THE COURT OF APPEAL

CIVIL

Record No.: 2020/99

Donnelly J. **Neutral Citation Number [2022] IECA 219**

Collins J.

Binchy J.

BETWEEN/

TIAGO DA SILVA MASCARENHAS

APPELLANT

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 7th day of October, 2022

Introduction

1. This is an appeal against part of the judgment and orders of the High Court (Barrett J.) refusing the appellant the reliefs he sought in judicial review proceedings. The sole order, the subject of this appeal, is the refusal to grant an order of *certiorari* of the decision of the respondent ("the Minister") dated the 26th March, 2019, to refuse the appellant permission to reside in this State. The appellant had also sought an order of *certiorari* in respect of the proposal to deport him issued by the Minister on the 26th March, 2019, however, the refusal of this order is not being appealed. Central to this appeal is whether the Minister dealt with the appellant's claim to a right to respect for his *private* life (as distinct from his family life) under Article 8 of the European Convention on Human Rights ("ECHR") erroneously/unlawfully. Issues raised included whether the Minister correctly addressed the nature of the permissions

the appellant had to reside in the State, and furthermore whether she gave adequate reasons for her decision.

Background

2. The appellant is a Brazilian national who was born in 1983. He has been resident in the State since 2006. The private life interests he asserts are that he had been living in Ireland for 13 years (at the time of the decision), he has established himself here enjoying commercial success as a director and shareholder of a company that employs others, has shareholdings in other companies, has been in employment here and has a significant body of friends here. He did not make any claim as to the right to respect for his family life.

3. The appellant lawfully entered the State on the 9th June, 2006 on a visitor permission which expired on the 3rd August, 2006. Thereafter, the appellant had a Stamp 2 (student) permission from the 3rd August 2006 to the 28th September, 2007. He had a Stamp 1 (Worker/Employment) permission from the 18th January, 2008 to the 28th February, 2009 and then had another Stamp 2 (student) permission from the 18th September, 2009 to the 30th September, 2011.

4. The appellant married an EU national on the 14th March, 2011 who was asserted to be an employee in the National Employee Training Centre. She had arrived in the State three days before the wedding. She then left the State the day after the marriage was contracted; the appellant did not inform the Minister of this and it seems that that was the last contact between the couple. It appears that she had moved to the UK in 2012 and had a child with her partner there in 2014.

5. After the marriage, the appellant applied for a residence permission pursuant to the European Communities (Free Movement of Persons) Regulations, 2006 ("the 2006 Regulations"). He was granted temporary permission on the 13th July, 2011 which was valid

until the 15th December, 2011 while his application was pending. On the 8th December, 2011 the appellant's permission to reside on a Stamp 4 EU Fam basis for a period of five years was granted and was registered on the 13th December, 2011.

6. On the 22nd July, 2015, the solicitor for the appellant applied on his behalf for retention of his residence card under the European Communities (Free Movement of Persons) Regulations, 2006 and 2008 on the basis of his divorce from the EU national as divorce proceedings had been initiated. No documents relating to the finalisation of the divorce proceedings were produced.

7. The application for retention of his residence card had not yet been decided by the Minister when the appellant's solicitor applied on his behalf for a Stamp 4 permission on the 11th May, 2016.

8. The application for retention of his residence card was refused on the 13th June, 2016. The reason for the refusal was that there was no evidence to show that the appellant's EU citizen spouse had exercised her EU Treaty Rights in the State in compliance with Regulation 6(3). However, as an exceptional measure, the Minister granted the appellant permission to reside in the State on a Stamp 4 basis for a 12-month period which was renewable subject to meeting specific conditions. This permission was granted under the provisions of national law.

9. On 3rd May, 2017, the issue of the appellant's marriage came to the fore. The appellant sought to renew his Stamp 4 permission with the Garda National Immigration Bureau ("GNIB") and was interviewed. In this interview, according to the Minister, he admitted that his marriage was one of convenience. The appellant was not permitted to renew his residence permission but was however granted a further residence permission for three months on the 5th July, 2017. He was told to await correspondence and on the 11th October, 2017, the Irish Naturalisation and Immigration Service ("INIS") wrote to the appellant. The Minister proposed to set aside the June 2016 permission pursuant to his executive powers unless the

appellant could provide reasons as to why the residence permission should be renewed. The Minister also proposed that she will be setting aside the EU Treaty Rights ("EUTR") decision of 2011 thereby considering it to be legally invalid. The appellant's solicitor replied by letter on the 13th November, 2017.

10. Further correspondence from the Minister was issued on the 8th February, 2018 which stated that it "*supersedes*" the 11th October, 2017 correspondence. This correspondence indicated that the Minister proposed to disregard the appellant's marriage as providing any basis for his EUTR residence application pursuant to Regulation 28 of the European Communities (Free Movement of Persons) Regulations, 2015 ("the 2015 Regulations") and proposed to revoke the appellant's permission granted in 2011. The letter also indicated that it was the Minister's intention not to grant the appellant a further renewal of his June 2016 permission, a point that the appellant says was a significant change from the earlier superseded proposal when the Minister had proposed setting it aside. The solicitors for the appellant replied to this correspondence on the 27th February, 2018.

11. In her decision of the 31st March, 2018, the Minister stated that the appellant's marriage was a marriage of convenience and the EUTR permission was revoked. The decision of the 31st March, 2018 was internally reviewed at the instance of the appellant and the review decision was delivered on the 18th May, 2018. It upheld the March 2018 decision; the finding of a marriage of convenience and the revocation of the EUTR permission. The appellant did not judicially review the finding concerning the nature of the marriage. It is a finding to which this Court can and must have regard.

12. The first time the Minister referred in this process to Article 8 ECHR rights was in her decision of the 31st March, 2018. The Minister found that the decision to revoke the permission did not interfere with any rights that the appellant may have under the Constitution or under Article 8. The Minister said that, where interference may arise in any subsequent proposed

decision, full and proper consideration will be given to those rights. This was repeated in the review decision of the 18th May, 2018.

13. On the 7th June, 2018, the appellant's solicitor made representations to the Minister on behalf of the appellant regarding the proposal to deport. The notice of an intention to make a deportation order was subsequently withdrawn.

14. On the 11th June, 2018, leave to seek judicial review was granted. These proceedings settled on terms, to include fresh consideration by the Minister of the possibility of granting discretionary permission to remain in Ireland for the appellant under national law.

15. On the 7th January, 2019, submissions to the Minister on behalf of the appellant were made regarding the renewal of his June 2016 permission (i.e. the Stamp 4 permission). This lengthy submission will be considered further below.

16. On the 26th March, 2019, the impugned decision, the subject of this appeal, was handed down. It refused the renewal of the June 2016 permission. The details of the decision will be referred to below. Furthermore, a notice of an intention to make a deportation order issued in respect of the appellant. That notice is not subject to appeal to this Court.

17. On the 10th May, 2019, leave to seek judicial review was granted. The judgment of the High Court was delivered on the 18th February, 2020.

18. On the 8th October, 2021, after the delivery of the High Court judgment detailed below and indeed, after a hearing date for the Court of Appeal had been fixed, the appellant sought to have the appeal vacated. He informed the Court that he had recently applied for Portuguese citizenship. On the 22nd October, 2021, Costello J. accepted the arguments of the Minister that the documentation relied upon by the appellant was vague and there was no certain outcome on the citizenship application and she directed that the appeal was to proceed.

19. On the 11th November, 2021, the appellant's substantive appeal was heard. Judgment was reserved. On the 21st December, 2021, the appellant *via* email advised the Court that he

had in fact obtained Portuguese citizenship. At that point, the Minister submitted that since the appellant now has EU citizenship and can therefore exercise his free movement rights within this State, the appeal is moot. The appellant submitted that as the decision of the Minister will have an impact on his rights, the appeal is not moot. Written submissions were made on this point and a further oral hearing held, at the conclusion of which the Court reserved its judgment.

The relevant submissions to the Minister and the Impugned Decision

20. The strong focus of the appellant's appeal was the claim that the Minister had not conducted a proper assessment on, and identification of, his Article 8(1) rights. This, according to the appellant, was demonstrated because the various permissions he had to reside in the State were not properly identified and considered. The appellant submitted that he should be able to identify from the Minister's March 2019 decision *why* he has Article 8(1) rights; he does not know *when*, or the time period during which, these Article 8(1) rights as identified by the Minister were engaged. He submitted for example that he does not know if the unlawful period of residence under the Stamp 4 EU Fam is being considered to engage Article 8(1) rights. The appellant clarified in oral submissions to this Court that the crux of the issue here is that the reasons given by the Minister were not adequate. The reasons why he had those rights would inform the challenge to whether the correct balancing exercise had been carried out by the Minister. The appellant referred in particular to the alleged failure of the Minister to acknowledge the Stamp 1 permission between the 18th January, 2008 and the 18th September 2009, the alleged failure to consider all the appellant's Stamp 4 permissions and, more generally, his status.

21. Naturally, the detail of, and context in which, the Minister gave her decision is important to the resolution of this appeal. Initially, in his written submissions to the Minister of June 2018, the appellant had relied on the decision in *Luximon & Balchand v. Minister for*

Justice and Equality [2018] IESC 24 to make the case that he too was similarly a "*settled migrant*" and not in the category of "*'visitors', or short-term entrants to the State, or persons who had no entitlement to be here at all*". These submissions then referred to various decisions of the European Court of Human Rights ("the ECtHR") on Article 8. As referred to above, the decision-making process moved on from that time, but by January 2019, the appellant was once again making a submission as to how the Minister ought to address his situation in her review.

22. Importantly, the appellant's letter of January 2019, although it listed the permissions and their duration, referred in general terms to those permissions when submitting how those permissions ought to be dealt with by the Minister. The relevant part of the submission commenced the paragraph with the phrase "*[i]n the premises, …, we submit that…*". Three points were then made by the appellant as follows:

a) that his residence in the State on foot of the permission granted in June 2017 should be considered as "*essentially continuous*" up to the present time;

b) that it should be recognised that he had extensive permissions to be in the State for reasons not based on his marriage both prior and subsequent to it;

c) that the most recent permissions given under domestic law were not based upon any EU right but were given precisely because he was not entitled to one.

23. The appellant's submission of January 2019 continued by saying that notwithstanding the Minister's concerns about the legitimacy of his marriage, "*he nonetheless had an adequate history of residence in the State over the prior 13 years or so, such as to justify the grant of a further permission – in particular …by rights associated with respecting his private life*". The letter then referred to *Luximon & Balchand*, saying that in that case timed out students were entitled to a consideration of their Article 8 rights. The submission then stated:

> "*[i]n light of [that] decision and in particular the fact of the Applicant's lawful residence as a student and as a holder of Stamp 1 residence in the State between 2006*

and 2011 and his rights thereafter under domestic law from June 2016 to the present; it is submitted that an exercise of a power by the Minister comparable to that in Luximon & Balchand cases was at issue, and consequently Article 8 ECHR rights should now be considered, and be treated as substantial. It is also noted that despite concerns the Minister may have about the marriage of our client, that legal residence is not a pre-requisite to Article 8 rights accruing. ECHR case law suggests that such rights can nonetheless accrue in those circumstances albeit that such rights are weaker in substance: [Kuric v. Slovenia and Nunez v. Norway cited]"

24. The impugned decision of the Minister of the 26th March, 2019 gave a long recital of the history of the appellant's immigration status. The decision clarifies that it is a review decision only based upon the Minister's executive powers. The manner in which the Minister treated the marriage, that is as one of convenience, is clearly set out. It clarified that the Minister did not consider the appellant had an unblemished immigration history or a continuous legal residence from arrival in the State based upon the findings in respect of the marriage of convenience. The Minister referred to the appellant's claim as to "*adequate history*" in the State and reliance on *Luximon & Belchand* and said that the position in his application deviates from the position there. Referring to the marriage of convenience, the review decision states "*[t]hus you became illegally present in the State through his (sic) own actions and remained on that permission which is now considered to be invalid from the outset for a period of 5 years*." The Minister said the appellant's situation must be considered differently from the situation of the applicants in *Luximon & Belchand.* .

25. The decision then commences under a new heading "Article 8 considerations". Under the sub-heading "*Background*" it commences:

"*It is accepted that a decision to refuse the s.4(7) application [Note: as recorded in the High Court judgment, it is common case that the decision was not one under*

s.4(7) but was an exercise of ministerial discretion. No point now arises on that issue in this appeal] in respect of yourself will constitute an interference with the right to respect for private [life] under Article 8(1) of the ECHR. However, it is submitted that this interference is justified by reference to Article 8(2)… "

26. The next sub-heading is "*Proportionality assessment*". The decision states:

"*In respect of your case your legal representative has outlined circumstances where they believe your Article 8 rights should be considered. It is noted that you have engaged in employment in the State for a number of years and have been present for a period of approximately 13 years. During this time, you have become a director of SEDA college and made a number of friends. During the 13 years you have been resident, it is noted that you resided for a period of approximately 5 years as a student. You were then present on the false pretences of being engaged in a marriage of convenience for a further period of 5 years before obtaining a Stamp 4 permission for a period of 1 year*."

27. The review decision then set out the further relevant facts, including that he was single with no children and that his claimed primary connection to the State was his business where he was a shareholder in three companies. The decision noted that "*[w]hilst it is noted that you are employed in one of these companies, it is also considered that you could continue to be a shareholder if required to leave the State*." The decision referred to the claim of his solicitor that he was of good character and conduct which should be considered. It was noted that he claimed that he did not engage in a marriage of convenience but said that this was found to be the case. The review decision also noted that the appellant had not told the Minister that the marriage had broken down. The decision pointed to the rights of the State including "*the right to control the entry, presence and exit of foreign nationals, subject to the Constitution and to international agreements. To be considered are issues of public policy, the integrity of the*

immigration scheme, its consistency and fairness to persons and to the State, as well as issues relating to the common good." It was said that in weighing the rights of the appellant against the rights of the State, refusing the discretionary permission was not disproportionate "*as the State has the right to uphold the integrity of the immigration system, subject to international agreements and to ensure the economic well-being of the State*." The factors related to the rights of the State were weightier than those of the appellant. In the "Conclusion" section, the review stated "*it is decided that a decision to refuse permission, in respect of you, the applicant is not disproportionate, as the State has an obligation to control immigration. It is therefore decided that a decision to refuse to renew your permission under the Minister's discretion is not in breach of the right to respect for private life under Article 8 of the ECHR*." The Minister refused the appellant's application for a residence permission.

The judicial review pleadings

28. The grounds on which an order of *certiorari* quashing the 26th March, 2019 decision of the Minister refusing the appellant a residence permission was sought were set out in nine grounds, some of which contained sub-grounds.

29. Ground (i) claimed that the Minister assessed the "*weight to be attached to the [appellant's] Article 8 ECHR rights on incorrect and/or mischaracterised facts and associated legal principles*". Ground (ii) set out the factual errors claimed, such as the inappropriate weighing of the non-student periods of residence. Ground (iii) claimed the Minister erred in law in treating his period residing here under the marriage of convenience as not giving "*rise to any rights pursuant to Article 8 ECHR*." Ground (iv) claimed that the Minister failed to have regard to the "*Council of Europe, Recommendation Rec (2000) 15 Concerning the Security of Long-Term Migrants*" ("the Council Recommendation"). Grounds (v), (vi), (vii) and (viii) claimed there was a breach of the proportionality principle, that the Minister failed

to consider relevant matters and/or considered irrelevant matters, that undue weight was put on the alleged marriage of convenience and that the Minister did not give proper reasons for the decision reached or provide clarity as to whether all relevant matters were considered either by reference to the earlier grounds "*or in respect of the broad question of why the decision reached was proportionate by reference to the weight of the rights of the [appellant] as weighed against those of the State*." The final ground (ix) claimed that "*[t]he manner in which the [Minister] applied Article 8 ECHR, and in particular Article 8(2) was in error*."

The High Court judgment

30. In his judgment, Barrett J. set out the factual background and circumstances of the appellant's residence in Ireland. He then dealt with each of the grounds in the appellant's statement of grounds and decided upon each one in turn. Before addressing each of the specific grounds, he made some observations. He noted that as a matter of law, the appellant cannot challenge the Minister's finding that there was a marriage of convenience. He held that the appellant was now left with a decision with very serious consequences when it comes to seeking a fresh permission. Furthermore, Barrett J. noted that the appellant was under an "*absolute obligation*", following receipt of his EUTR permission, to tell the Minister when his wife had left the State as this was a material change in circumstances. Barrett J. noted that, according to the appellant, his wife left two months after the marriage, yet, the first time the Minister was made aware of this was when the appellant applied for retention of his EUTR permission in 2015. Barrett J. stated "*[t]hat is a factor to which the Minister was entitled to have regard in the impugned decision.*"

31. Barrett J., in considering the emphasis laid by the appellant – in his correspondence for the renewal of his residence permission to the Minister dated the 7th January, 2019 - on his rights under Article 8 ECHR, observed:

> "*The nature of the private life rights advanced by [the appellant] was, on one level, quite precise and quite limited. Thus, he confined himself essentially to the fact that he has been living in Ireland for some years, has enjoyed commercial success as a company director and shareholder, has been in employment here, and has established a significant body of friends. (He does not contend to have a family life here). These matters are all clearly considered in the impugned decision. So, in truth, the Art. 8 ECHR case made by [the appellant] in the within proceedings was always going to be a difficult one for him to succeed in.*"

The absence of a claim to a family life in this jurisdiction is a matter of note and will be referred to later in this judgment.

32. Barrett J. said it was a difficult argument for the appellant as the Minister accepted there were Article 8(1) rights and had regard to the material before him and therefore, the appellant's argument was largely premised on the weighting given to his rights and that was held by the trial judge as being "*quintessentially a matter for the Minister (see Lingurar v. The Minister for Justice, Equality and Law Reform [2018] IEHC 96, at para. 14).*"

Failure to assess the weight attached to the appellant's Article 8 rights

33. Barrett J. dealt with each of the grounds put forward by the appellant. The first ground (containing grounds (i) and (ii) above) pertained to the alleged failure of the Minister to assess the weight to be attached to the appellant's Article 8 rights on incorrect/mischaracterised facts and/or erred in law in his consideration of Article 8. The appellant put forward four issues within this ground.

34. The first was that the appellant argued the Minister did not appropriately weigh those periods of residence in the State which were not based on a student-type permission. Barrett J. noted that this related to the Stamp 1/1A permission the appellant held in 2009. The appellant

pleaded that the Minister failed to acknowledge the correct position as to the various stamps that he enjoyed over time. Barrett J. disagreed and held that *"[i]t is clear from the impugned decision that the Minister knew precisely the nature of the permissions granted to [the appellant] during his time here. Nor, apart from assertion, is there any evidence to suggest that the Minister was not aware of the rights stemming from the permissions.*" Barrett J. held that the appellant did not produce evidence of the proposition that the decision-making authority ignored representations made by an applicant and he distinguished this case from *GK v. Minister for Justice* [2002] 2 IR 418 in that regard.

35. Secondly, the appellant argued that the Minister erred in construing the June 2016 permission as being one that was granted on the understanding that it was based on the marriage to the EU national being fully valid. The appellant argued that the Minister was incorrect to find that the right to residence was a derived right dependent on the EU national residing within the State in the exercise of her EU Treaty rights and for finding that there was no evidence to show she exercised those rights pursuant to Regulation 6(3) of the 2015 Regulations. Furthermore, the appellant argued that the Minister *suspected* that the marriage was one of convenience, at least from the 3rd May, 2017, and that this was prior to other residence permission decisions. Barrett J. held that *"the Minister also expressly engages with the issue of whether if he knew in June 2016 what he knew when the [2019 decision] was made, that would have made any difference (his answer in this regard being an unequivocal 'yes').*" Barrett J. stated that the argument that the Minister was aware of the marriage of convenience in 2016 cannot hold true. If that were the case, the State would then have to have pretended to become aware of the marriage of convenience in 2017 and proceed on that pretence in February 2018. He held that there was "*not an iota of evidence to suggest that the State/Minister so proceeded here.*"

36. The third issue put forward by the appellant was that the Minister did not consider the passage of time between the most recent permission of the appellant which expired in October 2017, up to the date of the 2019 decision, as constituting a period of time in which Article 8 rights accrued. Barrett J. characterised this argument that the appellant is contending for a "*'tolerated presence' in the State*". Barrett J. held that there is no such concept in law; one is either present in the State in accordance with the law or not, and referred to *AB, CD, and EF v. Minister for Justice and Equality* [2016] IECA 48 in that regard. Barrett J. noted that the appellant was putting forward a more subtle argument; that when it comes to an assessment of Article 8 rights, the historic reality of the appellant's presence in the State, whether lawful or unlawful, should be considered. Barrett J. noted however that that is exactly what the Minister did in his assessment as the appellant's economic activity within the State (which was the mainstay of his Article 8 argument) occurred when the appellant was here unlawfully and the Minister had regard to that activity.

37. The appellant's fourth issue was that the Minister erroneously found that the decision not to renew his residence permission was a justified interference with his Article 8 rights by reference to it being in accordance with s. 4(7) of the Immigration Act, 2004 (hereinafter, "the 2004 Act") in circumstances in which the Minister was in fact exercising an executive discretion. The appellant drew attention to the fact that the 2019 decision expressly stated that the 2016 permission was granted pursuant to the Minister's executive powers. Barrett J. stated that it is now common case that the 2019 decision was not made under s. 4(7) but rather pursuant to his executive powers. It was not claimed that the Minister missed Article 8 considerations by reference to this error. Barrett J. held that there would be no utility in quashing the decision as the Minister would just state that he was deciding it pursuant to his executive discretion and then go on to consider Article 8 rights where the appellant's factual circumstances have not changed. Barrett J. noted that the appellant was using this argument as

a gateway for arguing that the exercise of the discretionary power cannot be reconciled with the "*accordance with law*" requirement in Article 8(2) ECHR. However, the trial judge held that this was not pleaded. The reliance by the appellant on ground (ix) of his statement of grounds, wherein the appellant argued that the manner in which the Minister applied Article 8(2) ECHR was in error, also does not plead this. This is due to the fact that ground (ix) in fact deals with the "*radically different point*" that the *manner* in which Article 8(2) was applied was in error. This point was not pursued on appeal by the appellant.

The Minister placed undue weight on the marriage of convenience and erred in finding that the permissions thereunder were never valid.

38. Barrett J. considered three of the appellant's grounds together. These were the alleged failure of the Minister in treating the period he was in the State (but for which his permission was retrospectively considered to be based upon a marriage of convenience) as if it did not give rise to any Article 8 rights, the error of the Minister in placing undue weight on the marriage of convenience and/or deeming the relevant permissions granted thereunder as never being valid in circumstances where those permissions were spent and also the overlapping ground (ix) discussed above, namely that the Minister erred in the manner in which he applied Article 8, in particular Article 8(2) ECHR.

39. Barrett J. considered the effect of a marriage of convenience as a matter of law. Barrett J. held that the appellant had failed to explain what weight that he claimed should be attached to the marriage and the period of same. Barrett J. noted that the law in this area was then due to be considered in the near future by the Supreme Court in *MKFS (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 103 (the appeal to the Supreme Court thereof). The trial judge said, however, that that case has no practical effect to the present case as the facts were different. The trial judge noted that Article 8 rights contended for in this case are accepted by

the Minister and the Minister proceeded in the 2019 decision to consider whether these rights can be legitimately restricted by the refusal to grant a fresh permission. Barrett J. said that the question that arises here is; what is the purpose of quashing the decision and sending it back for reconsideration? He held that the Court would effectively be asking the Minister, who already found there were Article 8 rights present, to consider whether immigration control trumps the appellant's Article 8 rights in a situation where the Minister has already made this finding in the initial 2019 decision.

40. Barrett J. also held that there was in fact an operative and formal decision as regards the marriage of convenience that could have been subject to judicial review. Not proceeding with judicial review when one has the benefit of legal advice is "*not at all the same as not having a right to seek judicial review.*" He found that this was a collateral attack on the Minister's now unchallengeable decision that the appellant's marriage was a marriage of convenience and relies on *XX v. Minister for Justice and Equality* [2019] IESC 59 at para. 30 where the Supreme Court observed the need for finality in the context of judicial review proceedings.

Failure to consider or comply with the Council of Europe Recommendation concerning the security of residence of long-term migrants

41. The appellant argued that the Minister failed to consider and/or comply with, or justify non-compliance with, the Council Recommendation. The appellant submitted that the 2019 decision is therefore to be regarded as *prima facie* inconsistent with his Article 8 rights.

42. Barrett J. held that while the Recommendation is clearly a soft law measure, it does have value as a reference source. Barrett J. held that the issue here is that the appellant clearly comes within Article 3(a)(i) of the Recommendation as a person whose residence permit may be withdrawn, as he has engaged in "*proven fraudulent conduct, false information…[and]*

concealment of any relevant fact attributable to [him]". Therefore, the 2019 decision complied with the standards envisaged by the Recommendation.

43. This point was not pursued on appeal.

The 2019 decision was disproportionate

44. The appellant argued before the High Court that the 2019 decision failed to show that it was proportionate by reference to the analysis of the relevant facts and the level of weight actually afforded to the appellant's rights as against the nature of the pressing need and legitimate aim necessary in a democratic State warranting the Minister to refuse to renew the appellant's permission.

45. The trial judge noted that this was "*something of a smorgasbord of what has been claimed in [the appellant's] other grounds*". He noted however, the Minister has a right to consider the economic well-being of the State in his decision and that this is expressly referenced in Article 8(2) as legitimate aim. Barrett J. quoted *AO (Nigeria) v. Minister for Justice and Equality* [2019] IEHC 365:

> "*The applicant is…not in a position to provide any meaningful guarantee that his presence will never impact on the economic wellbeing of the country, so the possibility of an adverse impact is something the Minister can validly consider.*"

Barrett J. relied on *STE v. Minister for Justice and Equality* [2019] IECA 332 in that regard also. He noted that:

> "*That said, the Minister does face a challenging task in this regard; misfortune can strike any of us at any time, and all of us will have increasing recourse to public services, e.g., health services, as we grow older. So, it does not seem to the court that the Minister could decide applications simply by reference to factors such as 'who knows that the future will bring?' or 'you will grow old'; he needs to have regard to the particular facts before him, and to the competing interests presenting; however, as*

Clark J. states in Igiba (a minor) v. The Minister for Justice, Equality and Law Reform [2009] IEHC 593, at para. 21, 'Provided that he engages in a fact-specific analysis and weighs the competing interests there is no obligation on the Minister to identify an applicant-specific reason.' Here the Minister proceeded exactly as Clark J. contemplates."

Grounds of Appeal

46. The appellant's grounds of appeal were extensive and contained what appeared to be partial submissions. At the oral hearing, counsel confirmed that the appeal was confined to the refusal of the trial judge to grant *certiorari* in respect of the 2019 decision.

47. Arising from those grounds, the reply of the Minister, and the identification by the parties in their submissions of the issues, it is possible to extract the following substantive issues that arise for consideration in the appeal:

a. whether the decision in respect of Article 8 rights in the 2019 decision was based on the correct facts. At the oral hearing, this issue was premised on the argument that the Minister ought to have identified *why* she considered Article 8 rights were engaged;

b. whether the correct tests applied to the consideration of the appellant's Article 8(1) rights and did the Minister err in the manner in which she weighed the factors before her;

c. whether the rationale of the Minister was sufficiently clear so as to comply with the obligation to give reasons for the conclusions reached; and,

d. if required for consideration, whether relief should be refused on the grounds of conduct of the appellant.

Preliminary issue: mootness

48. At the outset it is necessary to deal with the issue of whether this appeal is moot. The appellant now has Portuguese citizenship and EU considerations must therefore be given by the Minister to his immigration status. In January 2022, on the same day as the appellant submitted that the proposal to deport him should be withdrawn in light of his new citizenship, the Minister withdrew the proposal.

49. The Minister requested the Court not to proceed to deliver judgment as the matter was moot as there was no live dispute remaining between the parties; there was no valid basis to deliver judgment as there was no concrete interest in judgment being obtained.

50. The appellant submitted that he has an interest in obtaining judgment as the Minister will be required to reconsider whether the appellant should have been given a renewal of his permission which expired on the 26th May, 2017. The appellant's point is that if *certiorari* is given the Minister could grant a permission on reconsideration and that would regularise the appellant's position in the State at the relevant time. He submitted there are multiple examples of benefits of lawful residence in one's immigration record. For example, as an EU citizen he would have a greater right against removal from the State if he has been in lawful residence in the State during the relevant period. He also submitted that lawful residence would affect his right to acquire Irish citizenship which itself has rights.

51. The Minister pointed out that if the appeal were to go ahead and the sole order sought was granted, *i.e.* an order quashing the 2019 decision, the most that could result is that the Minister would have to reconsider the appellant's residence application which he made in January 2019. The Minister submitted that the decision to revoke and disregard his EU residence card which, when issued, covered the period between December 2011 to December 2016 was upheld on review. These decisions, which were formed on the basis of a finding of a marriage of convenience, were not challenged. Therefore, this appeal cannot overturn this

adverse finding. The appellant has had no permission to be in the State beyond the 5th October, 2017, and therefore, the quashing of the 2019 decision and will not result in a finding that he was lawfully within the State. The Minister submitted that the assertion of the appellant that he still has an interest in the decision being quashed as it effects his immigration history in the State and deprives him of reckonable residence for the purposes of an Irish nationalisation application in the period between the expiry of his permission to be in the State and his acquisition of EU citizenship, is without merit. The Minister submitted that a judgment of this Court cannot affect the fact that the appellant failed to inform the Minister at the relevant time that his marriage broke down and continued to live here and benefit from rights not legitimately obtained.

52. In relation to the issue of naturalisation, the Minister submitted that the appellant did not refer to this in his affidavit. In fact, the Minister refused an application by the appellant for naturalisation on the 11th August, 2020 and no challenge was brought to this refusal. The Minister submits that to apply for naturalisation, section 15(1)(c) of the Irish Nationality and Citizenship Act, 1956 (as amended) ("the 1956 Act") requires one year's continuous residence in the State immediately before the application and, during the eight years immediately preceding that period, a total residence in the State amounting to four years. The Minister submits that the appellant has had no permission whatsoever to be in the State since October 2017 and therefore does not fulfil the requirements under the 1956 Act. He will only have one year's continuous residence in February 2023 – one year after he received EU citizenship. Furthermore, the Minister submitted that since the Minister decided to revoke the appellant's EUTR permission on the 31st March, 2018, the only valid immigration permissions held by the appellant over the relevant periods were between June 2016 to June 2017 under the Stamp 4 permission, and the further Stamp 4 granted by GNIB which covered July 2017 to October

2017. This totals 15 months. The Minister submitted that no naturalisation application could be made until 2026/2027.

53. The Minister then referred to case law dealing with mootness including *Godsil v. Ireland* [2015] 4 IR 535, *State (Doyle) v. Carr* [1970] IR 87 and *Hoffman v. Coughlan* [2005] IEHC 60.

54. The Minister submitted there was no practical benefit to this court decision for the applicant. Furthermore, a court can refuse relief where a change of circumstances removes the immediacy of an appellant's complaint and renders it historical. The Minister submitted that a court is entitled to assess the benefit to an applicant (including damage to reputation) when determining if it should grant relief or not and relies on *State (Furey) v. Minister for Defence* [1998] ILRM 89 to that effect. The Minister submitted that in the present case, no reputational damage arises here. The 2019 decision merely refuses the appellant permission to reside in the State. The appellant's adverse immigration history is recorded in earlier and unchallengeable decisions.

55. Finally, the Minister submitted that the Court will not exercise its discretion to grant relief where the case is essentially hypothetical. The Minister submitted that courts have held an appeal to be moot where it is such as to "*completely lose its character as a present, live controversy*" per Murray C.J. in *O'Brien v. Personal Injuries Assessment Board* [2007] 1 IR 328.

Decision

56. In *Godsil v. Ireland*, McKechnie J. stated at para. 37:

> "*Having reviewed these and other authorities at para. 51 of my Judgment in Lofinmakin, I summarised as follows what the legal position is:-*
>
> *'(i) A case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live*

controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing.

(ii) Therefore, where a legal issue has ceased to exist, or where the issue has materially lost its character as a lis, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined.

(iii) The rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain a legal interest in their outcome. There are other underlying reasons as well, including the issue of resources and the position of the court in the constitutional model"

57. On the issue of mootness, the central consideration for the Court is whether there is a live concrete issue before the Court. This Court has heard submissions in which both parties advance submissions as to whether the decision is now moot. The appellant places before the Court issues on which he submits that the decision may have an impact on his future immigration history. The Minister has counter-submitted that this is hypothetical and that the single most important consideration in any further immigration issue will be the marriage of convenience and the fact that certain decisions based upon that finding are unchallenged.

58. This was a case which had reached an advanced stage, that is to say judgment had been reserved, before the change in circumstances which are alleged to render the decision moot occurred. Further submissions and a hearing took place. Despite the fact that the appellant had prior to the hearing of the original appeal sought an adjournment on the basis of his application for Portuguese citizenship (on the basis that if he obtained it the proceedings may be moot), I do not consider that the issue of mootness is one that is entirely clear cut to the point that it can be stated immediately and without any doubt that there is no possibility of the

decision of this court having any real or live impact on the appellant's rights. In circumstances where the appeal had reached such an advanced stage the issue of the resources of the Court is now a more neutral one. This Court will have to give a detailed considered judgment on this issue either way. Even the issue of mootness will require a detailed consideration of the facts and a consideration of the possible legal effect of leaving the decision of the Minister (and the High Court decision) in being. In those particular circumstances, I am of the view that it is preferable that this Court would proceed to give judgment on the substantive issues in the case.

Substantive grounds of appeal

The nature of the appellant's appeal

59. The appellant's submissions addressed the alleged failure of the Minister to: (a) identify the reason why the appellant was recognised as having Article 8(1) rights; (b) identify and refer precisely to each period of residence; (c) identify the nature of the right attaching to each period; and (d) weigh each separate period appropriately in the balancing exercise that had to be carried out under Article 8(2). The individual aspects of the submissions therefore were related to what became a central submission in the appeal: that the Minister had failed to identify why he had Article 8(1) rights and the absence of that information affected his ability to know whether, or if, certain periods of residency had properly been weighed in the balance by the Minister when she addressed the limitation on those rights under Article 8(2).

60. An example of where the appellant submitted there were errors in the identification of time period is the reference by the Minister to a five-year period in which he had resided as a *student*. The failure to acknowledge his Stamp 1 (employment) permission for the period January 2008 to February 2009, was, the appellant contended, an important error because rights accrued in that period are considerably stronger than during a student permission. The Minister

took issue with the fact that there was a failure to refer to his Stamp 1 permission and points to a reference to Stamp 1 earlier in the decision under the heading "*Consideration*".

61. It appears to me that there has been something of a shift in the appellant's focus between the High Court and this appeal. There has certainly been a larger focus on the contention "*[n]o proper reason is given as to what Article 8 rights are engaged or why the Respondent considered them to exist.*" This contention is difficult to relate to the pleadings in this case, to his notice of appeal or to the manner in which the Minister's decision was made. In the pleadings, ground (viii) was one of inadequate reasons but this appeared to relate more particularly to the findings under Article 8(2). Ground (iii) is centred upon a view of the March 2019 decision as being one where the Minister erred in law in treating the period in which the appellant "*was present in the State (but for which his permission was retrospectively considered to be based upon a marriage of convenience) as if it did not give rise to any rights pursuant to Article 8 ECHR*"; thus that ground was claiming that the Minister had in fact treated that period as not relevant to the Article 8 assessment. There is also no express reference in the grounds to the alleged failure of the Minister to give reasons for concluding that he had Article 8(1) rights in the notice of appeal. The appeal is however now centred on the failure to identify the periods in which the appellant was present in the State and which gave rise to his Article 8 rights. As indicated above, the reason for this emphasis is that the appellant says that he does not know if those periods were weighed correctly in the period.

62. The Minister has submitted, correctly in my view, that there is a contradiction between the appellant's current position and that put before the Minister by the appellant in his solicitor's representations of the 7th January, 2019. In that letter, referred to above, he expressly asserted that his Article 8 rights were engaged; these primarily referred to his lawful periods between 2006 and 2011 and from June 2016 to the present which should "*be treated as substantial*". It was accepted by the appellant that lawful periods of residence gave rise to more

substantial rights than unlawful periods. In the decision, the Minister has accepted that Article 8 rights were engaged. That is a finding of significance. Furthermore, the Minister outlined in her decision that she was differentiating between time when he was lawfully resident and when he was "*illegally present in the State through his own actions*". Thus, she distinguished *Luximon & Balchand*.

63. Perhaps some of the shift in focus of the appellant is part of a natural refinement of an argument between first instance and appeal. It could also be a reflection of how the law itself may have evolved in the meantime. In the present case, it is noted that the Minister had relied in submissions upon the High Court decision in *MKFS (Pakistan) v. Minister for Justice and Equality* to submit that because the marriage was one of convenience that "*no rights can flow from it*". The appellant relied on the Supreme Court judgment in *MKFS (Pakistan) v Minister for Justice and Equality* ([2020] IESC 48), which stated "*that the Minister remains under an obligation to take the family and private rights (particularly those under Article 8 ECHR) of the applicant into account even where he has found that there is a marriage of convenience, though of course those rights will fall far short of the full panoply of rights which could be invoked by the parties to a genuine marriage*."

64. The problem for the appellant is that Barrett J. actually found that he could proceed without awaiting the Supreme Court decision because the outcome of the case had no practical effect in relation to the argument. Barrett J. held: "*The Minister here did not say, e.g., 'I have found it is a marriage of convenience; ipso facto no rights can arise'….When one looks at the impugned decision the Minister does point to the period of the marriage as one of fraud/deceit but proceeds nonetheless to find that there are Article 8 rights, predicated on the 13 -year residence, economic activity, friendships in the State, etc*." The position is that the High Court has determined that the Minister considered the factual period of time in which he lived in this State and balanced his interests against the competing interest of the State. Indeed, that was

what *MKFS (Pakistan) v Minister for Justice and Equality* decided, that the Minister was obliged to consider the factual circumstances arising for the purpose of dealing with an Article 8 claim even where there had been a marriage of convenience.

Was the Minister required to identify each period of residence that gave the appellant Article 8 rights?

65. If the appellant is to succeed in his argument that there was a failure to explain why he had Article 8 rights, then it seems to me that he must establish as a matter of law that the decision-maker is obliged to identify each and every period of residence that qualifies the person for rights. The appellant has not identified a single authority for that proposition. In submitting that time awaiting residence decisions had to be calculated and that unlawful presence could be calculated, counsel for the appellant relied upon the decision of the ECtHR in *Unuane v The United Kingdom* (App. No. 80343/17) and in particular on the apparent approval therein of the UK practice of requiring a "*balance-sheet*" approach by a judge. This entails the judge, having found the facts, setting out the pros and cons and giving reasoned conclusions as to whether the countervailing factors outweigh the important attached to the public interest.

66. A close examination of *Unuane* reveals that the balance-sheet approach referred to was in the context of the deportation of foreign offenders. The ECtHR took that reference from the case of *Hesham Ali v. Secretary of State for the Home Department* [2016] UKSC 60, in which the UK Supreme Court provided guidance as to how tribunals and courts should approach decision-making in the context of immigration cases involving Article 8 ECHR which concerned specific issues around how to treat offenders who had received prison sentences of between twelve months and four years. Lord Reed gave the leading judgment, but in the separate opinion of Lord Thomas there was a reference to the balance-sheet approach. Lord

Thomas had said that the balance-sheet approach had its origin in the Family Division cases and in an extradition case. It is of benefit to look back at those cases.

67. The first case in which the balance sheet approach appears to have been identified was in the England and Wales Court of Appeal decision *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2014] 1 WLR 563. As the title suggests, this was not an immigration but an adoption case; nonetheless Article 8 considerations, amongst other matters, were at issue. The idea of the balance-sheet arose in the context of the requirement that the evidence before the decision-maker was required to address all the options which are realistically possible and contain an analysis of the arguments for and against each option. The decision then had to be an "*analysis of the pros and cons*" and "*a fully reasoned recommendation*". The Court of Appeal encouraged the use of a kind of "*balance sheet*" which had been recommended in another case in a different context. Later in the judgment, the Court again made reference to the "*balance sheet*" in assessing the negatives and the positives of each of the two options *i.e.* in giving or refusing the parent leave to oppose the making of the adoption order.

68. The extradition case referred to was *Polish Judicial Authority v. Celinski* [2016] 1 WLR 551. The judgment in that case sought to address the proper conduct of extradition proceedings in the wake of important decisions of the House of Lords in *Norris v. Government of the U.S.A. (No 2)* [2010] 2 AC 487 and *HH v. Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338. The decision stressed the importance of judges hearing extradition cases where Article 8 was relied on, setting out an analysis of the facts as found, and, in succinct and clear terms, giving adequate reasons for their decision. The Divisional Court of England and Wales approved the "*balance sheet*" approach and said that they hoped that the judge would list the factors that favoured extradition and the factors that militated against extradition. The judge would then, on the basis of the identification of the relevant factors, set out the conclusion as a result of balancing those factors with reasoning to support that conclusion.

69. In this jurisdiction, the *Celinski* decision was referred to in the judgment of O'Donnell J. in *Minister for Justice and Equality v. JAT (No. 2)* [2016] IESC 17 where he referred to the more "*structured and rigorous approach*" to Article 8 claims that the Divisional Court of England and Wales sought to apply to the immediate and significant increase in Article 8 claims being made after the decision in *HH v. Deputy Prosecutor of the Italian Republic, Genoa*. O'Donnell J. did not think it appropriate to address the matters in detail as they were not the subject of argument. O'Donnell J. stressed the considerable and weighty public interest in ensuring that persons charged with offences face trial. It was only where the facts are truly exceptional that extradition/surrender will amount to a breach of the rights under Article 8. O'Donnell J. said with respect to the Article 8 assessment, that even where factors of delay and/or impact on children were at issue that it would not "*be necessary to carry out any elaborate factual analysis or weighing of matters unless it is clear that the facts come at least close to a case which can be said to be truly exceptional in its features*." Of course, it must be recognised that this was said in an extradition case where the public interest is especially high in light of the commitments the State has made under EU law, international conventions, treaties or bilateral agreements, as the case may be, and in light of the importance of ensuring that those alleged to have committed a crime are prosecuted and that those convicted serve the sentences imposed upon them. The State's interests in an immigration context are of a different character. Nonetheless, I think the point being made, that the extent of the analysis required may vary considerably depending on the strength of the interests at stake, is an important one. It is also important to state that O'Donnell J. clarified that exceptionality is not a test in itself; but it is only in exceptional cases that Article 8 rights will be successful in resisting extradition.

70. In its decision in *Unuane*, the ECtHR cited a passage from the UK Supreme Court decision in *R (Agyarko) v. Secretary of State* [2017] UKSC 11 in which Lord Reed stated that there was no search "*for a unique or unusual feature*" in immigration cases; what was at issue

was a test of proportionality. Lord Reed said that in cases involving precarious family life, "*something very compelling…is required to outweigh the public interest*".

71. It is also important to recall that immigration cases in the UK are subject to a very different legal code. In 2012, new immigration rules came into force in the UK having been published by the Secretary of State and laid before Parliament. Those rules were intended to "*comprehensively reform the approach taken towards ECHR Article 8 in immigration cases*" (Statement of Intent: Family Migration, UK Home Office, June 2012). The new rules (and the instructions provided with them) ("the Rules and Instructions") were said to reflect fully the factors that can weigh for or against an Article 8 claim and to set proportionate requirements that reflect, as a matter of public policy, the views of the UK government and parliament of how individual rights to respect for private or family life should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public from foreign criminals. Failure to meet the requirements would normally mean failure to establish an Article 8 claim and that if there was a failure "*it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would breach Article 8*." Lord Reed described this in *R (Agyarko)* as being an increasing emphasis on certainty rather than discretion, on predictability rather than flexibility, on detail rather than broad guidance, and on ease and economy of administration.

72. Unlike the *Hesham Ali* case, neither of the factual situations in the *Agyarko* decision concerned offenders. The facts concerned two different women who had remained for quite long periods in the UK after their initial leave had expired. Both were in relationships, had no children and one had a medical condition. Neither applicant came within the requirements of the rules for an entitlement to be granted leave to remain. Ultimately, their appeals were rejected by the UK Supreme Court. That Court stated that they had precarious family life and appropriate weight had to be given to the policy, expressed in the Rules and Instructions, that

when considering an application for leave to remain brought by a person in the UK in breach of immigrations laws, the public interest in immigration control can be outweighed only where there are "*insurmountable obstacles*" or "*exceptional circumstances*" as the Rules and Instructions provided. According to the Court, the crucial issue was whether in giving weight to the strength of the public interest in the removal of the person, the Article 8 claim is sufficiently strong to outweigh it.

73. The ECtHR decision in *Unuane* concerned the application of those UK Rules and Instructions. A deportation order was made in accordance with those rules against a foreign national who had permission to remain in the UK since 1999 and who had three children. All the children were British citizens and one had a significant ongoing medical issue. The applicant had committed offences concerning the falsification of thirty applications for leave to remain in the UK for which he received a sentence of five years and six months imprisonment. His partner had received a sentence of eighteen months imprisonment, but her deportation order was overturned by the Upper Tribunal in the UK. In the course of its decision, the Upper Tribunal said in respect of Mr. Unuane's appeal that the "*Rules…deal with people in genuine and subsisting parental relationships with the children and who have been in the United Kingdom for a long time themselves. We are quite satisfied that there is a genuine and subsisting parental relationship with the children but there are no 'very compelling circumstances over and above those described at paragraphs 399 and 399A'*". The latter was a direct quote from the Rules and Instructions.

74. At para. 82 of its judgment in *Unuane*, the ECtHR considered that the *Hesham Ali* and *Agyarko* decisions imposed a duty on appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law acknowledging that they had to attach considerable weight to the policy adopted by the UK

Secretary of State. The ECtHR referred to the balance-sheet approach. It therefore considered that the UK Immigration Rules and Instructions did not necessarily preclude the domestic courts and tribunals from employing the criteria set out in the ECtHR's own significant decision in *Boutif* for the purpose of assessing whether an expulsion measure was necessary and proportionate.

75. In that context, the ECtHR specifically noted that the Upper Tribunal had not made any other substantial finding adverse to the applicant *nor* had it conducted the separate balancing test required where there was an interference with family life. The Upper Tribunal had merely noted that it could not allow his appeal on the basis of the Rules and Instructions which required applicants to identify very compelling circumstances over and above the genuine and subsisting parental relationship. In light of that, it fell to the ECtHR to give the final ruling on whether the expulsion order was reconcilable with Article 8.

76. In conducting that balancing test, the ECtHR noted various factors and made particular reference to the findings made in respect of the applicant's partner. It said that the conclusion was not reconcilable with Article 8. The strength of his ties to his partner and children had been acknowledged by the Tribunal and also it had been established that parental support had been acute because of the medical condition. It said that the seriousness of the particular offence was not of a nature or degree capable of outweighing the best interests of the children so as to justify expulsion.

77. Contrary to what the appellant appears to imply in his submission, I do not accept that the approval by the ECtHR in *Unuane* of the "*balance-sheet*" approach was a direction that adjudicating bodies had to engage in an approach which mirrored that of a forensic accountant. The ECtHR was addressing its mind to the position of the law of the UK where the UK courts and tribunals were required to find the facts, set out the pros and cons and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the

public interest in the deportation of foreign offenders. This, it appears, is a setting out of the "*pros and cons*" when conducting the Article 8(2) assessment (*Unuane* being a decision based firmly in the "interference" with rights category). Such a factual assessment (even if not called a balance sheet assessment) is what is required in any event once a decision-maker has reached the stage that Article 8 rights are engaged.

78. I would also highlight that, when called upon "*in exercise of its supervisory jurisdiction*" to give its final ruling on whether an expulsion is reconcilable with Article 8, the ECtHR was able to do so in four relatively short paragraphs. Ultimately, the ECtHR pointed to the seriousness of the offence not being of a nature or degree capable of outweighing the best interests of the children so as to justify expulsion. Deportation was disproportionate to the legitimate aim pursued – the prevention of disorder and crime – and as such was not "*necessary in a democratic society*". The ECtHR did not identify individual periods of legal residency and then balance them against individual periods of illegal residency; instead, the ECtHR engaged in a balancing exercise between the offences committed and the best interests of the children. This was in effect a balancing of interests in light of the present circumstances: the best interests of the children are inherently focused on present and future interests of those children.

79. It is apparent therefore that what is required of a decision-maker is not a minute and detailed itemisation of factors in two columns where the weight of each item on one side is calculated and given a numeric value with the total of the numeric value of each item then added together and set against the total numeric value of the other column where a similar process was carried out. On the contrary, what is required is an identification of factors, namely the competing interests of the State and the individual, that are relevant to the issue of whether the right to respect of private (and/or family) life will be disproportionately interfered with by

the refusal to grant residence or, as the case may be, by deportation, and an appropriate, well-reasoned balancing of those competing interests.

80. The particular argument of the appellant that the *reason* why he has Article 8 rights – in the sense of the identification of which period of residency is being recognised as lawful or unlawful – must be specifically recorded in the decision does not find support in any of the case law. There is however a great deal of case law concerning the rights of those who are described as settled migrants and those who have what is termed "*precarious family life*". Lord Reed in the *Agyrako* decision, was relying on ECtHR jurisprudence when he said that for those with precarious family life "*a very strong or compelling claim is required to outweigh the public interest in immigration control*."

81. In the present appeal, the meaning of the *Luximon & Balchand* decision and a number of decisions of the ECtHR were addressed in submissions. Prior to the oral submissions however, this Court (Faherty, Power and Murray JJ.) had delivered judgment in *Chen v Minister for Justice & Equality* [2021] IECA 99. Although this decision was not referred to by the parties, it is appropriate to have regard to what it says as it discusses the effect of the Supreme Court decision on short term visitors to the State. In their joint judgment, Power and Murray JJ. considered whether *Luximon & Balchand* obliged the Minister to conduct an assessment of the impact of the decision upon the applicant's family rights prior to refusing her application to remain in the State made on the final day before the expiry of her 90-day visitor visa. The judgment entails an extensive review not only of *Luximon & Balchand* but of the ECtHR and CJEU jurisprudence concerning immigration and family/private life rights. Although the issue in *Chen* was different from that in the present case, the principles identified as stemming from the relevant jurisprudence are of assistance.

82. In respect of *Luximon & Balchand,* the Court in *Chen* said that the Supreme Court had made clear that its view that the Minister was required to undertake an Article 8 assessment

was based – and based exclusively – on the fact that the applicants in that case were long-term residents who had in that capacity, and while lawfully present in the jurisdiction, established links in the State. It was the "*characteristics of long-term migrants*" that they had acquired that generated the entitlement to the Article 8 review. Power and Murray JJ. were clear that the Supreme Court did not view its findings as having any relevance to the position of persons who had entered the State as short-term visitors. They identified one of the features of *Luximon & Balchand* to be that the nature of the permissions at issue and the terms on which they were granted and renewed from year to year, "*were such that the applicants might, while lawfully residing here, establish such links and connections with the jurisdiction*." The Court of Appeal also identified the crucial feature that the obligation to conduct the assessment of making a renewal or variation decision was grounded exclusively on the reach of the ECtHR.

83. The Court of Appeal addressed the Strasbourg jurisprudence in detail and stated that "*[c]ases that involve both immigration and family life, tend to fall into certain identifiable categories in the applications that are made to the Strasbourg Court*." The judgment identified first the cases where a State seeks to terminate the lawful residence of a settled migrant. Second, there are then cases where there is no "*interference*" with the right to respect for family life because the State will have exercised its sovereign right to control immigration and will have refused permission to enter or reside within its territory. In those cases, the Court will sometimes ask whether "*notwithstanding the absence of an interference, the State has a positive obligation to allow the foreign national concerned to enter and reside for the purpose of exercising family life*" (emphasis that of the Court in *Chen*).

84. Finally, the Court of Appeal then identified *Jeunesse v. The Netherlands (*App. No. 12738/10) (a case that was also addressed in *Luximon & Balchand* and relied upon by the Minister in this appeal) as an example of what some argued was a third category of case involving a "*hybrid*" of negative and positive obligations. This was where the obligations were

not purely positive obligations because the applicant usually lived, unlawfully, for a long time in the host state, and thus, realistically, a removal in such circumstances could be characterised as an "*interference*". The circumstances in *Jeunesse* were quite unusual. The impact of colonialism and national independence that had consequences for the nationality of residents was addressed, as were the circumstances where there had been two decades of residence in The Netherlands by the applicant after the overstay of her short-term visitor's visa where she had made several successful attempts to regularise her status together with the fact that her husband and three children were Dutch nationals.

85. Having addressed the decision in *Jeunesse*, the Court of Appeal then stated:

> "*In cases involving immigration and family life, the Strasburg Court, generally, begins its analysis by reiterating that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. It recognises that there may, in addition, be positive obligations inherent in effective 'respect' for family life. It considers that the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition but that the applicable principles are, nonetheless, similar. Irrespective of whether a case is approached from the perspective of a negative or a positive obligation, regard must be had to the 'fair balance' that is required to be struck between the competing interests of the individual and those of the community and, in that context, the State enjoys a certain margin of appreciation. In such cases, the court invariably recalls that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territories. It also confirms that where immigration is concerned, Article 8 cannot be considered as imposing on a State a general obligation to respect the choice by married couples of the country of their*

residence and to authorise family reunion in its territory. To establish the scope of a State's obligations, the facts of each individual case must be considered."

86. Power and Murray JJ. went on to say: "*[t]he Supreme Court in Luximon was satisfied that the Strasbourg Court had recognised that, in certain cases, a positive obligation could be imposed on the State to grant a right of residence to a foreign national. It acknowledged that such 'residence' cases may have been based on exceptional facts. Nevertheless, the 'tenor' of the jurisprudence, it held, may encompass situations such as those arising in Luximon*." The Court of Appeal referred to one reason the Supreme Court had held that a proposed deferral of the Article 8 considerations to the deportation stage was rejected, namely "*because, inter alia, it would have entailed a change in the appellants' status from one of lawfully settled resident to unlawfully present over-stayers.*"

87. The Court of Appeal contrasted the stark and obvious difference between the facts in *Luximon & Balchand* (and *Jeunesse*) and the facts in *Chen*. The appellants in *Luximon & Balchand* were lawfully settled migrants and the Minister's letter directing them to leave was a clear interference with their established family life in Ireland. The Court of Appeal said that:

> "*[f]or this reason, even without reference to the Grand Chamber's judgment in Jeunesse, the standard jurisprudence on the rights of lawfully settled migrants (such as set out in Üner v. the Netherlands (App. No. 46410/99) (2007) 45 E.H.R.R. 14 or Boultif v. Switzerland (App. No. 54273/00) (2001) 33 E.H.R.R. 50) would, in any event, have required an Article 8 assessment. What Jeunesse did was to recognise that there may be rare situations where it can be shown that, notwithstanding an applicant's unlawful presence in the State, there may exist 'exceptional circumstances' where a removal would constitute a violation of Article 8 of the Convention*."

88. Of course, the decision in *Chen* dealt with the issue of whether rights were acquired after only short-term visitor permission and categorically rejected that *Luximon & Balchand* or

the Strasbourg jurisprudence required the Minister to conduct a full assessment of the applicant's asserted Article 8 rights when her short-stay visa expired and her request for residence was made. The Court indicated that a detailed balancing of her interests will be undertaken at a later stage if the applicant made representations in the context of deportation proceedings.

89. The Court in this appeal is being urged to hold that the Minister was required to list clearly how and why the appellant was entitled to Article 8 rights. The appellant has submitted that he ought to know whether he was being considered on the basis of being a settled migrant or if he was being viewed as having only *precarious* or *unlawful* periods of residence. Thus, using the language of the obligations identified in Strasbourg case law, the appellant does not know if his case was addressed on the basis of positive or negative obligations. It is not self-evident however, that this identification could provide any benefit to the appellant, as the Court in *Chen* stated, "*[i]rrespective of whether a case is approached from the perspective of a negative or a positive obligation, regard must be had to the 'fair balance' that is required to be struck between the competing interests of the individual and those of the community and, in that context, the State enjoys a certain margin of appreciation*." In the present case, the Minister identified that there were Article 8 rights and then purported to carry out a balancing of the competing rights and interests.

90. I will address that balance shortly, but in my view, there is no obligation based upon the Strasbourg case-law – which governs this area as it is an ECHR right that is being invoked – to identify whether Article 8 is being engaged because of a positive or a negative obligation. Even the *Nunez v. Norway* (App. No. 55597/09) decision, relied upon by the appellant – where family rights were at issue and where at no time was the applicant's presence in Norway lawful – the ECtHR at para. 69 said that since the applicable principles are similar, it did not find it necessary to determine if the expulsion order constituted an interference with family life or a

failure of the State to comply with a positive obligation. In both contexts, the Court said at para. 68, "*regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole*". Furthermore, no authority has been opened to this Court where a requirement has been imposed to identify the precise reasons for recognition of Article 8 rights. All of the cases appear to turn on the balancing of interests.

91. The importance of focusing on the facts and circumstances of each particular case, rather than on labels as to migrant status, in the consideration of Article 8 matters in the context of deportation orders has already been established in the jurisdiction. For example, in *Rughoonauth v. Minister for Justice and Equality* [2018] IECA 392, a case referred to in the written submissions of both parties, the Court of Appeal (in a judgment delivered by Peart J.) refused an order of *certiorari* saying at para. 70:

> "*As I have said, the focus of the decision should not be whether a person here on a student permission, for however long, is or is not a 'settled migrant', but rather whether in the light of the facts and circumstances of the particular case such private life rights as are asserted are of such substance and significance for the applicant that their interference by deportation could be so grave as to engage Article 8, and therefore to require a proportionality assessment under Article 8.2.*"

92. The Supreme Court refused to grant leave to appeal based upon a contention that the Minister was operating a fixed policy and that the decision in *Luximon & Balchand* meant that the applicants' Article 8 rights were engaged and ought to have been considered in full. The Minister submitted that the appellant's situation in the present case was in fact similar to that in *Rughoonauth v Minister for Justice and Equality* where there had been presence in the Sate on a temporary and limited period but then an illegal overstay.

93. The appellant also relied however on *Rughoonauth v. Minister for Justice and Equality* to submit that the Minister was obliged to ask the question of whether the residence (and not

merely its nature) was such as to engage a requirement to carry out a proportionality examination. The appellant relied on the following passage at para. 67:-

> "*…the particular words used to describe the quality of a person's status can distract from the more fundamental question as to whether or not a particular person's residence in the State has been such as to … engage the requirement for proportionality under Article 8.2 ECHR. That is the question that the Minister must ask…and not simply…determine that there is no such entitlement because the applicant has been in the State on foot of a student permission*."

94. I do not consider that the appellant's reliance on that passage advances his cause. On the contrary, in that passage, Peart J. is in fact stressing that the focus ought to be on the residence in determining if an Article 8(2) proportionality assessment is required. Essentially that is what the Minister did in this case. She assessed the appellant as having Article 8 rights with reference to the 13 years of residence. This understanding of the judgment of Peart J. is strengthened by the dicta at para. 70 above, which although it concerned the identification of Article 8 rights rather than the basis for interference with those rights, is relevant because it confirms that the factual circumstances of each case must be considered *whenever* Article 8 rights are asserted. Like the decisions in *Luximon & Balchand* and in *Chen,* what *Rughoonauth* also asserts is that it will only be in exceptional cases that a person who is on a temporary permission such as a student visa might acquire the same level of private life rights as the person to whom the description "settled migrant" might normally be attached. I do not accept that it is authority for the proposition that the precise reason why the period of residency reached the level of granting Article 8 rights is necessary to be stated in the decision. On the contrary, I consider it to be expressly rejecting that requirement.

95. When one returns to this appeal, the importance of focussing on the facts of the particular case – in accordance with the relevant case-law – appears to have informed the

appellant's submission to the Minister for the purpose of asking her to consider granting him permission on the basis of his private rights. The appellant applied on the basis that he had an "*adequate history of residence*" and said that, even if the Minister had concerns about his marriage, that "*legal residence*" was not a prerequisite to Article 8 rights accruing. The Minister accepted that submission and held there were Article 8 rights which had to be dealt with. To the extent therefore that this is a "failure to give reasons" point, this submission on behalf of the appellant is rejected; the Minister was accepting that which had been put before her.

96. The appellant's submission to this Court that he requires to know precisely why the Minister accepted he had those rights rings hollow where not only did he receive what he had asked for (*i.e.* the Minister could view him as having an adequate immigration history even if concerned about his marriage of convenience) but also because, as this Court acknowledged in *Chen*, the ECtHR:

> "*…considers that the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition but that the applicable principles are, nonetheless, similar. Irrespective of whether a case is approached from the perspective of a negative or a positive obligation, regard must be had to the 'fair balance' that is required to be struck between the competing interests of the individual and those of the community and, in that context, the State enjoys a certain margin of appreciation*."

From that perspective, marking a strict boundary based upon the lawful period of residence in the present case and the precarity of residence based upon permissions granted because of a marriage of convenience, is irrelevant to the obligation on the Minister to strike a "*fair balance*" between the interests of this appellant and the community. Thus, once the Minister had recognised the right of the appellant to respect for his private life, the appellant could only be

refused the residence permission if the State's interests outweighed the appellant's private rights interests.

97. In reaching that conclusion, it must be acknowledged that identifying the nature of a residence, albeit in the sense of lawful or precarious (for whatever reason), may well be required in the particular balancing test to be applied. In the first place, the ECtHR jurisprudence recognised that rights under Article 8 are weaker where there is a precarious residence. Balancing interests may be adjusted when the residence is long-term lawful residence. In the present case, the Minister did engage with that distinction in that the letter rejected any suggestion that the appellant was in the same position as the appellants in *Luximon & Balchand*; instead the Minister referred expressly to his illegal presence in the State *i.e.* on the false pretences of being engaged in a marriage of convenience. Later the Minister referred to the appellant continuing to "*enjoy a right of residence you did not hold an entitlement to*." In conclusion, the Minister said that, having considered all the personal circumstances and representations submitted, including the immigration history and all rights arising, the interests of public policy and the common good in maintaining the integrity of the immigration system outweighed the features that might support the grant of a residency permit. Thus, the appellant was clearly informed that he was being assessed as someone whose presence in the State was not a continuous legal residence but was being assessed as a person whose presence in later years had been brought about because of a fraud on the immigration system. The appellant was aware of how the Minister was treating him.

98. In so far as the appellant relied upon what he submitted were incorrect/mischaracterised facts in relation to the periods of time identified by the Minister, this ground of appeal is not one of substance in circumstances where the Minister identified that the appellant did have Article 8 rights and proceeded to weigh his interests with the interests of the State. The Minister had regard to the entire period in which he resided in the State, but there can be no doubting

that the illegal nature of his immigration status in the years preceding his application was one of his own making and was a situation that was clearly - and correctly - identified in the decision letter as one of significance in the assessment of his Article 8 rights.

99. Moreover, I am not satisfied that the appellant had demonstrated that the trial judge erred in his assessment of the alleged errors of fact impugned by the Minister; in particular there is no evidence to suggest that the Minister misunderstood what was meant by the type of permissions which she referred to in the decision letter. A repeated and specific focus of the appellant in his submissions however was that there was an error made by the Minister in referring to the student permissions as being for a period of five years when they were for a period of three years. The student permissions were broken up by an intervening wait for a permission and a Stamp 1 permission of a year. Leaving aside that the Minister can be taken to have known of the nature of the permissions, the appellant's assertion of the importance of this "error" is not sustainable. In the first place, this Stamp 1 was superseded by a student permission. Whatever status the Stamp 1 had given him as a migrant was time limited because he returned to a temporary migrant status; being that of student. It is also important that his own solicitor had not identified any particular private life interests as being particularly relevant to that period of residence. Importantly, the Minister had taken into account the full period of his residence in identifying that he had Article 8 rights in accordance with the submissions made by the appellant's solicitor. The Minister then proceeded to weigh in the balance the competing interests of the appellant and the State. The nature of the other permissions to reside were considered i.e. the periods of lawful residence were taken into account, but this had to be weighed against the fact that the latter years of residence in the State were all referable to the marriage of convenience.

100. From the foregoing, I reject the appellant's submission that the decision was vitiated by any mistake in fact concerning the identification of periods of lawful/lawful residence or by mistake of law in failing to do so.

Weighing competing issues – the balancing of interests

101. The next issue is whether the Minister applied the corrects tests to the consideration of the appellant's Article 8 claims. To a large degree, many of these arguments were incorporated in the submission that there was an incorrect identification of the period for which the appellant's permission was retrospectively revoked; this was as much a submission of fact as of law. Counsel submitted that the balancing test could only be carried out appropriately where the basis for his Article 8 rights was properly identified. I have rejected that there was a legal obligation on the Minister to identify the precise reason, based on particular residence periods, that she accepted the appellant possessed Article 8 rights. I have also rejected that there was any mistake in fact that would vitiate the decision.

102. Counsel for the appellant submitted that the balancing act required to be carried out was not carried out lawfully. He submitted that unlawful presence in the State may be calculated but it can be outweighed by other factors. On questioning from a member of the Court as to what other factors ought the Minister to have taken into account, counsel confirmed that while there was no identifiable factor to which the Minister failed to have regard, the concern was with the weighting applied to the factors. Counsel related the issue back to the identification of why it was said that the appellant had the Article 8 rights; what was it that the Minister had identified that was to be balanced upon his side? Counsel accepted that on one view if one looked at the factors recited by the Minister *e.g.* 13 years of residence, ties in business and friends, compared with the marriage of convenience, the matter may go all one way while continuing to maintain that the factors may be strong enough on their own. Counsel urged the Court however that it was important that the framework of assessment was still maintained.

Counsel relied upon the EU Commission's 2014 "*Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on the free movement of EU citizens*" ("EU Handbook") to show that the general thrust of the tests to be applied if rights to respect for *family* life are identified, are those found in the ECtHR case law. In submitting that this also applied to the issue of private rights, counsel referred to the case of *Maslov v. Austria* (App. No. 1638/03) which concerned *personal* rights in the context of criminal offending behaviour. A marriage of convenience was not a criminal offence.

103. Counsel submitted that when one viewed the particular factor put forward by the Minister as the competing interest of the State, namely the economic well-being of the State, this rationale fell away given the view of the trial judge that the appellant appeared to be a successful businessman who is contributing to the State by virtue of his economic well-being. Counsel submitted that the reason was in fact opaque and required greater reasoning. Furthermore, counsel submitted that this was a reason which required particular consideration and assessment in the proportionality test as he had in fact been working in the State pursuant to a work permit.

104. The Minister rejected each assertion of error made on behalf of the appellant. These assertions were, according to the Minister, contrary to the general case made to the Minister (regarding his claim now that reasons had to be given as to why he had Article 8 rights), a failure to have regard to the findings of the trial judge (alleged failure to have regard to the finding on time periods), not in issue (EU law), not relevant (EU law and in particular the EU Handbook), not supported by the case law (identity of weight to attach to each time period), dealt with in the review (the balancing exercise), a matter of weighting for the Minister (factors such as economic well-being of the State) or a misreading of the Strasbourg case law (e.g. *Maslov*). The Minister submitted that for all of the submissions made by the appellant as to

flaws in the Minister's approach, what was clear was that the Minister had stepped back and looked at the 13 years of residence and had not been bogged down in technicalities. The assessment carried out of the appellant's private rights were outweighed by the interests of the State in controlling immigration. Any argument that there was a failure to assess his rights was without merit.

105. There is, in my view, a difficulty in seeking to decouple the appellant's argument that there was a flaw in the balancing exercise from his claim that he was entitled to be told precisely why he was entitled to Article 8 rights. When the decision of the Minister is viewed through what was asked of her and what was required of her, it is clear that she did in fact engage with the issues urged upon her on behalf of the appellant. The factors assessed by the Minister and set out at paras. 24-27 above were factors that had been indicated by the appellant and these were engaged with by the Minister. There was in fact a balancing exercise carried out by the Minister where the issues were enumerated and weighed in the balance.

106. The Strasbourg case primarily relied upon by the appellant in both written and oral submission was *Maslov v. Austria*. The appellant did so for the purpose of highlighting the approach to be taken in respect of infringement of Article 8 *private life* rights where a criminal offence has been committed. The ECtHR reiterated the fundamental principles set out in the *Uner v. The Netherlands* (App. No. 46410/99) decision. The focus of the appellant on those principles, which include an assessment of the nature and gravity of the offending, was for the purpose of contrasting the Minister's approach to the marriage of convenience here. To engage in a marriage of convenience was not a criminal offence and, the appellant submitted, ought therefore not to have been treated as a trump card overriding his private law rights.

107. The decision in *Maslov v. Austria* has very limited relevance to the present case. While it does demonstrate that private life rights, as distinct from family life rights (although first and foremost the applicant in *Maslov* had claimed interference with his family life), have

relevance in the general area of immigration, it was a case that concerned expulsion/deportation rather than residence rights. Furthermore, the applicant in that case had lawful residence in the host State but his expulsion was said to pursue the legitimate aim of prevention of disorder and crime. The aim of the Minister in this case was to control immigration and it can readily be seen that a fraud on the immigration system has specific relevance to that aim. Indeed, the appellant has not pointed to any case in which the Strasbourg court has stated that it is only where a person has been proven to have committed a criminal offence that residency may be refused in furtherance of the aim of control of immigration. In so far as the appellant has pointed to the EU Handbook on alleged marriages of convenience and to the reference there to consideration under Article 8 of family law rights of "*the nature and seriousness of the offence committed by the non-EU spouse*", I do not consider this to be persuasive. In the first place, this issue did not concern EU law and secondly the wording of the Handbook cannot and does not override a domestic court's duty to apply the Strasbourg jurisprudence as the domestic courts understand that jurisprudence. The ECtHR has not indicated that fraud on the immigration system such as relying on a marriage of convenience can only be taken into account by a State where a criminal offence has been committed and nothing in its case law suggests that such an approach is mandated. Finally, and importantly, given that all the case law emphasises the fact specific nature of the decision to be made, the facts in *Maslov* were entirely different to those at issue here.

108. In *Maslov*, the applicant lawfully entered and was lawfully present in the host country since childhood. A factor noted specifically by the ECtHR was that he spoke German and received his entire schooling in Austria where all his close family members live. There was a proven lack of ties to Bulgaria the country of origin; he did not speak Bulgarian. The Court held that his principal social, cultural and family ties were in Austria. The Court held that those factors and the fact that with one exception his offences were non-violent offences committed

as a minor, the State's duty to facilitate his reintegration into society, as well as the length of his lawful residence meant that the exclusion order, even though of a limited ten-year duration, was disproportionate to the legitimate aim pursued, namely "*the prevention of disorder or crime*". The 13 years of residence of this appellant in this State while an adult, much of it either on a temporary status or on a residence permit obtained through a marriage of convenience, with business ties (some of which can be maintained in another country) are private life interests of a completely different order of magnitude. It is also striking that the appellant has not pointed to any case from Strasbourg with similar facts to his own where it was held that a failure to give residency rights would be a disproportionate interference with private life rights. Indeed, the appellant has not identified cases in any jurisdiction that demonstrate a situation where respect for private life *alone*, as distinct from family life, outweighed a state's interest in enforcing immigration measures. Apart from *Maslov*, the case-law both here and in Strasbourg that have been addressed in this judgment were addressed to family life rights under Article 8. This supports the view that where sole reliance is placed upon private life interests the Article 8 argument is necessarily weaker.

109. The appellant pleads that the proportionality of the Minister's refusal decision is justiciable before the Court. He points to the reference by the trial judge to *Lingurar v The Minister for Justice, Equality and Law Reform* [2018] IEHC 96 when he said that the weighting to be given to his rights is "*quintessentially a matter for the Minister*" which appears to indicate that the matter is non-justiciable. I do not consider that the trial judge's statement was anything other than a statement that: "*[t]he weighing of evidence and the making of decisions in matters concerning asylum and deportation [and, I would add, immigration] are part of the executive functions of the Minister. Such decisions are amenable to judicial review and the role of the courts is limited to that extent*." (Per the Court of Appeal (McGovern J.) in *STE v. Minister for Justice and Equality* [2019] IECA 332 *[with addition]*).

110. The appellant's submission is that the rights of the State and the appropriate Article 8(2) considerations can have different weightings depending on the context. He submits that in the present case, the weight to be afforded the right to regulate immigration is case-specific and the interest involved in not renewing the permission of a man who is already lawfully residing and working is lighter than a case in which all permissions have expired and all renewal applications exhausted. This is a reference to the subsequent Stamp 4 permission which was granted to the appellant in June 2016 and was not revoked by the Minister in the review of March 2019. That submission amounts to another way of saying that the Minister was required to delineate all periods of lawful residence and to make the decision based upon that fact. As demonstrated above, there is no legal basis for such a proposition and it does not accord with the submission actually made by the appellant to the Minister. The Minister accepted that he had Article 8 rights but weighed his (admittedly) limited private life rights against the competing State interest in the control of immigration where the majority of his residence was after he had engaged in a marriage of convenience and had not told the Minister almost immediately afterwards that his wife had left the State (that being a material change in circumstances). Clearly these were matters which the Minister was entitled to weigh in the balance and no error has been demonstrated by the appellant in her approach.

111. I therefore reject the appellant's submissions that there had been an error in the balancing exercise of the Minister carried out in evaluating whether his private life interests outweighed the interest of the State in controlling immigration.

Conclusion

112. There was no legal requirement for the Minister to identify each period of residency as being either lawful or unlawful in her decision to accept the appellant's submission that he had Article 8 rights which would precipitate the requirement for an Article 8(2) balancing of

competing interests before the Minister could refuse him a residency permission. The Minister weighed all the appellant's private life interests in the balance before deciding that the State's interest in controlling immigration meant that it was a proportionate measure to refuse him a residence permission. There were no legal or factual errors that vitiated the Minister's refusal to grant the applicant a residence permission.

113. For the reasons set out in the judgment, I dismiss this appeal.

114. As the Minister has been entirely successful in opposing this appeal, it would appear that the Minister is entitled to her costs of this appeal against the appellant. Should the appellant wish to contest the making of an Order in those terms, the appellant should apply to the Registrar of this Court within two weeks of the delivery of this judgment for a short hearing on the issue of costs. If no such application is made within two weeks, then an Order dismissing this appeal and awarding the Minister her costs of the appeal should be made.

As this judgment is being delivered electronically, my colleagues Collins and Binchy JJ have authorised me to indicate their agreement to it and to the orders proposed.