that of this applicant), especially where a non-time-limited non-statutory application process as a fall-back is available. Under those circumstances the ECHR argument cannot succeed."

55. In the "I" case, the issues for consideration are:

(i) whether s.56(8) is contrary to the Constitution;

(ii) if not, whether s.56(8) is incompatible with the ECHR;

(iii) whether the proceedings are premature because she has not submitted an application for a visa for her family pursuant to the first named respondent's Policy Document on Non-EEA Family Reunification;

(iv) whether Ms. I had a vested right to family reunification, pursuant to section 18(3) of the Refugee Act 1996 which was the applicable statute at the time she was granted refugee status.

56. Thus, as can be seen from the outline of the three decisions under appeal, the principal issue to be decided in the appeals of "A" and "S" is whether the High Court was correct in its finding that s. 56(9)(a) of the Act of 2015 was unconstitutional and in "I", whether the High Court was correct in upholding the constitutionality of s. 56(8) of the Act of 2015. Depending on the decisions of this Court on those issues, other issues may require to be considered.

The legislation at issue

57. S. 56 of the Act of 2015 is central to the issues in these appeals and for that reason it would be helpful to set out its provisions here:

"56. (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.

(3) It shall be the duty of the sponsor and the person who is the subject of the application to co-operate fully in the investigation under subsection (2), including by providing all information in his or her possession, control or procurement relevant to 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 in accordance with section 10,
(c) where the person would be or is excluded from being eligible for subsidiary protection in accordance with section 12,
(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.

(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),

…

(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,

…"

58. I propose to deal with the issues arising in "A" and "S" in the first instance and then to deal with the issues arising in "I".

Departing from a decision and judgment of a court of equal jurisdiction

59. Before dealing with the substantive issues that arise from the judgment in "A" and "S", I propose to deal with one further issue that arises from that judgment. That is the issue as to the circumstances in which one judge of the High Court may decline to follow a decision of another judge of the High Court relating to the same issue or issues. I propose to consider the arguments on this aspect of the judgment of the High Court first.

60. It is not in dispute between the parties that the trial judge was referred to the judgment of the High Court in the case of *R.C. (Afghanistan) v. Minister for Justice and Equality [*2019] IEHC 65 in which the issue raised was identical to the issue arising in these proceedings. It is also the case that a further case of the High Court *V.B. v. Minister for Justice and Equality* [2019] IEHC 55 raised similar issues and while there were some differences between that case and the present cases, it is contended on behalf of the Minister that much of the ratio of that judgment applies to the present cases and this does not appear to have been disputed on behalf of Mr. A. and Mr. S.

61. In considering this issue it is appropriate to have regard to the judgment of the High Court in the case of *Re Worldport Ireland Limited (in Liquidation)* [2005] IEHC 189 (Clarke J., as he then was) and *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 in which Clarke J. also delivered one of the judgments of this Court. In *Worldpor*t, at paragraph 14, Clarke J. made the following observation:

> "I have come to the view that it would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J. in Industrial Services. It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority -v- Watson* [1947] K.B. 842 at 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant

authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the ratio in *Industrial Services* and decline to take the view, as urged by counsel for the Bank, that that case was wrongly decided."

62. Subsequently, in the case of *Kadri*, Clarke J. in this Court returned to the issue and commencing at paragraph 2.1 of his judgment, said as follows:

> "The jurisprudence of the High Court regarding the proper approach of a judge of that Court when faced with a previous decision of another judge of that Court is consistent. The authorities go back to the decision of Parke J. in *Irish Trust Bank v. Central Bank of Ireland* [1976-7] I.L.R.M. 50. Similar views have been expressed in my own judgment in *In Re Worldport Ireland Limited (In Liquidation*) [2005] IEHC 189, by Kearns P. in *Brady v. D.P.P*. [2010] IEHC 231, and most recently by Cross J. in B.N.J.L. v. Minister for Justice, Equality & Law Reform [2012] IEHC 74 where *Worldport* was expressly followed.
>
> 2.2 It seems to me that that *jurisprudence* correctly states the proper approach of a High Court judge in such circumstances. A court should not lightly depart from a previous decision of the same court unless there are strong reasons, in accordance with that *jurisprudence*, for so doing.
>
> 2.3 In his judgment Fennelly J. referred to the series of judgments of the High Court on the point in issue in this case. The trial judge considered himself bound by that line of authority. In the light of the case law to which I have earlier referred it seems to me that the trial judge was correct in that approach unless he viewed that line of authority as obviously wrong or having been arrived at without proper consideration of relevant case law or the like. In my view the trial judge was correct in the approach he took. In so finding it does not, of course, follow that this Court, now that the matter has come before it and been fully argued, is likewise constrained."

63. It is important to emphasise that the reasons for the approach outlined in those cases is in part due to judicial comity as mentioned by Clarke J. but also the requirement of

certainty in the law. Different decisions on the same issue by different members of the same court can only give rise to a situation where judges and practitioners alike would be unable to say with clarity what the state of the law is in any given area. Apart from the obvious uncertainty posed by a situation where judges were free to come to a view on a particular issue without regard to the view expressed previously by a colleague, as Clarke J. noted, the lack of certainty could give rise to increased litigation as parties and practitioners struggled to ascertain the legal status of a particular legal principle or the correct interpretation of a piece of legislation. It is for that reason that a judge of the same jurisdiction should have regard to a decision of a colleague on the same issue and should as a general rule follow that decision unless there is a clear basis for departing from that decision. As Clarke J. pointed out, it is only where there are substantial reasons for believing that the initial judgment was wrong that one should depart from it. It is not necessary to reiterate the types of situation in which that might occur as those have been described by Clarke J. in *Worldport*. In the case of *R.C. (Afghanistan)* referred to above a judgment was delivered on the 1st February, 2019 relating to the applicant who had obtained subsidiary protection on the 29th May, 2015. On the 4th October, 2016, he applied for family reunification for two brothers. Shortly afterwards, the International Protection Act 2015 was commenced. On the 11th June, 2017, he married a Ms. S.H. by proxy. On the 15th August, 2017 he applied for family reunification of his wife. It was communicated to the applicant in that case that his application could not be accepted under s. 59(9)(a) of the 2015 Act as the marriage post-dated the protection application. Proceedings were then commenced seeking, *inter alia*, a declaration that s. 56(9)(a) was unconstitutional or incompatible with the ECHR. The Court in that case rejected the arguments as to the alleged unconstitutionality of the provisions of the Act of 2015 and its alleged incompatibility with the ECHR. The factual background in relation to the case of *V.B*. was somewhat different. That concerned a situation in which family reunification was sought in respect of the applicant's mother and one of the issues in that case was whether or not the applicant's mother fell outside the specific definition of "member of the family" under s. 56 of the Act of 2015. An issue considered in that case was whether or not the applicant therein had an entitlement to apply for family reunification by other means and in both *R.C. (Afghanistan)* and *V.B.* it was held that the proceedings were premature insofar as the applicants in both of those cases had not exhausted other means to seek admission of their family members to the State by means of an application under the non-EEA Policy Document before commencing their challenge to the legislation. Given that a challenge to the constitutionality of s. 56 on similar grounds had been so recently considered and rejected, it is said that the trial judge in "A" and "S" should have followed the decisions of the High Court in *R. C. (Afghanistan)* and *V.B.*

64. Given the fact that the trial judge in the case of "A" and "S" came to a different view from that of his colleagues in *R.C. (Afghanistan)* and *V.B.,* it is important to consider what was said by the trial judge in this regard. At paragraph 25 of his judgment he makes the following comment:

> "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/ [2005] IEHC 189/[2012] IESC 27) line of case-law so to do."

65. It is clear from the trial judge's remarks that he must have considered that the decisions in *R.C. (Afghanistan)* and *V.B.* were wrong. It is also clear that he was of the view that he was entitled to depart from those decisions. It is undoubtedly the case that the trial judge had a different interpretation of the decision of the European Court of Human Rights in the case of *Hode and Abdi* referred to above to that of Humphreys J. as expressed in *R.C. (Afghanistan*). I accept that the trial judge in this case conducted a detailed analysis of the judgment of the ECHR in *Hode and Abdi* but what the trial judge herein has not done is to explain why his views on the decision in *Hode and Abdi* are correct and those of the trial judge in *R.C. (Afghanistan)* are not correct. The same point might be made in relation to the argument based on the opportunity to make a different form of application for family reunification which arose both in *R.C. (Afghanistan)* and in *V.B.* The problem is that whilst one knows that there is a difference of approach and that the trial judge in the instant cases clearly is of the view that the earlier decisions were wrong, it is impossible to ascertain precisely why that is so. A mere reference to the line of case law to be found in *Worldport/Kadri* is not a sufficient explanation of the reasons for departing from judgments which had been delivered on the same or similar issues just months previously. The whole point of the *Worldport/Kadri* line of case law is that if a judge of one level is to depart from a decision of a colleague at the same level then it is only appropriate to do so by reference to the reasons giving rise to a different point of view. These are not the sort of cases where one could point to a lengthy period of time having elapsed giving rise to a change in the jurisprudence of a particular court or an advance in the jurisprudence in the relevant area by reason of such lapse of time. It is not the case that different case law was relied on and considered in these cases which had not been opened to the trial judges in the other cases. There simply is no explanation. Given the importance of consistency and certainty in the law, the very least that one could expect is that in coming to such a different conclusion or opinion in relation to a particular area of law that the reasons for so doing should be explained clearly. The High Court in these cases of "A" and "S" was asked to find the provisions of s. 56(9) repugnant to the Constitution. The High Court in *R.C. (Afghanistan)* was also asked to find the provisions of s. 56(9) repugnant to the Constitution. The facts of the cases were similar and the issues were identical. Some five months had elapsed between the judgment of the High Court in *R.C. (Afghanistan*) and the judgment in "A" and "S". One would have thought that in an important decision relating to the constitutionality of legislation that a clear reason would have been given for departing from the earlier decision so soon after it had been given. One could well imagine circumstances where, for example, relevant case law had not been cited to the earlier court dealing with the matter which had the effect of bringing about a different conclusion. No such explanation is provided here and that is simply not helpful. In circumstances where one judge of the High Court feels it is necessary to depart from a decision of a colleague of that Court, it is incumbent on that judge to explain the reasons for doing so. This is not just a matter of comity but is a matter of importance in order to ensure that the law does not descend into uncertainty in

respect of the particular area of law concerned. Ultimately, the issue that arises in this case will be determined in the course of this judgment. The fact that the uncertainty thus created can be clarified by an appeal to this Court or, where appropriate, the Court of Appeal does not alter the fundamental point that a decision of the High Court should not lightly be disregarded. Our system of law is based on precedent. It has stood us in good stead for a long time. It provides a significant measure of certainty in relation to the law in any given area. Adherence to precedent does not bind judges to slavishly follow earlier decisions. Judges are entitled to consider the development of the law and it may be appropriate to come to a different view when the law in a particular area has advanced as our knowledge of different issues increases. It may even be that for one reason or another, a previous judgment on the same issue is thought to be in error. If so, a judge is entitled to disregard the earlier decision but in doing so, the judge so doing should explain the reasons for taking such a course. In this case, the trial judge has clearly come to a different view to that of his colleagues in the cases referred to above and he should have given an explanation of his reasoning in so doing. The necessity for doing so is all the more important in a case such as this given that on the one hand there is a decision of the High Court upholding the constitutionality of s. 56(9)(a) in *R. C.,* while on the other hand the decision in the High Court in the case of Mr. A and Mr. S has found the same provision of the Act of 2015 to be invalid having regard to the Constitution. Faced with these contrasting positions on the law, what approach could be taken by colleague in the High Court faced with a similar challenge to s. 56(9)(a)? The position was complicated further by the fact that the trial judge herein placed a stay on his order thereby leaving the status of s. 56(9)(a) uncertain during the currency of the stay. I will return later in the course of this judgment to consider briefly the fact that a stay was imposed on the order finding s. 56(9)(a) to be invalid having regard to the Constitution. On the face of it, the decision in this case appears to have had the effect of overturning the decision made just a short period before in *R. C.,* creating uncertainty as to the status of the provision affected. One can see, therefore, the difficulties which will result when one judge, if not in agreement with a decision of a judge of the same Court, departs from an earlier decision. It would be preferable in circumstances such as this if the judge dealing with the same issue in a later case followed the precedent laid down in the earlier case while expressing doubts as to the correctness of that decision and explaining precisely the reasons for the doubts. The issue in these cases was one which would inevitably have been the subject of an appeal and the confusion as to the status of s. 56(9)(a), particularly given the stay on the order, could have been avoided.

The Arguments

66. I referred earlier to the judgment of the High Court and to the reasons given by the Minister for contending that the provisions of s. 56(9)(a) are valid having regard to the Constitution and the rejection of those reasons by the trial judge. For ease of reference I will refer once more to the reasons proffered by the Minister for contending that the relevant provisions of the Act of 2015 are constitutional. They were that:

    (1) S. 56(9)(a) enables a refugee or person granted subsidiary protection who was separated from his or her spouse by the persecution or serious harm which gave

rise to their successful application for a declaration of refugee status or subsidiary protection, to reunite with the spouse from whom that person had been involuntarily and forcibly separated;

(2) this section enables family reunification, and finality in relation thereto to occur speedily;

(3) it was contended that the provisions of the section enabled 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. It was contended that this enables the Minister to grant permission to genuine spouses of such persons in line with normal immigration policy of the State;

(4) to comply with the State's international obligations.

67. The trial judge rejected the reasons put forward by the Minister for contending that the provisions of s. 56(9)(a) are constitutional as described previously. (See paras. 27-30 above.)

68. The first point made on behalf of the Minister concerns the basis on which the provisions of s. 56(9)(a) were found to be unconstitutional. It is said that whilst a number of provisions of the Constitution were referred to by the trial judge in the course of his judgment, it appears that the finding of unconstitutionality is by reference to Article 40.1 of the Constitution. While Mr. A and Mr. S refer in the course of their submissions to Article 40.1 and Article 40.3 of the Constitution and rely in particular on Article 41 in relation to the family to maintain that the State by its laws cannot fracture the constitutional definition of the family, I do not understand their submissions to take issue with the point made by the Minister as to the basis for the finding of unconstitutionality. I therefore propose to examine the arguments of the parties in that regard. Insofar as it is relevant I will consider the reliance by Mr. A and Mr. S on Article 40.3 and Article 41 in the context of the arguments as to Article 40.1.

69. At the outset, the Minister makes the point that the fact that Mr. A and Mr. S are not able to avail of the provisions of s. 56(9)(a) to have their wives enter the State does not preclude them from having their wives join them in the State. There is another procedure which could be utilised and it is the same procedure as that used by other lawful residents such as Irish citizens and other settled migrants. The position in relation to EU citizens is different given EU measures as to free movement which do not require to be considered here. There is no doubt that an argument based on equality necessitates that an individual claiming to have been treated unequally must be able to identify an appropriate individual by comparison to whom it can be shown that there is unequal treatment. In this context, it is helpful to refer briefly to *Kelly: The Irish Constitution* (5th Ed.) Hogan, Whyte, Kenny and Walsh in which it is said at para. 7.2.76 as follows:

"In *MR and DR v. An tArd- Chláraitheoir*, O'Donnell J. highlighted the need for any litigant relying on Article 40.1 to identify an appropriate comparator:

> 'Any equality argument involves the proposition that like should be treated alike. Any assertion of inequality involves identifying a comparator or class of comparators which it is asserted are the same (or alike), but which have been treated differently (or unalike). In each case it is necessary to focus very clearly on the context in which the comparison is made. It is important not simply that a person can be said to be similar or even the same in some respect, but they must be the same for the purposes in respect of which the comparison is made. A person aged 70 is the same as one aged 20 for the purposes of voting, but not of retirement.'

Failure to comply with this requirement accounts for a number of recent unsuccessful invocations of Article 40.1."

The authors then go on to give a number of examples including *Minister for Justice, Equality and Law Reform v. Devine* [2012] 1 I.R. 326 and *Webster v. Dun Laoghaire Rathdown County Council* [2013] IEHC 119.

70. Essentially, the point is made that it is necessary to identify an appropriate comparator to successfully invoke Article 40.1 as otherwise it may be possible to justify a difference in treatment of different classes of individuals by reason of the difference in circumstances of the respective classes of individuals.

71. What then are the comparators relied on by Mr. A and Mr. S, and are those comparators appropriate? It is suggested by the Minister that Mr. A and Mr. S rely on two classes of comparators but this is a contention rejected by them. Their submissions make it clear that the comparator relied on by Mr. A and Mr. S are those who married prior to applying for international protection as opposed to those who married after applying for international protection. By contrast, the Minister contends that the appropriate comparators are all other classes of lawful immigrants and Irish citizens who seek to have their non-EEA spouse join them in the State. (The reference to non-EEA spouses is to differentiate between those who are EU citizens and entitled to benefit from the provisions of EU law as to free movement). I accept the submissions on behalf of Mr. A and Mr. S that they do not rely on any other comparator as the Minister argued that they did, such as those who married after applying for refugee status but before the coming into force of the Act of 2015.

The importance of family reunification

72. Before considering in detail the appropriate comparator and whether it is that contended for by Mr. A and Mr. S or by the Minister, it would be useful to make a few observations about family reunification. Mr. A and Mr. S in the course of their submissions contend that the essential feature of a refugee is that they cannot return to their country of origin. However, they acknowledge that a refugee does not have an absolute right to family reunification in their host country. In their submissions they have referred to the decision

of the ECHR in *Tanda-Muzinga v. France*, 2260/2010 (10th July, 2014) in which it was stated at para. 75 as follows:

> "The Court reiterates that the family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life…It further reiterates that it has held that obtaining such international protection constitutes evidence of the vulnerability of the parties concerned (see *Hirsi Jamaa and Others v. Italy* [GC] No. 27765/09, 155, ECHR 2012). In this connection, it notes that there exists a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens, as evidenced by the remit and the activities of the UNHCR and the standards set out in Directive 2003/86 EC of the European Union . . ."

73. There can be no doubt therefore about the importance of family reunification for those who are forced to flee their country of origin. As that judgment makes clear this is recognised both by the UNHCR (see for example *UNHCR, Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001) and by the EU, for example, in the Directive referred to in the passage above. One of the observations made by the ECHR in that passage referred to is the need for refugees "to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens".

74. In the course of their submissions Mr. A and Mr. S contrasted the benefits inuring to someone who is entitled to avail of the provisions of s. 56 with someone who is confined to making an application under the Policy Document which is available to those who cannot apply under the provisions of the Act of 2015. The provisions of s. 56 of the Act of 2015 provide a family reunification procedure which is undoubtedly more favourable than that for other aliens seeking to bring about family reunification. Given the more favourable procedure and benefits available under the 2015 Act, it is perhaps not surprising that Mr. A and Mr. S contend that their exclusion from the benefits of s. 56(9)(a) is unconstitutional.

75. Mr. A and Mr. S in their submissions place particular emphasis on the place of the family within the Constitution. They say that once married, they together with their respective wives form families within the meaning of Article 41 of the Constitution. They highlight those provisions of Article 41 wherein the State "guarantees to protect the Family in its constitution" and "to guard with special care the institution of Marriage . . . and to protect it against attack". (See Article 41.2 and 41.3 of the Constitution). The point made on behalf of Mr. A and Mr. S is that s. 56(9)(a) creates two types of married refugees – either pre- or post-protection application – and treats them differently. This is said to amount to direct discrimination.

76. In support of their arguments, reference was made to a number of cases to demonstrate that marital status is something that comes within the provisions of Article 40.1 of the Constitution. Thus, reference was made to the case of *Murphy v. Ireland* [2014] 1 I.R.

198 and in particular paragraphs 34 to 35 and to *Minister for Justice and Equality v. O'Connor* [2017] IESC 21. It is perhaps worth quoting a passage from the judgment of this Court in the latter case where O'Donnell J. observed at paragraphs 20 to 21 as follows:

> ". . . Article 40.1 requires equality, not identity, of treatment. In particular Article 40.1 forbids unequal treatment as human persons. The narrow construction given to that phrase dominated the interpretation of Article 40.1 in the decades following *Quinn's Supermarket v. The Attorney General* [1972] I.R. 1, but has long since been qualified. However, it would be an overcorrection if the phrase was ignored entirely. It suggests, surely, that differences of treatment referable to immutable human characteristics such as race, gender or sexual orientation or matters of intimate personal choice intrinsic to a person's sense of themselves as a human person such as religion or marital status, are to be carefully scrutinised. . . . Article 40.1 is of course relevant in other contexts where no such potential ground can be invoked. . . .
>
> 21. . . . The essence of an equality claim is the sense of injustice that someone experiences when a person similarly situated is being treated differently and normally more favourably and in particular if the circumstances are suggestive of a discriminatory ground related to a persons human personality. . . ."

77. Complaint is made by Mr. A and Mr. S that no justification has been provided as to why it is of significance when the refugee was married. It is said that the lack of justification is reflected in the argument made by the Minister that the comparator should be confined to "other categories of migrants who are lawfully resident in the State (excluding EU/EEA citizens), or Irish citizens". The point is made that Mr. A cannot reside with his wife in Iraq and Mr. S cannot reside with his wife in Afghanistan unlike the comparator chosen by the Minister. It is said that no policy justification has been identified for treating them differently to other refugees when it comes to protection of the right to spousal unity and the protection and preservation of the family. Even if the Minister's chosen comparator was a valid one, the point is made that there is no justification as why a declared refugee is treated less favourably in respect of spousal reunion within the administrative scheme when compared with certain other sponsors.

78. Finally, it is contended on behalf of Mr. A and Mr. S that the position of the Minister that the appropriate comparator is not other married refugees but rather non-refugee migrants is a flawed position which would undermine any equality assessment.

79. I propose now to consider the arguments made in respect of the respective comparators relied on by the Minister and by Mr. A and Mr. S.

80. The Minister in his submissions, as we have seen, argues that Mr. A and Mr. S are treated the same as all other classes of lawful immigrants and, indeed, Irish citizens, who seek to have their non-EEA spouse join them in the State. It is accepted that more favourable treatment is available to one small group of people, namely those who come within the

requirements of s. 56(9)(a), that is those who were married prior to the application for international protection. The point is made that that which makes this group of people unique is the involuntary rupturing of their marriage. The Minister points out that such involuntary rupturing does not occur where the party to the marriage enters the State through normal immigration, *i.e.* not because they do so on the basis of a need for international protection, and seeks to be followed by his/her spouse, nor where an applicant for international protection or the holder of a declaration subsequently marries.

81. The Minister accepts that a classification must be for a legitimate purpose, must be relevant to that purpose and each class must be treated fairly. (See *Brennan v. Attorney General* [1983] ILRM 449). The Minister further points out that within the classes at issue here the difference is not a difference of status of marriage *per se*, that is as between married and unmarried persons, but rather the distinction between those married persons who suffer an involuntary separation from their spouse (caused by persecution or serious harm) and those who do not. It is submitted on behalf of the Minister that classifying persons based on whether or not their marriage was involuntarily ruptured is permissible and appropriate such that the correct classification for consideration is that of a pre-existing marriage which is sundered by the need for international protection; all persons within this category must be treated equally, unless a difference in treatment is justified in accordance with Article 40.1 of the Constitution (or Article 14 of the ECHR). The Minister contends that the purpose of s. 56(9)(a), that is, to afford more favourable treatment to such persons in the process of reunification of families, and spouses in particular, is relevant to the legitimate legislative purpose. Whilst acknowledging that Article 40.1 protects the right to equality of citizens, the State is required to have due regard to differences of capacity, physical and moral and of social function. Reference was made by the Minister to the purpose of s. 56(9)(a) as explained previously by him. The reasons given by the Minister were those rejected by the trial judge at paragraph 8 of his judgment and are set out at paragraph 26 of this judgment above.

82. The point is made on behalf of the Minister that insofar as Article 40.1 protects a right to equality that it is clear from the interpretation of that part of the Constitution in cases such as *Quinn's Supermarket v. Attorney General* [1972] I.R. 1 that the guarantee of equality relates to the essence of the person as a human being and not choices made by them. In that case Walsh J. stated at page 13 as follows:

> ". . . it is a guarantee of equality as human persons and (. . .) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community. This list does not pretend to be complete; but it is merely intended to illustrate the view that this guarantee refers to human persons for what they are in themselves, rather than to any lawful activities, trades or pursuits which they may engage in or follow."

83. Accordingly, the Minister makes the argument that there are two classes of married persons – those who were married prior to the application for international protection and other married persons. The latter group is said to consist of, *inter alia*, those who are married but whose spouses are apart from them because, for example, they are immigrants who came to the State alone and wish to be followed by their spouse, immigrants who married after they came to the State, Irish citizens who married persons who are abroad, or persons in the State without lawful permission to reside in the State and international protection applicants or beneficiaries who married after the date of application for international protection. It is said that within each class there must be equality with like being treated as like unless a difference in treatment is justified. The Minister reiterates the point that those who are able to avail of the provisions of s. 56 and 57 of the Act of 2015 enjoy more favourable circumstances than other immigrants and Irish citizens but emphasises the fact that the favourable provisions contained in the Act of 2015 do not operate as a prohibition on the entry of other spouses to the State. The Minister contends that the grant of more favourable treatment to a discrete category of immigrants by the 2015 Act is not invidious, arbitrary or capricious, nor is it irrational but it is justified by reason of the unique circumstances of that category of immigrants. At the heart of the arguments made by the Minister is the contention that the circumstances of a person who applies pursuant to the provisions of s. 56(9)(a) are materially different to a person who obtains international protection and marries thereafter. It is suggested that the latter group are akin to other settled immigrants. It is pointed out that any person, whether an immigrant or Irish citizen, is entitled to raise any issue with the Minister including any difficulties in satisfying the criteria contained within the Policy Document with the Minister and to ask the Minister to exercise his discretion to admit the spouse of that individual. The Minister goes on to add that even if the applicants, being protection beneficiaries who marry after making their application for international protection, could be considered to be in the same classification as the discrete category of protection beneficiaries who were married prior to the making of an application for international protection, it is submitted that the difference in treatment between such persons is lawful and is justified for the reasons relied on by the Minister and referred to previously. The Minister points out that the onus of demonstrating that there is unjustified treatment between persons in the position of Mr. A and Mr. S and the appropriate comparators rests on them.

84. The Minister then considered in some detail the basis upon which the trial judge rejected the reasons advanced by the Minister for the difference in treatment of those who were married prior to seeking international protection and those who were not. It is contended that the trial judge erred in his conclusions. The views of the trial judge were set out at paragraph 8 of his judgment which is, as previously noted, set out in paragraphs 26 *et seq*. above.

85. Insofar as the first reason was concerned, the trial judge rejected the reason put forward by the Minister by reference to the fact that there was a difference between Mr. A, being a refugee who married after he came to Ireland, as opposed to a person who married after coming to Ireland who then became a refugee *sur place*. However, it was pointed

out by the Minister in his submissions that a refugee *sur place* is rendered unable to return to his country of origin by reason of the circumstances which occur in the person's country of origin such that they are obliged to seek international protection. Thus, the Minister disagrees with the conclusion of the trial judge that there was a difference of treatment "without any apparent rationality or proportionality, which is another way of stating that the said differences are arbitrary". The point is made by the Minister that as a result of the circumstances changing in the country of origin, the refugee *sur place* cannot return to the country of origin and therefore the events which have occurred leading to the individual becoming a refugee *sur place* would rupture the marriage of a couple who were married prior to the making of such a claim. The point is made by the Minister that spouses who marry after the making of an application for international protection, whether arising *sur place* or otherwise, are not separated by the persecution or serious harm.

86. The comment made by the trial judge in relation to Reason 2 to the effect that the process under s. 56 was more streamlined and quicker than the process available under the Policy Document was that it was in effect an ancillary reason to the other reasons proffered and that only if those reasons were lawful was it lawful. The Minister comments on this that whilst the observation that the justification provided by Reason 2 was ancillary to the other reasons proffered, it was relevant to the argument that what is required by Article 40.1 is equality, not identity, of treatment. Insofar as Reason 3 was concerned, the Minister contends that issues of immigration control and marriages of convenience are less likely to occur where the marriage pre-dates the claim for international protection and it is said that this is all the more so when compared with marriages which took place after the grant of a declaration. Thus, the Minister again takes issue with the conclusions of the trial judge on this issue. The fourth Reason relates to the reliance by the Minister upon the State's international obligations. The point is made by the Minister that Council Directive 2004/83/EC, the Qualification Directive is part of the law of the State and therefore is something that can be referred to in these proceedings. It is accepted that it was not expressly cited to the High Court judge but nonetheless as part of the law of the State it is a matter that can be taken into consideration by this Court.

87. Finally, on the issue of constitutionality, reference is made by the Minister to the decision of this Court in the case of *Minister for Justice v. O'Connor* [2017] IESC 21 where it was reiterated that what is required by Article 40.1 is "equality, not identity, of treatment" and that differences in treatment "are to be carefully scrutinised". Reference was made to paragraph 22 of the judgment of O'Donnell J. in that case where it was stated as follows:

> "It is I think useful to consider the underlying right in issue in this case. Is there any breach of fair procedures in this case because the legal representation is made available under an administrative scheme of some antiquity with some particular procedures? Plainly there is not. It is difficult then to see how there could be a breach of the entitlement to equality before the law unless another person in a directly similar situation was provided with markedly superior services, and

particularly if the basis of the distinction was questionable. Here however, once legal representation was made available at the cost of the State, it is not a breach of the Constitution that such legal representation is made available through a different route in other cases."

That case concerned the availability of legal representation to those in respect of whom extradition was sought. They were entitled to apply for legal representation by means of the Attorney General's Scheme as it was then known as opposed to the statutory Legal Aid Scheme. In the present case it is pointed out that Mr. A and Mr. S are entitled to make an application for permission for their wives to join them in the State. It is contended that given that there is an availability to seek to have their wives join them by means of a different route does not mean that the fact that the route provided by s. 56(9)(a) is not open to them does not amount to unlawful discrimination. Insofar as the treatment of those applying under s. 56(9)(a) is more favourable than for persons such as Mr. A and Mr. S and indeed other categories who are not able to avail of the provisions under the Act of 2015, it is said that such treatment, although different, is justified, proportionate and legally permissible. Accordingly, it is contended that the presumption of constitutionality is not rebutted in this case.

88. Mr. A and Mr. S take issue with the approach of the Minister. Having referred to the pleas made by the Minister in the statement of opposition in each case, they argue that the Minister is mistaken in his approach to pre-application refugees to the effect that the difference in treatment between pre-application and post-application marriages is intended to mark the fact that pre-application refugees were forced to leave their spouse by reason of the persecution relied on. They point out that a refugee may marry in transit to the host country and thus before making any application under the provisions of s. 56(9)(a) and accordingly they contend that the provisions of s. 56(9)(a) do not achieve the objective advanced by the Minister.

89. They refer also to the submissions of the Minister in relation to the issue of refugees *sur place*.

90. Turning to the Minister's arguments as to the circumstances of a refugee *sur place*, Mr. A and Mr. S. say that the Minister acknowledges that the persecution concerned prevents the refugee from residing in their country of nationality with their spouse and that this in effect ruptures the marriage. They say that this is identical to the situation facing them and thus they say there is no justification, on any objective and proportionate policy level for a difference in treatment.

91. They go on to make the point that the UNHCR does not support a distinction between pre-flight and post-flight marriages. Mr. A and Mr. S then turn to the arguments made in respect of the reasons put forward by the Minister for the approach taken in s. 56(9)(a) of the Act of 2015. Not surprisingly, they submit that the trial judge did not err in any way in relation to his consideration of the reasons put forward by the Minister. Nevertheless, Mr. A and Mr. S went on to consider in detail the reasons proffered and the arguments made by the Minister in suggesting that the trial judge was incorrect. Thus, they refer to

Reason 1 and, in that regard, they emphasised the wording of s. 56(9)(a) and its use of the phrase "subsisting on the date the sponsor made an application for international protection in the State". They note that the phrase used in the law challenged in the case of *Hode and Abdi* referred to an applicant "whose marriage or civil partnership did not take place after the person granted asylum left the country of his former habitual residence in order to seek asylum". Thus, they contend that it is clear from the language used in s. 56(9) that it is intended to apply to refugees *sur place*, who may never have lived with their spouses in their countries of origin as well as those who did. They make the point that both types of refugee can enjoy marriage outside their country of nationality and therefore they contend that the timing of the sundering of the marriage is irrelevant to the reason why they cannot cohabit there. Therefore, they pose the question as to what difference does it make to the protection of the family when the application for refugee status was made.

92. In respect of Reason 3 put forward by the Minister, it was said that there was no evidence adduced to support the implication that post-application marriages might require greater scrutiny. Reference was made to the decision of this Court in the case of *AMS (Somalia, Family Reunification) v. Minister for Justice and Equality* [2015] I.L.R.M. 170. That was a case which concerned an application for reunification of certain family members outside the "so-called nuclear family". The Minister had refused to grant an application relating to an adult refugee's mother and siblings including a sister who was a minor at the time under the provisions of s. 18(4) of the Refugee Act 1996. In dealing with the issue of proportionality, the financial cost to the State of granting such an application was raised. In the course of his judgment, Clarke J. (as he then was) observed at paragraph 7.4 of his judgment that:

> ". . . in order for the Minister to have regard to such broader circumstances it would be necessary that there would be materials available analysing what the relevant costs would be. There do not appear to have been any materials available which indicated the number of persons who would come within the definition of a dependent member of a family for the purposes of s.18(4) and who would thus be persons who potentially might be the subject of applications for discretionary family reunification. . . . it should be possible to reach some broad view on the number of such persons who, if an application were successfully made on their behalf, might be a cost to the State and also what the likely average cost would be. At least some realistic overview, therefore, could be taken of the cost to the State generally of allowing discretionary family reunification applications."

Ultimately, in that case, the Minister relied solely on the costs incurred by granting the particular application in issue and not the wider cost to the State of allowing such applications in general and it was concluded that the Minister's decision was disproportionate. Clearly, the point being made on behalf of Mr. A and Mr. S is that the Minister, in asserting that the difference in treatment brought about by s. 56 enabled the Minister to carry out more careful consideration of marriages entered into after the making of an application for international protection was something that had 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. The point made on behalf of Mr. A and Mr. S is that it is insufficient to simply assert that these are matters "which are known to the Minister to occur".

93. Finally, Mr. A and Mr. S deal with the fourth Reason put forward by the Minister for the difference in treatment, namely "to comply with the State's international obligations". It is pointed out that no provision of international law was referred to and it was suggested that s. 56 of the Act would be unlawful as being contrary to Article 2(h) of Directive 2004/83/EC which makes reference to "the family [as] already existed in the country of origin". It points out that the Directive allows for more favourable standards to be adopted by Member States than those set out in the Directive and that it sets a floor, not a ceiling. Thus, it is contended that there is no international legal obligation to restrict entry and benefits to a particular category of spouses of refugees. In short, Mr. A and Mr. S make the point that the Minister filed affidavit evidence which sought to justify the difference in treatment created by s. 56. They point out that that evidence was assessed by the trial judge and that having done so he did not err in any way in reaching his conclusion to the effect that "the rationales offered in support of the constitutionality of s. 56(9)(a) fail for the reasons stated".

Decision on the constitutionality of s. 56(9)(a) of the Act of 2015

94. In order to consider this issue, I think it would be helpful to go through the reasons put forward by the Minister for contending that there is a difference between a person who was married prior to making an application for international protection and a person who married after making such an application. The reasons put forward by the Minister were dismissed somewhat tersely by the trial judge as has been seen above. Taking the last of those reasons first, namely, the contention by the Minister that the distinction between those who were married prior to the application for family reunification and those who married afterwards is, according to the Minister, to comply with the State's international obligations. As the trial judge pointed out no international obligation was cited to the Court in support of that reason. In the course of submissions, reference was made by the Minister to the Qualification Directive of 2004. It is apparent from the long title of the Act of 2015 that it was, in part, enacted to give further effect to that Directive. Two articles of the Directive are of interest. First of all, Article 3 provides for the possibility that Member States can have more favourable standards than those required by the Directive. It states as follows:

> "Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive."

95. Article 23 is also of relevance in that it deals with "maintaining family unity". It would be of assistance to refer to Article 23 provides as follows:

> "1. Member States shall ensure that family unity can be maintained.

2. Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status, who do not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24 to 34, in accordance with national procedures and as far as it is compatible with the personal legal status of the family member.

   In so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits.

   . . .

5. Member States may decide that this Article also applies 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 or subsidiary protection status at that time."

I should also refer to Article 2 of that Directive which contains definitions and at Clause (h) states as follows:

> "'family members' means, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection status who are present in the same Member State in relation to the application for international protection:
>
> - the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens,
> - the minor children of the couple referred to in the first indent or of the beneficiary of refugee or subsidiary protection status, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;"

The Directive confines the benefit of family reunification to those who were present in the same Member State in relation to the application for international protection as it appears from the definition that it is intended to apply to members of the family of the beneficiary "insofar as the family already existed in the country of origin". Thus, regardless of when someone married, the key question under the Directive was whether or not the persons concerned were present in the same Member State when the application for international protection was made. Insofar as the Minister seeks to rely on international obligations to justify the difference in treatment between the two categories of applicants for family reunification, I think it would have been helpful if the Minister had, in the first instance, identified the precise international obligations referred to and explained how those international obligations gave rise to a difference in treatment between the two

classifications. There was some discussion in the submissions of the extent to which international obligations may be a justification for a difference in treatment by reference to the decision of the ECtHR in *Hode and Abdi* and the criticism by Humphreys J. of that aspect of the judgment of the ECtHR. While that discussion is of interest, the reliance on international obligations by the Minister would have been of more assistance had the Minister identified the international obligations relied on and an explanation as to how any specific international obligation relied on could have the effect contended for. I accept, in general terms, that there are international obligations that favour family reunification as described in *Tanda-Muzinga* referred to previously. Nevertheless, I think it is unfortunate that the Minister has not explained with sufficient clarity how a requirement to comply with the State's international obligations could justify a difference in treatment between those who married pre-application and those who married post-application without reference to any specific international obligation, such as an EU Directive or any other measure, Treaty or Convention to which Ireland is a party which might create such a requirement. Therefore, whilst I accept that the State has international obligations in relation to refugees and those seeking international protection surrounding the question of family reunification, insofar as Reason 4 is concerned I am not convinced that the Minister has established this by the evidence before the Court as a reason for a difference in treatment.

96. The third reason referred to and relied on by the Minister concerns the suggestion that the provisions of section 56(9)(a) enable 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 requirements of immigration control. Reference is made specifically to concerns in relation to marriages of convenience or human trafficking or other such matters. It is said that these concerns arise because it is known to the Minister that there can be occasions when there are marriages of convenience or where there is human trafficking. It is said that the provisions of the Act of 2015 enable the Minister to grant permission to genuine spouses in line with the normal immigration policy of the State. As will be recalled, the trial judge rejected this reason for distinguishing between those who make applications in respect of their spouse in circumstances where they were married prior to the application as opposed to those who are married after the application. Again, in this context the trial judge referred to the position of refugees *sur place* and how difficult it was to reconcile what was said by the Minister with the position of refugees *sur place.* I have to say that I have some difficulty with the Minister's contention in this regard. The Minister has an obligation in the context of immigration control to consider whether a marriage is, in fact, a marriage of convenience or that it could be a cover for some form of human trafficking. That applies across the board. It applies to the person who is an Irish citizen married to an individual from outside the EEA countries who wishes to bring the spouse to this country and it applies to others who may wish to bring in a spouse to this country who was not otherwise entitled to be here. How the provisions of section 56(9)(a) can "enable the Minister to carry out more careful consideration" is hard to see. That is the obligation on the Minister in every case and I simply do not see how the provisions of the Act of 2015 could be said in anyway to make the task of the Minister easier or how, even if it were the

case that the Minister was thereby enabled to carry out more careful consideration, that could be justification for a difference of treatment. The Minister has obligations in relation to immigration control and those obligations are no greater and no less in the case of pre-application or post-application marriages. Accordingly, I cannot see any basis for the argument made by the Minister in this regard.

97. I now wish to turn to a consideration of the first reason relied on by the Minister. As will be recalled, the Minister contends that s. 56(9)(a) permits a person who has been granted a declaration of refugee status or international protection the ability to reunite with the spouse from whom they have been involuntarily and forcibly separated. I note the trial judge's observations that: "…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". Of course, the trial judge went on to consider the position of persons such as refugees *sur place* whose post-departure marriages pre-date their international protection application. Given his views in relation to that issue, he concluded that there were differences of treatment without any apparent rationality or proportionality. The approach of the trial judge in this case differs from the approach of Humphreys J. in the case of *R.C. (Afghanistan) v. Minister for Justice and Equality and Ors*. [2019] IEHC 65 referred to previously. It would, I think, be helpful to refer briefly to the judgment in that case. The facts of that case insofar as they are relevant are that the applicant came to Ireland in 2011 and applied for international protection. His asylum application was refused. He then sought subsidiary protection and this was granted on the 18th January, 2016 for a period of three years. It was noted that subsidiary protection was granted notwithstanding the confession of fraud on the protection system by the applicant in that case. He made a number of applications for family reunification in relation to family members. Following the commencement of the Act of 2015, the applicant on the 11th June, 2017 married a Ms. S.H. by proxy. On the 15th August, 2017 he applied for family reunification in respect of his wife. On the 25th August, 2017 the Minister stated that the application could not be accepted as the marriage post-dated the protection application. Judicial review proceedings were then commenced seeking to quash the decision of the 25th August, 2017 refusing to accept the application for family reunification together with a declaration that s. 56(9)(a) was in part unconstitutional or incompatible with the ECHR. The statement of grounds was amended by leave of the Court to allow the applicant to identify a comparator for the purposes of a discrimination claim. The comparator specified in that case was specified "on the basis that the applicant was discriminated against vis-à-vis a person granted international protection who married before seeking international protection. Thus, as can be seen the issues that arose in that case are the same as those which arise in the cases of Mr. A and Mr. S. One of the issues considered in the course of his judgment was the question of the appropriate comparator. Humphreys J. considered the distinction between those granted international protection who married before and after their applications and described it as being a distinction based on the timing and nature of the applications. He went on to say that:

> "A time-based distinction of this nature does relate to human personality of course, but it does not cut along an axis of human personality such as sex, sexual orientation or race."

He went on to consider whether the distinction between those who married pre-application and those who married afterwards was one lacking in a legitimate aim or disproportionate and came to the conclusion that the applicant in that case had not demonstrated that the distinction lacks a legitimate aim or that it is disproportionate to such aim. Dealing with the issue of those who come to Ireland, marry here and then seek protection *sur place* he observed as follows:

> "But those persons do not need family reunification rights vis-a-vis their spouses if those spouses are already here. If they are not here then the spouses are not being separated by the persecution which gives rise to protection *sur place*, so the distinction in the legislation makes sense notwithstanding the arguments advanced . . ."

Therefore, he concluded that the distinction in treatment was objectively justifiable as pleaded and that the applicant was in a materially different position as his marriage was not ruptured by persecution. He also upheld a plea to the effect that:

> "Persons who marry after the making of an application for International Protection do not have their marriage involuntarily sundered by reason of the persecution or serious harm grounding their application for International Protection."

98. Thus, Humphreys J. rejected any suggestion that the provisions of s. 56(9)(a) of the Act of 2015 were unconstitutional.

99. I find myself in agreement with the conclusions of Humphreys J. on this issue. I have referred previously to the importance of family reunification. The passage quoted from the decision in *Tanda-Muzinga* referred to above neatly encapsulates the importance of allowing those who have fled persecution to resume normal life with family members. That case recognised the fact that there was a consensus on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for others. The legislature in this jurisdiction has sought to give effect to that consensus by means of the provisions of s. 56 of the Act of 2015. In the provisions at issue in this case, the legislature chose to make a distinction between those who were married and whose marriage was subsisting on the date the sponsor made the application for international protection to seek permission for their spouse to join them in the State. I am of the view that this was a choice open to the legislature to take. The thrust of international consensus is that the refugee should be enabled to resume normal life. In the case of an individual who was not married at the time of seeking international protection, the question of resuming normal life simply does not arise. Those in the position of Mr. A and Mr. S and, indeed, R.C. in the case previously referred to, are not in the same position as a person whose relationships have been ruptured by the persecution which caused them to flee from their country of origin. So far as it has been contended on

behalf of Mr. A and Mr. S that there is no difference between them and a refugee *sur place* in the sense that they married having left the country of origin and have only married subsequently, I think there is no validity to this argument. Humphreys J. in his judgment in *R.C.* made the point that a refugee *sur place* is in a different position. If their spouse is here already with them, then it is not necessary for them to seek family reunification rights as he observed. He further pointed out that the situation in relation to a refugee *sur place* is that if the spouse is not here it is not by reason of the persecution that gives rise to the application for protection that has separated the spouses. I would add to that the fact that a refugee *sur place* who married after coming to this jurisdiction but before the application for international protection is made may find themselves in a situation where their marriage is effectively sundered by reason of the circumstances which give rise to the application for international protection if the other spouse continues to reside in the country of origin. To that extent a refugee *sur place* is in no different position to any other refugee who was married prior to making the application for refugee status or international protection. The critical point is that there was a relationship in being which has been sundered by the persecution that has given rise to the need to seek international protection. In the circumstances, even taking the appropriate comparator relied on by Mr. A and Mr. S, I am satisfied that the distinction sought to be made in the legislation between those who were married prior to seeking international protection and those who married subsequently is one which is legitimate and is proportionate having regard to the need to provide for family reunification on the one hand and the need to have regard to immigration control on the other hand. In the course of discussion on this issue, I have been somewhat critical of the reasons put forward by the Minister for making a distinction between pre-flight marriages and post-flight marriages. I have explained why I have come to the conclusion that the Minister is entitled to distinguish between pre-flight and post-flight marriages. The latter reasons put forward by the Minister, in reality, flow from the first reason. Thus, the Minister, in dealing with a person who has been granted refugee status or international protection and seeks family reunification, should deal with their application speedily. Further, it will be easier for the Minister to more carefully scrutinise a post-flight marriage than a pre-flight marriage. These are consequences which flow from the legitimate distinction that the Minister is entitled to make.

For the reasons outlined above I am satisfied that the provisions of s. 56(9)(a) are not unconstitutional and I would allow the appeal of the Minister on this issue.

I mentioned previously that the High Court in finding that s. 56(9)(a) was repugnant to the Constitution granted a stay on the order. It is unclear to me what status legislation found to be unconstitutional but in respect of which there is a stay on the declaration of the Court can have. This Court has, in exceptional circumstances, deferred making a declaration of invalidity. (See the discussion on this issue in *Kelly: The Irish Constitution*, (5th Ed) Hogan, Whyte, Kenny and Walsh at para 6.2.394 *et seq*.) The purpose of doing so has been to allow the Oireachtas/Executive the opportunity to address the consequences of a particular finding of invalidity. Clarke C.J. in *NHV v Minister for Justice* [2017] IESC 82 at 3 observed as follows:

"It does have to be strongly emphasised that the general rule must be that, on finding a measure of legislation to be unconstitutional, the Court should immediately declare it to be so and thereby render it inoperative under the terms of the Constitution. While the Court has not as yet had the opportunity to consider in any detail the parameters of any exceptional circumstances which might allow the Court to depart from that general proposition, nonetheless it must be made clear that the circumstances in which it would be appropriate for the Court not to follow the general rule must necessarily be exceptional. The Court has identified this case as one in which such exceptional circumstances did arise."

Leaving aside the difference between granting a stay and the making of a suspended declaration of invalidity, it clearly was not appropriate to grant a stay on the declaration of invalidity in this case.

Is s. 56(9)(a) incompatible with the ECHR?

100. Despite the finding that s. 56(9)(a) was unconstitutional, the trial judge went on to consider whether that provision was incompatible with the ECHR. There is an argument on behalf of the Minister to the effect that given the finding of unconstitutionality made by the trial judge, he erred in proceeding to consider the question of incompatibility. (see *Carmody v. Minister for Justice* [2010] 1 I.R. 635 at para. 47). However, given that I am satisfied that the provisions of s. 56(9)(a) are not unconstitutional, it is necessary in my view to consider the issue of compatibility and therefore, the approach of the trial judge was in ease of the parties.

101. In this context the trial judge relied on the decision of the European Court of Human Rights in the case of *Hode and Abdi* referred to previously. It should be noted that the trial judge in these proceedings and Humphreys J. in *R.C.* came to differing conclusions as to the effect of that decision. Given the differing approaches it may be useful to recall the provisions of the European Convention on Human Rights Act 2003 in which it is provided at s. 4 as follows:

"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."

The Court of Criminal Appeal in the case of *DPP v. O'Brien* [2010] IECCA 103, 14 – 15, has been referred to previously but it's observation in relation to the decisions of the Court of Human Rights bears repeating:

> "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. 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. Section 4(a) of the Act requires the courts to take judicial notice of the judgments of the European Court of Human Rights. 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. This principle is subject only to the proviso that any such interpretation must not be inconsistent with the Constitution."

Subsequently, O'Donnell J., speaking for this Court, in the case of *D.E. (An infant) v. Minister for Justice* [2018] 3 I.R. 326 at page 351 said:

> "The ECtHR does not apply the strict principles of *stare decisis* familiar in the common law world, and it is a mistake to read decisions as if they were binding authority rather than as part of a continuum of jurisprudence."

It is perhaps important at the outset to make the point that decisions of the European Court of Human Rights are not binding as such but that what is required is that the courts in this jurisdiction must take judicial notice of the judgments of the European Court of Human Rights and a court is not as such bound to follow a judgment of the European Court of Human Rights but will of course have proper regard to such judgments. With that in mind, I now propose to consider the case of *Hode and Abdi v. United Kingdom* [2013] 56 EHRR 27. Much reliance was placed on the judgment of the European Court of Human Rights in this case by the trial judge. In the course of his judgment, reference was made to two further U.K. decisions, namely *A (Afghanistan) v. Secretary of State for the Home Department* [2009] EWCA Civ. 825 and *F.H. (post-flight spouses) Iran v. Entry Clearance Officer, Tehran* [2010] UKUT 275 IAC to which I should briefly refer. In the first of those cases the appellant, an Afghani national resident in Pakistan, was refused permission to join her husband, a refugee, in the United Kingdom because the marriage had taken place after he left his country of permanent residence. At the time she was heavily pregnant and there was evidence to suggest that her husband could not live in Pakistan. Before the Asylum and Immigration Tribunal it was not possible for the Tribunal to identify any public interest being served by the omission from the Immigration Rules of any provision for a refugee to bring a post-flight spouse to the country. It ruled that on the facts of the case Article 8 of the ECHR was not engaged. On appeal, the Court of Appeal concluded 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. Therefore, they considered whether or not there was a public interest in refusing to grant the applicant leave to enter. As the Government had submitted its skeleton argument on the public interest point at a late stage, the Court held that it was estopped from re-

opening the issue. It went on to allow the appellant's appeal against the refusal of entry clearance but clearly stated that its decision could be of no authority if and when the issue arose again. In *F.H.,* 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 United Kingdom. It was not suggested that there was any other country where they could live together as husband and wife. An immigration judge refused her appeal. The Upper Tribunal allowed her appeal. It was noted with regard to the admission of post-flight spouses, refugees in the United Kingdom were in a particularly disadvantageous position compared to students, persons working in the United Kingdom, businessmen, artists and ministers of religion and so on. The Tribunal stated at para. 25:

> ". . . the appellant's situation is by no means an unusual one, and it arises from the provisions of the Rules from 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, by extending either paragraph 281 or, (perhaps preferably) paragraph 194, so as to extend to the spouses of those with limited leave to remain as refugees. In the mean time, 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."

102. The trial judge went on to consider the arguments made in *Hode and Abdi* by the applicants and the U.K. Government and also went on to consider the judgment of the Court of Human Rights and a number of observations made in the course of the judgment. In the course of its judgment, the European Court of Human Rights noted the following at paragraph 7:

> "The second applicant applied for a visa to join the first applicant in the United Kingdom. Although the first applicant was a refugee, the applicants did not qualify for 'family reunion' under the Immigration Rules HC 395 (as amended) ('The Immigration Rules') because paragraph 352A of the Immigration Rules only applied to spouses who formed part of the refugee's family unit before he or she left the country of permanent residence. The second applicant therefore applied for leave to enter the United Kingdom under paragraph 281 of the Immigration Rules, as the spouse of a person present and settled in the United Kingdom."

It appears that the Immigration Rules in the United Kingdom were changed after the 30th August, 2005 so that refugees were granted indefinite leave to remain and as such were "persons present and settled in the United Kingdom" in accordance with the Immigration Rules, but following the change to the Rules they were instead granted an initial period of

five years leave to remain although they could subsequently be granted indefinite leave to remain. As noted by the European Court of Human Rights at paragraph 20:

> "As a consequence of the change of the rules, for the first five years refugees were not 'persons present and settled in the United Kingdom' and could not be joined by a post-flight spouse during this period even if all the other requirements of paragraph 281 were met."

Some of the provisions of the Immigration Rules in the U.K. have echoes of the Policy Document.

103. It is worth considering some of the ECtHR's decision in the case of *Hode and Abdi.* First of all, at paragraph 43 the Court accepted that there was no obligation on a state under Article 8 of the Convention to respect the choice by married couples of the country of their matrimonial residence and to accept non-national spouses for settlement in that country. However, the Court considered that if the domestic legislation in the United Kingdom conferred a right to be joined by spouses on certain categories of immigrant, it must do so in a manner which is compliant with Article 14 of the Convention and ultimately it concluded that the facts of the case fell within the ambit of Article 8 (paragraph 43). In dealing with the issue of Article 14 it was noted that for such an issue to arise there must be a difference in the treatment of persons in analogous or relevantly similar situations. It was pointed out that 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. Of course, the Court recognised that a contracting state has a margin of appreciation in this regard (see paragraph 45). At paragraph 49 of the judgment it was noted that the U.K. Government did not dispute that the applicants had been treated differently from students and workers and their spouses, or from refugees and their spouses who married before leaving their country of permanent residence. The Government had however submitted that the applicants had not been in an analogous situation to any of those groups. The Court continued at paragraph 50 to observe as follows:

> "In fact, the only relevant difference was the time at which the marriage took place. Moreover, 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, the Court considers that they too were in an analogous position to the applicants for the purpose of Article 14 of the Convention."

The Court then went on to consider whether the difference in treatment was objectively and reasonably justified. One of the justifications put forward by the U.K. Government was that the aim of the Government was to provide an incentive to students and workers to come to the United Kingdom but in the case of refugees its aim was to honour its international obligations without providing further incentives to refugees for them to choose the United Kingdom over other countries of refuge (see paragraph 51). In paragraph 53 it was observed by the Court as follows:

> "The Court accepts that offering incentives to certain groups of immigrants may amount to a legitimate aim for the purposes of Article 14 of the Convention. However, it observes that this 'justification' does not appear to have been advanced in the recent domestic cases cited by the applicants. While the Court recognises that the Government were estopped from arguing this point in *A (Afghanistan),* it notes that in the later case of *FH (Post-flight spouses) Iran* the Upper Tribunal (Asylum and Immigration) found no justification for the particularly disadvantageous position that refugees had found themselves to be in when compared to students and workers, whose spouses were entitled to join them."

The Court then went on to say that it 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. It added at paragraph 55 as follows:

> "Furthermore, the Court sees no justification for treating refugees who married post-flight differently from those who married pre-flight. The Court accepts that in permitting refugees to be joined by pre-flight spouses, the United Kingdom was honouring its international obligations. However, 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."

On that basis the Court found that there was a breach of Article 14 of the Convention.

104. The trial judge in this case proceeded to follow and apply the judgment in *Hode and Abdi* to the circumstances of this particular case. In dealing with the conclusion of the ECtHR to the effect that that Court saw no justification for treating refugees who married post-flight differently from those who married pre-flight, the trial judge observed at para. 21 as follows:

> "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 different 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."

105. As will have been noted previously I have come to the conclusion in relation to the arguments in respect of the constitutionality or otherwise of s. 56(9)(a) that there was indeed a justification for the difference in treatment between pre-flight and post-flight marriages having regard to the provisions of the Constitution. For that reason, I cannot accept the observation of the trial judge as set out under paragraph (r) referred to above. First, the Immigration Rules in the United Kingdom are not exactly the same as those applicable here. Secondly, as will have been noted a considerable feature of importance in the United Kingdom Immigration Rules was the status of those who were granted refugee status who had initially a period of five years' leave to remain only. That put them into a

different position to Mr. A and Mr. S immediately. In this case, there is another route available to Mr. A and Mr. S to apply other than the provisions of s. 56(9)(a) and that is through the Policy Document. The applications in issue in *Hode and Abdi* had been made pursuant to Paragraph 281 of the Immigration Rules, which appears to be similar to the Policy Document, as it was accepted that the application could not be made pursuant to para 352A of the Immigration Rules, which appears to be similar to s. 56(9)(a). In circumstances where an application under the Policy Document has not been made by Mr. A and Mr. S, it is impossible to know one way or another how such an application would be dealt with and whether it would or would not be successful. It is worth bearing in mind that the European Court of Human Rights in the course of its judgment noted in passing at paragraph 7 the fact that the applicants did not qualify for "family reunion" under the Immigration Rules because those Rules only applied to those spouses who formed part of the refugee's family unit before he or she left their country of origin. There was no consideration by the European Court of Human Rights as to whether or not that particular provision, which after all is the provision at issue in these proceedings, could or could not be objectively justified.

106. In their submissions, Mr. A and Mr. S having referred to the decision in *Hode and Abdi* observed that:

> "(i) No objective and reasonable justification has been advanced by the Minister for the difference in treatment in spousal reunion between pre-application and post-application declared refugees.
>
> (ii) No justification has been mounted by the Minister as to why certain migrants in the administrative scheme (e.g. the spouses of Irish citizens, or particular types of workers) deserve more favourable treatment in respect of spousal union compared with declared refugees – thus, there is no legitimate aim or objective justification offered, such that the discrimination is contrary to Article 14 in conjunction with Article 8."

The Minister relies on the justifications previously relied on in regard to the issue of constitutionality. Reliance was placed on the judgment of Humphreys J. in the case of *R.C.* referred to previously on this issue. At paragraph 23 of his judgment, Humphreys J. observed as follows:

> "Turning to the prior question of whether the applicant has a right under art. 14 read with art. 8 to equal treatment with a protection seeker who married before the protection application, the applicant centres his case on the decision of the Strasbourg court in *Hode and Abdi v. the United Kingdom* [2013] 56 E.H.R.R. 27 (Application No. 22341/09, European Court of Human Rights, 6th February, 2013). *Hode* however was decided on certain factors which do not apply here. Firstly, the procedure adopted under the immigration rules did not allow for family reunification based on post-flight marriages: see para. 17 of the judgment. Secondly, the U.K. had changed the rules after the matters complained of (see para. 18). The new rules were not, as it happens, entirely equal as between pre and post-flight

marriages. The Strasbourg Court did not identify a problem with such differences, albeit that that did not fall for formal decision. At para. 56, the judgment said that 'the situation giving rise to the breach no longer exists'. Thirdly, domestic caselaw in the U.K. had cast some doubt on the legitimacy of the distinction under challenge: see *A. (Afghanistan) v. Secretary of State for the Home Department* [2009] EWCA Civ. 825*, F.H. (Post flight Spouses: Iran) v. Entry Clearance Officer*, Tehran [2010] UKUT 275 IAC. Fourthly, as far as the distinction between refugees is concerned based on the date of marriage, there does not appear to have been much, if anything, advanced by the U.K. as a rationale for the distinction other than compliance with international obligations: see para. 51 of the judgment. In the present case that is relied on, but only as one of a number of factors."

Humphreys J. then went on at paragraph 24 of the judgment to make some critical observations in relation to the decision in that case. He noted as follows:

"At para. 55 of the judgment, it is stated that 'the court sees no justification' for a pre and post-flight distinction. With huge respect to the court, that is more of an assertion than a reasoned argument. Likewise, when one looks at the dismissal by the court of the argument that compliance with international obligations was relevant on the basis that this 'will not in itself justify the difference of treatment' between otherwise analogous persons, one has to ask, why not? No reasons are immediately apparent. With immense respect to the Strasbourg court, the decision in *Hode* comes across as a somewhat improvident intervention in the delicate field of immigration. One could even make the case that improvident interventions on that particularly sensitive issue have the capacity over time to threaten the integrity of the overall European project. The scope of what might be upended in that regard is illustrated by para. 12 of the additional affidavit of Michael Quinn, 'the State is not a party to Council Directive 2003/86/EC on Family Reunification but the Minister is also cognisant that member states are permitted therein under Chapter V, Art 9 (2) 'Family Reunification of Refugees' to restrict such provisions to refugees whose family relationships predate their entry into the EU. This is the predominant position in the EU where more than half of the member states restrict the application of the more favourable family reunification rules for beneficiaries of international protection to family ties preceding the arrival of the sponsor in the member state'."

He concluded by saying at para. 26:

"On the facts before the court in the present case, one must come to the view that the State's reasons are legitimate and that the legislation is proportional for ECHR (and indeed constitutional) purposes, particularly for the purposes of rectifying separation due to persecution or serious harm, prevention of immigration fraud and compliance with all relevant international obligations."

I have previously indicated that I was satisfied that the position in relation to the difference in treatment between pre-flight marriages and post-flight marriages is one that

is justified having regard to the provisions of the Constitution. I am of a similar view in relation to the question of whether or not the provisions of s. 56(9)(a) are incompatible with the ECHR. The same reasons were relied on by the Minister and whilst I have expressed some criticism of the lack of detail provided by the Minister in relation to specifying the exact international obligations being relied on and how those are said to provide the justification for the difference in treatment to be found in s. 56(9)(a) of those who are married pre-flight and post-flight, and whilst I have also expressed some concerns in relation to the reliance by the Minister on the third reason put forward, namely the need to consider the validity of a post-flight marriage and to scrutinise it carefully, I am nonetheless satisfied that there is a valid reason for the difference in treatment between pre-flight and post-flight marriages. *Hode and Abdi* is a case based on the U.K. Immigration Rules and given the differences between the application of immigration and asylum law in the two jurisdictions, I am not persuaded that the conclusions of the Strasbourg Court in that case are such that this Court should take the same view in relation to the Irish legislation. In particular, it seems to me that what was found to be a breach of the Convention in *Hode* was the Immigration Rules that apply to those who are not entitled to avail of family reunification under paragraph 352A of the U.K. Immigration Rules as they then were, which is the equivalent of s. 56(9)(a). It was and remains open to Mr. A and Mr. S to make an application under the Policy Document. Such an application has never been made. It is only if an application under the policy document was made and was rejected for a suspect reason that a consideration of the jurisprudence to be found in *Hode and Abdi* might be of assistance. In all the circumstances, I am satisfied that there is no question of incompatibility in relation to the provisions of s. 56(9)(a) of the Act of 2015 with the European Convention on Human Rights. In the circumstances, I would allow the appeal of the Minister in these proceedings.

The case of "I"

107. I have previously set out the issues that arise in this case. The first concerns the question of constitutionality of s. 56(8) of the Act of 2015, secondly the issue of whether s. 56(8) is incompatible with the ECHR, the question of prematurity of the proceedings in circumstances where Ms. I had not submitted an application for a visa pursuant to the policy document on non-EEA family reunification, a question which was also raised on behalf of Mr. A and Mr. S but which was not necessary to decide albeit that it did have a peripheral relevance to the issue in those cases of the application of the decision in *Hode and Abdi* to the facts of those cases and finally a question as to vested rights pursuant to s. 18(3) of the Refugee Act 1996 which was the applicable statute when Ms. I was granted refugee status. I propose to commence by dealing with the issue of constitutionality first followed by the question of incompatibility and then the question as to vested rights. Only and insofar as it may be necessary will I consider the question of prematurity.

Is s. 56(8) of the Act of 2015 unconstitutional?

108. As this case was heard at the same time as the cases of Mr. A and Mr. S it is not necessary to set out all of the submissions made in that case which were relied on by Ms.

I. Ms. I referred to the passages from *Murphy v. Ireland* [2014] 1 I.R. 198 referred to above and from *Minister for Justice and Equality v. O'Connor* [2017] IESC 21 as to the approach to be applied in consideration of Article 40.1 of the Constitution. She also relied on the submissions made in those cases in relation to the judgment of *Tanda-Muzinga* for the purpose of emphasising the importance of reunification with her immediate family members.

109. I now propose to consider the arguments made on behalf of Ms. I in support of her contention that s. 56(8) of the Act of 2015 is unconstitutional.

110. First and foremost, Ms. I emphasises the fact that when she applied for family reunification with her mother in July 2018 she was a child. Her father and sister were also the subject of an application. The circumstances in which contact was lost with her mother have been described in a number of affidavits and while the trial judge was clearly dissatisfied with the information provided in that regard, it is not necessary to place undue emphasis on this aspect of the case. Suffice it to say that Ms. I obtained refugee status on the 25th September, 2014. At that time the Refugee Act 1996 was still in force. That Act contained no limitation on when an application for family reunification could be made. The Act of 2015 came into force on the 31st December, 2016. No application had been made by Ms. I for family reunification at that stage. When the Act of 2015 came into effect, the Act of 1996 was repealed. Notification was published as to the time limits now being imposed on applicants for family reunification (see paragraph 6 of the judgment of the High Court). Ultimately, the application was made for family reunification in July 2018, almost four years after the right to apply first arose and some seven months after the right to apply under the Act of 2015 had expired.

111. As I have said previously, Ms. I has emphasised the fact that she was a child when she obtained refugee status and when the application for family reunification was made. Reference was made in the course of the submissions to a number of constitutional provisions in relation to rights to the company of her family by virtue of Articles 40.3, 41 (in the case of a marital family) and Article 42A of the Constitution. Ms. I accepts that those rights are not without qualification.

112. Reference was made to the UN Convention on the Rights of the Child to which Ireland is a signatory which provides at Article 10.1 as follows:

> "In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family."

113. The Minister makes the point that the UN Convention on the Rights of the Child is not directly part of the law as is accepted by Ms. I. Thus, it is clear that no obligation is imposed by the UN Convention on the Rights of the Child on the State as a part of

domestic law. Reference was also made to a number of other international documents and in particular to the UNHCR Guidelines on Reunification of Refugee Families (July 1983) in which it was said as follows:

> "An unaccompanied minor child should be reunited as promptly as possible with his or her parents or guardians as well as with siblings. If the minor has arrived first in a country of asylum, the principle of family unity requires that the minor's next-of-kin be allowed to join the minor in that country unless it is reasonable under the circumstances for the minor to join them in another country. Because of the special needs of children for a stable family environment, the reunification of unaccompanied minors with their families, whenever this is possible, should be treated as a matter of urgency."

Reference was also made to the conclusions of the UNHCR's Governing Executive Committee which adopted a series of conclusions in 1981 stating:

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

It is the case that as a general proposition such international instruments make it clear that reunification particularly in the case of children should be dealt with positively and expeditiously. The Minister acknowledges in his submissions that it is clear that the United Nations encourages contracting states to ensure that there are measures or procedures in place which facilitate family reunification in appropriate cases and also recognises the particular vulnerability of certain persons such as children. That there is such encouragement is undoubted but there is no requirement to provide such measures. It was pointed out by the Minister that even if there was such an obligation by virtue of international law, a failure to comply therewith would not render the section unconstitutional (see *Re O'Laighleis* [1960] I.R. 93).

114. It is interesting to note from those international instruments that one of the matters emphasised is the fact that the question of reunification of minors with their families should be dealt with as a matter of urgency or as was stated in the conclusions of the Executive Committee in 1998, without undue delay.

115. Reference was made in the course of the submissions on behalf of Ms. I to what was said to be the policy rationale behind the imposition of a time limit. In this regard, an affidavit was sworn by Ms. Nicola Byrne on behalf of the Minister in which it was stated as follows:

> "I say that the time limit contained in Section 56(8) of the Act enables and facilitates the integration of the beneficiary of international protection status into the State and society in general by ensuring that applications for family reunification are made within a reasonable period of time. Furthermore the time limit introduces certainty into the procedure which was lacking in the open-ended nature of the provisions contained in the Refugee Act, 1996. It also operates to

ensure that family reunification applies to family members of the beneficiary of international protection status at the time the beneficiary was granted that status."

116. It is contended on behalf of Ms. I that, contrary to the arguments of the Minister, there are no objective and reasonable policy reasons to justify the imposition of the twelve-month time limit. Dealing with the matters raised on behalf of the Minister a number of points are made. In relation to the suggestion that the time limit facilitates and enables the integration of the beneficiary into the State by ensuring such applications are made within a reasonable period of time, it is suggested that the effect of s. 56(8) is in fact the opposite insofar as it precludes absolutely the statutory right to family reunification after twelve months without any regard as to the reasons why it may not be possible for the refugee to submit an application for family reunification within twelve months of the grant of refugee status. It is said that no application was made on behalf of Ms. I as she was unable to do so because the whereabouts of her family was unknown until 2018. Therefore, it is contended that the twelve month limitation period is inhibitive, rather than facilitative, of the integration process in circumstances where there is no discretion to extend the time limit regardless of the facts of the case.

117. Insofar as it is suggested that the time limit introduces certainty into the process which was lacking under the process that applied previously under the 1996 Act, it is said that such purported justification does not satisfy the proportionality test set out in the case of *R. v. Chaulk* [1990] 3 S.C.R. 1303 as approved by Costello J. in *Heaney v. Ireland* [1994] I.R. 593 at paras. 32-34 as follows:

> "The means chosen must pass a proportionality test. They must: -
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
> (b) impair the right as little as possible, and
> (c) be such that their effects on rights are proportional to the objective."

It is contended that a twelve-month absolute time limit fails to satisfy the second and third limbs of the proportionality test. It was contended that the absolute twelve-month policy was disproportionate having regard to affidavit evidence provided on behalf of Ms. I as to the limited number of children who are granted international protection each year. Reference was made to the decision in the case of *N.V.H. v. Minister for Justice and Equality* [2018] 1 I.R. 246 to suggest that by analogy, the blanket nature of the restriction in that case on taking up employment was what made the provisions of the relevant legislation unconstitutional. In that case it was held by this Court at page 317 at para. 20 as follows:

> "20. . . . s.9(4) does not merely limit the right severely: it removes it altogether. If there is no limitation on the time during which an application must be processed, then s.9(4) could amount to an absolute prohibition on employment, no matter how long a person was within the system. . . ."

Reference was also made to the decisions in the case of *White v. Dublin City Council* [2004] 1 I.R. 545 and *O'Brien v. Keogh* [1972] I.R. 144 in both of which provisions imposing a strict time limit on bringing proceedings were found to be unconstitutional insofar as there was no possibility of allowing a discretion for the extension of the time limit. Thirdly, the point was made that the third reason given on behalf of the Minister, namely that the time limit ensures family reunification applies to family members at the time the beneficiary was granted that status was something that failed the first limb of the proportionality test in that it was not rationally connected to the objective. It was argued that the existence of a time limit does not ensure that family reunification applies to family members at the time the beneficiary was granted that status.

118. Reference was then made on behalf of Ms. I to two decisions of the CJEU said to be illustrative of the approach required in international protection cases involving children. Those decisions concern Directive 2003/86/EC, the Family Reunification Directive. Ireland has not opted into that Directive and it is therefore inapplicable in this jurisdiction. However, it is said that the judgments of the CJEU in the two cases concerned underline the special place of children in the protection system and it is argued that those decisions are persuasive. In the first of those cases, *Case C-550/16 A & S* ECLI: EU:C:2018:248, it was held that a third country national below the age of eighteen at the time of his or her entry into the territory of a Member State and of the introduction of his or her asylum application in that state but who in the course of the procedure attains the age of majority and is thereafter granted refugee status must be regarded as a "minor" for the purposes of an application for family reunification having regard to the particular vulnerability of unaccompanied minors and the requirement that the best interests of the child must be a primary consideration in accordance with Article 24(2) of the Charter of Fundamental Rights of the EU. The second case was *Case C-380/17 K and B* ECLI:EU:C:2018:877 in which the CJEU held that Article 12(1) of Directive 2003/86/EC did not preclude national legislation which permitted rejection of an application for family reunification on the grounds that that application was lodged more than three months after the sponsor was granted refugee status, whilst affording the possibility of lodging a fresh application under a different set of rules. Article 12(1) is in the following terms:

> "1. By way of derogation from Article 7, the Member States shall not require the refugee and/or family member(s) to provide, in respect of applications concerning those family members referred to in Article 4(1), the evidence that the refugee fulfils the requirements set out in Article 7. . . .
>
> Member States may require the refugee to meet the conditions referred to in Article 7(1) if the application for family reunification is not submitted within a period of three months after the granting of the refugee status."

The provisions of Article 7 which were referred to provided that where an application for family reunification was not submitted within three months, further requirements could be imposed including evidence of resources, accommodation and health insurance. Thus, the fact that an application could be precluded if not made after three months was upheld by

the court. In Ms. I's submissions it was noted that the finding made by the court in that case was subject to three provisos; the court observed at paragraphs 61 and 62 of that case as follows:

> "61 Although the delay and administrative burden entailed in lodging a fresh application are undoubtedly inconvenient for the person concerned, nonetheless such inconvenience is not great enough to be regarded, in principle, as preventing that person from effectively asserting his right to family reunification in practice.
>
> 62. However, that would not be the case, first of all, if an initial application for family reunification could be rejected in situations where particular circumstances rendered the late submission of that application objectively excusable."

Reliance is placed on that passage to argue that s. 56(8), if it is to be proportionate, should permit an extension of time where the delay can be explained by objectively excusable reasons. It is contended therefore that no legitimate and proportionate response has been advanced by the respondents for the absolute twelve-month time limit such that s. 56(8) is unconstitutional. The Minister in his submissions on the constitutionality of s. 56(8) also makes reference to the decisions in cases such as *M.D. (a minor) v. Ireland* [2012] 1 I.R. 697, *Murphy v. Ireland* [2014] 1 I.R. 198 and *Minister for Justice v. O'Connor* [2017] IESC 21. It is not necessary to reiterate the passages from those decisions dealing with the principle of equality derived from Article 40.1 of the Constitution. However, the point is made on behalf of the Minister that Ms. I has failed to point to any constitutional basis for a right to family reunification. Having argued that there is, as a result of the provisions of s. 56(8), an unlawful discrimination between a person who makes an application within twelve months of the grant of a declaration of refugee status and one who does not, it is contended by the Minister that it is inappropriate for Ms. I that the inequality contended for is not a difference in treatment to which Article 40.1 of the Constitution applies. In other words, differentiating between two categories of persons solely by reason of their compliance with the statutory time limit is not such a difference as to engage the equality principles to be found in Article 40.1 of the Constitution. Accordingly, it is submitted that the imposition of a time limit on all persons by the provision concerned cannot infringe Article 40.1 although it is accepted that the application of a time limit for one category of persons could infringe Article 40.1 if there was an unjustified distinction based on an immutable characteristic, fundamental choice or matters which are intrinsic to human beings sense of themselves. Therefore, it is contended that Ms. I was treated in the same manner as any other person relying on the provisions of s. 56 of the Act of 2015. All applicants are required to make the application within twelve months of the date on which the declaration is granted. Thus, the argument is made that a person who complied with the time limit is not an appropriate comparator for the purposes of Article 40.1.

119. Turning to the core arguments, the Minister then addresses case law dealing with the constitutionality of limitation periods. First of all, reference was made to the decision in *Tuohy v. Courtney* [1994] 3 I.R. 1. In that case Finlay C.J. stated:

> "What has to be balanced is the constitutional right of the plaintiff to litigate against two other contesting rights or duties, firstly, the constitutional right of the defendant in his property to be protected against unjust or burdensome claims and, secondly, the interest of the public constituting an interest or requirement of the common good which is involved in the avoidance of stale or delayed claims.
>
> The Court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is . . . to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individuals constitutional rights." (Page 47).

In *White v. Dublin City Council* [2004] 1 I.R. 545, the measure found to be unconstitutional was a provision which imposed an absolute two-month time limit to challenge a decision to grant planning permission in the absence of a provision for an extension of time in circumstances where the aggrieved person did not know and could not reasonably have known within the two-month period that the decision affected his interests. It was held by the Supreme Court in that case that the section, by excluding any power to extend time, undermined or compromised a substantive right guaranteed by the Constitution, namely the right of access to the courts. Denham J. at paragraph 54 of her judgment concluded:

> "The Court considers that section 82(3B)(a)(i) constitutes an injustice to such an extent that in exercising its discretion to exclude any power to extend time for cases such as the present, the legislature undermined or compromised a substantive right guaranteed by the Constitution, namely the right of access to the courts. The Applicants, through no fault of their own, but through the unlawful act of the decision-maker was deprived of any genuine opportunity to challenge the legality of the decision within the permitted time. For these reasons, the Court concludes that the High Court was correct in holding that the provision in question is repugnant to Article 40 section 3 of the Constitution."

Emphasis was placed on the fact that in many of the authorities in which the issue of time limits on the institution of proceedings have been considered engaged a right of access to the courts or as it was put in the submissions a right to litigate.

120. Reference was also made to the decision in *Moynihan v. Greensmyth* [1977] I.R. 55 in which the limitation period of two years in the case of a claim against the estate of a deceased was found to be constitutional even in circumstances where the plaintiff was a minor. The point is made on behalf of the Minister that unlike the cases cited which involve a limitation period on the commencement of proceedings, there, what was at issue was an interference with the constitutional right of access to the courts or the right to litigate whereas in the present case there is no such legally enforceable fundamental right to family reunification other than that provided for by s. 56.

121. The Minister went on to emphasise the point that s. 56 and 57 of the Act of 2015 confers a specific right to those granted international protection to seek family reunification subject to a limitation period. The statutory right to seek family reunification is balanced by the executive power of the Minister to control the entry of non-nationals to the State. It is emphasised that there is no countervailing constitutional right on the part of the appellant and further that such rights as she may have are capable of vindication under the Policy Document. Thus, it is contended that in circumstances where she has not made an application under the policy document it cannot be said that s. 56(8) causes "hardship . . . so undue and so unreasonable having regard to the proper objectives of the legislation as to make it constitutionally flawed", as was required in *White v. Dublin City Council*, applying *Tuohy and Courtney*. The point is also made that in cases such as *O'Brien v. Keogh* [1972] I.R. 144 and *Moynihan v. Greensmyth* [1977] I.R. 55, there was no other means by which the litigants could vindicate their constitutional rights to bodily integrity or property. Therefore, it is contended that it is difficult to see any lack of proportionality in the circumstances of this case that could amount to unconstitutionality in circumstances where the Oireachtas has provided for a statutory right that may be exercised for a defined period and where there is an alternative available to Ms. I outside that period.

122. The Minister then went on to deal with the arguments made by Ms. I based on the decision in the case of *N.H.V*. referred to previously. It was sought to distinguish that case on the basis that *N.H.V*. was subject to an absolute prohibition on all asylum seekers seeking to work but s. 56(8) does not prohibit Ms. I from applying for permission for her family to enter and reside with her in the State and nor does it prevent them from doing so. There was no alternative means in *N.H.V*. by which asylum seekers could obtain permission to work in the State. Accordingly, it is contended that no constitutional right is removed absolutely by the provisions of s. 56(8). For those who do not make an application for family reunification within the twelve-month period provided by s. 56 and 57, it is open to make an application under the Policy Document referred to previously. The point is also made that it was open to the applicant to make an application under the provisions of the Act of 1996 from the date of granting of her declaration of refugee status in 2014 up to the 31st December, 2016. It is contended that the evidence does not establish that it was impossible for her to do so or indeed that it was not possible to make an application under the provisions of s. 56 of the Act of 2015 prior to the 31st December. Given that it remains open to Ms. I to make an application for her parents to enter and reside with her in the State, it is submitted that in conferring the right to apply for family reunification under the section for a period of twelve months only, s. 56 is not disproportionate to the aim sought to be achieved nor to the interference with any rights of Ms. I. Such rights as she has can be vindicated by the Minister in determining an application under the Policy Document were such an application to be made.

123. Finally, it is contended that s. 58 of the Act of 2015 which concerns the best interests of the child does not have the effect of disapplying s. 56(8) nor is the Minister required to extend the time prescribed in s. 56(8) for minors by virtue of s. 58 or any other provision

of the Constitution or indeed the Charter of Fundamental Rights or any guidelines or measures.

Decision on the issue of constitutionality of s. 56(8)

124. The first issue I want to consider is the question of the comparator. As will have been seen earlier in the course of this judgment concerning Mr. A and Mr. S, there was a dispute between the parties in those cases as to the appropriate comparator. It is important that an appropriate comparator be chosen when considering whether or not legislation is unconstitutional on the basis of Article 40.1 of the Constitution. At the end of the day, as I have found, even if one chose the comparator put forward by Mr. A and Mr. S, the legislation is not unconstitutional. That it is important to choose an appropriate comparator is beyond dispute. I have already referred to the passage from the judgment of O'Donnell J. in the case of *M.R. and D.R. v. An tÁrd Chlaraitheoir* [2014] IESC 60 which is referred to in paragraph 69 above. It is not necessary to repeat what was said there. Ms. I has contended that she is being treated differently to other declared refugees who are minors seeking reunification with their parents by reason of the fact that she applied outside the twelve-month time limit. However, the time limit imposed by s. 56(8) applies to all refugees, minors and adults alike. No distinction is made between any category of applicant for family reunification. As the Minister pointed out, all applicants are required to make the application within twelve months of the date on which the declaration of refugee status or international protection was granted. The fact that s. 58(2) of the Act of 2015 provides that in the application of ss. 53 to 57 of the Act, in the case of minors, the best interests of the child shall be a primary consideration does not oblige or enable the Minister to disregard or disapply the provisions of s. 56(8). Further, nothing in Article 40.3, Article 40.1 or Article 42A of the Constitution requires that this should be done. In the course of this judgment, when dealing with the case of Mr. A and Mr. S, I have referred to the importance of family reunification. That applies not just to spouses but, of course, must also apply to the case of children seeking reunification with their parents or parents seeking reunification with their children. It is not necessary to refer once again to the various guidelines and other international instruments dealing with this subject. The State has made provision for family reunification by means of the provisions contained in the Act of 2015. It should also be recalled, as explained previously, that the Act of 2015 is not the sole means by which family reunification can take place. As is clear, it is also possible to pursue family reunification through the Policy Document referred to previously. The extent of family reunification is not unlimited and the State is entitled to have regard to the requirements of immigration control in making such provision. It may be considered to be somewhat harsh in the case of children that they are subject to the same time limit as adults given that they are not themselves able to bring an application for family reunification without the intervention of others but it is perhaps worth bearing in mind that in this case, Ms. I was in the care of the Child and Family Agency and these proceedings were commenced by her through her allocated social worker who acted as her next friend in the proceedings, just as her application for refugee status was brought on her behalf. There is nothing to suggest that she was in any way inhibited by her status as a child from initiating an application or indeed in bringing proceedings. Ultimately, however, the fact that the legislation may be viewed as harsh when viewed through the

prism of its application to minors, it is at the end of the day a matter of policy for the legislature and is not an issue for the courts. It should be borne in mind, however, that the time limit commences when a declaration of refugee status has been granted. Thus, the twelve-month time limit does not begin to run while the individual concerned is going through the process of seeking a declaration of refugee status or international protection which inevitably takes some time. As was pointed out by the trial judge in his judgment in paragraph 25: "It is not a breach of any particular constitutional right to have a twelve-month time limit for family reunification or even to have a time limit that legal guardians must exercise on behalf of a person who is a minor at the time". He added that: "While we are familiar in say the personal injuries concept that limitation periods only run from attaining one's majority, that is not an absolute constitutional requirement, especially if there is someone in an effective position to assert rights on a child's behalf during his or her minority". He went on to comment that:

> "It is worth noting that for the purposes of the Geneva Convention, family reunification is encouraged by interested agencies but is not a legal obligation. It is hard to see how it can be said to be a matter of fundamental human rights such that it must be viewed as an implied constitutional right. In the absence of a substantive constitutional entitlement to family reunification, the Act is not a breach of Article 40.3 or 41. Even if there is such a right, a generous twelve-month time limit is not disproportionate and thus no breach of substantive rights arises, and is well within the margin of appreciation of the Oireachtas so it is not contrary to Article 40.1, nor in any event does it relate to the human personality."

I cannot disagree with those observations particularly, in the light of the fact that the 12 month time limit does not begin to run until a declaration of refugee status has been made.

125. In all the circumstances, I have come to the conclusion that first of all the comparator chosen by her is not appropriate. If it was appropriate to select as her comparator other minors seeking reunification with her family who complied with the time limit, one could observe that she is treated differently to that category of comparators. If such a comparator were suitable, it is difficult to see how any limitation period could withstand constitutional scrutiny. Secondly, she is not subject to any difference in treatment by reference to any characteristic that is relevant to an issue in relation to equality such as sex, age, gender, religion or other relevant status. The legislation applies equally to all applicants for family reunification. In the circumstances, I am satisfied that Ms. I has not established that s. 56(8) of the Act of 2015 is contrary to Article 40.1 of the Constitution or any other provision of the Constitution. I would therefore dismiss her appeal on that ground.

Is s. 56(8) compatible with the ECHR?

126. Ms. I has also relied on the decision of the ECtHR in *Hode and Abdi* in the course of her submissions. She refers to the core principles referred to in that case as being as follows:

"(i) The application of Article 14 of the ECHR does not require the violation of one of the substantive rights guaranteed by the Convention, but applies to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide (para. 42).

(ii) Only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of Article 14, but the phrase 'other status' is given a wide meaning (paras. 44 and 46).

(iii) There must be a difference in the treatment of persons in analogous, or relevantly similar, situations. The requirement to demonstrate an 'analogous situation' does not require that the comparator groups be identical. Rather, the applicants must demonstrate that, having regard to the particular nature of their complaints, they had been in a relevantly similar situation to others treated differently (paras. 45 and 50).

(iv) 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. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background (paras. 45 and 52)."

In seeking to apply those principles a number of observations have been made on behalf of Ms. I. First of all, it is contended that s. 56(8) is concerned with a statutory right to family reunification which the State has voluntarily decided to provide, thus bringing it within the scope of Article 8 of the ECHR and this in turn engages Article 14 of the ECHR. It will be recalled from the decision in *Hode and Abdi* that it was the case that the court found that there was in fact a violation of Article 14 but did not consider it necessary to examine the question of whether there had in fact been a breach of Article 8 of the ECHR.

127. The point was made that a difference in treatment based on "other status" is construed broadly and includes recognised refugees who submit an application for family reunification outside of the time limit contained in s. 56(8). It is contended that there is a difference in treatment between those who submit an application for family reunification within the twelve-month time limit and those who submit one outside the time limit. Thus, it is contended that they are in a relevantly similar situation in that both classes concerned recognise refugees making an application for family reunification. The case is then made that the difference in treatment is discriminatory because it has no objective and reasonable justification. Ms. I takes issue with the reasons put forward by the Minister for the difference in treatment, namely that the twelve-month time limit facilitates and enables the integration of the refugee into the State and Irish society by ensuring that applications are made within a reasonable time. It is said that there is no

relationship of proportionality between the means employed and the aim sought to be realised.

128. Insofar as it is contended by the Minister that the time limit introduces certainty into the procedure it is claimed that this fails the proportionality test because it does not impair the right as little as possible and is such that the effect on the rights of refugees is disproportionate to the objective. Further, it is contended that the twelve-month time limit is disproportionate having regard to the affidavit evidence as to the limited number of children who are granted international protection in the State each year. Finally, it is contended that insofar as the third justification put forward by the Minister is concerned, namely that the time limit ensures that family reunification applies to family members of the beneficiary of international protection status at the time the beneficiary was granted that status, it is said that the time limit has no rational connection to this objective. Thus, it is contended that s. 56(8) is incompatible with the ECHR.

129. The Minister in his submissions argues that *Hode and Abdi* is distinguishable on the grounds of "status". The question of whether Ms. I had "other status" was considered at length. It would be useful to recall what was said by the European Court of Human Rights at paragraph 45 of its judgment which has been paraphrased by Ms. I in her submissions:

> "Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations . . .. 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."

That Court did, of course, recognise that the Contracting States enjoyed a margin of appreciation in relation to the extent to which differences in otherwise similar situations justify a different treatment. In paragraph 46 of the judgment to which the Minister has referred, reference is made to the phrase "other status". Again, it would be helpful to refer precisely to what it said in that paragraph. The Court stated as follows:

> "In order for the applicant's complaint to be successful, he must therefore demonstrate that he enjoyed some 'other status' for the purpose of Article 14. In this regard, the Court recalls that the words 'other status'. . . have generally been given a wide meaning . . . Although the Court has consistently referred to the need for a distinction based on a 'personal' characteristic in order to engage Article 14, it is clear that the protection conferred by that Article is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent . . .. On the contrary, the Court has found 'other status' where the distinction was based on military rank, . . . the type of outline planning permission held by the applicant . . .whether the applicant's landlord was the State or a private owner . . . the kind of paternity the applicant enjoyed . . . the type of sentence imposed on a prisoner . . . and the nationality or immigration status of the applicant's son . . ."

In the case of *Hode and Abdi* it was not disputed that the applicant's category was treated differently to students, workers and "pre-flight" refugees seeking family reunification.

130. The core point made on behalf of the Minister is that Ms. I does not have "other status" within the meaning of Article 14 of the Convention. The application of a time limit does not equate to or confer status under Article 14 or constitute "other status" as understood within Article 14 of the Convention. It was pointed out that the difference in treatment arises not by reason of any distinction between different groups of people but arises from the date on which the person made the application. It is the date rather than the person which leads to the difference in treatment. The point was made that Ms. I has complained that a time limit was applied to her but it is noted that that time limit was also applicable to the persons she relies on as a comparator but the difference between them is that they complied with it. Accordingly, it is contended that she has not suffered "discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" in accordance with Article 14 or indeed discrimination based on any other status recognised in the jurisprudence of the ECtHR. It is submitted that *Hode and Abdi* is not authority for the proposition that a difference in means by which certain rights may be vindicated offends Article 14 of the Convention. In *Hode and Abdi* it was the absolute exclusion of persons from the Immigration Rules by reason of their "other status" which was found to offend Article 14.

131. Finally, the Minister made the point that there are mandatory time limits applicable to applications lodged with the European Court of Human Rights itself.

Decision on the issue of compatibility

132. Ms. I has sought to rely on the decision in *Hode and Abdi* by way of analogy to support her contentions. At the outset, I should say that I accept that an application for family reunification engages Article 8 rights as was accepted in *Hode and Abdi* albeit that it was not necessary to decide whether there had been a violation of Article 8 rights in circumstances where there was found to be a violation of rights under Article 14.

133. In order for Ms. I to succeed in her complaint as to the compatibility of s. 56(8) with the ECHR it is necessary for her to establish a difference in treatment based on an identifiable characteristic or status capable of amounting to discrimination. In this case, Ms. I has chosen as her comparator other declared refugees who are minors seeking reunification with their parents but who made the application within the time limit imposed by the provisions of the Act of 2015. I have referred to the observations of the European Court of Human Rights at paragraph 46 of its judgment as to what may amount to a distinction based on a characteristic that is necessary to engage Article 14. Ms. I has contended that she is being treated differently to other declared refugees who are minors seeking reunification with their parents by reason of the fact that she applied outside the twelve-month time limit. That is not something which in my view could amount to a distinction or a difference in treatment. Ms. I has not established that she enjoys some "other status" as that phrase is used by the European Court of Human Rights by reason of her failure to make an application within the twelve-month time limit. The provisions of s. 56(8) apply

without distinction to all declared refugees. There is no difference of treatment between various categories of declared refugees. The only difference is that Ms. I did not comply with the time limit. I fail to see how such a situation could give rise to a complaint of discrimination. After all, time limits are commonplace. I have already referred to some of the case law in relation to issues as to the constitutionality of particular time limits. Time limits are a part of our jurisprudence and for good reason, as has been explained in many of the cases dealing with time limits in the context of legal proceedings but there are also many time limits in other areas, such as the time limit at issue in these proceedings. There is nothing inherently wrong with the imposition of a time limit. I repeat the point made previously that the time limit at issue herein does not commence until such time as the applicant for family reunification has been granted a declaration of refugee status or international protection. Thus, it is difficult to see how the time limit could be said to be unreasonable. More to the point, there is nothing in these proceedings to suggest that the time limit in this case operated unfairly as between one category of refugee and another. Finally, if there are any doubts on the use of time limits in general, one only has to look at the position that pertains to lodging applications to the European Court of Human Rights itself, as the Minister pointed out. Thus, for the reasons explained, I am not satisfied that Ms. I has established that the time limit imposed by s. 56(8) of the Act of 2015 operates in such a manner as to amount to discrimination as far as she is concerned. In the circumstances I would dismiss her appeal in relation to the issue of compatibility of s. 56(8) of the 2015 Act with the ECHR.

Vested rights

134. Ms. I has referred to the provisions of s. 18 of the Refugee Act 1996 which was the section of that Act which allowed for family reunification. No time limit was contained within s. 18 as to when an application could be made. It is argued that as Ms. I was granted a declaration of refugee status while that Act was in force that she has a vested right to family reunification with her mother and father pursuant to the provisions of s. 18 of the Refugee Act 1996. Reliance is placed on the provisions of s. 27 of the Interpretation Act 2005 in support of her argument. It is of course recognised by Ms. I that the Act of 1996 has been repealed and that the Act of 2015 came into effect from the 31st December, 2016. That Act contains transitional provisions and at s. 69(1) the following is stated:

> "1. 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."

Reference was made in the course of the submissions on this issue to a number of well-known cases including the decision of the Court of Appeal of England and Wales in *Chief Adjudication Officer v. Maguire* [1999] 1 WLR 1778 and Ms. I sought in the course of her submissions to distinguish the facts of her case from a number of decisions in which a similar argument was rejected including the decision in the case of *S.G. (Albania) v.*

Minister for Justice [2018] IEHC 184 in which Humphreys J. commenting on the authorities and observed at paragraph 37:

> "There is no right to have a statute applied to one after its repeal merely because one has made representations about it prior to the repeal. Section 27 was clearly meant to cover vested rights such as property rights or matters of that nature, or situations where it would be clearly unjust to preclude the person from completing a process under the repealed legislation. None of those situations apply here."

Reference was also made to the decision of Keane J. in the case of *V.B. v. Minister for Justice* [2019] IEHC 55 in which he stated, having referred to the decision of Humphreys J. in *S.G. (Albania)* and O'Donnell J. in the case of *Minister for Justice, Equality and Law Reform v. Tobin (No. 2)* [2012] 4 IR 147 at pp. 352-3, and observed as follows:

> "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."

Counsel on behalf of Ms. I have sought to distinguish that decision from the circumstances in this particular case.

135. The Minister in his submissions referred also to the transitional provisions contained in the Act of 2015. The point was made that the issue of a vested right only arises for consideration where it is clear that the Act of 2015 did not intend to repeal the provisions of s. 18 of the 1996 Act but in fact intended that those provisions survived the repeal of the Act. In this regard reference was made to s. 4(1) of the Interpretation Act 2005 which provides as follows:

> "A provision of this Act applies to an 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."

The Minister places emphasis on the fact that s. 69(1) of the Act of 2015 contains a transitional arrangement and argues that it is clear that the Oireachtas intended that all declarations of refugee status given under the 1996 Act are now deemed to be given under the Act of 2015 and that the Act of 1996 does not survive having regard to the transitional provisions. Reference was also made to the provisions of s. 70 of the Act of 2015 which referred to applications which had previously been made under the Act of 1996 but had not at that stage been determined. Section 70 provided that insofar as applications made under the Act of 1996 and which had not been completed by the time of the repeal of that Act, that the Act of 1996 should continue to apply in respect of the application. However as pointed out no such application had been made by Ms. I prior to the commencement of the Act of 2015.

136. The Minister in his arguments goes on to refer to the decision in the case of *V.B.* referred to previously and whilst it is accepted that the facts in that case are somewhat different, nevertheless it is said that the ratio of the decision applies in the present situation. That case was followed by Barrett J. in the case of *X. v. Minister for Justice and Equality* [2019] IEHC 284 in relation to an application by a subsidiary protection declaration holder in respect of their children where it was stated by Barrett J. at para.1: "Nor does the Court accept that Mr. X had a vested right under the 2013 Regulations to seek family reunification; he had but a right to apply for same and did not do so; see *V.B. v. Minister for Justice* [2019] IEHC 55, paras. 47 to 49, 52." That decision was in fact the subject of an appeal to this Court and judgment was delivered in that case on the 9th June, 2020 in which the decision of Barrett J. on this issue was upheld.

Decision on the issue of vested rights

137. Ms. I had the option to make an application for family reunification once she received a declaration of refugee status. She did not do so, or perhaps, more accurately, no application was made on her behalf during the currency of the Act of 1996. The reason for this was stated to be the difficulty in making contact with her relatives. (I note that the trial judge was somewhat sceptical about the lack of evidence in this regard but for the purpose of this decision I take it that the reason for the delay was as stated.) Once the Act of 1996 ceased to have effect, there was a time limit in operation in relation to applications for family reunification. That fact was publicised by the Department of Justice and Equality. An application was ultimately made which was out of time. The trial judge in the course of his judgment on this issue said at paragraph 18 as follows:

> "The conclusion is that here, all that the applicant had was a right to take advantage of an enactment. That right ended on repeal, and was not the sort of vested right preserved by s. 27 of the 2005 Act. . . ."

138. I think it is important to have regard to decisions such as *V.B*. referred to above. It will be recalled that in that case, reference was made to the judgment of this Court in the case of *Minister for Justice v. Tobin (No. 2)* [2012] 4 IR 147 at paras. 446-447 in which O'Donnell J. stated as follows:

> "446. . . . The right that the appellant had acquired or which had accrued after *Minister for Justice v. Tobin* [2007] IEHC 15 & [2008] IESC 3, [2008] 4 I.R. 42 was a right not to be surrendered. However, that right could be taken away by a change in the law. Here the law had changed, and the specific question which had to be addressed, and for which s. 27 of the Act of 2005 provides guidance, is whether that change in the law was intended to merely remedy prospectively the legal flaw identified by the decision in *Minister for Justice v. Tobin* [2007] IEHC 15 & [2008] IESC 3, or to go further and ensure the appellant himself was to be subject to the possibility of future surrender for the offences which had been the subject of the request in *Minister for Justice v. Tobin*.
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> 447. The mere existence of a right does not preclude statutory interference with that right. Indeed, it may be relatively easy to infer such an intention in many cases."

139. I am satisfied that Ms. I had a right under the Act of 1996 which was unlimited by time. The legislature, as it was entitled to do, repealed the Act of 1996 and in doing so introduced new provisions in relation to family reunification. Those provisions included a time limit in s. 56(8) as we have seen. The Act also contained transitional provisions which meant that someone in the position of Ms. I had to make an application for family reunification within twelve months from the date of the Act of 2015 coming into force. It seems to me to be plain from the provisions of the Act of 2015 in relation to the repeal of the Act of 1996 and the fact that transitional provisions were included in that Act to deal with the position of someone like Ms. I that it cannot be suggested that she can rely on the provisions of s. 27(1) of the Act of 2005. Had Ms. I made an application pursuant to the Act of 1996, prior to its repeal, then assuming that the application had not been concluded, that application as provided for in the Act of 2015 would have been dealt with under the Act of 1996. As she did not make an application prior to the repeal of the Act of 1996 under its provisions, Ms. I had a period of twelve months from the coming into force of the Act of 2015 to make an application for family reunification. She did not do so and in the circumstances, I cannot see any basis for suggesting that she had a vested right to apply under the provisions of the 1996 Act. I therefore reject the arguments made on behalf of Ms. I in relation to vested rights. In the circumstances I would dismiss the appeal of Ms. I for the reasons given.

Finally, given the conclusions, I have reached it is not necessary to deal with the arguments as to prematurity.

Conclusion

140. The issues arising in these cases concerned the validity of various provisions of s. 56 of the Act of 2015. In the case of Mr. A and Mr. S it was contended that the provisions of s. 56(9) of the Act of 2015 were unconstitutional and incompatible with the ECHR on the basis of the distinction made in the section between pre-flight marriages and post-flight marriages. For the reasons indicated above, I have rejected the arguments of Mr. A and Mr. S and would allow the appeal of the Minister in those cases.

141. In the case of Ms. I, she has sought to argue that the imposition of a time limit in s. 56(8) of the Act of 2015 was unconstitutional and incompatible with the ECHR. She has also argued that she had a vested right to seek family reunification without any time limit having regard to the provisions of the Act of 1996, which was repealed by the Act of 2015. For the reasons outlined above I would dismiss her appeal.

142. Finally, it should be borne in mind that the door is not closed to Mr. A and Mr. S and Ms. I. It is open to all of them to make an application to the Minister through the Policy Document and no doubt, the Minister will exercise his discretion appropriately having regard to the particular circumstances of each of the individuals concerned.