

THE HIGH COURT

[2022] IEHC142; [Record No. 2020/882 JR]

BETWEEN

R.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

AND

[Record No. 2020/881 JR]

BETWEEN

A.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 15th March, 2022.

INTRODUCTION

1. This is a composite judgment in two cases which were heard together. Each case concerns a decision of the Minister to refuse the applicant a permission under the Special Student Scheme (hereinafter “the Scheme”) by reference to a good character and conduct ground provided for under the Scheme..

2. The Scheme was introduced to address the situation of non-EEA nationals who held a student permission in the State during the period 1 January, 2005 and 31 December, 2010 and

were affected by the decision of the Supreme Court in *Luximon v. Minister for Justice, Equality and Law Reform* [2018] 2 I.R. 542, [2018] IESC 24. The Scheme identified eligibility criteria. In relevant part, eligibility criterion 3.7 of the Scheme provides that application could be made for permission where applicants:

“have been of good character and conduct prior to your arrival and since your arrival in this State”.

3. Both cases concern applicants who had long residence in the State, initially on foot of student visas which had been renewed periodically and subsequently by reason of a residency permission granted on foot of marriage to an EU citizen (pursuant to the provisions of the EC (Free Movement of Persons) Regulations 2006 and 2008 (“the Regulations”). In both cases the residency permission had been revoked. In one of the cases the Minister invoked the entitlement under Regulations 27(1) and 28(1) to revoke permission to remain in the State on the basis that the marriage was one of convenience and in the second case under Regulations 24 and 25 that documentation submitted was false and misleading as to material fact.

4. The Scheme provides for a review in the event of an unsuccessful application. Both applicants sought a review and made submissions in support of their applications for review. Both applications for review were determined in identical terms by reference to criterion 3.7 above.

FACTUAL BAGKGROUND AND REVOCATION OF RESIDENCY

The R. Case

5. In the R. case, the applicant is an Indian national who entered the State on a student visa in October, 2009. She married a Lithuanian national in September, 2014. She was granted a residence card in March, 2015 by reason of her marriage. In October, 2016 she gave birth to a baby girl whose father was an Indian national. Her Lithuanian husband was believed to be living with his long-term partner and had a child in that relationship.

6. The Minister corresponded with the applicant at her last known address alerting her to concerns based on this information, specifically that the documentation she had provided to

evidence the exercise of rights by her spouse in the State were false and misleading as to a material fact and that she had knowingly submitted this documentation in order to obtain a right of residence which she would not otherwise enjoy. The applicant did not respond to these concerns. By letter dated the 18th May, 2018, the Minister advised the applicant of a decision to revoke her residency in reliance on Regulations 27(1) and 28(1). She was advised of a right to seek a review within fifteen working days. No review was sought. Instead, she proceeded to make an application under the Scheme.

7. By letter dated the 12th April, 2018, she was advised that her application was refused because her permission type had changed contrary to condition 3.4 of the Scheme when she was granted residency on foot of her marriage to an EU citizen. This refusal was the subject to an application for review. On review the Minister referred to the fact that there had been a change of permission contrary to the eligibility conditions under the Scheme and that the permission granted had been determined to have been claimed on the basis of fraud. The decision on review was then the subject of an application by way of judicial review. These judicial review proceedings were compromised on the basis that the Minister would reconsider the application without regard to this condition.

8. The decision following fresh consideration was communicated by letter dated the 4th September, 2020. In this letter the applicant was referred to section 3.7 of the Scheme and the permission granted under the Regulations and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States which had been revoked in May, 2018 on the basis that the Minister was of the opinion that her marriage had been one of convenience contracted for the sole purpose of obtaining a derived right of free movement and residence under EU law as a spouse who would not otherwise have such a right. The applicant was advised of a right to seek a review.

9. It is clear from the Decision letter that the basis for refusal was that she was not considered to have been of good character and conduct since her arrival in the State because she had been determined by the Minister to have contracted a marriage of convenience for the sole purpose of obtaining a derived right of free movement and residence under EU law.

10. By letter dated the 28th September, 2020, a review of this Decision to refuse under the Scheme was sought. It was claimed in the review letter that the decision was unreasonable in

the circumstances. It was contended that there was an onus on the Minister to do a balancing act between the marriage of convenience finding and other evidence as to the good character of the applicant. It was contended that the evidence relied upon to make the finding was “*circumstantial*” and that the finding in the absence of any other consideration being given is in breach of the laws of natural justice and fair procedures. The letter proceeded to outline the applicant’s work history and her employment in a management position for over ten years with the same employer. For the first time since the revocation decision some two years earlier, it was contended that the marriage was based on a genuine relationship and whilst the regularisation of her visa status was a consideration, it was not the only consideration. It was contended that the applicant had instructed an immigration consultant to seek a review on her behalf but it was accepted that no review had in fact been sought. It was claimed that after her relationship with her husband ended, she entered into an abusive relationship with the father of her child and was now a single mother, unable to return to India in her circumstances. The review letter was supported by several character references from colleagues and friends.

11. By letter dated the 23rd October, 2020, the applicant was advised of the Decision following review. The letter adopts the same form and language as the A. case. It is stated that all of the information and documentation contained in the Scheme application, immigration material held by INIS and the additional material provided in the application for a review had been considered. Eligibility criterion 3.7 was quoted. The decision then simply asserts:

“In arriving at this Scheme refusal decision, I found that the appropriate procedures were applied and the decision maker applied the correct interpretation of the eligibility criteria as detailed in the Special Scheme for Students notice which is available on the INIS website.”

12. Unlike, the decision under review, no reason for the decision was stated but it appears from the letter that the reasoning given by the original decision maker is endorsed. This is the decision challenged in these proceedings.

The A. Case

13. In the A. case, the applicant is a Pakistani national. He arrived in the State on the 15th January 2007 on foot of a student visa. Thereafter, he was granted a Stamp 2 Student Permission which he renewed from time to time as required by law until its expiry on the 2nd January 2013.

14. In February 2012, the applicant met V.K., an EU citizen (from Estonia), and they married in September 2012. The applicant subsequently sought a residence card pursuant to their EU Treaty Rights.

15. In October 2012, the applicant was granted a temporary permission pending the determination of his application. In April 2013, that application was refused. A review of that refusal was refused in January 2014. In April 2014, the applicant renewed his application for a Residence Card and was again granted a temporary permission for six months. On 9th October 2014, the applicant was granted a Residence Card for a period of 5 years however, when he attended at GNIB for his passport to be stamped, they refused to stamp it, as they believed his marriage to be a marriage of convenience.

16. By way of letter dated 13th November 2014, the respondent informed the applicant of her intention to revoke the applicant's permission on the basis that the applicant's wife was no longer resident in the State and that the applicant had submitted fraudulent documents to the respondent in an effort to conceal his wife's departure.

17. The applicant's immigration consultant entered into correspondence with the respondent but ultimately the respondent revoked the applicant's permission under cover of letter dated the 17th February 2016. A finding was made that the applicant had submitted fraudulent documents although there was no finding made of the applicant being in a marriage of convenience. It was stated in this letter that the applicant's wife was resident in Estonia with her partner and two children. It was stated that one of the children was born in 2012 and the other in 2014 when she was supposedly residing and working in the State. She further submitted her 2013 Declaration of Income to the Estonian Tax and Customs Board declaring her residence in Estonia. No review of this decision was sought.

18. In January 2017, an immigration consultant applied for a permission for the applicant to reside in the State under s.4 of the Immigration Act 2004. In his submission the applicant claimed his wife had an affair and had not been truthful with him. It transpired that she had a partner and two young children living in Estonia. No explanation was given as to how she could have two young children while married to him and working in the State without him

noticing. Under the character and conduct heading, the application asserted that the applicant had not come to the attention of the authorities in this country and had no criminal convictions. No reference was made to the revocation of his residence permission on the basis of misleading documents constituting a fraud within the meaning of the Regulations. The respondent would not consider the applicant's application and issued a removal order. The removal order was challenged by way of judicial review which was compromised and the removal order was quashed.

19. In June 2018, the applicant was issued with a proposal to deport following on from a further refusal. The considerations document made express reference to the revocation of his residence permission, the grounds for same and the fact that a review was not sought.

20. In November 2018, the applicant sought permission to remain in the State under the Scheme. That application was refused on the basis that the applicant had previously held a permission (the Residence Card) after his student permission. That refusal was upheld on the same ground in June 2019. The applicant sought judicial review of that decision and those proceedings were subsequently compromised, permitting the applicant to renew his application and for reconsideration by the respondent.

21. The applicant renewed his application under the Scheme but that application was refused under cover of letter dated the 3rd September 2020. The refusal was made by reference to section 3.7 of the Scheme criterion and the fact that the residence permission granted in October 2014 had been revoked in February 2016 on the basis that the documentation provided:

“...appeared to be intentionally misleading in order to circumvent immigration rules and that this constitutes as fraudulent within the meaning of Regulation 24 and 25 and Article 35. You did not submit a review of this decision”.

22. The applicant sought a review of said refusal by way of letter dated the 29th September 2020. The thrust of this letter was mistakenly directed to a finding of marriage of convenience (which had not been made) rather than the submission of misleading documents and this was not addressed in any way. The applicant was informed by way of letter dated the 23rd October

2020 that the previous refusal was upheld on the same grounds, namely that because the applicant had previously used fraudulent documents, he did not meet the criteria that he be of good character and conduct before and after entering the State. The letter communicating the decision following review and the subject of challenge in these proceedings was in all material ways identical to the letter in the R. case and the same template was adopted.

GROUNDS OF CHALLENGE

23. The decisions are challenged in similar terms which might be summarized as follows:

- I. the Minister operated a fixed policy such that a previous finding leading to the revocation of residence permission automatically precluded the applicant from consideration under the Scheme and that the application of this policy resulted in a failure to properly consider the application;
- II. the Minister erred in law in failing to properly assess the applicant's character and conduct by relying exclusively on the finding which led to the revocation of the EU residence permission and failing to weigh the other evidence of good character against the evidence relied upon to revoke EU residency permission in assessing whether the applicant had been of good character and conduct for the purpose of the Scheme.

24. A fair procedures argument was advanced in submissions but was not pleaded as a ground upon which leave was granted. The gist of this argument was that fair procedures required the Minister to alert the applicant to the proposal to rely on the previous finding of marriage of convenience (in the R. case) and to the previous finding that intentionally misleading documents within the meaning of Regulations 24 and 25 (in the A. case) had been submitted to afford the applicant an opportunity to address this before the decision on the Scheme application was made. While this fair procedures ground is not further considered in this judgment because it was not a ground upon which leave was granted, I note that the first decision letter in the R. case clearly referred to the change in permission because of the marriage of convenience determination and it must have been obvious that it was a feature of the applicant's immigration history which was relevant to a good character and conduct

consideration. Similarly, the first decision letter in A. refers to the finding that intentionally misleading documents has been submitted. It must have been clear to the applicants that these findings would inform the Minister's considerations and they had opportunity to address such submissions as they wished to these findings.

DISCUSSION AND DECISION

Fixed Policy

25. The contention made that the Minister operates a fixed policy of refusing applications where there has been a finding of marriage of convenience is easily disposed of.

26. It is not contended on behalf of either applicant that the fact that a finding had been made that residency had been improperly obtained either in reliance on a marriage of convenience or on misleading documentation is not relevant to a consideration of character and conduct and could not on its own provide a basis for a refusal under the paragraph 3.7 criterion. Absent evidence that the Minister proceeded on the basis that permission under the Scheme could not be granted where a residence permission had been revoked because of a marriage of convenience or the submission of misleading evidence, I am satisfied that this argument cannot be sustained. There is no such evidence in either case.

27. I agree with the respondent's submissions that for an argument based on fixed policy to succeed there must be evidence of a fixed policy. In these cases the only evidence presented is that each of the applications failed and that the letters of refusal on review followed an identical template. In both cases, the basis advanced for refusing was the good character and conduct ground and in both cases a finding in reliance on a failure to demonstrate good character and conduct was supported by material before the decision maker which was clearly capable of justifying the conclusion regarding good character and conduct. The fact that each of two applications failed in similar terms, albeit on the basis of different facts and circumstances, does not establish a fixed policy. There is simply no evidence of such a policy and nothing in the terms of the decisions made suggests that the Minister considered herself precluded from granting permission under the Scheme having regard to the decisions previously made to revoke EU residency rights.

Consideration of Good Character and Conduct

28. The case that there has been a failure to consider the applications on their merits because of a flawed approach to the assessment of the good character and conduct criterion and a failure to have regard to all relevant considerations is advanced in reliance on a series of cases taken in the context of citizenship applications pursuant to s. 15 of the Irish Nationality and Citizenship Act, 1956 (as amended), namely, *Hussain v. Minister for Justice* [2013] 3 I.R. 257; *GKN v. Minister for Justice* [2014] IEHC 478; *Talla v. the Minister for Justice and Equality* [2020] IECA 135 and; *M.N.N v The Minister for Justice & Equality* [2020] IECA 187. It is argued on behalf of the applicants that a proper application of the good character and conduct criterion under the Scheme requires a consideration of all of the evidence in relation to character and conduct as established by the case-law in the naturalisation context and they contend that there was a failure to do this in these cases.

29. Considering firstly the decision of Hogan J. in *Hussain*, it seems to me that it is authority for the proposition that the Minister must measure the concept of good character and conduct by reasonable standards (as opposed to exalted standards) of civic responsibility and must afford an opportunity to an applicant to address the factual basis for an adverse character finding but:

“...provided that the Minister’s application of these principles to the facts of the case is reasonable, then his or her ultimate decision is probably unimpeachable.”

30. In *Hussain*, the Court of Appeal found that the Minister would have been entitled to rely on a person’s knowing possession of either forged notes or counterfeited items as evidence that a person was not of “good character” provided that the Minister also afforded an opportunity for a response to these concerns and considered any explanation offered. In *Hussain*, an opportunity to provide an explanation was never provided. This is not the case here where the decision to revoke EU residence for this very reason was taken on notice to the applicants and was not challenged. Furthermore, reference was again made to the basis for the revocation of the permission during the decision-making process under the Scheme and was addressed by the applicants for the purpose of the review.

31. In *GKN*, MacEochaidh J. agreed with the comments of Lang J. in *Hiri v. Secretary of State for the Home Department* [2014] ETHIC 256 finding that the good character test under the British Nationality Act, 1981 (similar to our s. 15 test) was wider in scope than an assessment of whether one had criminal convictions and while criminal convictions might be considered in assessing good character it could not be done mechanistically and inflexibly and there has to be a “*comprehensive assessment of each applicant’s character, as an individual, which involves an exercise of judgment, not just ticking boxes on a form.*”

32. It seems to me that the situation here is quite different to that in *GKN* in that the Minister has based his decision not on the fact of a conviction without regard to what the conviction was for or the surrounding circumstances but has identified the fraudulent basis advanced for residency in reliance on a marriage of convenience or misleading documents, as found by her, as evidence that the applicants have not been of good character. Unlike the position in *GKN* where the submission to the Minister omitted mitigating factors, in these cases the decision maker knows exactly the nature of the concerns as to character which arise, has available the contrary evidence demonstrating good character in the form of the material submitted and is satisfied that in the circumstances the good character and conduct criterion under the Scheme is not met.

33. In *Talla*, Haughton J. adopted the findings of Lang J. in *Hiri* and added to them in stating at para. 37:

“I too would adopt the principles enunciated by Lang J. The Minister in determining whether a person is of ‘good character’ must undertake a comprehensive assessment of each applicant’s character as an individual. While criminal convictions, or the commission of offences, are relevant to this enquiry and assessment, it is wider in scope than that, and the outline facts and any mitigating circumstances, the period of time that has elapsed since the last conviction, and other factors that may be relevant to character, must all be taken into consideration.”

34. It is contended on behalf of the applicants that it cannot be said that the Minister has undertaken a comprehensive assessment of each applicant’s character as an individual. They contend that mitigating factors have not been taken into consideration. It is contended on behalf of the applicants that the Minister is not entitled to rely on the previous findings as regards a marriage of convenience or the submission of misleading documents in and of themselves to

determine that she was not of good character and good conduct. I disagree. The Minister must not ignore other evidence of character but the fact that the Minister concludes that the applicants have not been of good character and conduct because of a finding that they had been involved in a marriage of convenience or had relied on misleading documents does not mean that the Minister has engaged in a tick box exercise and has failed to consider other information before her. After all, it is accepted that the fact of involvement in a marriage of convenience or reliance on misleading documents are relevant considerations and evidence of bad character. In my view such involvement, in and of itself, is enough to justify the decision that the applicants have not been of good character and conduct even where other evidence of good character is before the decision maker. These cases are not like *Talla* where relevant material had not been brought to the attention of the decision maker. The ratio of the decision in *Talla* is clear from para. 46 of the judgment where Haughton J. states:

“...the Minister must consider and analyse all relevant material, and a failure to do so makes the lawfulness of the decision susceptible to judicial review....this does not mean that the decision maker must consider the entire file, or that a system of presenting a summary and recommendation cannot be adopted – provided that all of the relevant material and information is fairly brought to the decision maker's attention and is considered.”

35. In *MNN*, Power J. in the Court of Appeal provided the following summary of the principles emerging from the caselaw in relation to good conduct as follows at para. 12:

“Over the years since lodging his application for naturalisation, the appellant was unrepresented. In or about September 2017, he obtained the assistance of his current solicitors. On 6 November 2017 they wrote to the Minister on his behalf seeking a decision on his application for naturalisation. Noting that over three years had lapsed since his application had been lodged, they submitted that the appellant was entitled to a decision as a matter of fair procedures. In that letter the appellant's solicitors set out a comprehensive account of the appellant's circumstances and made detailed submissions in relation to ‘(i) the incident of 31 May 2013 and (ii) the road traffic offences referred, to above’. Enclosed with that letter was a letter of the same date penned by the appellant and addressed to the Minister.”

36. The Decision letters following review do not refer to the factors relied upon in seeking a review of the decision as to good character. In particular, the decision letters do not reflect a balancing of the employment history of the applicants in the State in positions of trust and responsibility as against and the evidence of bad character underpinning the finding of a marriage of convenience. While the good character evidence is not engaged with, an assertion is made that all information submitted was considered. Counsel for the applicant pointed out that this expression appeared in identical terms in both cases and he described it as “boilerplate.” On the other hand, counsel for the respondent contends that the Court is not entitled to look behind this statement and relied on the decision in *Olakunori (A Minor) v. Minister for Justice & Equality* [2016] IEHC 473 where the Court found (Humphreys J.) at para. 64 that:

“(iv) the applicant’s submissions should, in the absence of evidence to the contrary, be regarded as having been considered if the decision maker states that they were considered; narrative discussion is not generally required and would only arise in special circumstances (of which the present case is clearly not one).”

37. The Decision letters in these cases expressly record that the additional information submitted as part of the review was considered. I agree with the respondent that just because the application failed and the new materials submitted are not discussed in the reasoning does not mean that the application itself and the materials submitted were not considered. There is a presumption that material has been considered if the decision says so, albeit that this presumption may be displaced on the basis of factors in the case (*G.K. v. Minister for Justice* [2002] 2 I.R. 418 & *MH (Pakistan) v. IPAT & Anor* [2020] IEHC 364) such as, for example, where a reason given is not reconcilable with the material without further explanation. These are not such cases. Looking at substance of the decisions (as per the dicta of Power J. in *MNN*), in my view the applicants have not established any unfairness in the decision-making process by reason of a failure to refer discursively to the new material submitted for the review.

38. I should pause here to refer to the decision in *Saneechur v. Minister for Justice and Equality* [2021] IEHC 356 which was cited by counsel for the applicant in the A. case, it being suggested that the conclusion that documents were false was unsustainable (despite not being challenged as such when the residence permission was revoke) where it involved discounting

work records in the face of other information to the contrary without a rigorous approach to establishing which is correct. It seems to me that there is no similarity between the facts and circumstances in *Saneechur* and the position in the A. case. There was a wealth of evidence favourable to the applicants in *Saneechur* which was simply ignored for no good reason. Here, on the contrary, the applicant does not dispute that he was married to a lady who was in a relationship with the father of her two children all living in Estonia whilst claiming to be working in the State, married to him and submitting documentation to support this claim. He makes no attempt to explain how she could have a child with another man whilst married to him unbeknownst to him. He barely engages with the facts relied upon by the Minister in revoking his residency at any stage and he did not at any material time post communication of an intention to revoke his residence permission attempt to stand over the documents submitted in support of his application by contending that he was residing with his spouse who was working in the State throughout the relevant period and the documents were in fact genuine.

39. It was pointed out on behalf of the respondents that the test that the applicant be “*of good character*” under s. 15 of the 1956 Act (as amended) is not the same as the test under the Scheme. The Scheme predicates eligibility on demonstrating that the applicant “*has been of good character and conduct*”. In written submissions, emphasis was placed on the fact that the Scheme requires regard be had to “*character and conduct*” as opposed to just character whereas in oral submission, the focus shifted to the difference between “*is of good character*” as opposed to “*has been of good character and conduct*”. The argument that the test is different is supported by the different approach to criminal convictions under s. 15 and under the Scheme. Under s. 15 of the 1956 Act, a criminal conviction is a relevant consideration in assessing whether a person is of good character but it is not determinative. It is long established that a criminal conviction is not an automatic bar to eligibility for a certificate of naturalisation. Under the Scheme, however, the fact of a criminal conviction is a separate and unambiguous ground for disqualification. Clause 3.6 of the Scheme provides that an applicant must:

“have no adverse criminal record in this State or any jurisdiction. Please note that failure to disclose any criminal convictions in any jurisdiction will result in your application being deemed ineligible”.

40. I accept, therefore, that the test for eligibility for naturalisation prescribed in statute in discretionary terms is not the same as the test under the Scheme and that the caselaw is not directly applicable. It seems to me that the eligibility test under the Scheme is in some ways a higher or more restricted standard in that the focus of eligibility under the Scheme is directed in a targeted manner to a specific cohort of persons who were in the State on a particular basis and in respect of whom special provision is being made. That said, in my view, the s. 15 concept of “*good character*” as developed through the case-law and the approach to assessing “*good character*” in that context is helpful in identifying the correct legal approach to assessing character under a similar criterion in the Scheme. Further, I do not consider the use of language which requires the applicant to “*have been of good character*” as distinct to a test of “*is of good character*” (within the meaning of s. 15) to significantly change the proper approach to character assessment.

41. Accordingly, even though the test under the Scheme is directed to narrowing eligibility and is parsed in restrictive terms, it seems to me that the better approach to decision making when assessing character, which is not a black or white issue but requires a moral judgement, is to ensure that all matters relevant to character are considered and that negative and positive factors are weighed in a manner which allows for proportionate and fair decision making. Reliance placed by counsel for the respondent in the R. case on a strong sentiment expressed by the Court in *KP v. Minister for Justice & Equality* [2017] IEHC 95 to seek to persuade me that a finding of a marriage of convenience was so serious that the applicant could never satisfy a good character and conduct criterion because it so clearly was not compatible with a finding that a person had been of good conduct. I would sound a caveat that the sentiment expressed by the High Court in that case must be understood in the context in which it was made. In the judgment in that case the Court (Humphreys J.) condemned marriages of convenience (at para. 20) as:

“a gross breach of duties under immigration law and of unenumerated duties under the Constitution ..that is apart from the risk of abuse of persons trafficked for the purpose of compelling them to enter a marriage of convenience”

42. It seems to me that the court never intended its condemnation of an attempt to enforce rights fraudulently obtained (which was the issue in *KP*) to be adopted or applied in a manner

which blinds the decision maker in cases such as these ones to a consideration of the particular facts and circumstances of the case in hand. When forming a judgment as to character, whilst it is entirely legitimate to recognise that at a level of principle marriages of convenience risk being abusive and often are to varying degrees for the reasons identified in *KP*, that is not to say that once the label of marriage of convenience is attached that all participants are equally culpable of wrongdoing. As in any area of life, there is a spectrum of wrongdoing. At one end of that spectrum where marriages of convenience are concerned, there is clearly a risk of egregious abuse of persons trafficked for marriage. When this happens it involves not only bad character and conduct but criminal wrongdoing. Without in any way condoning marriages of convenience, however, it is my view that it would be unfair and could produce unjust results to approach every marriage of convenience, so found, as involving an equal degree of moral wrongdoing.

43. Accordingly, I accept that the appropriate approach to the assessment of good character in this context is as set out in *Talla* and *MNN* and requires that the respondent consider all of the aggravating and mitigating circumstances relevant to the question of whether an individual can be deemed to have been of good character and conduct, notwithstanding a finding of fraudulent conduct for the purpose of the EU Regulations already made by the respondent, in determining Scheme eligibility. It is clear, however, that where such a finding has been made, a person seeking to establish that they have been of good character and conduct when applying under an immigration scheme has a steep hill to climb and properly so.

44. Adopting the same approach established in respect of s. 15 to the Scheme criterion, I do not see anything in that case law to support a finding that the decision-making process in these cases was tainted by a failure to properly consider mitigating factors advanced on behalf of the applicants or a failure to demonstrate such consideration in the record of the decision made. The applicant in each case was refused permission under the Scheme in accordance with its terms. While there may be circumstances in which the mere assertion by a decision maker that regard was had to particular matters without further engagement with the substance of the material said to have been considered on the face of the decision undermines the decision making process whether because of the nature of the material or the reasons identified for the decision which may not be reconcilable with this material without further explanation or some other factor, the character references relied upon in these cases and said to have been considered by the decision maker did not raise matters of such moment or weight as might require to be

specifically addressed to ensure a sustainable decision. Quite simply, in my view, what was contended in the supportive material in the form of character references from colleagues and friends and partial explanation for previous conduct was insufficient to disturb the negative conclusion to be drawn from the findings made in revoking the residence permissions and to either demonstrate that the applicant satisfied criterion 3.7 of the Scheme or to require further explanation as to why not.

45. These are not cases like *Talla* or *GKN* where submissions were not brought to the attention of the respondent or *MNN* where there was a fully exculpatory account of events. In these cases there is no real dispute as to the facts which led to the adverse findings. The decisions expressly confirm that the additional material submitted was considered and there is no evidence to the contrary. There was simply nothing in the additional material which would warrant the respondent setting aside the refusal on review having regard to the nature of the fraud on the immigration system which had been identified as disqualifying the applicant in each case.

46. The evidence of a previous finding of involvement in a marriage of convenience or reliance on misleading documents provided a proper basis for a negative decision in relation to conduct sufficient to ground refusals of both applications under the Scheme.

CONCLUSION

47. It is clear from the decision in each case that the applicants were refused because of behaviour which constitutes a fraud on the immigration system. While there are degrees of culpability when it comes to the wrongdoing involved in perpetrating such a fraud, a finding in the immigration context that there has been a fraud is clearly a weighty, significant and relevant one when assessing character and conduct also in the immigration context. Nothing in the material submitted on behalf of either applicant was of sufficient substance or moment to require further explanation from the respondent as to why, on full assessment of the material before her, she did not consider that good character and conduct had been demonstrated in accordance with the Scheme criterion. This was clearly a decision which was supported by the evidence and was one which it was open to the respondent to take.

48. Accordingly, I dismiss the applications in each case. As the applicants have been entirely unsuccessful, I would propose an order for costs against the applicants in favour of the respondent, such costs to be adjudicated in default of agreement. In the event that the parties wish to contend for a different order, I direct that the party contending for a different order should deliver written submissions to the Court and the other party within seven days of this judgment. Thereafter, I will allow a period of a further seven days for a response to the other party before proceeding to make my final ruling on the form of the order.