THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 264

2022/161 JR

BETWEEN:

N.K.M.

Applicant

-AND-

THE MINISTER FOR JUSTICE

Respondent

Judgment of Mr Justice Cian Ferriter delivered this 17th day of May 2023

Introduction

1. In these judicial review proceedings, the applicant seeks to quash a decision of the Minister for Justice ("the Minister") refusing an application by the applicant for family reunification under the Irish Refugee Protection Programme Humanitarian Admission Programme 2 (known as "IHAP 2") ("the scheme") in respect of her 16 year old nephew, who presently lives in Kinshasa, Democratic Republic of the Congo ("DRC"). The applicant is an Irish national originally from DRC. Her nephew is the son of her brother, who died in DRC in 2014.

2. The basis of the application was that her nephew was a "*related minor child without parents, for whom she has parental responsibility*", one of the categories for eligibility under the scheme. As part of her application, the applicant provided evidence that she had adopted her nephew under Congolese law in July 2020. During the course of the application process, the applicant also submitted that her nephew was a "*vulnerable family member with no parent or (legal) guardian in DRC",* a different ground for eligibility under the scheme.

3. The application was refused on the basis that the applicant had failed to submit evidence of legal guardianship or adoption recognised under Irish law. This is said to be an error of law (on the basis that the question of parental responsibility in the context of minors from countries covered by the scheme could not be lawfully confined to adoptions recognised under Irish law, where none of the scheme countries is a party to the Hague Convention on inter-country adoptions) and to have involved regard to irrelevant considerations (i.e. the consideration of an adoption recognised under Irish law).

4. The Minister says, in summary, that there is no error of law or regard to irrelevant considerations in the decision. She says that the decision involved fact-specific findings and that the decision should be read in light of the documents generated in the process as a whole which make clear that there were legitimate policy concerns about acceding to the application (including concerns in relation to the nephew's mother's whereabouts and whether the nephew's carer was consenting to the transfer) which rendered the decision one which the Minister was entitled to arrive at.

5. In order to protect the privacy interests of the applicant's nephew, I will refer to him in this judgment as "the nephew". Similarly, I will refer to the woman (said to be a close relative) presently looking after the nephew in Kinshasa as "Ms. N".

Background

6. The applicant was born in DRC and lived there until 2000, when she arrived in the State. She applied for refugee status but withdrew her application when she was granted permission to remain in the State as the parent of an Irish citizen. She was naturalised as an Irish citizen on 20 March 2013. The applicant works as a care assistant and lives with her husband and children in Dublin.

7. The applicant's nephew was born in October 2006. He is the son of the applicant's brother, who died in DRC in 2014. In the years prior to his death, the applicant's brother was unaccounted for and she believed him to be dead. The applicant says that the whereabouts of her nephew's mother are unknown, that she has not been seen in many years and that she believes her to be dead.

8. As her nephew has no parents to care for him, the applicant says that she assumed parental responsibility for him: she has discharged the costs associated with his day-to-day living expenses including maintenance, school fees, and medical fees. Her nephew currently lives in Kinshasa with a relative, Ms. N, whom the applicant says cares for her nephew on the applicant's behalf.

The IHAP 2 scheme

9. The details of the scheme, including its eligibility criteria, are published on a page on the website of the Minister's department. Under the scheme, Irish citizens, persons with refugee status, subsidiary protection status or programme refugee status could apply (or "propose") for eligible family members to join them in Ireland. In order to qualify for the scheme, family members were required to be nationals of one of the following countries: the Syrian Arab Republic, Afghanistan, South Sudan, Somalia, Sudan, the DRC, the Central African Republic, Myanmar, Eritrea and Burundi. This list was based on the UNHCR Annual Global Trends Report, with the countries included in IHAP 2 being the "top ten major source countries of refugees." The call for proposals under IHAP 2 was open from 20 December 2018 until 8 February 2019. The relevant webpage makes clear that permissions under the scheme are granted by the Minister on a discretionary basis.

10. The scheme provided for seven categories of eligible family member beneficiaries as specified in the terms of the scheme as promulgated on the website of the Minister's department. These categories included the following categories which are relevant to these proceedings:

- ***"A related Minor Child without parents for whom the proposer has parental responsibility*** * *(The related Minor Child must be unmarried and without dependents) e.g. Orphaned Niece/Nephew/Grandchild, Sibling)"*

  The asterisked note to this category states "where a **proposer** does not have sole parental responsibility, the consent of the person that shares responsibility will be required"

- ***"A Vulnerable Close Family Member who does not have a spouse/partner or other close relative to support them."***

(highlighting in original)

11. The other categories include "***The Proposer's Minor Child*** *(where the Minor Child is not eligible for reunification with a sponsor under the terms of the International Protection Act 2015. The Minor Child must be unmarried and without dependents)."*

12. The terms of the scheme stipulated, under the heading "documents required" in the section headed "*How do I make a proposal for the IHAP?*", that "evidence of legal guardianship" must be provided if the proposed beneficiary is "a related minor child". This section of the scheme's terms also stated "*if you are not able to supply any of these documents or supporting evidence with the form, please state why you are not able to do so on the proposal form. This checklist is not exhaustive. It is the responsibility of the proposer to ensure that they provide all of the supporting documentation required to support the proposal.*"

13. Applicants under the scheme were required to fill out a standard application form. The application form framed the two categories relevant to these proceedings as follows:

> ***"A related Minor Child without parents for whom the proposer has parental responsibility **** *(The related Minor Child must be unmarried and without dependents) e.g. Orphaned Niece/Nephew/Grandchild, Sibling) [<u>Important</u>: Evidence of Legal Guardianship will be required. If this is not possible, you must give a detailed and compelling explanation for the inability to provide this evidence].*
> **In certain circumstances, where a proposer does not have sole parental responsibility, the consent of the person that shares responsibility will be required.*
>
> ***A Vulnerable Close Family Member who does not have a spouse/partner or other close relative to support them".***
>
> (highlighting and emphasis in original)

The applicant's application under the scheme

14. On 8 January 2019, the applicant's solicitors lodged an application under the scheme seeking permission for the applicant's nephew to join her in Ireland. The basis of the applicant's application was that her nephew was "*a related minor child without parents, for whom she has parental responsibility*".

15. When completing the application form, the applicant described her "*relationship to proposer in Ireland*" as "*nephew and ward. I have parental responsibility for him*."

16. The applicant enclosed a statement from Ms. N in support of the application. In that statement Ms. N described herself as a housewife residing at an address in Kinshasa where the nephew "is living after his father's death". She certified "as a close relative" the nephew's date of birth, his father and his father's date of birth. She stated that "*since the death of* [the nephew's father] *in Kinshasa on 10 March 2014, his mother has not been seen for a long time and that* [the nephew] *and all his needs regarding maintenance, school fees, medical fees have been taken care of by* [the applicant] *who is residing in the Republic of Ireland at the moment*."

17. It will be noted that while the applicant described her nephew as an orphan, Ms. N in her statement stated that his mother had not been seen for a long time. The applicant through a letter from her solicitors of 17 January 2020 stated that her nephew was orphaned at a young age although it was also later said on her behalf (in a letter of 2 September 2020 from her solicitors to the Minister's department) that her nephew's mother "has been missing for many years" but that she did not have official documentation to prove this. In her affidavit verifying her statement of grounds in these proceedings, the applicant averred that her nephew's mother "abandoned him when he was a young child and has not had any part in his upbringing".

July 2019 refusal of application and subsequent course of events

18. By letter of 8 July 2019, the Minister refused the application on the basis that the application was incomplete. The Minister said that the applicant had failed to provide evidence of her familial relationship to her nephew as neither the applicant nor her husband had referenced her nephew's parents as siblings in their asylum applications.

The letter referenced UNHCR guidelines on the assessment of a proposal involving a minor child which stated that the following would be taken into consideration: "[whether] *the best interests of the minor child will be served by travelling to reside in the State*". The letter referenced that part of Ms. N's statement which stated that the nephew's mother had not been seen for a long time and that his needs were being taken care of by the applicant and then stated "*it is considered not to be in the best interests of the child to be granted permission to reside in the State when his mother, although her current whereabouts is not known, may be residing in the DRC*". The Minister also stated that Ms. N's statement did not adequately identify the nephew's current caregiver (stating only that "she is a close relative") and stated that "*in the case of a proposed minor beneficiary, the following supporting documentation is required: the signed consent from the current carer of the minor beneficiary allowing for him to travel to permanently reside in Ireland*" and specified that a certified copy of a valid passport or national identity card in respect of the current carer was required and that "*death certificates in respect of the parents of the minor beneficiaries, if applicable, are also required*".

19. It appears that this decision of 8 July 2019 was not received by the applicant or her solicitors at the time and the applicant did not find out about the decision until after she was notified of the outcome of a review of the decision, which was notified to her on 11 February 2021. As we shall come to, the applicant challenged the review decision of 11 February 2021 by way of judicial review and the judicial review proceedings were settled on the basis that the original decision was withdrawn and a fresh decision would be issued. The fresh decision was made on 15 December 2021 and is the subject of this application for judicial review.

20. The applicant changed solicitors after she lodged the scheme application and her new solicitors made a subject access request ('SAR') to the Minister in May 2019. As the SAR response related only to documents on file at the time the SAR was made, the July 2019 decision was not included. The SAR response contained an undated "IHAP processing sheet" which outlined a number of alleged deficiencies in the applicant's initial application: one such deficiency was that Ms. N's statement did not expressly give permission for her nephew to travel to the State and did not clarify whether the Ms. N was her nephew's current carer. Unaware that a first instance decision had been

given, the applicant's solicitors emailed the Minister on 3 October 2019 seeking time to take instructions and to supply evidence to address these issues. This email was not acknowledged by the Minister.

21. The applicant's solicitors then followed up by letter to the Minister on 17 January 2020 seeking to address the concerns raised in the processing sheet obtained via the SAR. The letter clarified that the applicant did not mention her brother as a sibling in her asylum application, as at the time the application was made, she believed him to be dead. It also contended that Ms. N's consent was not required for her nephew to travel to the State as she was not his legal guardian.

22. The applicant then formally adopted her nephew for the purposes of Congolese law on 8 July 2020.

23. The translated adoption certificate references "*the adoption judgment of 21 July 2020 rendered by the Kinshasa/Gombe Children's Court and the family code in force in the Democratic Republic of Congo, especially sections 651, 653, 655*", making clear that the adoption order was made a court. It stated as "*reason for adoption: lack of parents means*." The certificate also states that the child was born of the union of the nephew's father (who is recorded as deceased and having been a policeman) and the nephew's mother who is described as a housekeeper residing at an address in Kinshasa. The original adoption certificate referred to the applicant with an address in Kinshasa (said by the applicant to be a temporary address which she was renting while staying in Kinshasa for a few weeks holiday). The adoption certificate was later corrected to properly record the applicant's address in Ireland. The applicant says that the address for her nephew's mother listed on the adoption certificate is a different address to that listed for her on her nephew's birth certificate and that she believes that the address on the certificate may be the registered address of the mother's family home where the mother was born.

24. Still unaware of the July 2019 decision, in July 2020 the applicant's solicitors wrote to the Minister seeking a response to the letter sent in January of that year. An update was again sought from the Minister on 2 September 2020. In this letter, the applicant's solicitors stated that the application presented "*exceptional humanitarian*

considerations, particularly given that [the applicant's nephew] *is a minor child with no parents or guardians in the DRC*".

25. The applicant's solicitors wrote to the Minister on 22 September 2020 with a copy of the Congolese adoption order. As this order confirmed that the applicant had adopted her nephew as a matter of Congolese law, it was argued that it was evidence that the Congolese authorities acknowledged the applicant's close relationship to, and responsibility for, her nephew. The letter stated, "*we accept that the Irish state does not acknowledge overseas adoptions unless certain conditions are met, and the adopting parent must hold a declaration of eligibility and suitability from the adoption authority prior to entering into a legal adoption. However, although this adoption may not have legal effect in Ireland, we are submitting it as evidence of the close relationship between* [the applicant] *and her nephew, and the lack of any other suitable carer for the child, which has been recognized by the Congolese authorities by approving this adoption*".

26. A further letter was issued by the applicant's solicitors to the Minister on 14 October 2020, seeking a response on the matter. This letter included a certified translation of the adoption order sent to the Minister on 22 September 2020. This letter stated "*it may be the case that this adoption is not recognized by Irish law, or the principles of the Hague convention. However, we submit it is compelling evidence of our client's responsibility towards her young nephew who is undoubtedly a vulnerable family member for the purposes of the IHAP scheme… We ask you to consider the applicant's right to protection for family life under the ECHR act and the Irish Constitution, and the best interests of the minor child in this matter*".

27. Still unaware of the July 2019 decision, an update was sought by the applicant's solicitors on 25 November 2020. The Minister wrote to the applicant's solicitors on 2 December 2020, stating that a "review" was being carried out regarding the application. Only at this point did the applicant and her solicitors appreciate that a first instance decision had likely been made in her case.

28. On 15 January 2021, the applicant's solicitors wrote to the Minister questioning the "review" in the 2 December 2020 letter and seeking confirmation that a first instance decision had been made in her case. The letter stated "*we are of course conscious that this proposal involves complex issues regarding adoption in a foreign jurisdiction.*

However we were hoping the proposal may be able to be granted under the "vulnerable family" category [i.e. the second category of eligibility referred to earlier]. *We do understand that you need to be satisfied that was no issue of parental consent outstanding*." The letter requested that the Minister let the applicant know what remaining issues are to be determined so that she would be given the opportunity to assist and noted that "*she is prepared to travel to the Congo to gather more evidence*".

29. The Minister notified the applicant and her solicitors, on 11 February 2021, of the decision to uphold the original decision of 8 July 2019. This decision confirmed to the applicant and her solicitors, for the first time, that a first instance decision had been made in her case on 8 July 2019. The reasons given for upholding the decision was that as an Irish citizen, the applicant was bound by the laws and legislation of the State, and could not therefore formally adopt a child from DRC as DRC was not a signatory to the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption (the 'Hague Convention').

30. As already noted, the applicant challenged the decision of 11 February 2021 by way of judicial review and that case was settled, resulting in a fresh first instance decision being provided on 15 December 2021. That decision is the decision under challenge in these proceedings.

31. On 11 October 2021, the applicant's solicitors wrote to the Minister enclosing an amended Congolese adoption certificate containing her address in Dublin. The letter also enclosed counsel's written submissions that had been made in support of the earlier judicial review. This letter again made the point that even though her adoption of her nephew might not satisfy Irish adoption, he was a vulnerable family member with no parents or guardians in DRC, and that the case therefore presented exceptional humanitarian considerations. A follow-up letter from the applicant's solicitors was sent on 15 November 2021 seeking a decision in the case.

The Impugned Decision

32. On 15 December 2021, the Minister issued her fresh decision, refusing the applicant's application on the essential basis that the applicant had not submitted evidence of legal guardianship or an adoption recognised under Irish law.

33. In light of the arguments advanced at the hearing, it is appropriate to set out the material parts of the decision in full, as follows:

> *"Having reviewed the file on the IHAP application and the submissions received in this office, I have decided that your client's IHAP application is refused. The following paragraphs contain the reasons for this decision.*
>
> *While I am satisfied that there is sufficient documentary evidence on file now to support your client's statement that* [the nephew] *is her nephew, this relationship would have to be supported with evidence of legal guardianship or a recognised adoption and permission for him to travel to and reside in Ireland from the adult carer with whom the minor lives in order for permission to be granted under IHAP.*
>
> *As your client is a citizen of Ireland since before the date on the adoption certificate and she is resident in Ireland, any adoption concerning a child residing outside of Ireland would be treated as an inter-country adoption in Irish law.*
>
> *As noted in our letter dated 11/02/2021, the adoption certificate that was submitted shows that it was carried out in the Democratic Republic of Congo, which is not a signatory to the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption and with which Ireland does not have a bilateral agreement. Ireland is a signatory to this Convention and does not recognise adoptions carried out in any country that is not a signatory. Therefore, we are not in a position to accept the adoption certificate.*
>
> *I note from your letters, dated 14/10/2020 and 11/10/2021, that you have requested that your client's IHAP application be considered under the alternative category of "vulnerable family". At the time of application, your client selected the category "related minor child without parents for whom the proposer has parental responsibility", which specifies that the applicant must submit evidence of legal guardianship.*

The statement that was submitted on behalf of the adult carer of the minor beneficiary does not specify the relationship between them and it does not contain any reference to legal guardianship or parental responsibility on the part of the proposer or any other person. Counsel for your client stated in paragraph 14 of his submission that the adoption certificate was provided as evidence of parental responsibility, however the adoption must be recognised in order for it to be accepted for any purpose.

I am happy to consider the application under either category but it does not remove the requirement on this office to consider the vulnerability of minors to exploitation, in particular to child trafficking, and to comply with the obligations as a signatory to the Hague Convention, therefore I must still require evidence of legal guardianship or an adoption recognised in Ireland. I note from paragraphs 17 and 18 of the submission by Counsel for your client, dated 04/05/2021, that he stated that it would be open to your client to pursue the recognition of the adoption under section 81 of the Adoption Act 2010. To date, this office has not received any indication that your client has made any attempt to engage with the Adoption Authority of Ireland regarding the adoption.

As no evidence of legal guardianship or an adoption recognised in Ireland has been submitted and no evidence of engagement with the Adoption Authority of Ireland has been provided, I am refusing the IHAP application."

34. The applicant now seeks to quash this decision on the grounds that the Minister has misapplied the scheme and taken account of irrelevant considerations.

The parties' submissions

35. The applicant's essential point is that the Minister erred in law in making it a *sine qua non* of a successful application under the relevant categories of the scheme that the applicant demonstrate a legal guardianship or an adoption recognised in Irish law.

36. In broad terms, the Adoption Act 2010 Act ("the 2010 Act") sets out four ways in which an adoption from another country (an inter-country adoption) can be recognised as an adoption under Irish law:

a) Where the adoption took place in accordance with the Hague Convention: s.57(2)(b)(ii) of the 2010 Act;
b) where the State has a bilateral agreement with the country where the adoption took place: ss.57(2)(b)(ii) and 73 of the 2010 Act;
c) where the State enters into a once-off agreement with the country where the adoption took place in respect of an individual child who has been adopted by relatives who are habitually resident either in that country or in the State: ss. 57(2)(b)(ii) and 81 of the 2010 Act;
d) where the adoptive parent was habitually resident in the country where the adoption took place at the time when the adoption took place: s.57(2)(b)(i) of the 2010 Act.

37. The applicant says that she could not and would never have been able to satisfy the requirement of an adoption recognised in Irish law, as DRC is not a signatory to the Hague Convention. The State has not entered into any bilateral (or once-off) agreements with DRC or any other state for the purposes of the 2010 Act. The applicant points out that none of the countries included in the IHAP 2 scheme is a signatory to the Hague Convention. As such, the applicant submits that the interpretation advanced by the Minister is one which effectively precludes all applications in the "related minor child" category relating to children who may be the subject of an adoption in a scheme country and where parental responsibility is present in fact, which is at odds with the plain intention of the scheme.

38. In a related argument, the applicant submitted that the terms of the scheme required only for applicants to show "evidence of legal guardianship" where their proposed beneficiary was a "related minor child". By importing a requirement to show evidence of legal guardianship or adoption recognised in Irish law, it was argued that the Minister introduced a condition which was not expressed in the terms of the scheme itself, which could not be fulfilled and relied on same to the exclusion of the applicant). In so doing,

the applicant submitted that the Minister erred in law, and took into account irrelevant considerations.

39. In his able submissions, counsel for the Minister contended that the decision should be properly read in context as a fact-sensitive decision with conclusions that were perfectly open to the Minister to lawfully arrive at on the application before her. He submitted, in reliance on *dicta* of Humphreys J. in *Killegland Estates v Meath County Council* [2022] IEHC 683, that the court was entitled to have regard all the circumstances surrounding the decision when interpreting the reasons for the decision, including other documents before the Minister when the decision was made. He submitted that a key part of the relevant context was that there remained a legitimate question mark over the whereabouts of the nephew's mother, this being an issue raised in the internal analysis which supported the (subsequently withdrawn) original decision of the Minister of 8 July 2019, where it was stated that "*no death certificate was provided in respect of* [the nephew's mother]. *Although it is stated that her whereabouts are unknown, she may still reside in DRC and like her husband did previously, she may return to her home.*" He submitted this was also evident from the applicant's own correspondence, through her solicitors, which at various points described the nephew as an orphan while also stating that his mother had "not been seen for a long time".

40. Furthermore, it was submitted that this was a situation where no adoption certificate at all was furnished with the initial application under the scheme but rather the applicant travelled to DRC to obtain such a certificate in circumstances where she had been an Irish resident for a long number of years and where there was no evidence (apart from the evidence of financial support for her nephew provided through his carer's statement) that the applicant had ever existed in a *de facto* parental relationship with her nephew; it was accordingly open to the Minister to take the view that the applicant's nephew was in fact in the *de facto* guardianship of his carer in DRC who had not, despite the issue being raised with the applicant during the course of the process, stated that she consented to the applicant's nephew travelling to Ireland. It was said that this context to the case supported concerns as to exploitation of children and Ireland's obligations under the Hague Convention as this was a scenario where an adoption certificate was obtained specifically for the purposes of obtaining a permission under the scheme. Counsel for the Minister accepted that the concerns in relation to vulnerability of minors

to exploitation and Ireland's Hague Convention obligations would likely carry less weight if there was clear evidence that the nephew's mother was in fact dead.

41. Counsel for the Minister emphasised that the Minister was not making the case that an unrecognised adoption could never be evidence of parental responsibility; he submitted that, equally it was not the case that an unrecognised adoption automatically established parental responsibility as a matter of Irish law under the scheme. Counsel for the Minister also submitted that the applicant herself was aware of the difficulties in bringing her application within the relevant category of the scheme, as evidenced by the fact that she chose mid-process to also apply under the category of "*vulnerable close family member who does not have a spouse/partner or other close relative to support them.*"

Discussion

42. I should say at the outset that, despite the submissions made on behalf of the Minister that the decision was justified when viewed in context by the facts of the case (such as the question marks over the nephew's mother's whereabouts, whether Ms. N should more properly be regarded as the nephew's guardian and the timing and circumstances of the procurement of the Congolese adoption order), in my view this is a situation where the reasons for the decision are evident on the face of the decision itself and there is no requirement to have recourse to other documents in the process to make sense of the decision or to discern the precise basis of the decision. This is clear from the terms of the decision itself where the decision-maker expressly states that "*Having reviewed the file on the IHAP application and the submissions received in this office, I have decided that your client's IHAP application is refused. The following paragraphs contain the reasons for this decision.*" Those "following paragraphs" clearly set out the basis for the decision and it does not seem to me to be open to the Minister to now supplement those reasons with grounds for refusal that might otherwise have been open based on material on the file.

43. Accordingly, in my view, the real issue for determination in this judicial review is whether the Minister erred in law in the reasons set out in the decision and not whether

it might otherwise have been open to the Minister to lawfully refuse the application based on the material before her.

44. It is clear from the terms of the decision that it is based on a view of the decision-maker that an adoption order made in a scheme country such as DRC needed be recognised in Irish law in order for it to be accepted for any purpose under the scheme whether as evidence of parental responsibility in relation to the category of a related minor child without parents for whom the proposer has parental responsibility or as a fact supporting a contention that a proposed beneficiary was a vulnerable family member who did not have a close relative to support them. In my judgment, that view is erroneous as a matter of law, for the reasons that follow.

45. As we have seen, both the notes to the scheme document and the content of the application form in respect of the parental responsibility category state that evidence of legal guardianship is required, while caveating this requirement by stating that if this is not possible, the applicant must provide a detailed and compelling explanation of the inability to provide such evidence. It seems to be that this recognises that a relationship between a related minor child and an applicant may be *de facto* one of parental responsibility in circumstances where legal guardianship has not been formally obtained or recognised in either Ireland or the source country. The Minister fairly acknowledged in her submissions that parental responsibility might arise in cases of *de facto* guardianship, stating that "*while it is not possible to exhaustively define the circumstances in which de facto guardianship will occur, the essential question will be whether the sponsor has been genuinely exercising parental rights and responsibilities over a minor.*" I agree with that statement: the essential question for this category of eligibility is whether the applicant has been genuinely exercising parental rights and responsibilities over the minor child the subject of the application.

46. In my view, consistent with the approach taken by Cooke J. in *Hassan v Minister for Justice, Equality and Law Reform* [2010] IEHC 426, it would be wrong to approach the question of parental responsibility in the relevant category of the scheme solely by reference to the concepts of legal guardianship or adoption as understood and recognised in Irish law. The scheme is a humanitarian one designed (through this category of eligibility) to offer family reunification for vulnerable children with an adult

relative resident in Ireland who fulfils the role of parental responsibility where the child's parents are dead (or, as fairly accepted by the Minister, where the parents' whereabouts are unknown and there is no realistic prospect of the parents coming back into the child's life). The concept of parental responsibility in the scheme needs to be interpreted to reflect the reality that the role of parental responsibility may be fulfilled in substance where a formal legal order cognisable in Irish law may not exist in the scheme country in question but where all the circumstances point to the role of parental responsibility being fulfilled by the applicant towards the child in question. Such circumstances could legitimately include the fact that the child had been legally adopted in a scheme country even where that adoption has not been recognised in Irish law (and, indeed, may not be capable of being recognised in Irish law).

47. By definition, the countries included in the scheme are not parties to the Hague Convention and therefore to effectively insist on a requirement under the scheme that an adoption be made in a country which is a party to the Hague Convention would be to impose a requirement incapable of being fulfilled. I would also observe that a requirement that an adoption could only be reckoned under this category of the scheme if the adoption had been recognised as a matter of Irish law would in fact makes no sense on its own terms as if the adoption was recognised as a matter of Irish law, the child in question would be the applicant's child as a matter of Irish law and the child would not come within the category in question in any event.

48. I fully appreciate that the issue of inter-country adoption and the status of unrecognised foreign adoptions in Irish law is a complex one. However, one was to keep in mind the context of the scheme and its purposes. Many of the countries covered by the scheme are war-torn and may not have had properly functioning legal and civil administrations where legal guardianship (or, indeed, legal adoptions) could be obtained for children whose parents are dead (or long since missing and unlikely to resurface to care for their children). It would undermine the purposes of the scheme if, notwithstanding that an adult relative resident in Ireland has in fact been fulfilling the role of parental responsibility to a child from a scheme country and where the best interests of the child would be advanced by uniting that child with the Irish resident adult relative, an application was nonetheless bound to fail because an adoption order from a scheme country is not recognised (indeed, may be incapable of being recognised) in Irish law.

49. In applying the scheme to categories of children who are by definition vulnerable, the Minister is of course entitled to adopt an approach which involves rigorously scrutinising such applications and only granting applications if satisfied that it is genuinely in the best interests of the child to be united with the applicant in the State. While the Minister may, on any given set of facts, be perfectly entitled to refuse an application based on a foreign adoption order, in my view, it was not correct in law to refuse the application on the essential basis that the adoption was not recognised in Irish law and therefore that it could not be accepted for any purpose under the scheme. Rather, in my view the correct legal analysis of the scheme is that a foreign adoption order is a factor to which regard should be had when assessing whether eligibility within this category is made out. An unrecognised foreign adoption may be very consistent with a *de facto* guardianship or a *de facto* position of parental responsibility; equally, such an adoption may not be sufficient to demonstrate parental responsibility on the overall facts of a case. The assessment will inevitably be fact-sensitive. However, in my view the Minister erred in adopting the position in this decision that the adoption simply couldn't be accepted for any purpose under the scheme because it was not one recognised in Irish law.

50. It is of course the case that the fact of such a foreign adoption order does not of itself oblige the Minister to grant an application under the scheme; this would be to treat a foreign adoption order as one recognised in Irish law when that is not in law the case. Rather, the weight be attached to the fact of an adoption granted in a scheme country is a matter for the decision-maker, taking into account all the circumstances of the case. For example, there may be question marks over the legitimacy or validity of the adoption order or the circumstances of its procurement. The child's true care situation may be such that, notwithstanding such an adoption order, *de facto* parental responsibility or guardianship was being undertaken by a party who is not the applicant and it is in the child's best interests that that care relationship continues. However, the simple point remains that on the facts of the case before me it was not correct as a matter of law to require that the DRC adoption order be recognised as a matter of Irish law in order for it to reckoned in the applicant's application under the scheme.

51. I wish to make it clear that in arriving at that decision I am not to be taking as expressing any view on the overall merits of the applicant's application under the scheme, still less that the Minister was required to accede to the application under the scheme simply because the applicant had obtained an adoption order in DRC in respect of her nephew.

Conclusion

52. In the circumstances, I propose to grant an order of *certiorari* quashing the decision of the Minister and remitting the matter to the Minister for a fresh decision.

53. Given the complex range of factors which potentially arise in this case (including the nephew's mother's whereabouts, any attempts to obtain updated information as to same and the reality of whether she is likely to re-enter the nephew's life; the extent of the applicant's relationship with her nephew, apart from financial support; the scope and effect of the adoption order as a matter of DRC law; the views of Ms. N as to whether it would be in the child's best interests to be reunified with the applicant in Ireland and whether she is consenting to his proposed transfer to the State; and, potentially, given his age, the child's own views) and in light of the terms of this judgment, it would seem to me to be appropriate to allow the applicant, following the remittal of the matter, to make such supplemental submissions as she may wish to make in support of her application and for the Minister then to make a fresh decision on the application in light of such submissions.