

# THE HIGH COURT

## JUDICIAL REVIEW

[2022] IEHC 378

[2021/852 JR.]

**BETWEEN**

**RA**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE**

**RESPONDENT**

### **JUDGMENT of Mr. Justice Cian Ferriter delivered on the 21<sup>st</sup> day of June 2022**

#### **Introduction**

1. These judicial review proceedings arise from findings made by the respondent (the “Minister”) that the applicant fraudulently submitted false or misleading documentation or information in the context of a residence card application and that he contracted a marriage of convenience. Those findings were contained in a decision of 8<sup>th</sup> July, 2021 (the “review decision”) in which the Minister decided to revoke and render void *ab initio* a “stamp 4” residence permission granted to the applicant. That permission had been contained in a residence card granted to the applicant on 6<sup>th</sup> November, 2013 on the basis that the applicant was a spouse of an EU national whom he had married in Ireland on 14<sup>th</sup> February, 2013. The residence card had been granted to the applicant pursuant to powers of the Minister contained in SI No. 548 of 2015, the European Communities (Free Movement of Persons) Regulations, 2015 (the “2015 Regulations”). The 2015 Regulations were introduced to give effect to the provisions of Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (known variously as the “Free Movement Directive” and the “Citizens Directive”).

2. The applicant seeks an order of *certiorari* quashing the review decision. The applicant’s essential case is that the decision was arrived at in breach of fair procedures and due process. He contends that the decision made findings about the submission of false or fraudulent

documentation and information, without identifying the documentation or information said to be fraudulent and, therefore, without giving the applicant an adequate opportunity to rebut the allegations of reliance on fraudulent material. The applicant also complains about an inappropriate shifting of the burden of proof in circumstances where a serious finding of fraud lay at the heart of the impugned decision. The applicant also maintains that the evidential basis for the finding of a marriage of convenience was not sufficiently strong and that the Minister failed to properly engage with the evidence in fact advanced on his behalf in support of his position, thereby failing to have regard to relevant evidence.

3. The Minister, for her part, maintains that the process engaged with was compliant with fair procedures and, in particular, that the reasonable grounds for the Minister suspecting that the marriage was a marriage of convenience were clearly identified and notified to the applicant, and that the applicant had every reasonable opportunity to make his case in relation to the allegation that the marriage was one of convenience. The Minister submits that she complied with the requirements of the 2015 Regulations as regards the investigation and determination of the suspicion that the applicant's marriage was a marriage of convenience.

### **Factual Background**

4. The applicant is a national of Pakistan who arrived in the State as a student on 29<sup>th</sup> February, 2007, when aged 22 years. He received a "stamp 2" student visa which was renewed annually until 30<sup>th</sup> September, 2012. The terms of his student visas were such that he was not permitted to work for more than 20 hours a week. He was enrolled in Grafton Business College in Dublin.

5. It appears that the applicant was engaged in full time employment during the currency of his student visa permissions, in breach of the conditions of those permissions.

6. The applicant says that he met MD, a Swedish citizen, while she was on holidays in Dublin in August 2012. They remained in contact when MD returned to Sweden. MD came back to visit the applicant later in 2012 and they decided to continue their relationship. He said that she moved to Ireland full time in December 2012 and obtained employment here. It seems that MD obtained her PPSN in the State on 1<sup>st</sup> November 2012.

7. The applicant and MD married on 14<sup>th</sup> February, 2013. It appears that they would have submitted a notice of an intention to marry three months before that, being 14<sup>th</sup> November, 2012.

8. Following their marriage, on 1<sup>st</sup> May, 2013, the applicant submitted an application for EU treaty rights pursuant to the 2015 Regulations. This application was approved and he was granted a “stamp 4 EUFam” which was valid until 5<sup>th</sup> November, 2018, i.e. for five years. As his passport was only valid until 11<sup>th</sup> August, 2016, it appears that the applicant’s EU residence permission was valid only up to that date.

9. The applicant says that, in or around August, 2015, he and MD began to encounter difficulties in their relationship and, in September, 2015, MD returned to Sweden after she had lost her job and the relationship had broken down. He says that MD returned to visit him over Christmas, 2015 and, by that stage, it had become apparent to both of them that the marriage had irreparably broken down and there was no prospect of reconciliation. Divorce proceedings were initiated in Sweden in September, 2016 and the Swedish courts granted an order of divorce on 6<sup>th</sup> March, 2017.

10. Regulation 11(2) of the 2015 Regulations, headed “*Retention of Rights of Residents*” provides, *inter alia*, that a family member of an EU citizen who is not a national of a Member State must notify the relevant authorities of a change in marital status including a divorce. The applicant accepts that he did not inform the Department upon departure of his wife from the State, or at the time of their divorce. He did, however, instruct a firm of solicitors in June 2017 to write to the Minister to seek to regularise his status. In this application of 28<sup>th</sup> June 2017, the applicant informed the Residence Division of the Minister’s Department of all of the details of his marriage including the fact it had broken down and the departure of his wife from the State. He says that he did so in circumstances where he was aware that he could not continue to hold the residence status which had been granted to him and, as a result, he was seeking alternative permission which would enable him to remain and continue to work as he had always done since he arrived in the State. He was hopeful that the Minister would take a pragmatic view of his situation. The application of 28<sup>th</sup> June 2017 is referred to as a “*change of status*” application. It is an application to the Minister to invoke her executive discretion under s.4(7) of the Immigration Act, 2004, as amended. The Minister, ultimately, declined to exercise her discretion under s.4(7) in the applicant’s favour.

11. By letter of 6<sup>th</sup> November 2018, a different section of the Minister's Department (being the EU treaty rights section) wrote to the applicant stating that it had come to their attention that his wife no longer resided in the State. This letter indicates an intention to revoke the EU treaty rights permission which had been given to the applicant on 6<sup>th</sup> November 2013. It stated "*it has come to the attention of this office [the EU treaty rights section of the Department] that the EU citizen [to whom the applicant had been married] is no longer resident or exercising her EU treaty rights in the State in accordance with the provisions of Regulation 6(3) [of the 2015 Regulations].*" The letter went on to state that:

*"As you are aware the rights of a third country national is a derived right based on the EU citizen residing and exercising their EU Treaty Rights in the State under Regulation 6. As your EU family member left the State and has not exercised their rights here since 2015, your derived right of residence ceased to be valid in 2015."*

12. The letter invited written representation from the applicant as to why his derived right of residence should not be treated as ceasing in 2015.

13. The applicant's solicitors replied to that letter, by letter of 19<sup>th</sup> November 2018, confirming that the applicant did not wish to seek a review of the decision, and asking instead for a determination on his application for stamp 4 permission pursuant to s.4(7) Immigration Act 2004.

14. On 10<sup>th</sup> December 2018, the Minister's Department sent an addendum to the intention to revoke letter of 6<sup>th</sup> November 2018. In this letter, the Department noted the fact of the approval of the applicant's EU family residence application on 6<sup>th</sup> November, 2013, the fact that the applicant had notified through his submissions of June, 2017 that he and his spouse were residing at separate locations in July, 2015 as their relationship was failing, and that MD had returned to Sweden in September, 2015, and that the marriage was dissolved by divorce on 6<sup>th</sup> March, 2017.

15. A "*number of points of concern*" were said to arise from those circumstances. These concerns, as set out in the letter, can be summarised as follows:-

- (i) The applicant failed to inform the Department of the change in situation in his relationship with MD contrary to Regulation 11(2) of the 2015 Regulations notwithstanding that had been advised in his permission letter of 6<sup>th</sup> November, 2013 to keep the office up to date as to any change in circumstances.
- (ii) The letter stated *“the Minister is of the opinion that you deliberately contrived to conceal MD’s absence from the State for almost two years in order to superficially maintain the permissions to remain which had ceased to be valid from the time your EU spouse left the State”* and expressed concern at the applicant’s disregard for the provisions of the 2015 Regulations by continuing to work in the State when he did not hold a valid permission for same.
- (iii) That the date of his student registrations took place almost exactly one month after his previous permissions had expired.
- (iv) That records indicated that he engaged in full time employment in the State since February, 2007 which was in breach of the conditions of his student permission.
- (v) The Minister *“has concerns that you contrived to enter into marriage with an EU national... in order to obtain a secure residence permission in the State”*.
- (vi) The Minister was of the opinion that he did not approach GNIB on the expiry of his residence card or inform the EU treaty rights office of his change in status *“as to do so would have brought attention to your situation and to the cessation of your derived permission to remain at that time”*.
- (vii) That there was a short time between *“you allegedly entering the State, her receipt of a PPSN (on 1/11/12), your marriage and your submission of a residence application based on this marriage”*.

16. The letter then stated:

*“Based on the above, the Minister is of the opinion that the documentation you provided in support of your application to evidence the residence of you and your spouse in this State is false and misleading as to material fact. The Minister is also of the opinion that the documentation you provided to evidence the exercise of rights by your spouse in the State are also false and misleading as to material fact. You knowingly submitted this documentation in order to obtain a right of residence which you otherwise would not enjoy. This constitutes a fraudulent act within the meaning of the Regulations and*

*Directive, which provides that Member States may refuse, terminate or withdraw any rights conferred under the Directive “in the case of abuse of rights or fraud, such as marriages of convenience”. **If this is found to be the case the Minister will proceed to revoke your expired permission to remain in accordance with the provisions of Regulation 27(1) of the Regulations and Article 35 of the Directive.***

*It should be noted that if your marriage is found to have been one of convenience in accordance with Regulation 28(2) of the Regulations, **then in accordance with Regulation 28(1) of Regulations, the Minister will disregard this marriage for the purpose of the determination of this matter. Further your previous permission held from 27/11/2013 on the basis of this marriage will be deemed to have not been valid and will be revoked in accordance with Regulation 27(1) of the Regulations.***

(emphasis in original)

17. The letter then sought representations as to why his “permission to remain should not be revoked, to dismiss concerns “that the marriage was a marriage of convenience in accordance with Regulation 28(2) and to address the issue of your submission of false and misleading information to this office in order to attain a residence card”.

18. The letter stated that:

*“Any representations should also include a detailed immigration history of the EU citizen including dates of travel to and from the State and the period from 2012 to present and state the purpose of such travel. A detailed relationship history should also be provided along with any other information/documentary evidence you may wish to provide as to why your now expired residence should not be revoked.”*

19. The letter concluded:

*“Please be advised this letter notifies you of the intention of this office to disregard your marriage to MD and revoke your permission to remain and is issued to you as a supplement to our letter dated 06/11/2018 which informed you of the intention of this office to revoke your permission.”*

20. While it might be said that the thrust of the letter was to the effect that the Department did not accept that the marriage was a genuine one, it will be noted that the allegations are that the applicant committed a fraudulent act by the submission of false and misleading documentation and that the marriage is one of convenience.

21. The applicant then submitted material in response to this letter, including photographs of himself and MD, and postcards between them. During the course of the process leading to the review decision, the applicant submitted a significant amount of material evidencing their living together and their sharing of household and utility bills. This material included evidence of the applicant and MD jointly entering a tenancy agreement; evidence of joint utility bills for the house they lived in in Dublin; evidence of the applicant's course results in the Grafton College of Management Sciences and evidence of MD attending a German language course in the Goethe-Institut in Dublin in March 2013.

### **First Instance Decision**

22. An official in the EU Treaty Rights Section of the Minister's Department then gave a decision on the treaty rights revocation and marriage of convenience issue on 29<sup>th</sup> January 2019 (the "first instance decision"). In order to put the issues arising in this judicial review in their proper context, it is necessary to refer at some length to the contents of this decision.

23. The first instance decision set out the background facts, which had been set out in the 10<sup>th</sup> December 2018 addendum to the intention to revoke letter. It referred to further inquiries being undertaken in respect of the circumstances of the marriage, subsequent to the issue of the letter of 6<sup>th</sup> November 2018 (the original intention to revoke letter) pursuant to these inquiries. It was then stated:

*"It was identified that [MD] first obtained her PPSN in the State on 01/11/2012, having allegedly first entered just three months prior to this. Given the date of the marriage contracted between you and [MD] the latest date you could have submitted your notice of intention to marry was 14/11/2012 a mere thirteen days after [MD] obtained her PPSN. Given this timeline it is assessed that [MD] only entered in the State to procure a PPSN to enable you to submit this notice as 'all parties serving notice of intention to*

*marry, who have a current address within the State and/or a future address within the State, must provide a PPSN’.*”

24. The decision then went on to state that:

- The applicant had consistently been employed in a manner which was contrary to the student permission held by him which indicated that he had relocated to the State for economic purposes as opposed to study
- When the applicant was no longer eligible to renew his student permission he *‘contrived to enter into a marriage with [MD] to enable him regularise his status here’*
- This finding was *‘substantiated’* by the fact that the applicant never informed the Treaty Rights Section of the Department that [MD] had departed the State as the applicant was *‘aware it would have an adverse impact on [his] permission to reside here’*.
- The applicant never made contact with GNIB to obtain the remainder of the permission (beyond the expiry of the stamp on his passport up until 11/08/2016).
- The applicant sought to change his status in an effort to secure a position of his own right without notifying the EU Treaty Rights Office of the Department of that application to change status.

25. The decision noted that the applicant had submitted a document refuting the concerns of the Minister stating that the applicant’s marriage was genuine prior to the divorce on 06/07/17.

26. The first instance decision then stated:

*“You submitted a substantial quantity of postcards purported to have been written by [MD] to you however they are not deemed to be sufficient to verify that the relationship between you both was genuine. Despite being in a relationship for over three years you could only provide two photographs depicting you together which is extremely limited given the duration of your alleged residence together.”*

27. The decision then states as follows:-



*“As you are aware, your permission to remain in the State is a derived right based on your EU citizen continuing to exercise her rights in the State in accordance with Regulation 6(3) of the Regulations. As the EU citizen evidently ceased exercising their rights in the State in 2015, you would have ceased to derive a right of residence in this regard. Accordingly, your permission to remain in the State is invalidated in accordance with Regulation 6(3) of the Regulations.*

*Based on the above information, the Minister is of the opinion that the documentation you provided in support of your application to evidence the residence of you and your spouse in this State is false and misleading as to a material fact. The Minister is also of the opinion that the documentation you provided to evidence the exercise of your rights by your spouse in this State are also false and misleading as to a material fact. You knowingly submitted this documentation in order to obtain a right of residence which you otherwise would not enjoy. This constitutes a fraudulent act within the meaning of the Regulations and Directive, which provides that Member State may refuse, terminate or withdraw any rights conferred under the Directive “in the case of abuse of rights or fraud, such as marriages of convenience”. **Therefore, the Minister has decided to invalidate your permission to remain in accordance with the provisions of Regulation 27(1) of the Regulations and Article 35 of the Directive.***

*In addition to the above, based on an assessment of your application to date, the Minister is also of the opinion that your marriage is one of convenience, contracted for the sole purpose of obtaining a derived right of free movement and residence under EU law as a spouse who would not otherwise have such a right. **To that end, in accordance with Regulation 28(1) the Minister has disregarded this marriage for the purpose of the determination of this matter. Therefore, the Residence Card Permission (Stamp 4 EU Fam) held by you from 06/11/2013 on the basis of this marriage was never valid.*** (emphasis in original)

## **Request for review**

28. The applicant then lodged a request for review of that decision (on form “EU4”). He was not legally represented at this point. He stated in this document, *inter alia*, that he had more than two photographs of himself and MD:

*“some of the photos I have on my phone and some are by email which I sent to [MD]. We have so many good memories of each other. It was her choice to bring those two best pictures amongst all. I think it is very natural to any loving human couple to accept and understand each other by all means.”*

29. He stated that *“she had obtained a PPSN in Ireland before she moved here from Sweden and we booked the marriage ceremony date in a few weeks because she was sending CVs in Sweden and she travelled a couple of times for interviews”*. He stated that *“It was obvious for both of us that we will be living together very soon”*. He says that they wished for a child and they did everything they could in this regard including visiting Sims fertility clinic where they met a gynaecologist. He accepts that he should have informed the Department when MD left the country but there was no sign at that point that they would divorce because MD had asked him to support her financially while she was looking for a job in Sweden and he did that. He stated in the review decision that they met in December 2015 when MD travelled from Sweden to Ireland to celebrate the New Year with her.

30. As we shall come to, none of these matters is referenced in the review decision.

31. The applicant subsequently engaged a new firm of solicitors who put in a submission in support of the review by letter of 22<sup>nd</sup> July, 2019. This letter contained a number of submissions, including a submission that given the seriousness of a finding that their marriage was invalid, it was imperative that due process be followed when the Minister was seeking to determine whether the marriage was one of convenience. It was requested that the basis upon which the Minister proposed to make any finding and any information leading to the Minister’s suspicion must be put to the applicant and MD to give them an opportunity to reply. Criticism was made that the procedures in place were unduly opaque, especially when regard was had to the *“drastic impact”* of a finding of a marriage of convenience.

32. A supplemental submission was made by the applicant's solicitors on 15<sup>th</sup> November, 2019 in circumstances where nothing had been heard meanwhile in respect of the review application.

### **The Review Decision**

33. The review decision was eventually delivered on 8<sup>th</sup> July, 2021.

34. The review decision affirmed the first instance decision. The decision began by noting that the applicant had remained illegally in the State for a period of five months after the expiry of his last student permission (which expired on 30/09/2012) and before his marriage to an EU citizen on 14/02/2013.

35. Reference was then made to the first instance decision which was summarised as:

*“the Minister was of the opinion that the documentation that you provided in support of your application was false and misleading as to material fact, particularly with regard to your and the EU citizen’s residence in the State and with respect to the EU citizen’s exercise of rights. This constituted a fraudulent act within the meaning of the Regulations and Directive and the Minister decided to revoke your residence card in accordance with the provisions of Regulation 27(1) of the Regulations and Article 35 of the Directive.”*

36. The decision went on to state that:

*“Furthermore, the Minister was of the opinion that your marriage was one of convenience, contracted for the purpose of obtaining a derived right of free movement and residence under EU law as a spouse who would not otherwise have such a right. The Minister had decided to revoke your permission to remain in accordance with the provisions of Regulation 28(1) of the Regulations.”*

37. It, therefore, appears that there were two separate bases for the revocation, a fraudulent act within the meaning of Regulation 27(1) and a finding that the marriage was one of convenience within Regulation 28(1).

38. The review decision letter then noted the following matters:

- *“The accelerated nature of your relationship and decision to marry is of some concern - it appears that you met, moved in together, and married each other within a period of just 6 months.”*
- That the applicant’s immigration position in Ireland *“was precarious in Ireland when you decided to marry”*.
- That in his change of status application of 28<sup>th</sup> June 2017 the applicant maintained that he and MD began living in separate residences in July 2015 as their relationship was breaking down while in his response to the intention to revoke letter he asserted that he and MD had resided at different addresses for 2 months due to the fact that their landlord had given them notice to leave and they couldn’t find affordable accommodation for both of them.
- That the applicant failed to inform the Treaty Rights office of the fact that MD had moved back to Sweden in September 2015 and that divorce proceedings were initiated in Sweden in September 2016 and a divorce was granted on 06/03/2017.

39. In an important paragraph, the review decision then stated:

*“There is little information or documentation on file in respect of your relationship with the Union citizen in this case. That is to say, there is nothing to suggest that you as a couple made any financial commitments to each other, had any joint assets or liabilities, travelled or lived together for any significant length of time outside the State, or lived together for any significant time in the State. Nor is there any useful information or documentation on file in respect of your relationship prior to your marriage or, indeed, after your marriage.*

*The evidence available to the Minister strongly indicates that your marriage to Union citizen MD was one of convenience in accordance with Regulation 28 of the Regulations that was contracted in an attempt to obtain an immigration permission to which you would not otherwise be entitled. This marriage was never genuine, and the Minister is of the view that it should be disregarded for the purposes of immigration.”*

40. The review decision then noted that the applicant had provided a number of documents to evidence the parties' living together including utility bills, a residential tenancy agreement in both of their names and bank statements in both of their names. It was then stated:

*“It is considered that you submitted and sought to rely upon information and/or documentation that you knew to be false and/or misleading in order to obtain a derived right of free movement and residence under EU law to which you would not otherwise be entitled. This is an abuse of rights in accordance with Regulation 27 of the Regulations.”*

41. Further:

*“As the EU citizen in this case has not exercised her EU Treaty Rights in the State since September 2015, your entitlement to a derived right of residence ceased at that time also. Therefore, the permission that you held between 30/09/2015 and 05/11/2018 was not a valid permission. “*

42. In upholding the first instance decision, the review decision then stated:

*“The Minister is satisfied that you submitted and sought to rely upon documentation and/or information that you knew to be false and/or misleading in order to obtain a derived right of free movement and residence under EU law to which you would not otherwise be entitled. This is an abuse of rights in accordance Regulation 27 of the Regulations.*

*Moreover, the Minister is satisfied that your marriage to MD was one of convenience in accordance with Regulations 28 of the Regulations that was contracted in an attempt to obtain an immigration permission to which you would not otherwise be entitled. The marriage was never genuine, and it should be disregarded for the purpose of immigration. As such, any immigration permissions that were provided on the basis of this marriage were not valid permissions.*

*Against this background, the Minister recommends that the decision of 29/01/2019 to revoke your residence card should be affirmed. Furthermore, the permission that you held between 30/09/2015 and 05/11/2018 was not a valid permission, and it should be revoked.”*

### **Applicant’s case**

43. In his statement of grounds, the applicant relies on the following matters in support of his application for an order of *certiorari* of the review decision:

- (i) the manner in which the decision was made was in breach of fair procedures and due process in circumstances where reliance is placed on the applicant having submitted false/fraudulent documents in the course of his application for a residence card but these documents are nowhere identified
- (ii) the Minister placed an impermissible burden of proof on the applicant, requiring him to refute assertions surrounding the alleged provision of false documentation without specifying what documentation was false and otherwise relying on purely circumstantial evidence to make serious findings of fraud and marriage of convenience
- (iii) that the finding of marriage of convenience was arrived at by “undue focus” on “extraneous and circumstantial matters”
- (iv) the evidential basis for the finding a marriage of convenience was wrong
- (v) the finding was arrived at by taking into account irrelevant matters or failing to fully identify all relevant matters.

### **Relevant Legal Provisions**

44. The 2015 Regulations apply, *inter alia*, to the spouse of a Union citizen where the spouse married the Union citizen while in the State and for so long as the spouse seeks to remain with the Union citizen in the State (Regulation 3(1)). The Regulations make clear that a “spouse” does not include a party to a marriage of convenience. The Regulations impose an obligation on a person residing in the State as a family member of a Union citizen to notify the registration officer of the registration district in which he or she is located of any change in his or her status, including dissolution of marriage (Regulation 11(2)).

45. Regulation 27 is headed “cessation of entitlements”. It provides, *inter alia*, in Regulation 27(1) that the Minister may revoke rights, entitlements or status granted under the regulation where such right, entitlement or status “is being claimed on the basis of fraud or abuse of rights”. The rights and entitlements in question include a residence card.

46. Regulation 27(2) provides that: “*where the Minister suspects, on reasonable grounds, that a right, entitlement or status of being treated as a permitted family member conferred by these Regulations is being claimed, or has been obtained, on the basis of fraud or abuse of rights, he or she shall be entitled to make such enquiries and to obtain such information as is reasonably necessary to investigate the matter.*”

47. Regulation 27(3) provides that where the Minister proposes to exercise his or her powers under Regulation 27(1), he or she shall “(a) *give notice in writing to the person concerned, which shall set out the reasons for his proposal and shall give the person concerned a period of 21 days within which to give reasons as to why the right, entitlement or status concerned should not be revoked, and (b) consider any submissions made in accordance with subparagraph (a).*”

48. Regulation 27(4) provides that “in this Regulation, “abuse of rights” shall include a marriage of convenience or civil partnership of convenience”.

49. Regulation 28 is headed “marriages of convenience”. Given its centrality to the issues in this judicial review, I propose to set out the terms of Regulation 28 in full:

*“Marriages of convenience*

*(1) The Minister, in making his or her determination of any matter relevant to these Regulations, may disregard a particular marriage as a factor bearing on that determination where the Minister deems or determines that marriage to be a marriage of convenience.*

*(2) Where the Minister, in taking into account a marriage for the purpose of making a determination of any matter relevant to these Regulations, has reasonable grounds for*

*considering that the marriage is a marriage of convenience, he or she may send a notice to the parties to the marriage requiring the persons concerned to provide, within the time limit specified in that notice, such information as is reasonably necessary, either in writing or in person, to satisfy the Minister that the marriage is not a marriage of convenience.*

*(3) Where a person who is subject to a requirement under paragraph (2) fails to provide the information concerned within the time limit specified in the relevant notice, the Minister may deem the marriage to be a marriage of convenience.*

*(4) The Minister may exercise the power under paragraph (2) in respect of a particular marriage whether or not—*

*(a) that marriage has previously been taken into account in determining any matter relevant to these Regulations or the Regulations of 2006, or*

*(b) that paragraph has previously been invoked in respect of that marriage.*

*(5) The Minister shall determine whether a marriage referred to in paragraph (2) is a marriage of convenience having regard to—*

*(a) any information furnished under these Regulations, and*

*(b) such of the following matters as appear to the Minister to be relevant in the circumstances:*

*(i) the nature of the ceremony on the basis of which the parties assert that they are married;*

*(ii) whether the parties have been residing together as husband and wife, and, if so, the length of time during which they have so resided;*

*(iii) the extent to which the parties have been sharing income and outgoings;*

*(iv) the extent to which the parties have been dealing with other organs of the State or organs of any other state as a married couple;*



*(v) the nature of the relationship between the parties prior to the marriage;*

*(vi) whether the parties are familiar with the other's personal details;*

*(vii) whether the parties speak a language that is understood by both of them;*

*(viii) whether a sum of money or other inducement was exchanged in order for the marriage to be contracted (and, if so, whether this represented a dowry given in the case of persons from a country or society where the provision of a dowry on the occasion of marriage is a common practice);*

*(ix) whether the parties have a continuing commitment to mutual emotional and financial support;*

*(x) the history of each of the parties including any evidence that either of them has previously entered into a marriage of convenience or a civil partnership of convenience;*

*(xi) whether any previous conduct of either of the parties indicates that either of them has previously arranged a marriage of convenience or otherwise attempted to circumvent the immigration laws of the State or any other state;*

*(xii) the immigration status of the parties in the State or in any other state;*

*(xiii) any information provided by an tArd-Chláraitheoir or registrar within the meaning of the Civil Registration Act 2004;*

*(xiv) any other matters which appear to the Minister to raise reasonable grounds for considering the marriage to be a marriage of convenience.*

*(6) For the purposes of these Regulations “marriage of convenience” means a marriage contracted, whether inside or outside the State, for the sole purpose of obtaining an entitlement under—*

*(a) the Council Directive or these Regulations,*

*(b) any measure adopted by a Member State to transpose the Directive, or*

*(c) any law of the State concerning the entry and residence of foreign nationals in the State or the equivalent law of another state.”*

50. The parties were unable to point to any authority which squarely addressed the proper parameters of a decision-making process leading to a finding of fraud or abuse of rights (including a finding of marriage of convenience) pursuant to the 2015 Regulations.

51. In *Singh and WW v the Minister for Justice and Equality* (Barr J., unreported, 10<sup>th</sup> May 2022), the court struck down a decision of the Minister refusing the first applicant in that case residency in the State on the basis that the Minister had not engaged in a detailed analysis of the evidence that had been furnished on behalf of the applicants in support of the application in question, including a failure by the decision-maker to have regard in the impugned decision to relevant evidence in support of the application. The facts of that case related to a partner with whom the Union citizen had a durable relationship, within the meaning of article 3(2) of the Citizens Directive, as transposed into Irish law in the 2015 Regulations. Barr J. concluded, on the facts of that case, that the impugned decision should be set aside “due to the fact that the Minister did not engage with the evidence that had been produced and did not carry out an extensive examination of the applicant’s personal circumstances, as required by the Directive the 2015 Regulations and the principles set down in the *Pervaiz* case.”

52. The reference to the *Pervaiz* case is to the case of *Pervaiz v the Minister for Justice* [2020] IESC 27, where the Supreme Court considered the proper approach to the assessment of an application under the 2015 Regulations on behalf of an applicant who was said to be in a durable relationship with a Union citizen. Baker J. in her judgment stated that when considering such applications the Minister must engage in an “extensive examination of their personal

circumstances” and justify any refusal by reasons. Baker J. noted (at paragraph 40) that the evidence need not always be in documentary form, but may involve a narrative, albeit that mere assertion would not suffice.

53. While *Pervaiz* dealt with a durable relationship scenario, and not that of a marriage, it seems to me that the general guidance set down by the Supreme Court in that case as to the proper approach to the assessment of an application for residence status pursuant to the 2015 Regulations is of assistance to the question of the proper approach of the Minister, or any decision-maker on her behalf, to the question of an assessment of whether such residence status should be revoked.

54. In *MKFS v the Minister for Justice and Equality* Supreme Court, unreported, McKechnie J., 24<sup>th</sup> July 2020, the Supreme Court held that a finding pursuant to the 2015 Regulations that the marriage was one of convenience did not have the effect of rendering that marriage a nullity at law; “*Rather, such determination is limited to the immigration/deportation context; the sole consequence thereof is that it entitles the Minister to “disregard” the marriage “in the very specific context” set out in the 2015 Regulations.* (McKechnie J. at paragraph 111)

55. The parties referred to a number of other authorities, including *Saneechur v the Minister for Justice and Equality* [2021] IEHC 356. In that case Barrett J. held that the reliance by the decision-maker on an error in a payslip was a wholly unreasonable basis to ground the serious finding that the applicant’s application for EU treaty benefits was fraudulent. He also found a series of other flawed findings in the decision in issue, leading him to conclude, on the facts of that case, that the Minister’s investigation process (which, although not expressly so stated, appears to have been an investigation process under the 2015 Regulations) “was disproportionately lacking in rigour and did not yield a safe finding” (see paragraphs 5, 7, 9 and 12 to 16).

### **The Parties’ submissions**

56. Counsel for the applicant submitted that important factual matters tendered on behalf of the applicant in answer to the allegation that fraudulent documentation was submitted or that he was engaged in a marriage of convenience were simply not engaged with in the decision-

making process. He laid emphasis on the fact that in order for a marriage to be a marriage of convenience within the 2015 Regulations the *sole* purpose of the marriage must be for obtaining an entitlement under the directives or regulations of the law of the State concerning the entry and residence of foreign nationals i.e. the sole purpose of the marriage is to obtain residence rights or benefits. He emphasised that this was a high hurdle. Here, he said that there was no question but that the applicant and MD had been married in the State. They shared accommodation and all the liabilities going with that. Utility bills and the like were in joint names. They were in a modest financial position so emphasis by the decision-maker on lack of evidence of them taking holidays was unfair to the reality of the position. MD spent almost 3 years in Ireland. They attended a fertility clinic together in June 2013 which, it was submitted, was a step representing the antithesis of a marriage of convenience. It was submitted that it could not be said that a marriage is for the sole purpose of attaining residence rights or benefits when the couple are taking steps to see if they can have a child.

57. While it was acknowledged that the applicant had been in breach of his obligations by working in excess of the permitted hours when on a student visa, and not informing the Minister of the fact that his wife had left the State in September 2015, and that they had been divorced in March 2017, it was emphasised that it was the applicant who had given the relevant information to the Minister when making his application to regularise his position in June 2017, having obtained legal advice at that time. While the initiating documentation in the decision-making process sought to present it as if this information had independently come to light as a result of the Department's investigations, this was simply not so.

58. Counsel for the applicant submitted that the findings as to submission of fraudulent documentation, in the first instance decision, which was broadened slightly to findings of the submission of fraudulent documentation and/or information in the review decision had no identified basis. He submitted that it was difficult to avoid the conclusion that anything adverse to the applicant was taken as an indicator of fraud, while no weight at all was given to the significant evidence of a genuine relationship and interconnectedness between the applicant and MD.

59. A point was raised in the applicant's written submissions to the effect that the process of determination of whether or not a marriage was one of convenience under the 2015 Regulations constituted the administration of justice in light of the Supreme Court's decision

in *Zalewski v The Labour Court and Ireland* [2021] IESC 24. As this was not pleaded, it was properly not pursued at the hearing before me.

60. It was submitted on behalf of the applicant that the relevant authorities made clear that a finding of fraud, even on the civil side, had to be grounded in clear and cogent evidence. It was submitted that the Minister fell into clear legal error by arriving at a determination of fraud in disregard of significant and weighty evidence in favour of the genuineness of the marriage, as exemplified in a number of clearly erroneous findings in the decision.

61. Counsel for the Minister emphasised that, as had been made clear by the Supreme Court in *MFKS*, the determination that the marriage was a marriage of convenience is one that only has implications in the immigration context; it is not the case, as a matter of law, that the marriage is to be regarded as invalid for all purposes when a determination has been made under the 2015 Regulations that a marriage is a marriage of convenience. She emphasised that the case law made clear that determinations as to the existence of a marriage of convenience very factually based. Accordingly, *Singh* involved a situation where there was evidence of durable emotional and personal ties including the applicant providing medical support to his partner, along with extensive evidence (such as social media posts on different dates over a reasonably prolonged period) evidencing a genuine relationship. It was submitted that, in contrast, in this case the applicant was unable to advance evidence of a meaningful relationship; all that was produced were a couple of photographs and some postcards. It was submitted that the decision-maker was entitled to reach the conclusion that this was a marriage of convenience.

62. It was emphasised that no irrationality challenge had been made to the findings. In relation to the applicant's core complaint of a lack of fair procedures and due process, counsel for the Minister submitted that the chain of correspondence demonstrated that the Minister had made clear her concerns as to the legitimacy of the marriage and had expressly invited representations on that, which was in accordance with Regulation 27(3). She submitted that the findings arrived at in the review decision involved a valid application of the factors set out in Regulation 28(5). It was submitted that the Minister had correctly approach the matter by identifying the reasonable grounds for concern, in accordance with Regulation 27(2): the addendum to the intention to revoke letter identified a series of concerns, including the failure of the applicant to notify his wife's departure from the State; a breach of the conditions of his

visa permissions; the failure to approach the authorities post the expiry of his residence permission on 11<sup>th</sup> August 2016; concerns as to the legitimacy of the marriage. It was emphasised that the applicant's repeated non-compliance with his immigration obligations was a factor which clearly fed into the *bona fides* of his intentions as regards his marriage.

63. In discussion with the court, counsel for the Minister submitted that the reference to the submission of fraudulent documentation (and ultimately to false and misleading documentation or information in the review decision) was a reference to the fact that the applicant was maintaining he had a genuine marriage when the Minister was of the view he did not.

## **Discussion**

64. The applicant sought to make a complaint about an impermissible shifting of the burden of proof to the applicant of the question of whether or not his marriage was one of convenience. There was no challenge in these proceedings to the validity of the relevant provisions of the 2015 Regulations including Regulation 28. I do not see that the structure of Regulation 28 is such as to impermissibly shift the burden of proof. The regulation envisages the Minister having reasonable grounds for considering that the marriage is one of convenience. Accordingly, the onus is on the Minister in the first instance to set out why he or she believes there are reasonable grounds for that view. Given the gravity of the consequences of a determination that a marriage is one of convenience, it is clear that the Minister would have to have a sufficiently cogent basis to take the view that there are reasonable grounds for considering that a marriage is one of convenience. Regulation 28 then, quite properly, envisages the Minister notifying the parties to the marriage of that view to enable them to satisfy the Minister that the marriage is not one of convenience.

65. It will be noted that Regulation 28(2) envisages that the Minister may send a notice to both parties to the marriage requiring information necessary to satisfy the Minister that the marriage is not a marriage of convenience. While it was not an issue raised in the pleadings in this case, one could envisage scenarios where fair procedures would require on a given set of facts that both parties to the marriage are notified of the Minister's reasonable grounds for considering that the marriage is a marriage of convenience. At a minimum, if the Minister suspects that a benefit under the regulations has been obtained improperly on the basis of a marriage to a Union citizen which the Minister suspects to be a marriage of convenience, the

beneficiary of that benefit would have to be put on notice of the Minister's suspicions and given a full opportunity to make submissions in that regard. On the facts here, as the question of marriage of convenience was tied up with the question of cessation of entitlements, I am satisfied that appropriate notice was given to the applicant pursuant to Regulation 27(3) to allow him make such submissions as he saw fit.

66. While accepting that the decision-maker should not be under an undue onus of proof, in light of the gravity of the consequences of a determination pursuant to the provisions of the 2015 Regulations that the marriage is one of convenience, or that a person has otherwise obtained EU family right benefits by fraud, it is important that fair procedures are properly adhered to and that the decision-making process is sufficiently rigorous to ensure that an adverse finding is arrived at only following a careful evaluation of all of the evidence and submissions put before the decision-maker. The requirement for such an approach is evident in the authorities cited earlier in this judgment.

67. In my view, the decision-making process that culminated in the review decision here was vitiated by two infirmities.

68. The first infirmity was an apparent view of the decision maker, evident throughout the process and articulated as a finding in the review decision, that the applicant had relied on false or misleading documentation or information when applying for EU family right benefits. In my view, this finding was circular as it appeared to be premised on a finding (not previously made against the applicant) that the marriage was one of convenience and that therefore any documentation referencing the fact of the marriage was fraudulent; however, the process in which that assumption and finding was made was in fact directed towards the question of whether the marriage was one of convenience within the meaning of the regulations. Aside from the question of the proper characterisation of the marriage, no material was pointed to which was suggested to be fraudulent or falsified of itself. This was not a case where documentation or information had been submitted which was itself false e.g. it was not a case where there was a forged marriage certificate or where material factual information (such as the residence of the Union citizen in Ireland) was deliberately misstated. Rather, the question was one of the proper characterisation of the marriage for immigration law purposes in light of facts which were largely not in dispute. The self-standing finding of fraudulent submission of

documentation or information, separate from the finding that the marriage was one of convenience, does not seem to me to have been justified on its own terms in the circumstances.

69. If I am wrong in the forgoing view, I believe that the decision-making process and the review decision itself was in any event vitiated by a separate infirmity. This separate infirmity arose from a failure by the decision-maker to properly engage with the evidence and submissions advanced on the question of marriage of convenience; specifically, there was a failure to properly engage with the evidence and submissions advanced when considering the factors which the Minister is obliged to have regard to in determining whether a marriage is one of convenience, as set out Regulation 28(5) of the 2015 Regulations.

70. In this regard, the following issues arise in relation to the review decision:

- (i) The decision holds, *inter alia*, that there was nothing to suggest that the applicant and MD had any joint liabilities. This is incorrect. There was documentation showing joint liabilities in the form of liabilities associated with their cohabiting in the same property including rent and utility bills.
- (ii) The decision holds as one of the reasons supporting its conclusions that there was nothing to suggest that the applicant and MD “travelled or lived together for any significant length of time outside the State”. It is difficult to see the relevance of this factor in circumstances where the applicant’s case was that MD had come to live with the applicant in this State and then returned to Sweden after the relationship broke down.
- (iii) The decision then holds that there was nothing to suggest that the applicant and MD had lived together for any significant length of time in the State. This finding is wholly at odds with the evidence before the decision-maker of their cohabitation for some two and a half years.
- (iv) The decision goes on to state that “*nor is there any useful information or documentation on file in respect of your relationship prior to your marriage or, indeed, after your marriage*”. There was in fact information provided in respect of their relationship prior to their marriage and after their marriage.



- (v) No reference at all is made in the review decision to the submission made by the applicant in the review application about the couple's attempts to get treatment in a fertility clinic. Counsel for the Minister submitted that as supporting documentation had not been tendered at the time of the review application, the Minister was entitled to disregard this factor. While I accept such an approach would be legitimate as a general proposition, on the face of it, attempts by a couple to get fertility treatment would be entirely at odds with the marriage being one of convenience. The applicant specifically raised this matter in his application for review of the first instance decision. While accepting that there is no necessary obligation on the Minister to seek out further documentation from an applicant, given the exceptionality of this factor, at a minimum, the decision-maker ought to have stated why in the review decision he was rejecting this factor. There is simply no reference to this most singular factor in the review decision at all.

71. As we have seen, as a matter of fair procedures, the authorities require a proper engagement with evidence and submissions tendered on behalf of the applicant who is the subject of an allegation of being party to a marriage of convenience. In my view, the review decision here fell short of such proper engagement.

72. I should emphasise that my findings are confined to the lawfulness of the decision and decision-making process and are not concerned with the underlying merits of the allegation that the marriage was one of convenience. The review decision placed considerable reliance on the applicant's past transgressions of the immigration rules, including working full-time while on a student visa which limited him to 20 hours work a week and not informing the Minister in a timely fashion of the fact that his spouse had left the State. These of course are factors which the Minister was entitled to have regard to and will be entitled to have regard to in any fresh determination of the matter. However, for the reasons outlined above, the applicant has identified sufficient shortcomings in the decision and decision-making process to render him entitled to an order of *certiorari* of the review decision. Following that order, the matter should be remitted to the Minister for determination by fresh decision maker.

## **Conclusion**

73. For the reasons outlined above, I will grant an order of *certiorari* quashing the Minister's review decision of 8<sup>th</sup> July 2021 and remit the matter for a fresh determination in accordance with law.