THE HIGH COURT

[2023] IEHC 338

[Record No. 2022/204 JR]

BETWEEN:-

MUHAMMAD IMRAN

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on the 22nd day of June, 2023.

Introduction.

1. The applicant is a Pakistani national. He has resided in the State since 25th November, 2003, when he originally entered under a student visa. The applicant states that he met one, E.L., a Hungarian national, online in June 2010 through a dating app. On 11th January, 2011, the applicant married E.L., who had arrived in the State in August 2010.

2. On 6th July, 2011, the applicant obtained a residence card on the basis that he was a qualified family member of an EU national, who was exercising her right to work within the State. On 14th July, 2016, he was issued with a permanent residence card, on the basis that he was a qualifying family member and had been resident continuously in the State for a period of five years.

3. In 2016, the applicant's relationship with his wife broke down. While the date of her departure from the State, is a matter of some dispute between the parties, it is the applicant's case that she returned to Hungary on a permanent basis in or about August 2016.

4. In these proceedings, the applicant challenges a decision of the respondent made on 13th December, 2021, to revoke his permanent residence card, on the basis that he had submitted false and misleading information concerning the carrying on of a self-employed activity by his wife in the period January-June 2016, when it had been asserted by him that she had been self-employed in her own childminding business during that period.

5. In particular, the respondent found that a receipt book, which contained 92 receipts that had been purportedly issued by the applicant's wife to various named individuals in respect of childminding services provided to them on various dates between 7th December, 2015 and 31st May, 2016, were fraudulent documents; having regard to the fact that in written submissions that were made on behalf of the applicant by his solicitor in advance of the review decision, it had been stated on behalf of the applicant that E.L. had departed

from the State in January 2016. On that basis, the respondent held that the applicant had fraudulently asserted that his wife had been working in the State during the period January to May 2016, and had submitted documentation that he knew to be fraudulent and/or misleading to support that assertion.

6. In a letter dated 12th January, 2022, the applicant's solicitor made submissions in respect of the conclusions reached by the respondent in her review decision of 13th December, 2021. The solicitor stated that the applicant had made an error in his instructions in relation to the date of departure of his wife from the State. The letter stated that while the applicant could not recall the exact date of her departure, he believed that she had not left the State until the middle of 2016. The letter requested the Minister to review her decision in the matter.

7. While the applicant does not challenge the validity of the finding made by the respondent that he submitted documentation that he knew to be false and misleading in a material respect in support of his application for a residence card; the applicant challenges the decision of the Minister to revoke the residence card on the basis of the submission of such documentation, due to the fact that there was no proportionality assessment carried out by the respondent in the review decision of 13th December, 2021, as the applicant submitted was required by Art. 35 of the Citizen's Rights Directive (2004/38EC) and by Reg. 27 of the European Communities (Free Movement) Regulations 2015 (SI 548/2015).

8. That is a summary of the essential issue that arises for determination in this case. The remaining submissions made on behalf of the parties will be dealt with later in the judgment.

Chronology of Relevant Dates.

9. While some of the relevant chronology has been given earlier in the judgment, it is necessary to set out in some detail the background to the applicant's immigration status within the State and the background to the present proceedings.

10. As already noted, the applicant entered the State on 25th November, 2003 on a student visa. He maintained that he started an internet relationship with E.L. in or about January 2010. She came to the State in August 2010. The applicant and E.L. married on 10th January, 2011. On 6th July, 2011, the applicant obtained a residence card as a qualifying family member.

11. On 9th February, 2016, the applicant lodged an application for citizenship. On 20th May, 2016, the applicant applied for a permanent residence card on the basis of his being a qualifying family member and having resided in the State for a period of five years. With his application, the applicant submitted an amount of documentation, including a receipt book, containing 92 receipts, in respect of babysitting work done by his wife in the State in the period 7th December, 2015 to 21st May, 2016. On 14th July, 2016, the applicant was granted a permanent residence card.

12. As previously noted, the applicant's marriage to E.L. broke down in or about 2016. While it is a matter of some dispute, the applicant maintains that she returned to Hungary on a permanent basis in or about August 2016.

13. On 14th May, 2018, the respondent issued a letter to the applicant, informing him of a proposal to revoke his permanent residence card, on the basis that it was suspected that his marriage to E.L. had been a marriage of convenience and because he had submitted documentation which the Minister regarded as being false and misleading, due to the fact that the receipts contained in the receipt book, did not tally with the records of the Department of Employment Affairs and Social Protection (DEASP), which indicated that E.L. only worked in the State for one week in 2016.

14. On 16th August, 2018, the original first instance decision was given in the matter, which concluded that the applicant had contracted a marriage of convenience with E.L. for the purpose of obtaining a right to reside in the State. It further held that the documentation which had been submitted by him, in particular, the receipt book for the period December 2015 to May 2016, had been fraudulent and misleading. For those reasons, the respondent had reached the decision that she would revoke his permanent residence card. That decision was subsequently withdrawn on 5th October, 2018, due to the fact that the applicant's solicitor had not been provided with certain documentation on foot of an FOI request.

15. On 1st October, 2018, the applicant made submissions on the Minister's proposal to revoke his residence permission.

16. On 19th November, 2018, a further first instance decision was issued, wherein the Minister reached the decision to revoke his permission to reside in the State, due to the fact that the Minister had formed the opinion that the applicant had contracted a marriage of convenience and had submitted false and misleading documentation in relation to his

assertion that his wife was working in the State in the first five months of 2016. By letter dated 7th December, 2018, the applicant sought a review of that decision.

17. In February 2019, E.L. obtained a consent divorce from the applicant from the courts in Hungary. On 29th March, 2019, the Minister was informed of the grant of the decree of divorce by the applicant's solicitor.

18. On 11th February, 2021, further submissions were lodged on behalf of the applicant in relation to the pending review decision. In particular, the applicant contested the assertion that he had entered into a marriage of convenience with E.L. He also contested the assertion that she had not been working in the State in the period January/May 2016, due to the fact that DEASP only had a record of one payment to her in 2016. It was explained by the applicant that that related to work that she had done in the Smyth's Toys shop, during the Christmas period of 2015. The majority of her wages had been paid during 2015, however the payment in respect of one week had got carried over into 2016, due to the fact that she was paid weekly in arrears.

19. In the course of those submissions, a critical statement was made on behalf of the applicant, which formed the basis of the subsequent findings by the Minister in the review decision, which subsequently issued on 13th December, 2021. In the course of the solicitor's letter dated 11th February, 2021, the solicitor stated as follows on behalf of the applicant:

> *"Our client accepts that the Minister is entitled to revoke his residence card based on EU Treaty rights from a certain point in time. [Ms. L] left Ireland in January 2016. Thereafter she didn't return. Therefore our client accepts that the Minister is entitled under Article 11 of Directive 2004/38/EC, to curtail his permission from a period in time six months after his wife left the State. However, the Minister's proposal to revoke his permission in its entirety ab initio is not accepted."*

20. On 12th October, 2021, further submissions were made on behalf of the applicant.

21. On 13th December, 2021, the respondent gave her decision on review of the first instance decision. Having set out the background of the applicant's immigration status within the State, it was stated that the Minister was not satisfied that it had been adequately established that the applicant's marriage to E.L. was one of convenience in accordance with the Regulations and the Directive. The decision stated that the Minister was not satisfied that there were sufficient grounds to make a finding under Regulation 28(1) of the

Regulations. Therefore the Minister had decided that that element of the first instance determination of 19th November, 2018, should be set aside.

22. The decision then went on to deal with various visits that had been made to the applicant's house by the gardaí and the interactions that both he and E.L. had had with them. The decision went on to note that the applicant had advised through his solicitors, that E.L. had left the State in January 2016 and had not returned. The decision pointed out that in his application for a permanent residence card, which had been lodged on 20th May, 2016, the applicant had advised that E.L. was self-employed with a company that she had established on 29th February, 2012 called "Evelin Childcare".

23. The decision noted that a receipt book had been submitted as evidence of her activity within the State in the period December 2015 to May 2016. The decision noted that the applicant's legal representatives had advised that E.L. had left the State in January 2016 and had not returned. It noted that if that was the case, it would not have been possible for her to have undertaken childminding work in the State in that period. Accordingly, the decision concluded that the invoices submitted in respect of E.L.'s childminding activities in 2016, had to have been either false or misleading. The decision also noted that the information held by DEASP, did not reflect the work that the applicant alleged had been carried out by E.L. as a childminder during 2016.

24. The decision went on to state that against that background, the Minister was not satisfied that E.L. had been engaged in genuine self-employment as a childminder in 2016. The Minister was of the view that the documentation and information submitted as putative evidence of E.L.'s self-employment in the State in 2016, had been submitted with the intention of misleading the Minister into thinking that the EU citizen was exercising her EU Treaty rights as a childminder during that time, when that was not the case. It was noted that in his application for a permanent residence card, which was made on 20th May, 2016, the applicant had stated that he and E.L. were living together in Cork city and that she was exercising her EU Treaty rights through self-employment in her childminding company. The decision stated that it appeared that none of that was true and that E.L. had not been living in Ireland on the date that the applicant had made his application for a permanent residence card. It followed that his permanent residence card had been provided under false pretences.

25. The decision went on to state that the Minister was satisfied that the applicant had submitted and sought to rely on information and/or documentation that he knew to be false

and/or misleading in order to obtain a derived right of free movement and residence under EU law, to which he would not otherwise be entitled. It stated that that was an abuse of rights in accordance with Reg. 27 of the 2015 Regulations.

26. The essential conclusions of the review decision were contained in the following paragraphs:

> *"The Minister is satisfied that your marriage to [E.L.] was genuine and was not one of convenience in accordance with the Regulations. However, in support of your application for a permanent residence card, the Minister is satisfied that you submitted and sought to rely upon documentation and/or information that you knew to be false and/or misleading in order to obtain a derived right of free movement and residence under EU law to which you would not otherwise be entitled. This is an abuse of rights in accordance with Regulation 27 of the Regulations. The Regulations provide that the Minister may refuse terminate or withdraw any rights conferred upon the Directive in the case of fraud or abuse of rights.*
>
> *Therefore, the Minister finds that the permanent residence card that was provided to you on 14 July 2016 should be revoked. The permission that you held between 14 July 2016 and 19 November 2018 was not a valid permission because the documentation and information that you provided as evidence of your entitlement to a permanent residence card under the Regulations, has been found to be false and/or misleading as to a material fact."*

27. On 11th January, 2022, the applicant lodged a fresh application for a permanent residence card. This application was subsequently withdrawn on 23rd November, 2022.

28. On 12th January, 2022, the applicant's solicitor sent a letter to the respondent, explaining that the applicant had made an error in his instructions in relation to the date of departure of E.L. from the State. That error was explained in the following terms:

> *"Upon taking further instructions from our client at this time, we are instructed that our client's instructions through our office in respect of that point were given two-three years after [Ms. L] had left the State and that he had recalled incorrectly at that remove that [Ms. L] had left in January 2016. He has now clarified for us that she left in mid-2016, but cannot recollect the exact date. One thing he is sure of is that the documentation submitted was genuine and truthful. Therefore, he must have been mistaken in the date of departure as she had worked in accordance with*

the invoices before she left the State. He regrets this human error and that he did not make your office aware that he was unsure of the exact month at the time. To be fair to our client, it is often difficult to recall with certainty exact dates at such a remove."

29. On 14th April, 2022, a decision was issued by the respondent, refusing the applicant's application for citizenship. On 15th April, 2022, the applicant's solicitor wrote to the respondent seeking a reassessment of the citizenship application once the present proceedings had concluded.

30. On 9th May, 2022, the applicant obtained leave to seek judicial review of the revocation decision of 13th December, 2021. The applicant did not disclose the fact of the second application for a permanent residence card that had been made by him on 11th January, 2022, nor that his application for citizenship had been refused on 14th April, 2022.

Relevant Legal Provisions.

31. The relevant provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29th April, 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No. 2016/68 and repealing Directive 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75,35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (hereinafter 'the Citizen's Rights Directive 2004/38/EC') are as follows:

Article 35

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.

32. The relevant provisions of the European Communities (Free Movement of Persons) Regulations 2015 (SI 548/2015) (hereinafter 'the 2015 Regulations'), are as follows:

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;

[…]

33. Regulation 27(2) provides that where the Minister suspects on reasonable grounds that a right, entitlement or status of being treated as permitted family member conferred by the Regulations, was being claimed, or had 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. Regulation 27(3) provides that where the Minister proposes to exercise his or her power under para. (1), he or she shall give notice in writing to the person concerned and afford them a period of 21 days within which to give reasons as to why the right, entitlement or status concerned should not be revoked and the Minister shall consider any submissions made on behalf of the person concerned.

Submissions on behalf of the Applicant.

34. On behalf of the applicant, Mr. Power SC, submitted that the core issue in this case revolved around whether the review decision of 13th December, 2021, was legally valid, having regard to the fact that it was submitted that that decision did not contain any proportionality assessment, as to whether it was proportionate to the finding that the documents submitted were fraudulent and misleading, to proceed to revoke the permanent residence card that had been issued to the applicant, having regard to the totality of the circumstances in this case.

35. It was submitted that Art. 35 of the Citizen's Rights Directive and Reg. 27 of the 2015 Regulations, mandated that a proportionality assessment should be carried out where a finding that false and misleading information had been provided by an applicant, prior to proceeding to revoke the right of such person to reside in an EU Member State.

36. In support of the proposition that it was necessary to carry out such a proportionality assessment, counsel referred to the decision of the CJEU in *McCarthy v. Secretary of State for the Home Department* (Case C-202/13), and to the Irish decisions of *Saneechur v. Minister for Justice and Equality* [2021] IEHC 356 and *A.K.S. (A Minor) v. Minister for Justice* [2023] IEHC 1. It was submitted that these cases clearly established that it was a requirement of the Directive and the Irish regulations that the decision maker should carry out such a proportionality assessment, before proceeding to revoke the rights of a person to reside in a Member State pursuant to their EU Treaty rights.

37. In relation to the lack of candour point, counsel accepted that there had been an omission to refer at the leave application stage to the fact that a second application had

been lodged by the applicant for a permanent residence card on 11th January, 2022. That omission had been explained by Ms. Beazley in her affidavit sworn on 25th November, 2022. She had stated clearly that due to an administrative error, instructions in relation to the lodging of that application had not been included in counsel's brief to prepare the draft proceedings for the judicial review application. For that reason it was not included in the applicant's grounding affidavit. Ms. Beazley had accepted that due to inadvertence on her part, she had not spotted the omission from the grounding affidavit. She had accepted full responsibility for the omission in this regard and had apologised to the court for same. Counsel submitted that in these circumstances, there had been no breach of the duty of candour by the applicant *per se*. In the alternative, it was submitted that the omission to mention that fact at the leave stage, was not of such seriousness as to deprive the applicant to relief that he might otherwise be entitled to.

38. In relation to the remaining omissions of which complaint had been made by the respondent, namely that the applicant had not referred to his citizenship application and the refusal thereof, when moving the *ex parte* leave application in the within proceedings; it was submitted that that application was not relevant to the matters that arose for determination in these proceedings. Therefore, it was submitted that their omission did not constitute a breach of the Practice Direction HC81.

39. Similarly, in relation to the omission to inform the court that the applicant had had two children in Pakistan, one born in 2009 and the other born in 2014, it was submitted that the omission of these facts from the grounding affidavit, was not material, as these facts were not relevant to the issues that arose on this application. Accordingly, it was submitted that there was no breach of candour in relation to the omission to refer to these two items at the leave stage in the within proceedings.

40. Finally, it was submitted that the reasons given by the decision maker in the decision of 13th December, 2021, were not adequate to fully explain to the applicant and his legal advisers why the particular decision had been reached. It was submitted that on this additional basis, the decision ought to be struck down.

Submissions on behalf of the Respondent.

41. On behalf of the respondent, Mr. Conlan Smyth SC, submitted that it was important to note that the applicant in these proceedings had not contested the finding that he had provided false or misleading information to the respondent. He submitted that it was also

important to note that the finding made by the decision maker that E.L. had departed from the State in January 2016, had been based on a statement to that effect made by the applicant's solicitor in the course of written submissions.

42. Counsel submitted that the provisions of Practice Direction HC81 were clear in terms of the mandatory obligation that was placed on applicants to put all the material and relevant facts before the court when seeking leave to proceed by way of judicial review. In this case, when the application for leave was moved on 9th May, 2022, the applicant had not informed the court that he had lodged a fresh application for a permanent residence card on 11th January, 2022. It was submitted that that was clearly a material fact in relation to the present proceedings, which also related to his holding of a permanent residence card. While it was a matter for the court as to the adequacy of the reason proffered for this omission, it was submitted that the court ought to mark the lack of candour by declining the reliefs sought in this application.

43. It was further submitted that the applicant had not been entirely frank when moving the *ex parte* leave application, when he had omitted to make any reference to the fact that he had applied for citizenship and that that had been refused in April 2022. Nor had he made the court aware of the fact that he had two children in Pakistan, one born prior to his marriage to E.L. and the other born during the subsistence of that union. It was submitted that these omissions constituted a breach of the duty of candour on the part of the applicant.

44. Without prejudice to that submission, counsel further submitted that the decision was not vitiated by a failure to carry out any alleged proportionate assessment. It was submitted that the requirements of Art. 35 of the Directive and Reg. 27 of the 2015 Regulations, merely mandated the decision maker to look at the individual circumstances of each applicant, prior to reaching a decision. The nature of that duty to carry out an individual assessment, had been established in the *McCarthy* case.

45. It was submitted that in the present case, it was clear from the impugned decision, that the decision maker had taken into account all relevant factors relating to the applicant and his circumstances, prior to reaching the decision that the permission to reside in the State should be revoked. It was submitted that the decision maker had had regard to the fact that the applicant had resided in the State since 2003. The Minister had also had regard to the fact that the applicant had contracted a valid marriage with an EU citizen in 2011. In

this regard the decision maker at the review stage had departed from the decision reached at first instance.

46. It was submitted that the decision maker had been entitled to have regard to the fact that the applicant had submitted a large number of documents that were found to be false or misleading. That was a significant fraud. It was submitted that the documents had to be fraudulent, given the assertion made on behalf of the applicant that his former wife had left the State in January 2016. It followed as a matter of logic, that the documents which purported to show that she carried out babysitting services within the State in the first five months of 2016, had to be fraudulent and untrue.

47. It was submitted that in these circumstances, having regard to the serious nature of the fraud and to the extensive nature of the documentation that was submitted in pursuance of that fraud, the decision maker had acted in a proper and legal manner in reaching the decision that was reached in this case.

48. Finally, it was submitted that when read as a whole, the decision was logical and clear. The reasons why the decision maker had come to the conclusion that the documents were fraudulent and untrue, were clearly stated. That conclusion arose entirely from the assertion made by the applicant's representative that E.L. had left the State in January 2016. It was submitted that the reasons for the decision were very clearly stated in the decision itself.

49. In this regard, counsel referred to the decision in *YY v. Minister for Justice* [2017] IESC 61, where the Supreme Court had held that a lengthy narrative discussion of the reasons underpinning a decision was not required in all circumstances. Counsel referred to the dicta of O'Donnell J. (as he then was), where he had cautioned against expecting civil servants preparing decisions, to achieve the exacting standards that are sometimes, although not always, achieved by judgments of the Superior Courts. He had stated as follows: "*All that is necessary is that a party, and in due course a reviewing court, can genuinely understand the reasoning process*". It was submitted that when read as a whole, the decision in this case clearly met that standard.

Conclusions.

50. The court will deal first with the submission made by counsel on behalf of the respondent, that the applicant's application herein should be dismissed *in limine*, for failure on the part of the applicant to comply with the duty of candour that is imposed on all

applicants when seeking relief by way of judicial review. In particular, it was asserted that because the applicant had failed to draw to the attention of the court the following facts: that he had lodged a fresh application for a permanent residence card on 13th January, 2022; that he had applied for and had been refused Irish citizenship; and that he had two children in Pakistan with another woman; the court should dismiss the application at the outset.

51. The court does not accept that the applicant's case must be struck out *in limine* for lack of candour. It is undoubtedly the fact that when seeking leave to proceed by way of judicial review, the applicant did not disclose the fact that he had lodged a fresh application for a permanent residence card on 13th January, 2022. The reason for that omission has been explained in the affidavit sworn by Ms. Michelle Beazley on 25th November, 2022. In that affidavit, she stated that due to an administrative error, details of that application had not been included in the papers that were forwarded to counsel. For that reason, it was not referred to in the applicant's draft grounding affidavit. Ms. Beazley accepted that due to inadvertence on her part, she had not spotted the omission when the draft papers had been returned to her. The court accepts this explanation as given by Ms. Beazley. Accordingly, the court finds that there was no culpable lack of candour on the part of the applicant in failing to refer to that application.

52. In relation to the two remaining omissions, being the refusal of the citizenship application and the fact that he had two children in Pakistan, the court accepts the submission made by counsel on behalf of the applicant, that these matters were not relevant to the issues that arose for determination in the within proceedings. While it may be arguable that where there is a duty of *uberrimae fides* on applicants seeking leave in asylum cases; in such circumstances, it may have been preferable that these matters were referred to in the grounding affidavit; I am not satisfied that their omission constitutes a culpable lack of candour on the part of the applicant. Accordingly, the court refuses to strike out the applicant's proceedings herein on grounds of lack of candour.

53. Turning to the core issue in this case, which is whether when the Minister is considering a proposal to revoke a permanent residence permit based on EU Treaty rights, she is obliged to carry out a proportionality assessment; the court has come to the conclusion that it is necessary for the Minister to carry out such an assessment.

54. The court is of the view that where an applicant has been found to have been in a valid marriage with an EU citizen, who was exercising her EU Treaty rights by living and

working in Ireland; and when the non-EU citizen has been living and working in Ireland for approximately twenty years; and has been tax compliant; and has not come to the adverse attention of the gardaí; the decision maker must carry out a proportionality assessment when considering whether to take the drastic step of revoking a permanent residence card, when a finding has been made that the applicant had submitted false and misleading information.

55. The court is satisfied that from the wording of Art. 35 of the Citizen's Rights Directive and Reg. 27 of the 2015 Regulations, that it is necessary to carry out such an assessment.

56. It is clear from the decision in *McCarthy v. Secretary of State for the Home Department*, that it is incumbent on a Member State to carry out an individual assessment where there is a purported interference with EU Treaty rights: see in particular paras. 49-55. In *A.K.S. (A Minor) v. Minister for Justice & Ors.*, Phelan J. looked at the wording of Art. 35 and Reg. 27 and found that it clearly gave a discretion to the Minister to revoke a residency permission, upon a finding that there had been fraud or a marriage of convenience. She stated as follows at paras. 104 and 105:

> "*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."*

57. While the issue in the *A.K.S.* case, concerned whether the Minister was obliged to carry out a proportionality assessment in relation to the adverse consequences that would

flow from the revocation of a right to reside in the State of a parent, in relation to the minor applicants, who themselves had acquired a derivative right to reside in the State; the case is nevertheless of relevance to the facts in this case.

58. In her judgment, Phelan J. stated that it was clear from the language of the Regulations and from the parent Directive, that the respondent had a discretion to revoke the permission to reside in the State, but was not required to exercise that discretion, whenever a finding had been made that a person had entered into a marriage of convenience. She held that the language used in the Directive and in the 2015 Regulations, did not mandate revocation in the case of every incident of fraud or marriage of convenience. She held that the Directive and the 2015 Regulations, both enabled revocation in circumstances where that was a proportionate exercise of discretion (see para.118). Phelan J. stated as follows at para. 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*."

59. Support for the proposition that a proportionality assessment is required, is also found in the *Saneechur* case, where Barrett J. stated as follows at para. 21:

> "*Third, one arrives next at the Minister's remarkable conclusion that "Because you have asserted a right based on documentation intentionally misleading as to a material fact about a central aspect of your application you cease to be entitled to any right of residence…". The court admits to some surprise that the Department of Justice would come to court and seek to stand over a conclusion that is so patently infirm in substance and thrust. When one looks to Article 35 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives*

64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ("Citizens' Rights Directive"), it provides, inter alia, that "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….Any such measure shall be proportionate…". Yet there is simply no proportionality assessment undertaken in the impugned decision. There is just a blanket cessation of any EU treaty rights presenting. That is so flawed an approach that on this ground alone, the impugned decision would have to fall (though, as can be seen, there are multiple grounds on which it falls)."

60. While the impugned decision cannot be faulted for its logic, insofar as it found that the receipt book submitted had to be fraudulent and misleading, having regard to the fact that the applicant's representative had expressly stated that E.L. had left the State in January 2016; the Minister did not carry out any assessment in relation to the proportionality of revoking the right to reside in the State for the applicant, in his personal circumstances, as against the finding that the receipt book was fraudulent and misleading.

61. In particular, no consideration appears to have been given to the fact that the applicant appears to have been tax compliant during the relevant period. This included making a declaration in relation to the earnings of E.L. from her babysitting activity. Neither did the Minister appear to consider any lesser sanction, such as making an official complaint to the gardaí, having regard to the fact that Reg. 30(1)(m) provides that a person who submits information that to their knowledge is false or misleading in a material particular, shall be guilty of an offence. This lesser punitive sanction does not appear to have been considered by the respondent.

62. Furthermore, it has to be remembered that these receipts were furnished at a time when it was alleged that the documents were fraudulent and misleading, due solely to the fact that DEASP, only had a record of E.L. earning one-week's wages in 2016. The receipt book was submitted as a means of showing that she did in fact have earnings from her self-employment as a babysitter during the first five months of 2016. At that time, there was no question that E.L. was not present in the State during that period. It was only when the statement that E.L. had left the State in January 2016, was made in the further submissions lodged on 11th February, 2021, that the decision maker latched onto this fact and held that, therefore, the documents submitted had to be fraudulent in nature. It does not appear that

this aspect was put to the applicant for his further comment. In other words, the issue as to whether E.L. was even present in the State in 2016, was not ever an issue that was live in the mind of the applicant, or his advisers.

63. The court is satisfied that as no adequate proportionality assessment was carried out in the decision in this case, it will have to be struck down.

64. Turning to the final submission on behalf of the applicant, that the decision was bad for lack of adequate reasons, the court is not satisfied that there is any substance in this submission. The court accepts the submission made by counsel on behalf of the respondent, that a decision maker is not expected to produce a judgment similar to a judgment of the Superior Courts. As long as the essential conclusion reached by the decision maker and the reasons for coming to that conclusion, are patently clear from the decision itself, adequate reasons will have been given. The court is satisfied that when one reads this decision as a whole, it is absolutely clear why the decision maker reached the decision in this case.

65. Finally, although not pleaded or argued in this case, the court is satisfied that the effective result of the court's judgment herein, which is to set aside the review decision and have the issue of revocation re-examined, is in accordance with the general justice of the case.

66. The court is of that view, due to the fact that a finding of fraud is a very serious matter. In this case it is alleged that the applicant forged approximately 92 receipts, so as to fraudulently assert that E.L. was present and working in Ireland in the period January to May 2016. It has been found that those documents are completely fraudulent, due to the statement made on behalf of the applicant in the further submissions lodged in advance of the decision, to the effect that E.L. had left the State in January 2016. The allegation that the applicant had submitted a substantial volume of forged documents in support of a fraudulent application by him, is a very serious allegation.

67. The finding of fraud is based on the book of receipts that were submitted by the applicant in furtherance of his original application for a permanent residence card in 2016. While the receipts are very short handwritten entries in a receipt book, they have an amount of significant detail in them. First, all the receipts are purportedly signed by E.L. All of the receipts are purportedly dated and the name of the recipient of the babysitting services, is given in each receipt.

68. If the receipts were forged by the applicant, that meant that the applicant had to forge E.L.'s signature on approximately 92 occasions. That would be very difficult to do convincingly. There are copies of E.L.'s authenticated signature in the documentation that was submitted to the respondent as part of the applicant's second application for a permanent residence card. In particular, there is a copy of a signed employment contract for E.L.; a signed tenancy agreement dated 6th July, 2015; a signed passport and a signed ID card in the name of E.L.; all submitted as part of that application. There was also a receipt book for the period July 2012 to March 2013, wherein all the receipts were also signed by E.L.

69. While I am not a qualified expert in handwriting analysis, from a perusal of the documentation before the court, the authenticated signatures of E.L. as appearing on her passport, her ID card and on the various contracts signed by her, appear to be consistent with her signature as appearing in the rent book for 2012/2013 and in the questioned rent book for the period January-May 2016. However, this is an area on which the opinion of an expert in handwriting analysis could be obtained.

70. An easier way to establish that E.L. was in Ireland and provided babysitting duties in the disputed period, would be to obtain an affidavit or statement from some of the regular customers of E.L., as identified in the receipts, stating that she did in fact provide childminding services for them in the first five months of 2016.

71. The court also notes that in written submissions dated 1st October, 2018, the applicant's solicitor stated as follows:

> *"For the sake of completeness, we enclose herewith a copy of the Revenue's Self-Assessment tax calculations for Muhammad Imran noting a total income of €15,186 being self-employed taxi driving in the sum of €8,246 for himself and babysitting services for his wife in the sum of €6,940. Less deductions and credits, tax in the sum of €1,000 was raised by the Revenue Commissioners."*

72. While it is not stated for which particular period these tax returns relate, it is presumed that they relate to 2016. If that is the case, it would appear that the applicant did in fact make a tax return in respect of the income earned by E.L. during 2016. If so, this documentation would be strongly supportive of the veracity of the receipt book.

73. The court is of the view that to base a serious allegation of fraud on a single sentence in a set of submissions furnished in February 2021, when the consequences of such a finding

are so great, seems somewhat harsh. It is in the interests of justice that the applicant be given an opportunity to correct the statement that was made on his behalf, that E.L. left Ireland in January 2016, and to establish that the receipts submitted are not forged documents.

74. As noted earlier in the judgment, it is noteworthy that the receipt book was originally furnished to deal with the assertion that was based on the DEASP records, that their records only showed E.L. as receiving one-week's wages in 2016. That had been explained by the fact that she had worked in the Smyths Toys shop during the Christmas period of 2015, but she had received one-week's wages from that period in January 2016. Thereafter, it was asserted that she was self-employed as a babysitter. Such earnings would probably not be covered in the records held by DEASP, and would only appear in tax returns made by or on behalf of E.L. for the 2016 period. It was never put to the applicant that the receipt book was forged, due to the fact that on his own account, E.L. had left the State in January 2016. It is in accordance with the requirements of justice that the applicant be given an opportunity to confront this serious issue in a comprehensive manner.

75. For the reasons set out herein, the court will make an order setting aside the decision of the respondent dated 13th December, 2021 and will remit the matter back to the respondent for further consideration.

76. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

77. The matter will be listed for mention at 10.30 hours on 11th July, 2023 for the purpose of making final orders.