THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 1

[Record No. 2021/613 JR]

BETWEEN:

A.K.S (A MINOR SUING BY HER MOTHER AND NEXT FRIEND J.K.) AND GUARDIAN S.S

APPLICANTS

AND

THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 11th day of January. 2023

INTRODUCTION

1. These proceedings concern the lawfulness of the decision-making process and decision of the First Respondent to revoke the Second Applicant's permanent residence card with purported retrospective effect on grounds of alleged fraud perpetrated in the course of securing residency on foot of a marriage of convenience.

2. The impugned decision was taken pursuant to the provisions of the European Communities (Free Movement of Persons) Regulations, 2015 [hereinafter "the 2015 Regulations"], giving effect to Directive 2004/38 EC [hereinafter referred to as "the Directive"].

3. The Second Applicant enjoyed residency rights deriving from his marriage to an EU citizen exercising free movement rights in the State since early 2010, with his initial applications being processed pursuant to the provisions of the now revoked European

Communities (Free Movement of Persons)(No.2) Regulations, 2006 (as amended) [hereinafter "the 2006 Regulations"]. The 2006 Regulations were revoked in December, 2015 and stand replaced by the 2015 Regulations.

4. The impugned decision was made on the 1st of April, 2021. The decision was to the effect that as the First Respondent had concluded that the marriage between the Second Applicant, the EU citizen, was one of convenience contracted in order to obtain immigration permission, the marriage could be "*disregarded*" for the purposes of the Regulations. The Second Applicant was advised that in consequence previous permissions were *"deemed invalid from the outset"* and the residence card held was revoked in accordance with Regulation 27[1] of the 2015 Regulations.

5. At the time of the impugned decision the Second Applicant had been residing in the State since 2006 (some fifteen years), having divorced his EU citizen wife before subsequently securing permanent residency in the State derived from his then dissolved marriage. Thereafter he remarried a non-EU national in 2014, becoming a father to the First Applicant, a child of that second marriage, in 2019. As a child whose parent had been lawfully resident in the State for the requisite period, the First Applicant was then entitled to Irish citizenship at birth and was issued with an Irish passport in recognition of this fact.

6. The First Respondent has confirmed her position as being that where residence is revoked on grounds of fraud and marriage of convenience, the First Applicant's citizenship would also be void *ab initio* because neither of her parents would be considered to have had the requisite lawful residence at the time of her birth arising from the retrospective decision to nullify the Second Applicant's residency. Notwithstanding the First Respondent's acceptance of the consequences for the First Applicant of a retrospective nullification of her father's residence status, the First Respondent maintains that the First Applicant's rights are not engaged.

7. The First Applicant's position was not considered in the impugned decision.

8. Although a review process is provided under Regulation 25 of the 2015 Regulations by way of appeal against the first instance decision, the Applicants have not proceeded with that

review principally on the basis that the First Applicant's rights are not adequately safeguarded in that process.

BACKGROUND

9. The Second Applicant is a non-EU/third country national who came to the State on the 8th of October, 2006 with a stamp 2 permission (student visa), which was valid until the 31st of October 2009. In 2009 well-documented changes to the student visa system were introduced with the effect that a person resident on foot of a student visa in the State found themselves in a precarious immigration position (*Luximon v Minister for Justice & Equality Bachand v Minister for Justice & Equality* [2018] 2 I.R. 542).

10. The Second Applicant married a non-Irish EU national, Ms. SB, on the 3rd of September, 2009 in Ireland. The said Ms. SB had initially entered the State in January 2009 and was issued with a PPSN that same month.

11. The Second Applicant applied for a residence card (using a Form EU1) as the spouse of Ms. SB, following his marriage in September 2009. This application was granted in February 2010. For the purpose of the initial application for a residence card, the Second Applicant submitted an undated letter from a named company (controlled or managed by one Mr. D), which stated that his wife Ms. SB was employed as a cleaning supervisor from May, 2009. Payslips for three weeks were also provided which referred to 25 weeks insurable employment, and gross cumulative pay of €8,750 up to the 9th of October, 2009. The Second Applicant also submitted another letter from the same Mr. D, stating that the Second Applicant and Ms. SB were tenants of his property at a specified address in an apartment building in North Inner-City Dublin. File documentation exhibited in the proceedings suggest that an officer in the EU Treaty Rights Division of the First Respondent's Department had contacted the company and spoke with Mr. D who confirmed that Ms. SB was employed there.

12. The Second Applicant and Ms. SB were divorced in her country of nationality in February, 2013. The Second Applicant applied for recognition of the retention of his EU Treaty Rights in July 2013 (using a Form EU5). In this application, he submitted evidence of divorce but also claimed that Ms. SB was still living with him in the State (at the same apartment complex in North Inner-City Dublin given as their address on the first application) and was still working in the State. He submitted six payslips purporting to show that Ms. SB was

working for a different named company to that which it had been claimed employed her at the time of the previous application (although connected in that both appear to be controlled or managed by the same Mr. D who is also their purported landlord at material times). A tax credit certificate referring to Ms. SB's new employer was relied upon. The Second Applicant also submitted a further letter, purportedly from the landlord, dated the 11th of June 2013, stating that the Second Applicant and Ms. SB remained tenants at his North Inner-City Dublin property.

13. Notwithstanding the fact of their divorce, the application for retention of the Second Applicant's residence card was granted in July, 2013 in accordance with Regulation 10(2)(b)(i) of the 2006 Regulations and the Second Applicant was advised that his permission to remain granted in February, 2010 remained valid until February, 2015 "*on an individual and personal basis*".

14. In January 2014, the Second Applicant married Ms. JK, a non-EU/third country national who had moved to Ireland on a student visa. The Second Applicant applied for a certificate of naturalisation in November, 2014. This application has never been determined.

15. In April, 2015, the Second Applicant applied for permanent residence under the 2006 Regulations (using a Form EU3). While his application was being processed, the Second Applicant was issued with temporary permission pursuant to Regulation 7 of the 2006 Regulations. Amongst the documentation submitted in support of the application, in addition to the documentation already held on the First Respondent's file, was a letter purporting to be from Mr. D confirming residence in his apartment complex between 2010 and 2013.

16. In November 2015, the Second Applicant was granted a permanent residence card under the 2006 Regulations (the 2015 Regulations were subsequently signed on 1st of December, 2015).

17. It is a troubling but important feature of this case that supporting correspondence from Mr. D was submitted with a different spelling of his surname appearing as between the various documents submitted in successive applications. As I understand the position from what is before me, Mr. D appears to accept some documents as having been signed by him but not others. I make no findings of fact in this regard and refer to same by way of background only.

18. An Garda Síochána searched the Second Applicant's house in March, 2019 at a time when he says he was out of the country. It appears that originals of documentation relied upon in his residence applications were seized by Gardaí on this occasion.

19. The First Applicant, being the daughter of the Second Applicant and Ms. JK, was born in early August 2019. She was granted an Irish passport at the end of October, 2019, on the basis of the reckonable residence of the Second Applicant.

20. From disclosure made in the context of a subsequent criminal trial (which remains pending) it appears that members of An Garda Síochána have spoken to the owner of the Company and former landlord, Mr. D who is reported to have stated that he had given Ms. SB work by cleaning houses for which she was paid approximately €40.00 to €50.00 per house. He is claimed to have said that she was not employed on a salary basis.

21. It has further transpired that the Department of Social Protection advise the First Respondent that they do not have a record of income as set out on the payslips, and there were no corresponding payments into Ms. SB's bank account, according to the statements provided by the Second Applicant. The First Respondent has confirmed that Department of Social Protection records indicate that Ms. SB is recorded as having employer PRSI contributions for 30 weeks in 2012 but none for any later period. The Second Applicant has been advised that An Garda Síochána have reported to the First Respondent that Ms. SB was recorded by the authorities in her country of nationality as employed in that country from 2013 onwards, although the dates of same have not been provided as far as I can see.

22. The Second Applicant confirms that he was interviewed by An Garda Síochána on the 27th of November 2019. The memorandum of interview completed at that time has been exhibited in these proceedings. Almost a year later, the Second Applicant was charged with five counts of using or having in his possession false instruments (specifically, the landlord's letter and payslips) and one count of causing a loss by deception, by inducing the First Respondent to grant him retention permission. These charges have not yet come to trial. It appears that the Garda National Immigration Bureau [hereinafter "GNIB"] provided a report to the First Respondent in December, 2019, which is said to have raised a series of issues. This report has not been disclosed.

23. While the report submitted to the First Respondent has not been disclosed, it is clear that An Garda Síochána have spoken with Mr. D, who was both landlord at material times and a director of at least two of the companies alleged to have employed Ms. SB during the marriage. Statements were taken from Mr. D. These appear to not have been disclosed in the context of the First Respondent's decision-making process but have become available through the disclosure process associated with the criminal trial.

24. From his statement to the Gardaí it appears that Mr. D denied that Ms. SB had been employed by his company, although he appears from the statement taken and exhibited in a replying affidavit that his evidence as recorded in the statement relates to the 2013 employment. Mr. D says that the payslips provided by the Second Applicant in support of the 2013 application were not issued by his company. Mr. D further denied having signed the letter of the 11th of June, 2013 stating that the Second Applicant and Ms. SB were living at an address in North Inner-City Dublin where he owned apartments (the original of which is said to have been found in the Second Named Applicant's residence by An Garda Síochána on the occasion of their search in November, 2019).

25. Enquiries made on behalf of the First Respondent appear to be understood as confirming that Ms. SB was working in her home country in 2013 at the time when it had been contended by the Second Applicant in applying for residency that she had been working for the company operated by Mr. D. The First Respondent maintains that the Department of Social Protection do not have any record of her working in Ireland at this time. Communication with the Department of Social Protection has not been disclosed. Nor have the precise dates it is claimed that Ms. SB was working in her home country been particularised, however, correspondence from the First Respondent in the context of the revocation process suggests that after the dissolution of her marriage, Ms. SB had official returns in both her home country and the State for the years 2015, 2016, 2017 and 2018.

REVOCATION PROCESS

26. On the 27th of November, 2020, the First Respondent wrote to the Second Applicant, warning him that she was considering revoking his permission to remain in the State. The letter

was returned marked *"unknown at this address"*. As he had not received the letter, the Second Applicant did not make representations in response to the proposal.

27. On the 5th of February 2021, one Mr. RF of the First Respondent's Department wrote to the Second Applicant confirming that in the absence of submissions from the Second Applicant in response to the notification letter of the 27th of November, 2020 (which it was noted had been returned marked "*unknown at this address*" but without the Second Applicant having advised the First Respondent of a change in address), the First Respondent had found that the application for residency had been supported by documentation which was false and misleading as to a material fact and reliance on same by the Second Applicant constituted a fraudulent act within the meaning of the 2015 Regulations and the Directive as a result of which the First Respondent had decided to revoke the Second Applicant's permission to remain in accordance with the provisions of Regulation 27(1) of the 2015 Regulations and Article 35 of the Directive. The letter further recorded the First Respondent's conclusion that the marriage contracted was one of convenience for the purposes of obtaining an immigration permission to which the Second Applicant would not otherwise be entitled with the effect that any previous permission held on the basis of this marriage dating back to October, 2009 were now "*deemed invalid from the outset and the residence cards held on that basis are revoked in accordance with Regulation 27(1) of the Regulations*."

28. Despite sending the notification letter to an old address, the letter, advising the Second Applicant that his residence in the State dating back to 2009 was unlawful, was posted to the Second Applicant's new address.

29. The Applicants' solicitors wrote to object to the decision on the basis that the Second Applicant had not received the notification of the proposal to revoke the Second Applicant's residence cards. By letter dated the 18th of February, 2021, the First Respondent agreed to withdraw the decision and re-issued the original notification.

30. In the re-issued notification letter received by the Second Applicant in February, 2021, reference was made to the documentation submitted in support of the EU1, EU5 and EU3 applications made on his behalf, specifically:

- A PRTB registration letter in respect of the Second Applicant and the EU national dated the 5th of April, 2009 signed by Mr. D relating to a North Inner-City apartment;
- A letter from Mr. D stating the First and Second Applicants' are residing at a North Inner-City Apartment since the 1st of April, 2009;
- A letter from Mr. D in his capacity as landlord for another apartment in the same North Inner City Apartment block stating that the Second Named Applicant and his EU citizen wife were residing at that property since the 1st February 2010;
- A PRTB registration letter in respect of the Second Applicant and the EU citizen for an address at the said North Inner-City Apartment block was provided dated the 15th of February, 2010 and signed by the landlord;
- A letter signed by Mr. D dated the 11th of June, 2013 stating both the Second Applicant and the EU citizen had been residing at the said North Inner-City Apartment block since the 7th of April, 2009 for approximately 4 years;
- A letter from a company purportedly signed by Mr. D stating that the EU citizen is a full-time employee of the company employed as a cleaning supervisor since the 4th of May, 2009;
- Payslips dated September and October 2009 and February to May, 2013 (from different employers but both companies associated with Mr. D) as evidence of the exercise of rights by the EU citizen spouse.

31. The Second Applicant was advised that information available to the First Respondent from the Department of Social Protection and Employment Affairs showed that payslips provided in respect of the EU citizens employment in the State dated 2013 do not match official records and show inaccurate economic activity in this State. It was also stated that based on further information available to the First Respondent from An Garda Síochána, it was noted that the EU citizen was residing in her home country and in employment there since 2013. The information relied upon was not particularised. The letter continued:

> *"On examination of this documentation and further information available to the Minister from An Garda Siochana, The minister is of the opinion that the documentation listed above in respect of you and the EU citizens residence in this State and the employment of the EU citizen in this state provided by you to this office in support of your EU1 application, EU5 application and EU3 application is false and*

you knowingly provided these documents in order to obtain an immigration permission in the State.

Information available to the Minister from the Department of Social Protection and Employment Affairs shows that the Union Citizen has no record of employment since 2018 in this State and further information available to the Minister from An Garda Siochana shows that the EU citizen has been in continuous employment in Latvia since August 2018. This information also shows that the EU citizen has a Revenue returns history in this state for the years 2010, 2011, 2012, 2015, 2016, 2017 and 2018, with no Revenue returns in 2013 and 2014 in this State. Also the EU citizen has been recorded as a tax payer in Latvia and engaged in employment in Latvia for the years 2008, 2013, 2014, 2015, 2016, 2017, 2018 from August to December, 2019 and 2020.

It has also been noted that you are currently married to a XX [nationality removed for this judgment] national named [Ms. JK], who arrived in this state on 28/04/2014 on a stamp 2 basis and residing at the same address as you on her arrival. It is also noted than you and [Ms. JK] married in this State in 2014. Also further information available to the Minister from An Garda Siochana shows that 5 money transfers were made through Western Union from you to Ms. K between 28/12/2012 and 12/05/2013 while you were still engaged in a marriage to the EU citizen."

32. The letter stated that based on the above cited information, the First Respondent was of the opinion that the information provided in support of the application to evidence the residence of the Second Applicant and his spouse in the State was false and misleading as to a material fact and reliance on it was a fraudulent act within the meaning of the 2015 Regulations and the Directive which provide that the First Respondent may refuse, terminate or withdraw any rights conferred in the case of abuse of rights or fraud, such as marriages of convenience. The notification letter then asserted:

"If this is found to be the case the Minister will proceed to revoke your permission to remain in accordance with the provisions of Regulation 27(1) of the Regulations and Article 35 of the Directive."

33. The letter continued that the First Respondent was of the opinion that the marriage was one of convenience and said that any previous permission held on the basis of such a marriage, so found:

> *"will be deemed to have never been valid and the residence card held on that basis will be revoked in accordance with Regulation 27(1) of the Regulations".*

RESPRESENTATIONS ON BEHALF OF THE SECOND APPLICANT

34. The Second Applicant's solicitors made representations (during the course of which, they asked that a new decision maker be appointed which request was refused). They pointed out that under Article 13(2)(a) of the Directive and Regulation 10(2)(b)(i) of the 2015 Regulations what is material is the EU spouse's residence at the date of the initiation of the divorce proceedings (reliance also placed on C-218/14 *Singh v. Minister for Justice and Equality*) and not at the time of the divorce or subsequently. It was pointed out that the divorce proceedings in this case were commenced in 2012 with the result that information to the effect that Ms. SB was working in her home country at some unspecified time in 2013 or subsequently was not relevant as her residence in the State up until the initiation of the divorce application is what requires to be demonstrated for the purpose of establishing her spouse's derived rights.

35. The submissions lodged also focussed on the requirement for proportionality in the decision-making process submitting that to retrospectively revoke over 11 years of historic immigration permissions would be wholly disproportionate to the concerns expressed on behalf of the First Respondent in the notification letter having regard to his Article 8 rights (under the European Convention on Human Rights) with reliance placed on the decision of the Supreme Court in *Luximon v. Minister for Justice* [2018] 2 I.R. 542.

36. The jurisdiction of the First Respondent to retrospectively revoke permissions which were no longer extant was raised and the First Respondent was referred to the use of the present tense in Regulation 27(1) of the 2015 Regulations. It was submitted that the subject matter of the Regulation 27(1) decision making process could only be the Second Applicant's extant permission valid from November, 2015 until November, 2025.

DECISION TO REVOKE WITH RETROSPECTIVE EFFECT

37. A second decision was made on the 1st of April, 2021 on behalf of the First Respondent by Mr. RF, the same official who had made the previous rescinded decision. This decision was to similar effect as the decision of the 5th of February, 2021, revoking the Second Applicant's residence card, finding that he had engaged in a marriage of convenience, and purporting to render his residence in the State since 2009 to be residence without permission.

38. In arriving at this decision, the letter recites that the Second Applicant had not provided answers to the point made that the original application was founded on documentation which An Garda Síochána had "*found*" to be false and misleading. Reference was made for the first time to the fact that in 2009 the rules regarding student registration were about to change and in consequence the First Respondent was satisfied that the Second Applicant "*contrived to enter into a marriage with EU national Ms. SB in order to maintain a residence permission in the State*."

39. By way of observation, it is unclear what findings of An Garda Síochána were relied upon given that there is a pending prosecution against the Second Applicant in respect of which no findings have yet been made by a court. It is also unclear what findings may have been made in respect of the original residency application as the charges preferred against the Second Applicant all appear to relate to the documentation submitted in 2013, after the Second Applicant's divorce, and the record of the statement taken from Mr. D suggests that he was only asked about the 2013 employment and not Ms. SB's previous employment dating to 2009. In his decision letter Mr. RF appears to conflate Mr. D's evidence in relation to employment in 2013 with employment with a different company also owned or controlled by Mr. D in 2009 which was not addressed by Mr. D at all in his statement to An Garda Síochána. It may be that Mr. RF, on behalf of the First Respondent, was relying on a report from An Garda Síochána, which has not been disclosed, rather the actual statement made by Mr. D as it appears, at least on my reading, to assert a position regarding documentation which is not borne out by documentation exhibited by the investigating member in these proceedings in the form of recorded interviews and statements.

40. The First Respondent further relied on transactions on Ms. SB's bank account at a time when she was believed to be living in Latvia to conclude that the Second Applicant was using her account. Notably, a concern in this regard had not been notified previously to the Second

Applicant and had not been relied upon in the previous decision, which had been rescinded. No reference was recorded to any checks being carried out with Ms. SB with regard to this activity on her bank account. Western Union Transfers to a person whose name was similar to the Second Applicant's now wife in 2012 were relied upon to conclude that the Second Applicant had been involved in a relationship with his now wife during the course of his marriage to Ms. SB.

41. The First Respondent concluded that as the applications for residency were based on false and misleading information as to a material fact, the permissions obtained were "*never valid*". It was confirmed that the First Respondent had decided to revoke the permission in accordance with Regulation 27(1) and Article 35 of the Directive. It was further concluded that the marriage was a marriage of convenience and that any permission deriving from the marriage including permissions dating back to 2009 which were expired were "*deemed invalid*" from the outset and residence cards held on that basis revoked in accordance with Regulation 27(1) of the 2015 Regulations.

42. Although the decision of the 1st of April, 2021 refers to the Second Applicant's marriage in 2014, it did not make any reference to the First Applicant.

INVOKING THE REVIEW PROCESS

43. The Second Applicant sought a review of the decision under Regulation 25 of the 2015 Regulations on the 1st of May 2021. The application for a review was stated to be on the condition that the review process would be *"sufficiently robust"* to address the concerns of the Applicants, in particular in relation to the knock-on effect on the First Applicant's entitlement to Irish citizenship and her rights protected under the European Convention on Human Rights and the Charter of Fundamental Rights and Freedoms. Reliance was also placed on the decision of the Supreme Court in *Damache v. Minister for Justice* [2020] IESC 63. In the letter of the 1st of May 2021, the Applicants' solicitors made a series of requests which might be summarised as follows:

a) A request for all documents alleged to be false and misleading;

b) All information provided to the First Respondent from any source that was relevant to the decision, whether referred to in it or not;

c) An inquiry into the reasons for the investigation;

d) A query as to when Ms. SB was notified of the proposal to revoke permission;

e) A claim that the process should be subject to the 2006 Regulations, rather than the 2015 Regulations;

f) A complaint that the rights of the First Applicant were not considered, and that the decision would have extremely detrimental implications for her entitlement to citizenship;

g) An assertion that the Second Applicant was prejudiced by having to defend himself against criminal charges relating to the same issues raised by the First Respondent.

44. In addition to seeking a copy of the information relied upon in the decision-making process and raising issues about the Second Applicant's ability to engage in the process whilst maintaining his rights in a pending criminal process was raised, clarification was also sought as to who bore the burden of proof, the standard of proof being applied and how it was proposed to deal with hearsay evidence and questions of credibility in the process.

45. The First Respondent replied to the letter of the 1st of May, 2021 to state that the review was in a queue to be processed and that a Freedom of Information Act request could be made in the ordinary way. The Second Applicant was granted permission to remain pending the review.

46. The Applicants' solicitors wrote again on the 25th of June 2021 this time threatening proceedings unless they were given assurances regarding the procedures to be followed on the review. The First Respondent replied on the 28th of June 2021, stating that she was not in a position to issue a substantive response at that time to the issues raised, but that arrangements

would be made to identify the documents referred to by the First Respondent and furnish a copy to them.

47. The Regulation 25 review has not been pursued as, in the absence of assurances as to the procedures to be followed, the Applicants initiated judicial review proceedings on the 30th of June, 2021.

PROCEEDINGS AND ARGUMENTS

48. In these proceedings the Applicants seek, *inter alia*,

a) An order of *certiorari* in respect of the First Respondent's decision communicated to the second applicant by way of letter dated the 1st of April, 2021;

b) A declaration that the First Applicant is an Irish citizen by birth whose citizenship cannot be the subject of revocation;

c) In the alternative to the relief sought at paragraph 2, an order prohibiting the Respondent from proceeding to investigate and review the Second Applicant's historic immigration status in the State until adequate provision is made to ensure that the procedural rights of the First Applicant are appropriately safeguarded;

d) An interim order prohibiting the First Respondent from concluding the review of the decision of the 1st of April, 2021 pending the determination of these proceedings;

e) A declaration that Ireland has failed to transpose or properly transpose Articles 30 and 31 of the Citizens Directive (2004/38/EC) by failing to establish an independent appeals procedure for decisions taken under Article 35 of the said Directive;

f) A declaration that the administrative appeals process provided by the Respondents (whether combined with the availability of judicial review or not) fails to comply with the provisions of Article 47 of the Charter of Fundamental Rights;

g) In the alternative to the relief sought at paragraph b, a declaration that, in all the circumstances of this case, the Respondents have failed to properly implement or apply the terms of the European Charter of Fundamental Rights, and more particularly Article 24.2 thereof;

h) A declaration that, having regards to the circumstances and timing of the events under consideration by the First Respondent relating to the immigration status of the Second Named Applicant, the applicable law governing the review of such matters is the European Communities (Freedom of Movement) Regulations 2006, as amended;

i) A declaration that, in all the circumstances of this case, the First Respondent has failed to perform her functions in a manner compatible with the State's obligations under the European Convention on Human Rights, as required by s. 3(1) of the European Convention on Human Rights Act 2003.

49. In advancing this case the Applicants rely on the fact that the First Applicant is a citizen of Ireland by birth by virtue of s. 6 of the Irish Nationality and Citizenship Act 1956 (as amended) and in fact and in law was granted citizenship on that basis. It is pointed out that the Constitution makes no provision for the involuntary removal or stripping of citizenship so granted and there is no basis in law for any procedure to reopen or revisit the question of citizenship so granted. It is contended that the decision of the 1st of April, 2021 impugned in these proceedings and the procedure under which it was made failed to give any, or any adequate, regard to the circumstances of the First Applicant and the consequences of such a decision on her individually and represents a collateral attack on the citizenship status of the First Applicant.

50. It is further contended that the procedure whereby the decision of the 1st of April, 2021 was reached, and the proposed review procedure are insufficiently independent and impartial to vindicate the First Applicant's procedural rights, as a presumptive citizen of Ireland by operation of law, in a process calculated to potentially deprive her of that citizenship. It is maintained that the process falls short of providing those procedural safeguards required to meet the high standards of natural justice applicable to a person facing such severe

consequences as are potentially at issue for the First Applicant. Reliance is placed on Article 30 of the Directive which provides that a decision such that of the 1st of April, 2021 must specify the court or administrative authority with which an appeal may be lodged. It is maintained that the review procedure provided for by the Free Movement Regulations does not meet the requirements of Article 30 because the review provisions do not establish an independent and suitably impartial appeal body.

51. Complaint is also made in relation to the failure to observe the requirements of the European Charter of Fundamental Rights by the failure to consider the best interests of the First Applicant as a primary consideration, as required by Article 24.2 of the Charter and obligations on the State under the European Convention on Human Rights by revoking the Second Applicant's residence card with retrospective effect without any prior consideration of the First and/or Second Applicants' private and/or family lives. It is further contended that the decision of the 1st of April 2021 was produced in circumstances giving rise to a reasonable apprehension of bias and/or in which objective bias is established on the part of the decision maker, Mr. RF, a servant and/or agent of the First Respondent. Further in reaching this decision, it is complained that the First Respondent, her servants and/or agents failed to conduct a proportionality assessment, as required by the terms of the Directive and the decision is in fact disproportionate. Issues were also raised with regard to the fairness of the procedure adopted, the reliance on undisclosed information and the unquestioning reliance on garda evidence.

52. The First Respondent's position has at all times been that this application is premature and that the First Applicant has no standing to bring these proceedings.

53. Firstly, it is maintained that no final decision has been taken by the First Respondent regarding the revocation of the residence cards since the first instance decision is subject to a right of review, which review procedure was not complete at the time of issue of these proceedings.

54. Secondly, reliance is placed on the fact that no attempt was ever made by any emanation of State to withdraw the First Applicant's passport or to revoke her citizenship. As a result, it is their position that these proceedings are speculative, pre-emptive and premature. The first eight grounds in the Statement of Opposition specifically make it clear that it is the

Respondents position that the citizenship of the First Applicant "*does not properly arise for consideration in these proceedings*.''

55. The Respondents maintain that any argument regarding the effect of the revocation of the residence cards on the First Applicant's right to a passport (albeit the complaint relates to citizenship and not a passport), are matters that will only fall to be determined when the review mechanism is complete and/if at that stage, her right to an Irish passport is questioned or disputed by the State.

56. With regard to the Applicant's reliance on the intervening decision of the Supreme Court in *U.M. v. Minister for Foreign Affairs* [2020] IESC 25, they dispute its' applicability on the basis that *UM* related to a fact situation where the Minister for Foreign Affairs refused a passport to a child applicant on the basis that his derivative right of citizenship had been retroactively invalidated because of the revocation of his father's refugee status. The Respondents maintain that as there had been no such positive action in this case, these proceedings are not the appropriate forum for a debate on the entitlements of the child in the absence of an interference with such rights.

57. They maintain that the sole matter arising in these proceedings is the validity of a first instance determination of the First Respondent that the Second Applicant's residence cards should be revoked because they were obtained by fraud. It is contended that I cannot be called upon to decide any other issue in the absence of a factual matrix for same.

STATUTORY FRAMEWORK

58. Irish citizenship is a status recognised under the Constitution. Article 9 of the Constitution provides:

> *"1. 1° On the coming into operation of this Constitution any person who was a citizen of Saorstát Éireann immediately before the coming into operation of this Constitution shall become and be a citizen of Ireland.*
>
> *2° The future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law.*

3° No person may be excluded from Irish nationality and citizenship by reason of the sex of such person.

2 1° Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law.

2° This section shall not apply to persons born before the date of the enactment of this section.

3 Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens."

59. By virtue of s. 6(1) of the Irish Nationality and Citizenship Act, 1956 (as amended) [hereinafter "the 1956 Act"] the First Applicant was entitled to Irish citizenship by birth, provided that she complied with subsection 6(2) as follows:

"(2) (a) Subject to subsection (5), a person who is entitled under subsection (1) to be an Irish citizen shall be an Irish citizen from the date of his or her birth if—

(i) he or she does any act that only an Irish citizen is entitled to do, or

(ii) in the case of a person who is not of full age or who is suffering from a mental incapacity, any act is done on his or her behalf that only an Irish citizen is entitled to do."

60. Section 6 of the 1956 Act was amended by the provisions of the Irish Nationality and Citizenship Act 2004. The 1956 Act provided that *"every person born in Ireland is an Irish citizen from birth"*. However, in 2004, s. 6 was amended to provide that:

"Subject to section 6A (inserted by section 4 of the Irish Nationality and Citizenship Act 2004), every person born in the island of Ireland is entitled to be an Irish citizen."

61. Section 6A, to which the entitlement set out at s. 6 was expressly made subject, was also inserted by the 2004 Act, and provided for a parental residency requirement:-

> *"A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years."*

62. Section 6A(2) provides that this section, i.e., the residency requirement, does not apply to persons born before the commencement of the 2004 Act, nor to persons born in the island of Ireland to parents at least one of whom was an Irish citizen, a British citizen or a person entitled to reside in the State without any restriction on his or her period of residence including in accordance with the permission granted under s. 4 of the Immigration Act 2004.

63. It appears to be accepted for present purposes that the First Applicant is entitled to citizenship unless it can be said that the period of residence of the Second Applicant in Ireland is not reckonable for the purposes of s.6A.

64. This in turn requires a consideration of s. 6B of the 1956 Act, as inserted by the 2004 Act. Section 6B(4), so far as it is relevant, provides:-

> *"A period of residence in the State shall not be reckonable for the purposes of calculating a period of residence under section 6A if— (a) it is in contravention of section 5(1) of the Act of 2004"*

65. The *"Act of 2004"* is the Immigration Act of that year, and again so far as is relevant, s. 5 of that Act provides that:

> *5 (1) "No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act or a permission given to him or her after such passing by or on behalf of the Minister (2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State. (3) This section does not apply to— ... (b) a refugee who is the holder of a declaration (within the meaning of that Act) which is in force…"*

66. In this case, the Second Applicant had a permission deriving from EU law and issued in accordance with s. 5(1) of the 2004 Act, but an issue arises in these proceedings as to whether that permission can be retrospectively nullified under the regulatory regime in place in respect of EU rights.

67. Neither the 1956 Act nor any other law identified to me or by me provides for the denationalisation of a citizen by birth.

68. Section 7 of the Passports Act, 2008 [hereinafter "the 2008 Act"], however, deals with the issue and cancellation of passports and provides for the issue of a passport by the Minister for Foreign Affairs where the applicant is an Irish citizen as follows:

> *"7. (1) Before issuing a passport to a person, the Minister shall be satisfied—*
>
> *(a) that the person is an Irish citizen, …"*

69. Section 12 of the 2008 Act concerning the refusal to issue passports provides in relevant part that:

> *"12.— (1) The Minister shall refuse to issue a passport to a person if—*
>
> *(a) the Minister is not satisfied that the person is an Irish citizen,*
>
> *(b) the Minister is not satisfied as to the identity of the person,*
>
> *(c) ….*
>
> *(d)….,*
>
> *(e) in connection with the application concerned for the issue of a passport, a person (whether or not the applicant)—*
>
> *(i) knowingly or recklessly provides information or documents that are false or misleading in a material respect, or*

(ii) makes a statutory declaration, or swears an affidavit, that is false knowing it to be false or being reckless as to whether it is false,

(f) the person is a child and section 14 is not complied with in relation to the issue of a passport to the child, or

(g) the Minister has been notified by the Courts Service that an order has been made to require the surrender of any child's passport or to require any person to refrain from applying for a passport for any child so long as the order is in force.

(2) ....

70. Section 18 of the 2008 Act relates to the cancellation and surrender of passports. It states in relevant part that:

"18.— (1) The Minister may cancel a passport issued to a person if—

(a) the Minister becomes aware of a fact or a circumstance, whether occurring before or after the issue of the passport, that would have required or permitted him or her to refuse under section 12 to issue the passport to the person had the Minister been aware of the fact or the circumstance before the passport was issued,

(b) the Minister is informed by the Minister for Justice, Equality and Law Reform that the Irish citizenship of the person (a naturalised person) has been revoked by that Minister of the Government or that the person has renounced Irish citizenship,

(c) ....

(d) ...

(e) ....

(f) ...

(2) Where a passport issued to a person is cancelled under subsection (1), the Minister shall inform the person by notice in writing of the cancellation and the grounds for it.

(3) Where a passport issued to a person is cancelled under subsection (1), the person shall, if he or she is in possession or control of the passport, surrender it as soon as practicable to the Minister.

(4) Where a passport is cancelled under subsection (1), the Minister may, if appropriate, require by notice in writing the person who is in possession or control of the passport to surrender it to the Minister within such period as may be specified in the notice.

(5) …

(6) …

(7)…).”

71. Finally, s. 19 of the 2008 Act relates to the appeals process. It provides as follows:

“19.— (1) A person who, in relation to an application for the issue of a passport to him or her, is dissatisfied with a decision of the Minister under paragraph (b), (c), (d), (e), (f) or (g) of subsection (1), or subsection (2), of section 12 may appeal the decision to a passport appeals officer.

(2) A person who, in relation to the cancellation of a passport issued to him or her, is dissatisfied with a decision of the Minister under paragraph (a) (other than a decision on the ground that the person is not an Irish citizen), (c), (d), (e) or (f) of section 18(1) may appeal the decision to a passport appeals officer.

(3) A person who is entitled to apply for the issue of a passport on behalf of another person under section 6 may appeal a decision of the Minister referred to in subsection (1) or (2) on behalf of that other person.

(4) The Minister may appoint one or more persons who, in the opinion of the Minister, have knowledge or experience relating to the issue of passports, to be a passport appeals officer (in this Act referred to as “a passport appeals officer”).

(5) A passport appeals officer shall hold office for a term of 3 years.

(6) A passport appeals officer shall be paid such remuneration (if any) and such allowances for expenses as the Minister, with the consent of the Minister for Finance, may from time to time determine.

(7) A passport appeals officer may—

(a) resign from office by letter addressed to the Minister and the resignation shall take effect on the date on which the Minister receives the letter,

(b) be removed from office by the Minister but only if, in the opinion of the Minister, he or she has become incapable through ill-health of effectively performing his or her functions under this Act or has committed stated misbehaviour.

(8) A passport appeals officer shall be independent in the performance of his or her functions under this Act.

(9) An appeal under this section shall be made in writing to a passport appeals officer and shall be accompanied by a statement of the grounds relied on by the appellant.

(10) The passport appeals officer shall forward a copy of the appellant's statement under subsection (9) to the Minister.

(11) The Minister shall furnish observations in writing relating to the grounds of appeal to the passport appeals officer and a copy of such observations to the appellant concerned and the appellant shall be afforded an opportunity to reply thereto.

(12) A passport appeals officer may, in determining an appeal under this section—

(a) confirm the decision of the Minister, or

(b) recommend that the decision of the Minister should be set aside,

and he or she shall inform the Minister and the appellant concerned by notice in writing of his or her determination and the reasons for it.

(13) Where the Minister does not accept the recommendation of a passport appeals officer under subsection (12)(b), the Minister shall inform the passport appeals officer and the appellant concerned by notice in writing and of the reasons for so doing.

(14) An appellant may withdraw an appeal under this section by sending a notice of withdrawal to the passport appeals officer.

(15) The Minister may prescribe time limits for the making and determination of appeals under this section and such ancillary, supplemental or consequential matters as may be necessary for giving full effect to this section."

72. In revoking the Second Applicant's residency permission, the First Respondent proceeds under the 2015 Regulations. These Regulations were introduced pursuant to s. 3 of the European Communities Act, 1972 and serve to give further effect to the Directive. Of relevance to these proceedings, Regulation 10(2)(a) provides for retention of citizenship on divorce in the following terms:

"10. (1) Where the marriage or civil partnership of a Union citizen is dissolved or annulled and, at the time of the dissolution or annulment, as the case may be, he or she had a right of residence in the State under these Regulations, a family member who is a national of a Member State shall retain the right of residence that he or she enjoyed at the time of the dissolution or annulment.

(2)(a) Subject to subparagraph (b), where the marriage or civil partership of a Union citizen is dissolved or annulled and, at the time of the dissolution or annulment, as the case may be, he or she had a right of residence in the State under these Regulations, a family member who is not a national of a Member State may retain a right of residence in the State on an individual and personal basis.

(b) A right of residence of a family member referred to in subparagraph (a) is subject to the Minister being satisfied that—

(i) prior to the initiation of the dissolution or annulment proceedings concerned, the marriage or civil partnership had lasted at least 3 years, including one year in the State"

73. The 2015 Regulations make no provision for the acquisition or loss of citizenship but provide as regards cessation of residency as follows:

"Cessation of entitlements

27. (1) The Minister may revoke, refuse to make or refuse to grant, as the case may be, any of the following where he or she decides, in accordance with this Regulation, that the right, entitlement or status, as the case may be, concerned is being claimed on the basis of fraud or abuse of rights:

...

(b) a residence card, a permanent residence certificate or permanent residence card;

...

(g) a right of residence under Regulation 10(2);

(h) a right of residence under Regulation 12(1).

(2) 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.

(3) Where the Minister proposes to exercise his or her power under paragraph (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).

(4) In this Regulation, 'abuse of rights' shall include a marriage of convenience or civil partnership of convenience."

74. Regulation 28 deals with the Minister's powers in respect of a marriage of convenience as follows:

"28. (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."

75. Neither Regulation 27 or 28 of the 2015 Regulations provide in express terms for a retrospective nullification of permissions which have issued on foot of false or misleading information or by reason of a marriage of convenience. Indeed the provisions of Regulations 27 and 28 are couched in the present tense both as regards a permission which *"is being relied upon"* and a marriage which "*is*" a marriage of convenience (as opposed to a post-divorce situation where reference would be made to the marriage in the past tense). It is also clear that the Regulations do not mandate the revocation of a permission that "*is being relied*" upon but they empower revocation by providing for a discretion ("*may*") to revoke. This is in contrast with the language used in the 2006 Regulations where revocation was mandatory. There is no express reference in the Regulations to a requirement that this power be exercised proportionately.

76. A review of the decision may be sought under Regulation 25 as provided for in the following terms:

"25. (1) A person who has, or who claims to have, an entitlement under these Regulations to enter or reside in the State may seek a review of any decision concerning such entitlement or claimed entitlement.

(2) An application for review under this Regulation shall be submitted to the Minister within 15 working days of the receipt by the person concerned of the decision and shall set out in writing the grounds for review and the particulars specified in Schedule 4.

(3) The Minister may, where he or she is satisfied that it is warranted in the particular circumstances, extend the period referred to in paragraph (2) within which a review must be submitted.

(4) A review under this Regulation of a decision under paragraph (1) shall be carried out by an officer of the Minister and who—

(a) shall be a person other than the person who made the decision, and

(b) shall be of a grade senior to the grade of the person who made the decision.

(5) The officer carrying out the review shall have regard to the information contained in the application and may make or cause to be made such enquiries as he or she considers appropriate and may—

(a) confirm the decision the subject of the review on the same or other grounds having regard to the information contained in the application for the review, or

(b) set aside the decision and substitute his or her determination for the decision."

77. It is clear that it is envisaged under Regulation 25 that the review would be carried out by a more senior officer but, like the first instance decision maker, within the Minister's department. There is no express reference to a requirement for proportionality in Regulation 25, or indeed elsewhere in the 2015 Regulations.

78. Article 35 of Directive 2004/38/EC provides in relation to fraud and marriages of convenience:

"Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."

79. The procedural safeguards referred to in Articles 30 and 31 require notification of a decision and the provision of access to judicial and, where appropriate, administrative redress procedures in the State whereby a person may appeal against or seek review of any decision taken against them. Although the Directive envisages the use of administrative redress procedures, this is qualified by the requirement that this occur "*where appropriate*". The redress procedures must allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They must also ensure that the decision is not disproportionate. Thus the requirement for proportionality in decision

making is expressly provided for under the Directive in a manner which is not mirrored in express terms in the 2015 Regulations.

DISCUSSION AND DECISION

80. This case raises difficult and somewhat circular questions relating to the requirement for procedural safeguards in a decision-making process which has as a potential consequence of the loss of citizenship by birth. In considering the requirement for procedural safeguards the legal effect of revocation of a residence permission on vested rights or rights acquired prior to the date of revocation must also be addressed. Two recent decisions of the Supreme Court are immediately relevant to a consideration of these issues namely, *Damache v. Minister for Justice & Ors* [2021] 1 ILRM 121 [hereinafter "*Damache*"] and *UM (a minor suing by his father and next friend MM) v Minister for Foreign Affairs & Anor* [2022] IESC 25 (hereinafter '*UM*').

81. In *Damache*, the Supreme Court concluded that the process provided for under s. 19 of the 1956 Act in relation to the revocation of citizenship acquired by naturalisation did not meet the high standards of natural justice applicable to a person facing such severe consequences as are at issue by reason of the absence of an impartial and independent decision maker (paras. 129 and 134 of the judgment of Dunne J. on behalf of the Court). In *UM*, the Supreme Court concluded (judgments of O'Donnell CJ. and Dunne J.) that as a matter of law a decision to revoke refugee status of the applicant's father, and therefore the lawful basis for his residence, was prospective in effect and did not have the effect of nullifying *UM*'s derived rights to citizenship acquired on foot of the father's residence prior to revocation of his refugee status. It is important to note that the decision in *UM* was only delivered in June, 2022 and post-dates the invocation of the decision-making process in this case.

Were the First Applicant's rights affected by the Revocation Process initiated in November, 2020?

82. The difficult issues identified at para. 80 arise because the First Respondent states in opposing these proceedings that if the decision at first instance is upheld at review stage, then it will follow that the First Applicant was not entitled to Irish citizenship at birth because neither of her parents had the requisite period of lawful residence in the State prior to her birth (para.

7 of the Affidavit of one Ms. KG sworn on the 7th day of February, 2022). At the same time, the First Respondent maintains that the First Applicant's citizenship is not engaged by the decision or process under challenge or, by extension, by these proceedings. At paragraph 9 pf her Affidavit on behalf of the First Respondent Ms. KG accepts that the First Applicant's entitlement to Irish citizenship is dependent on the legality of her parents' residence in the State when she was born. She adds that a finding of fraud in respect of a residence permission operates to render that permission *void ab initio*. The First Respondent's position appears to be that this followed as a matter of law. This position is understandable in its historic context because when the decision was made at first instance and these proceedings commenced the conventional wisdom, confirmed by the decision of the Court of Appeal in *UM* (Murray J., [2020] IECA 154 - since overturned), was that a fraudulently obtained permission was a nullity, *void ab initio* and that a child's citizenship rights deriving therefrom following birth in the State were also a nullity.

83. It would follow from the logic of the First Respondent's pleaded position that the First Applicant's rights are not engaged in the Regulation 27 process that it was not necessary to consider them in the context of the first instance decision under challenge in these proceedings and the review process established under the 2015 Regulations. This position is consistent with the terms of the decision reached at first instance where no regard whatsoever was had to the position of the First Applicant in considering the exercise of the Regulation 27 power to revoke. It is also consistent with the terms in which the opposition to these proceedings has been expressed where the Respondents maintain variously that the citizenship of the First Applicant does not arise for consideration, the issuing of a passport is not the grant of citizenship and no issue of the involuntary removal or stripping of citizenship arises but, if the true position is that neither of the First Applicant's parents had the required period of lawful residence prior to her birth, then she would not have been entitled to Irish citizenship from birth and was not entitled to a passport, a fact that cannot be altered by any subsequent event such as the issue of a passport to her (paragraphs 1, 2 & 3 of the Statement of Opposition). It is expressly pleaded on behalf of the Respondents that the circumstances and interests of the First Applicant were not a relevant consideration in the decision of the 1st of April, 2021. It is further contended that the Applicants' Article 8 rights were not relevant considerations for the First Respondent in deciding whether or not the Second Applicant obtained those cards on the basis of false and misleading documents and a marriage of convenience.

84. To my mind the First Respondent's position that the First Applicant's right to citizenship is not engaged by the decision on review, but may be rendered void *ab initio* where the finding on review is that there was fraud perpetrated by the Second Applicant, is a contradiction in terms. If the First Named Applicant's citizenship status could be rendered *void ab initio* as a matter of law in consequence of the decision under the 2015 Regulations, then manifestly her rights are engaged triggering a requirement that her entitlement to fair procedures is observed in the process. It is difficult to see how it could be contended otherwise. The trigger for fair procedures was identified by Hardiman J. in *Dellway Investments Ltd. v. NAMA* [2011] 4 I.R. 1, 328 in the following terms:

> *"If a decision made concerning me or my property is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form. It would be unjust to exclude me from being heard."*

85. Fennelly J. further stated in *Dellway* (p. 328 to 329) as follows:

> *"If the requirement is that there be direct interference with the legal substance of the rights, the statement is too narrow. It should be capable of including material practical effects on the exercise and enjoyment of the rights."*

86. In *A.P. v. Minister for Justice and Equality* [2019] IESC 47 Clarke C.J. helpfully summarised at para. 4.3 the type of material to which a person potentially affected by a public law decision is entitled when stating that it is clear that a person who may potentially be directly and adversely affected by a public law decision is entitled to be heard in the decision-making process and, in that context, will ordinarily be entitled to be informed of any material, evidence or issues which it might be said could adversely impact on their interests in the decision-making process. Indeed, where the rights which stand to be adversely impacted are citizenship rights, it is now established that a very high level of procedural safeguards are required.

87. It suffices to refer to the decisions of the Supreme Court in both *Damache* and *UM*, to understand the enormity for the First Applicant of a decision affecting her citizenship rights. In his judgment in *UM*, O'Donnell CJ places the special constitutional position of Irish

citizenship enshrined in the terms of Article 9 of the Constitution in its historical context (para. 3). He traces the developments which led to separate constitutional amendments in 1998 (in respect of the Good Friday Agreement) and 2004 and the measures adopted through the provisions of the Irish Nationality and Citizenship Act, 2004 amending the 1956 Act and providing in law for the acquisition of citizenship at birth on the basis of the reckonable residence in the State of a parent prior to birth.

88. For her part, in her separate judgment, Dunne J. records that the acquisition or loss of citizenship is a matter of profound significance for the individual concerned (para. 35) citing paras. 26 and 27 of her judgment in *Damache* as follows:

> *"26. The importance of citizenship was reflected on by O'Donnell J. speaking in the case of AP v. Minister for Justice [2019] 3 I.R. 317; [2019] 2 I.L.R.M. 377 14 at para.2 of his judgment on the issue of the discretion of the Minister to grant a certificate of naturalisation where he observed as follows (at pp.345/401): "The origin of the procedure, and the extremely broad discretion conferred upon the Minister, lies in some fundamental conceptions of sovereignty. It is a basic attribute of an independent nation that it determines the persons entitled to its citizenship. A decision in relation to the conferral of citizenship not only confers the entire range of constitutional rights upon such a person, but also imposes obligations on the State, both internally in relation to the citizen, and externally in its relations with other states."*
>
> *27. The loss of citizenship, entailing as it does the loss of protection of the full range of constitutional rights conferred upon a citizen, is a matter of grave significance to the individual concerned. It may, in some cases, render the individual stateless. As the individual concerned becomes an alien on the loss of citizenship that person becomes subject to the risk of deportation. The individual concerned will no longer be entitled to obtain an Irish passport and that will have an impact on the individual's ability to travel. The State will no longer have any obligation to provide consular assistance to the individual concerned as they would in the case of an Irish citizen who runs into difficulties when abroad. Other rights, such as the right to vote in the State will be lost. For an individual who had obtained Irish citizenship and did not have citizenship by descent in a Member State of the European Union, the loss of citizenship in Ireland will result in the loss of citizenship of the European Union with all that that entails."*

89. While the decision-making process does not on its face concern the First Applicant insofar as her residence permission is not under review, it cannot be gainsaid but that the decision as contemplated by the First Respondent when the revocation process was initiated was considered by both the Applicants and the First Respondent to be capable of having material practical effects on the exercise and enjoyment by the First Applicant of her citizenship rights. This being the case, if the process was capable of lawfully having the potential consequences contemplated by the First Respondent (a question to which I return below), then it seems to me that the First Applicant's interests were required to be considered in the decision-making process. It is manifest that they were not.

90. In *Damache*, the Supreme Court concluded that the enormity of the decision for the person whose citizenship status was in jeopardy meant that a high level of procedural safeguards was required and was not present in the then existing process established under s. 19 of the 1956 Act. The situation here appears to be even more stark. At least in the situation of the adult at risk of losing an acquired citizenship (considered by the Supreme Court in *Damache*), there was a process which allowed for consideration of the affected interests, albeit one that was not considered by the Supreme Court to be fit for purpose, before the revocation decision was made. Whilst refusing to acknowledge that the First Applicant's rights were engaged in the revocation process in train under the 2015 Regulations, the First Respondent has not in argument before me pointed to any separate process which would be available to the First Applicant whereby she might establish her entitlement to citizenship notwithstanding that they had been rendered *void ab initio* by reason of a revocation decision in respect of her father's residence taken under the 2015 Regulations.

91. Reference was made in oral submissions, but not relied upon in the Opposition papers, to a process available under the 2008 Act. As apparent from the terms of s. 19 of the 2008 Act set out above, however, while an appeal to a passport officer is provided for where there is a decision to withdraw a passport or to refuse one, the decision of the passport officer is not binding as to result on the Minister for Foreign Affairs. Quite apart from the fact that the process under the 2008 Act was not relied upon in Opposition and is available only in respect of a decision with regard to a passport which while an important expression of citizenship rights is but one part of those rights, it does not seem to me that this process has the requisite independence required under the decision of the Supreme Court in *Damache v. Ireland* where the effect of the decision is to find that one's right to citizenship was *void ab initio*. In

particular, it is immediately obvious that the appeal to a passport officer under the 2008 Act is not binding as to outcome. Accordingly, while the First Applicant's position was not considered by the First Respondent to be engaged in the Regulation 27 process, it appears that no other procedure would be available to the First Applicant to establish her right to citizenship in circumstances where her father's residency was said to have been rendered *void ab initio* with the consequential asserted nullification of her right to citizenship.

92. Where the effect of a revocation decision was as contemplated by the First Respondent, the failure to make provision for the consideration of her rights in a sufficiently robust process (meeting standards prescribed in *Damache*) before a decision that might negative her status as a citizen fails to respect the most fundamental tenets of constitutional justice. It must, however, be seriously questionable in view of the intervening decision of the Supreme Court in *UM* whether the legal effect of revocation under the 2015 Regulations could be the retrospective unravelling of acquired citizenship rights of a third-party child, contrary to the understanding of the First Respondent when the decision to revoke was made and these proceedings were instituted.

Is the Regulation 25 process sufficiently robust where the First Applicant's Citizenship Rights are potentially affected?

93. As observed above, it is my view that the 2015 Regulations provide fewer procedural safeguards than had been available under the process provided for under s. 19 of the 1956 Act which was found to be unconstitutional in *Damache*. Whereas in the process considered in *Damache* provision had been made for an independent committee to review the First Respondent's decision to revoke citizenship, albeit in circumstances where it had no power to bind the First Respondent, the 2015 Regulations allow for all decision making to be taken in the First Respondent's name with an internal administrative review within the First Respondent's own department and no external oversight other than proceedings by way of judicial review.

94. It is part of the Applicants' case in these proceedings that the review process under the 2015 Regulations fails to meet the requirements of Articles 30 and 31 of the Directive. While the review procedures provided for under the 2015 Regulations has been found to be adequate for the purpose of decisions taken in relation to EU residency rights (*Balc v. Minister for Justice*

[2018] IECA 76), it is also clear that the review provided under the 2015 Regulations could never be considered to meet the standard of high level of procedural protection mandated by the decision in *Damache* where a process which may entail the loss of citizenship is in train. Addressing the failure to provide for an external appeal in the 2015 Regulations, Peart J. observed in *Balc* (para. 80):

> *"80. I am also satisfied that it is not contrary to the Directive that the review would be carried out by another and more senior official from within the Minister's department. While under the Carltona doctrine referred to above both the first instance official and the more senior reviewing official are each acting "as the Minister", it is overly simplistic to assert that it is therefore the Minister who is making both decisions, and consequently that the review is not "independent" thereby rendering the remedy ineffective. The fact is that the review is carried out by a different and more senior official as provided for in the Regulations. Any requirement for independence as it is to be considered in this particular context is met by the need for it to be undertaken by a different and more senior official. It would of course be different if the Regulation permitted the review to be carried out by the same first instance decision-maker. But that is not the case. Where an administrative review is permitted by the Directive, and where there is no requirement for an independent tribunal such as the RAT in the asylum context, there can be nothing objectionable about a different and more senior official in the same department carrying out the review."*

95. This conclusion is however tied to what was considered to be the requirement for independence in "*this particular context*", there being no suggestion that the particular context entailed an attack on the citizenship rights of a child. I am quite satisfied, notwithstanding the decision in *Balc*, that the Regulation 25 review process falls short of *Damache* requirements of procedural fairness where a decision with the potential to negative citizenship status is in contemplation.

96. This does not necessarily mean that the Regulation 25 review process falls foul of the requirements of Articles 30 and 31 of the Directive, as claimed. It seems to me that consideration of whether the Regulation 25 review process is compliant with requisite levels of procedural fairness mandated under Articles 30 and 31 of the Directive in turn requires a finding to be made with regard to the lawful parameters of the process in train under the 2015

Regulations. My conclusion that the review process under the 2015 Regulations does not meet a *Damache* level of procedural fairness would only invalidate that review process if the First Respondent were lawfully seized of a power to revoke with retrospective effect in a manner which was potentially capable of depriving the First Applicant of citizenship of the type purported to be exercised by the First Respondent. Where the process under the 2015 Regulations is confined to a determination of rights prospectively of the person with EU residence right or, if retrospectively, in a manner which does not impact on a third-party child's citizenship rights, it seems to me that a requirement for *Damache* safeguards would not arise with the result that the Regulation 25 review process, as stood over by the Court of Appeal in *Balc,* is not drawn into fresh question in these proceedings before me.

97. The requirement for a higher level of procedural safeguards flows from the enormity of the consequences of the decision in contemplation for the child citizen whose position stands to be so seriously affected. It seems to me that if the 2015 Regulations, properly construed, do not provide for a power to retrospectively nullify vested citizenship rights of a non-party child, then the Regulation 25 review procedure is not drawn into question. Whether the Regulation 25 review process is appropriate falls to be determined by the identification of the proper parameters of the decision-making process in train under the 2015 Regulations.

98. Similarly, the determination of the parameters or scope of the decision-making process in train under the 2015 Regulations is relevant to a proper consideration of the Respondents' contention that giving notice to all parties potentially affected by a decision under the 2015 Regulations is unworkable in excusing a failure to engage in a consideration of the First Applicant's rights in the decision-making process. The nature of protection required and what might otherwise be required to be made "*workable*" is determined by the extent of proposed interference with rights and interests. Afterall, there is no requirement to notify and consider the position of a child whose citizenship rights are not affected by the process. As already noted, the particularly high level of procedural safeguards which the Supreme Court identified in *Damache* is only triggered where the contemplated decision has a potential impact on citizenship rights, as had been envisaged by the First Respondent in line, it should be fairly acknowledged, with the decision of the Court of Appeal in *UM* and the conventional wisdom at that time.

99. Irrespective of whether a power exists under the 2015 Regulations to make a decision which has the effect of nullifying an acquired right to citizenship, a question I will turn to next, for present purposes and in the context of the particular decision challenged in these proceedings, it seems to me that in embarking on a process which it was contemplated by the First Respondent could result in removing the First Applicant's right to citizenship without treating her rights as engaged and without providing appropriate procedural safeguards, the First Respondent embarked upon an unlawful process under the 2015 Regulations. A decision with such far reaching effect for the First Applicant's citizenship rights could not lawfully have been made within the framework of the 2015 Regulations by reason of the absence of *Damache* safeguards.

The Parameters of a Decision under the 2015 Regulations

100. In circumstances where I am asked to make orders restraining the revocation process under the 2015 Regulations pending the provision of appropriate procedural safeguards and where it is also contended that the decision-making process is unlawful because it fails to provide for proper consideration of the Applicants' rights in that process, it is necessary to consider the actual parameters of the process as provided for under the 2015 Regulations. In *M.K.F.S. v. Minister for Justice and Equality* [2018] IESC 103, the Supreme Court (McKechnie J.) observed that the 2015 Regulations provided for decision making relating specifically to EU residence rights. McKechnie J. noted, at para. 96 of his judgment, as follows:

> *"The Minister, in making his finding under the 2015 Regulations that the Appellants' marriage was one of convenience, did not purport to make any consequent decision, with far-reaching legal effects, that the marriage was therefore a nullity at law for all purposes: quite rightly so, for the 2015 Regulations do not permit him to do so. …"*

101. He went on to conclude (at para. 98) that the Minister's determination that there had been a marriage of convenience under review in that case had relevance only in the immigration/deportation context, and that the Regulation simply enabled the Minister to disregard the marriage for such purposes stating:

"His determination that it is a marriage of convenience cannot lead to the marriage being a nullity at law for all purposes, all the more so here where both parties to the marriage contest that very finding. However, while the Minister's decision does not mean that the otherwise legally valid marriage is thereby a legal nullity, I do not rule out that a court, properly seised of an appropriate annulment application by a party with standing, may conclude that such a marriage is a grounds for a nullity: then again, it may not. This, however, is not the case in which to reach such a conclusion. It will suffice to say that the Minister's finding regarding the marriage of convenience is confined to the immigration/deportation context and the sole consequence, as explained in this judgment, is that he may disregard the marriage for such purposes."

102. It might be said by a slightly strained analogy that the First Respondent's determination in this case cannot mean that residence which may be disregarded for the purpose of establishing EU residence rights can also be disregarded so as to nullify the already vested, citizenship rights of a child acquired on foot of a residence permission which had been recognised as valid at the time of her birth. However, the starting point in analysing the intended purpose and effect of the exercise of a power to revoke under the 2015 Regulations is in a study of the terms of the Regulations themselves and the Directive which it is designed to give effect to.

103. When one studies the language of the 2006 Regulations (now revoked), the 2015 Regulations and the Directive, it is noteworthy that no express reference is made to retrospective revocation. Regulation 24 of the now revoked 2006 Regulations, provided that where "*it is established that a person to whom these Regulations apply has acquired any rights or entitlements under these Regulations by fraudulent means then that person shall immediately cease to enjoy such rights or entitlements*." This suggests that under the 2006 Regulations, a finding of fraud resulted in a mandatory revocation of status but in referring to "*immediately cease to enjoy*", it seems to me that a prospective effect was intended as "*immediately*" in its ordinary English meaning suggests "*from now on*". It may also be construed as meaning that a period of residence which is affected by the finding of fraud cannot be relied upon to ground a claim for further rights under the Regulations.

104. In contrast to the mandatory language of the previous Regulation 24 of the 2006 Regulations, Regulation 27 of the 2015 Regulations provides instead in discretionary terms

that the Minister "*may revoke*" where it is found in accordance with the Regulation that a right, entitlement or status concerned is being claimed on the basis of fraud or abuse of rights. Nothing in the language used requires that such revocation would necessarily follow on a finding of fraud or a marriage of convenience (contrary to what was suggested in the First Respondent's correspondence in this case).

105. Considering then Article 35 of the Directive, it is noted that it also uses permissive language in that it provides "*Member States may adopt the necessary measures to refuse, terminate or withdraw any rights conferred by this Directive in the case of abuse of rights or fraud*.". From the language used what appears to be envisaged is a power to terminate rights acquired under the Directive. On my reading the Directive does not require or even permit automatic revocation. I based this view on the fact that Article 35 requires that "*any such measure shall be proportionate and subject to the procedural safeguards provided*."

106. Similarly, and as noted above, the language in relation to finding a marriage of convenience appears to confine the power vested in the First Respondent to making a finding where the marriage is in being, rather than where the marriage has been dissolved through divorce. This is apparent through the use of present tense language throughout Regulation 28 including in Regulation 28(1) the use of the words "*to be*", in Regulation 28(2) "*reasonable grounds to believe that a marriage is a marriage of convenience*", and that the "*marriage is not a marriage of convenience*", in Regulation 28(3) "*the Minister deems the marriage to be a marriage of convenience*" (not "*to have been*"), and Regulation 28(5) "*whether a marriage referred to in paragraph (2) is a marriage of convenience*". While Regulation 28(4) provides that the Regulation 28 process may be engaged where a marriage has previously been taken into account in determining any matter relevant to the Regulations, this is not expressly extended to apply even where the marriage has since been dissolved.

107. The absence of differentiation in the Regulations and in the First Respondent's correspondence between situations when a revocation order is made with retrospective effect or prospectively or not made at all or an acknowledgement of a range of options, resonates with the considerations underpinning the Supreme Court's decision in *UM* with regard to s. 21 of the Refugee Act, 1996. It was noted in that case that grounds for revocation of refugee status varied (e.g. a return to the country of origin) and it could not be intended that in each case that revocation was intended to apply retrospectively to its inception as that simply did not make

sense. In *UM* the fact that the legislation did not distinguish between situations where it would be appropriate to revoke retrospectively and others when it would not, was relied upon to conclude that retrospection was not envisaged by the Legislature in any case.

108. The situation here is clearly different to that considered by the Supreme Court in *UM* not least because there is a single power to revoke expressed in general terms and because *UM* was a case concerned with the revocation of refugee status and a consideration of the proper interpretation of s. 21 of the Refugee Act, 1996 as opposed to the revocation of EU residence and the proper interpretation of the provisions of the 2015 Regulations or the Directive. While the *UM* decision arose in the different context of the revocation of refugee status and not EU residence permission, it seems to me that it is nonetheless of some assistance on the question of the proper parameters of the decision making under the 2015 Regulations.

109. The facts in *UM* require to be considered to properly contextualise the *ratio* of the Supreme Court's decision. In 2006, UM's father MM had been declared a refugee pursuant to the Refugee Act 1996. In November 2012, it transpired MM had spent several months in Afghanistan, his country of origin and that he had previously been refused asylum in the UK, a fact which had not been disclosed as part of his subsequent (successful) Irish application. MM's child, UM, was born on the 1st of June 2013, and on the basis of MM's residence in the State met the criteria for Irish citizenship. On the 10th of June 2013, MM was issued a proposal to revoke his refugee status with effect from 31st of August 2013 which was not challenged. MM's refugee status was revoked on two separate grounds under s. 21(1)(a) of the Refugee Act 1996 (voluntarily re-availing himself of the protection of Afghanistan) and s. 21(1)(h) (obtaining a declaration on the basis of false or misleading information). Thereafter, an application was made on behalf of UM for an Irish passport. This application was refused, and the refusal confirmed, on the basis that the Minister for Foreign Affairs was not satisfied that UM was an Irish citizen due to the revocation of MM's refugee status. UM sought *certiorari* and a declaration as to citizenship. This was refused in the High Court (Stewart J., [2017] IEHC 741) and again in the Court of Appeal (Murray J., [2020] IECA 154). The matter then came before the Supreme Court where, as noted above, the applicant was successful in judgments delivered by Dunne J. and O'Donnell CJ.

110. Notwithstanding important differences between this case and *UM*, the present case is concerned with the effect which a purportedly retrospective revocation of an immigration status

of a first party has on a second party whose entitlement to citizenship is derived from the first party's historic status. In these proceedings it has been the contention on behalf of the Applicants that the First Respondent's revocation of the Second Applicant's residence card under Regulation 25 of the 2015 Regulations is unlawful since it was intended to take effect in a retrospective manner, prejudicial to the First Applicant's entitlement to assert her Irish citizenship. In the correspondence which issued in the decision-making process, the Second Applicant was advised, both in the notification letter and subsequently in the first instance decision letter, that where a fraud and marriage of convenience was found, his permissions would be revoked and he would be deemed to have been unlawfully present in the State from the outset. It is the Respondents' position in response to these proceedings that this in turn would render the First Applicant's citizenship *void ab initio*.

111. In essence, therefore, the question raised in this case is not dissimilar to the fundamental issue raised by the applicant in *UM*, namely the lawfulness of a retrospective nullification of the vested rights of a child who has acquired citizenship based on a parent's residence where that parent's status has been found to have been fraudulently acquired The Supreme Court determined the question in UM's favour by finding that revocation of the father's immigration permission only took effect prospectively from the date of revocation but they arrived at this decision both because questions of status were involved and also having regard to the language of s. 21. The Supreme Court distinguished private law jurisprudence to the effect that "*fraud unravels all*" on the basis that there are strong countervailing considerations when issues of status are concerned, particularly in the context of derived rights.

112. The following passage from O'Donnell CJ indicates the correct starting point for assessing whether a statutory power is capable of retrospective effect impacting on an acquired status (para. 15):

> *"... If the effect of revocation is to revoke ab initio, then it would follow that this status, and the legal consequences of it under the Immigration Act 2004, are being altered. As Lord Selborne said in Main v. Stark [1890] 15 A.C. 384:- "words not requiring a retrospective operations, so as to affect an existing status prejudicially, ought not to be so construed". In my view, a power granted by statute as in this case, revocation, should not be construed to be capable of having this effect unless clear language is used. While in legal proceedings it is possible that a court may, at the*

suit of an injured party, declare that certain events, conducts or actions are and were invalid and a nullity, that is not something which the Oireachtas is assumed to do generally. The principle of prospective operation of legislation and legislative provisions is, in my view, the correct starting point for the interpretation of statutes. In my view, it is appropriate to approach the Act on the basis that the Oireachtas is not to be presumed to permit retrospective alteration of the legal nature of past conduct and events unless clear words are used,…"

113. This is very different to the Court of Appeal's overturned approach where *"… the starting point must be that a fraudulently obtained permission is a nullity*." The requirement for clear wording to the contrary to displace a prospective reading of legislative provisions is reaffirmed later in the judgment of O'Donnell CJ as follows (para. 17):

"… the importance of clarity and certainty might mean that it would be expected that the legislation permitting any revocation would be careful and detailed, and would address the problems created by time, reliance and, in particular, the question of derivative rights, and in any event would state unequivocally that retrospective nullity, either absolute or qualified, was intended. …"

114. The presence of discretion on the part of the First Respondent not to revoke a permission at all, notwithstanding the presence of fraud or abuse of rights, reinforces the *prima facie* interpretative position that the power provided for under the 2015 Regulations is not one which permits retrospective nullification of status. As Dunne J. put it in *UM* (para. 49):

"But, having regard to the need for certainty in relation to these matters, again, on balance, how could revocation date from any period other than the date of formal revocation of the declaration of refugee status. After all, the Minister is given the power "if he or she considers it appropriate to do so" to revoke the declaration. If, for whatever reason, no revocation has taken place, it is difficult to see how these specific categories could be said to have been revoked prior to a formal decision by the Minister to do so."

115. In this case, a question of status also arises, albeit a status deriving from a parent's questionable residence, under different statutory provisions. It seems to me that the starting point should be that the principle of prospective operation of legislation and legislative provisions should apply when interpreting the provisions of the 2015 Regulations and that it is appropriate to approach those Regulations on the basis that they are not to be presumed to permit retrospective alteration of the legal nature of past conduct and events affecting an acquired status unless clear words are used, mindful of course that the 2015 Regulations, as transposing Regulations, also require to be interpreted in a manner which gives effect to the Directive. It is clear from *UM* that the concept of retrospective nullification affecting acquired status while not outlawed in theory is considered by the Supreme Court to be generally unsuited to the public law context, and particularly unsuited to addressing historic immigration status and derived rights and requires a clear legal basis.

116. I consider that the wide ranging and significant power to nullify vested rights asserted by the First Respondent in the decision-making process in this case goes beyond what is clearly contemplated by the Regulations or the Directive and would have required to be addressed expressly and in clear terms in legislation. Regulation 27 does not satisfy the criteria to provide an adequate legal basis for the retrospective alteration of the legal nature of past conduct and events affecting an acquired status of citizenship by reason of the absence of clear wording providing for same. It is not careful or detailed, does not state that retrospective nullity of acquired rights is intended and makes no attempt to address the question of derived rights or other complications. It is not necessary to decide whether the reasoning in *UM* extends to preclude the retrospective nullification of a residence permission where an acquired status is not in question, as that is not the issue which arises in these proceedings and I make no findings in this regard.

117. As I am satisfied that the process under the 2015 Regulations is confined to a consideration of the Second Applicant's residence rights in a manner which does not determine vested or acquired rights to citizenship, it seems to me that the requirement for a higher level of procedural safeguards, as found in *Damache,* is not triggered.

Proportionality in Decision Making

118. It seems to me that there is a disconnection between the correspondence which issued in this case and the requirements of the Directive as transposed through the 2015 Regulations. I am satisfied that the First Respondent has erred in approaching the exercise of her power (whether retrospective or prospective) under the 2015 Regulations by proceeding as if the Regulations mandate revocation. It is clear from the language of the Regulations (and indeed its parent Directive) that the First Respondent has a discretion to revoke but is not required to exercise that discretion. It was plainly said not once but in repeated correspondence that a finding of fraud and marriage of convenience "*will*" result in his permission being revoked and previous permissions being "*deemed*" to have been invalid. I am satisfied that this correspondence is not aligned with the language of the Regulations and misstates the nature and effect of powers vested under the 2015 Regulations which, whatever about the separate question of retrospection, do not mandate revocation in the case of every incident of fraud or marriage of convenience. Rather the Directive and the 2015 Regulations both enable revocation in circumstances where this is a proportionate exercise of discretion. This is an important distinction.

119. The requirement to exercise a discretion in a proportionate manner is rooted in clear terms in the Directive, if not in the Regulations, but in any event flows as a matter of constitutional justice and arising from the requirement to respect and vindicate fundamental rights affected by the decision and may be considered necessarily implied in a decision-making process under the 2015 Regulations which purports to interfere with rights (see *Luximon v. Minister for Justice & Equality*). Accordingly, a proportionate exercise of a power to revoke would require consideration of the impact of revocation on any acquired rights prior to the exercise of such a power.

120. A central complaint in this case has been against the First Respondent's refusal to contemplate the First Applicant's circumstances when making her decision on revocation. While it was urged on me in oral submissions that the Second Applicant had not made submissions pertaining to the effect a decision to revoke retrospectively would have for the derived rights and status of the First Applicant and that it would be open for him to do so in the review process if he participated in it, this rings hollow when weighed against the First Respondent's clearly stated position that the First Applicant's rights are not engaged and her citizenship does not arise for consideration and also the clearly stated position that his permission would be revoked retrospectively with the consequence that the First Applicant's

citizenship, deriving from her father's residency, would be nullified as void *ab initio*. It is common case that the Respondents considered that there was no responsibility to consider the position of the First Applicant in this process at all notwithstanding the Respondents' understanding of the implications of the process in light of the decision of the Court of Appeal in *UM*.

121. While the Respondents' position that the rights of the Applicants were not relevant to whether or not rights were acquired on foot of a fraud or a marriage of convenience is logical and even correct, this is not to say that those rights did not require to be considered in deciding to exercise a discretion to revoke and the terms in which such discretion would be exercised i.e. prospectively only or if retrospectively, tailoring such retrospective application to ensure no impact on the derived or acquired citizenship rights of the First Applicant which were rooted in the Second Applicant's residency. The concluding observation of Dunne J. in *UM* as to the effect of discretion bears repetition. She said (at para. 126):

> *"The giving of such a discretion to the Minister would have enabled the Minister in an appropriate case to consider the effect of a decision to revoke on those who would appear to have obtained derivative rights prior to revocation."*

122. Where it is proposed to make a revocation order, be it retrospective or prospective, I am satisfied that consideration should be given in the exercise of a discretionary power to the potential impact of the decision on acquired or vested rights. An assessment of the potential impact of the decision on acquired or vested rights is necessary as a first step to ensuring that the decision ultimately taken does not give rise to a disproportionate interference with such rights.

123. It is clear from the terms of the correspondence that at that time the decision-making process under the 2015 Regulations was invoked, the First Respondent did not understand the nature of her power as discretionary rather than mandatory. In consequence she did not appreciate that she was required to exercise her discretionary power in a proportionate manner having due regard to all affected rights and interests. The process was fundamentally flawed for this reason.

Restraining the Process

124. Returning then to relief sought directed to restraining the process. The position in law has been clarified by the decision of the Supreme Court in *UM* in a manner which differs from conventional wisdom at the time this process was first embarked upon. As set out above, I have concluded that the power to revoke contained in the 2015 Regulations is clearly discretionary. I have further concluded that it does not extend to a power to revoke which has the effect of nullifying acquired or vested citizenship rights. This conclusion is supported by the reasoning of the Supreme Court in *UM,* which is to the effect that where a decision maker might conclude that it is appropriate to revoke with retrospective effect in some instances but not others based on the nature and extent of the fraud identified or the particular circumstances of a case which might bear on proportionality then it cannot be said that the provision which provides for revocation *simpliciter* without differentiation falls to be construed as providing that once revoked some permissions but not others are void *ab initio*.

125. In these proceedings the position of the First Respondent has to date been that the power under Regulation 27 of the 2015 Regulations is one which allows the First Respondent to retrospectively change the status of a permission holder, and to bind holders of acquired rights where those rights derive from the status of the permission holder. This is very similar to the position of the respondents in *UM*. It seems to me to be clear in the wake of the Supreme Court decision in *UM*, that the revocation of permission under the 2015 Regulations in exercise of a discretionary power to do so should not properly be considered to nullify the First Applicant's citizenship rights on the basis that the residence permission was void *ab initio*. A decision of such moment goes well beyond what was contemplated by either the Directive or its transposing Regulations. If I am correct in this conclusion, then the need for heightened procedural safeguards in the revocation process falls away because the First Applicant's citizenship rights will not be affected by the process. The nature of the safeguards required is determined by the nature of the process in train and its contemplated consequences.

126. Within the parameters of the process prescribed under the 2015 Regulations, which I have concluded does not include a power to nullify acquired citizenship rights based on residency granted under the Regulations, it is necessary for the First Respondent in exercising her discretionary power to revoke a residence permission to consider the impact on that decision on the rights of affected parties so that any decision reflects a proportionate exercise of the decision-making power. In deciding whether to revoke the First Respondent should

consider the impact of that decision on both the Second Applicant and the interests of other affected persons which are brought to her attention.

127. It being established by this decision that the First Respondent does not have a power to nullify acquired rights to citizenship derived from a period of residence granted under the 2015 Regulations but subsequently revoked in this process, it would be wrong to restrain the process. It is to be expected that fair procedures will be observed in any further steps taken in this process where the discretionary power to revoke falls to be exercised in a proportionate manner.

128. Before concluding I propose to briefly address a number of other issues arising on the Applicants' case and identified by the Respondents as a barrier to relief in these proceedings which are not directly dealt with above.

Different Decision Maker

129. The Applicants have contended that when the first instance decision was withdrawn because of the failure to notify the Second Applicant of concerns in relation to his status and the invocation of the Regulation 27 and 28 process, a new decision maker should have been assigned because Mr. RF had prejudged matters. It seems to me that their complaint in this regard is not well-founded. Authorities such as *Kemper v. An Bord Pleanála & Ors* [2021] IEHC 281 dispose of this question. I am satisfied that a refusal to remit to a different first instance decision maker following a rescinding of the first decision was permissible in the circumstances of this case. The question of when it may be necessary to remit to a different decision maker was considered by Allen J. in *Kemper* in the following terms (para. 61):

> *"61. Finally, although the issue was not argued, I have considered whether it would be appropriate to give any direction or recommendation as to the composition of the Board by which the application is to be reconsidered.*
> *62. The question of whether, in a case which is suitable for remittal, the matter should be remitted to the same decision maker depends very much on the nature of the error which has been identified in the decision. In some cases, for example where objective bias has been established, or where the decision maker has been shown to have misconducted himself, the matter could not possibly be remitted to the same decision maker. In others, for example where the mistake shown to have been made was a legal*

mistake, there is no reason in principle why a decision maker who has made such a mistake should not be asked to reconsider the decision in accordance with the law as it has been explained. In such cases there will be no basis for any reasonable apprehension that the decision maker will approach the reconsideration otherwise than objectively and in accordance with the law. The fact that the decision maker has previously come to a particular conclusion by reference to a mistake of law will not justify a reasonable apprehension that he will necessarily come to the same conclusion on the basis of a correct understanding of the law.

63. This is a case which clearly falls within the latter category. Without in any way minimising the seriousness of the error or the importance of the consultation with the EPA required by the 2007 Regulations, the mistake was a misstep in the minefield of the Planning and Development Act, 2000 and the Waste Water Discharge (Authorisation) Regulations, 2007 which have been the subject of numerous amendments and revisions. I have found that there was no justification for the assertion that the reconsideration of Irish Water's planning application or the consultation with the EPA might be a mere box-ticking exercise and this, I am satisfied, is the case whether the composition of the Board is the same as that which made the condemned decision or different.

64. I am satisfied that this is not a case in which the court should direct that the members of the Board undertaking the reconsideration of the application should not be those who made the condemned decision, or even, I think, that the court should made a recommendation to that effect."

130. By proceeding to make a determination in the absence of submissions, Mr. RF cannot in my view be said to have pre-judged the position in a manner which would interfere with his ability to arrive at a different conclusion once submissions are received. Indeed, in this case it is clear that different considerations were relied upon in the second decision as the two decision letters are not identical. While the outcome of the process was the same, the second letter engaged with the submissions received from the Second Applicant notably to point out the matters which the Second Applicant has not addressed such that the notified concerns remain.

131. Justice must be seen to be done. In determining whether an apprehension of bias or prejudgment is reasonable, the perspective of the observer of justice is taken from the standing point of a reasonable and properly informed person. Had Mr. RF been properly directed as to

the parameters of his jurisdiction (which I have found above he was not), then I am satisfied that there is no reasonable basis for an apprehension that he had otherwise prejudged matters such that he might be perceived as being unable to fairly arrive at a different decision following a consideration of submissions made after a first decision insofar as they contained new or relevant information. The capacity of a decision maker to change his or her mind based on better information before they are *functus officio* is a core attribute of the decision maker.

Adequate Alternative Remedy

132. The Respondents argue that as the Applicants have failed to exhaust the alternative remedy available to them (i.e., a review mechanism provided by the Minister) that their proceedings ought to fail on that basis alone. I have been referred, *inter alia,* to the *State (Abenglen Properties Limited) v. Dublin Corporation* [1984] I.R. 381, *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497, *EMI Records (Ireland) v Data Protection Commissioner* [2013] IESC 34, Koczan v Financial Services Ombudsman [2010] IEHC 407, *Petecel v. Minister for Social Protection* [2020] IESC 25, *Stefan v. Minister for Justice* [2001] 4 I.R. 203 and *N v. Minister for Justice, Equality and Law Reform* [2008] IEHC 308.

133. The Respondents maintain that under Regulation 25 of the European Communities, an expansive form of review is provided, which should be exhausted before resorting to judicial review. In view of the conclusions I have reached as to the nature of procedural safeguards required where a decision interferes with the rights of a citizen child who may be deprived of citizenship consequent upon that decision having regard to decisions such as *Dellway*, *Damache* and *UM*, I do not accept that the Applicants could be considered to have had an adequate alternative remedy when these proceedings were commenced. At that time, the First Respondent was asserting a power to retrospectively revoke the Second Applicant's residency with the effect that as a matter of law, at least as then understood, the First Applicant's citizenship would be rendered *void ab initio* but without providing the high level of procedural safeguards that it was clear from *Damache* would be necessary where a decision of such far reaching consequence was in contemplation.

134. The Applicants, confronted with the Respondents' determined approach to the exercise of a power to revoke retrospectively in circumstances where the decision of the Court of Appeal in *UM* supported them in their position that such a retrospective revocation would also have

the consequential effect of rendering the First Applicant's citizenship status *void ab initio* with the resultant loss of both Irish and EU citizenship rights, without providing assurances in relation to procedural safeguards necessary in such circumstances, could not be considered to have an adequate remedy under Regulation 25.

Prematurity and Standing

135. The Respondents separately contend that the Applicants' case is built on the misconceived premise that the impugned decision of the 1st of April, 2021 is a direct and specific attack on the First Applicant's citizenship, in consequence of which it is asserted that the First Applicant has standing to bring these proceedings. It is the Respondents' position that the First Applicant's citizenship is not the subject of the impugned decision and accordingly the First Applicant does not have standing to maintain these proceedings against the First Respondent.

136. As clear from my reasoning above, however, I do not accept that the First Applicant's interests were not engaged in a process which purported (albeit in my view wrongly) to authorise the retrospective revocation of her father's permission to be in the State with consequential effect that her citizenship rights acquired at birth would be avoided, which was the position in law at that time both as understood by the First Respondent and on foot of the decision of the Court of Appeal in *UM*.

137. In the absence of clear legislative provisions directed to the treatment of her citizenship rights upon the revocation of the Second Applicant's residency rights and by reason of the decision of the 1st of April, 2021, the First Applicant found herself in a position specifically contemplated by both Dunne J. and O'Donnell CJ. in the course of *UM* (para. 17):

> "*....as a citizen subject to a question mark.*"

138. By purporting to revoke the Second Applicant's permission retrospectively and with a contemplated prejudice to the First Applicant, it seems to me that the decision of the First Respondent operated to place a question mark over the First Applicant's Irish citizenship, albeit in a process which was not directed specifically to her.

139. In view of the correspondence received from which it was clear that the First Respondent considered that revocation with seeming retrospective effect necessarily flowed from findings of fraud and marriage of convenience, the Applicants' apprehension that the Second Applicant's immigration status would be assessed in isolation from any consideration of the effect of such determinations on the First Applicant was properly grounded. It was further borne out by the failure of the First Respondent to give any of the reassurances sought in pre-litigation correspondence and the Respondents' maintenance of this same position throughout these proceedings. The Statement of Opposition continues to assert that the First Applicant's status does not fall for consideration in this process, or in these proceedings whilst maintaining that the effect of a revocation would be to render her acquired status *void ab initio*.

140. While *UM* is clearly distinguishable in that it concerned a decision in relation to that child's passport and she was directly and centrally involved, the established position in Irish law having regard to the requirements of constitutional justice is that a person whose rights are affected by a process is entitled to be considered in that process. Where her position is not being considered in the process as it ought to be, she is an interested party with standing to bring a challenge directed to identified inadequacies in the process. I do not consider objections suggested on grounds of prematurity or lack of standing to be well founded.

CONCLUSION

141. I am satisfied that the purported exercise of a power to retrospectively revoke the Second Applicant's residency deeming it void *ab initio* by the First Respondent in the letter of the 1st of April, 2021 was *ultra vires* and should be quashed. Contrary to the First Respondent's asserted understanding of her powers, it does not follow from a finding of fraud or marriage of convenience that a residence permission will be automatically revoked. While it is an open question as to whether the First Respondent had been vested with a power to retrospectively revoke the Second Applicant's EU residence rights, it is nonetheless clear that any power was discretionary and therefore fell to be exercised in a proportionate manner having due regard to affected rights and interests. No proportionality assessment was conducted in this case.

142. The First Respondent's position maintained throughout the process and in opposing these proceedings that the revocation of residency would have the effect of nullifying the First Applicant's acquired citizenship status but without requiring a fair consideration of those rights in the process cannot be correct. Were the legal effect of a decision to revoke a residence permission the effective nullification of the acquired rights of a child of the putative resident, then the child's interests must be considered in the decision-making process in accordance with a high level of procedural safeguards.

143. An express legal basis with attendant safeguards is required where a power to revoke residence is purported to be exercised in a manner which nullifies vested citizenship rights. No legal basis for such a wide-ranging power exists under the 2015 Regulations. As I am satisfied that the First Respondent misconstrued her powers under the 2015 Regulations in proceeding on the basis that she was required to revoke the Second Applicant's permission with purported retrospective effect upon a finding of fraud and marriage of convenience and in a manner which fails to properly consider the interests of the First Applicant and the proportionality of her decision, her decision at first instance cannot stand.

144. It seems to me that the relief required in these proceedings is an order of *certiorari* quashing the decision of the 1st of April, 2021. I do not propose to restrain the further conduct of the process because it is a matter now for the First Respondent to proceed in an *intra vires* manner by clearly identifying the parameters of her discretionary powers under the 2015 Regulations, notifying the potential impact of any contemplated exercise of those powers in accordance with the requirements of fair procedures and ensuring that the requisite procedural safeguards are in place and duly notified.

145. Finally, for the sake of completeness, insofar as issues were raised in these proceedings regarding deference shown to "*findings*" made by An Garda Síochána and failure to provide particulars of information relied upon, it is recalled that in any such process the affected person is entitled to notice of any material, evidence or issues relied upon in arriving at a negative decision. Procedural safeguards should include the opportunity to stress test evidence relied upon through cross-questioning and oral evidence where fairness so requires in the event of a conflict on the facts or a personal credibility issue which can only fairly be resolved in this way. It will be a matter for the First Respondent to ensure that appropriate safeguards are in place

should she continue with her consideration of a proposal to revoke the Second Applicant's residence permission.