



**UNAPPROVED
THE COURT OF APPEAL**

**Appeal Number: 2022/107
Neutral Citation Number [2023] IECA 227**

**Costello J.
Faherty J.
Haughton J.**

BETWEEN/

S.R.

**APPLICANT/
APPELLANT**

- AND -

THE MINISTER FOR JUSTICE

RESPONDENT

- AND-

Record No. 2022/108

BETWEEN/

L. A.

**APPLICANT/
APPELLANT**

- AND-

THE MINISTER FOR JUSTICE

RESPONDENT

Judgment of Ms. Justice Faherty dated the 3rd day of October 2023

1. These cases concern applicants (non-EEA nationals) who have had relatively 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 In both cases the residency permissions obtained on foot of marriage to an EU citizen have been revoked. In the case of Ms. Rana (hereinafter referred to as “the first applicant”, for ease of reference), the Minister invoked the entitlement under Regulations 27(1) and 28(1) of the Regulations to revoke her permission to remain in the State on the basis that the marriage was one of convenience, and in the case of Mr. Ali (hereinafter “the second applicant”), the Minister invoked Regulations 24 and 25 of the Regulations on the basis that the documentation submitted was false and misleading as to material fact.

2. Following the respective revocation decisions, both applicants applied to remain in the State pursuant to the “Special Scheme for non-EEA nationals who held a Student Permission in the State during the period 1 January 2005 to 31 December 2010” (“the Scheme”). These appeals concern the Minister’s refusal to grant the applicants immigration permission pursuant to the Scheme.

The Scheme

3. The Scheme was introduced in the wake of the decision of the Supreme Court in *Luximon v. Minister for Justice & Equality* [2018] 2 I.R. 542.

4. The introduction to the Scheme describes it as one open to non-EEA nationals who held a student type permission to be in the State between 1 January 2005 to 31 December 2010. Its purpose was to permit qualifying persons to remain in the State with a right to work for two years on Stamp 4S conditions. It was open to both visa and non-visa required non-EEA nationals. Once an application under the Scheme was acknowledged, and for the duration of the processing of the application until a decision issued, no steps would be

taken to remove an applicant from the State purely on the basis that their immigration permission had expired.

5. Para. 2 of the Scheme provides that a decision would be made “solely on the merits of the information supplied in the on-line application form and any ancillary checks that may be performed by the Irish Naturalisation and Immigration Service (INIS) in arriving at a decision”. Para. 2 goes on to state that the Scheme applies to any non-EEA national who had commenced their presence in the State lawfully under a student type permission with a limited right to work and who maintained a lawful presence in the State for at least two years. To be successful an applicant “will also have attempted to avoid being unlawful in the State through engaging with immigration authorities” and have contributed to the economy through their time as paying students and workers as well as being able to demonstrate a certain connection with the State. As is apparent from para. 2 of the Scheme, there is an emphasis on lawfulness and openness.

6. Para. 3 set out the eligibility criteria, which, in summary, required an applicant to:

- have been registered as a student with the immigration authorities between 1 January 2005 and 31 December 2010 and commenced their presence lawfully in the State with a limited right to work (3.1).
- have held the requisite student type permission as defined in para. 3.2 of the Scheme.
- have attempted to avoid being unlawfully in the State through engaging with the immigration authorities (3.3).
- have not had their immigration stamp changed other than a student type permission during the period referred to (3.4).

- have lived continuously in the State since arrival and provided documentary evidence of continued presence in the State at least throughout, 2016, 2017 and 2018 to date (3.5).
- have no adverse criminal record in the State or any other jurisdiction. Failure to disclose such criminal convictions in any jurisdiction renders an application ineligible (3.6).
- have been of good character and conduct prior to your arrival and since your arrival in the State (3.7).
- have been lawfully employed in the State while under student permission by furnishing documentary evidence such as P.60 forms, P.45 forms and payslips (3.8);
- provide a history of their enrolment/registration as a student, including details of any qualification gained (3.9).
- demonstrate a connection to the community where they live (e.g. membership of sporting clubs, community groups, church groups and/or sponsorship by a member of the community).

7. Para. 11 of the Scheme provided that an unsuccessful applicant could submit a request for a review within 20 working days of the refusal letter with the final decision to be communicated by post.

8. Both applicants were refused immigration permission under the Scheme, at first instance and on review. Those refusals were challenged by the applicants unsuccessfully in the High Court. It is those Orders dismissing the applications for judicial review that are the subject of the within appeals. One of the issues for consideration in the appeals is whether the decision-maker on review considered all the materials furnished by the applicants with their review applications.

The first applicant

9. The first applicant is a citizen of India. She arrived in the State on 12 October 2009 on foot of a student visa. Thereafter she was granted a Stamp 2 Student Permission which she renewed from time to time as required by law until its expiry on 29 October 2014.

10. In September 2014, the first applicant married G.P., a Lithuanian EU citizen who was working in the State in exercise of his EU Treaty rights. She subsequently sought a residence card based on the marriage. On 21 March 2015, the first applicant was granted a permission pursuant to the Regulations. That permission came with a warning that where it is established that the right or entitlement was acquired by fraudulent means, including a marriage of convenience, then the person would immediately cease to enjoy such right or entitlement and that any person asserting such right or entitlement based on information known to be false or misleading shall be guilty of an offence.

11. In October 2016 the first applicant gave birth to a baby girl. The father of the child was an Indian national.

12. In April 2018, the Minister corresponded with the first applicant at her last known address provided to the Department of Justice, alerting her to the Minister's concern that 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 first applicant was afforded an opportunity to respond and clarify the matters raised within fifteen days. The Minister's letter was not replied to. The first applicant had

not informed the respondent of any change of address. Correspondence then sent to the first applicant's previous address was returned "not called for".

13. By letter dated 18 May 2018, the Minister advised the first applicant of the decision to revoke her residency in reliance on Regulations 27(1) and 28(1) of the Regulations. The letter noted that the first applicant had been granted permission to remain for a period of five years on 21 March 2015 on the basis that she was a family member of an EU citizen who was residing in the State and exercising his EU Treaty rights. It recited that in support of her application for a residence card the first applicant had submitted documentation including a utility bill, PRTB letters, rent receipts, a Letting Agreement and letter from a landlord as evidence of her residence at a named address in Dublin 24. She had also submitted a P.60, payslips, a contract of employment and a letter from an employer as evidence of her EU citizen spouse's employment. Reference was made in the Minister's letter to the efforts made to contact the first applicant in respect of her immigration status at the last known address she had provided to the Department and that correspondence sent to her previous address had been returned "not called for". It was also noted that her Stamp 4 EU Fam Garda National Immigration Bureau ("GNIB") registration card expired on 27 September 2017. This, it was said, was a cause of concern for the Minister as while the first applicant's approval letter was valid until March 2020, she had not sought to renew her registration card or informed the GNIB of any change in her circumstances or her address.

14. The letter of 18 May 2018 continued as follows:

"Information available to the Minister from the Department of Social Protection, informs, that on 28/10/2016 you gave birth to [a baby]. You are in receipt of Child benefit for this baby since 22/11/2016. [The baby's] Father is an Indian National

who possesses a student permission to reside in this State. Your E.U. spouse [Mr. P.] is linked to and resides with his Lithuanian partner since 28/02/2011.

[Mr. P.] has a child with his Lithuanian partner.

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

In addition to the above, based on an assessment of your application to date, [the] Minister is also of the opinion that your marriage to [Mr. P.] **is one** of convenience contracted for the sole purpose of obtaining a derived right of free movement and residence under EU as a spouse who would not otherwise have such a right. **If this is found to be the case, the Minister will proceed to revoke your permission to remain in accordance with the provisions of Regulation 28(1) of the Regulations.** The Minister contacted you by correspondence of 20/04/2018 outlining the above concerns to you and afforded you an opportunity to respond and clarify these matters within 15 days. This letter was returned to the office "not called for" on 15/05/2018

and was re-issued. No submissions or correspondence have been received.

Therefore, the permission to remain which was granted under the provisions of [the Regulations] has now been revoked for the reasons stated above”. (Emphasis in bold in the original)

15. The first applicant was advised of her right to seek a review within fifteen working days.
16. No review was sought of the revocation decision of 18 May 2018.
17. It is common case that the first applicant did not respond or challenge the concerns raised in the Minister’s correspondence. Her position before this Court is that she did not receive the correspondence of 18 April 2018 and so did not respond. She maintains however that she instructed an immigration consultant to appeal the adverse finding of a marriage of convenience in the 18 May 2018 letter but that she later found out that the consultant had not issued the appeal. She says that she has now instructed her solicitor to appeal the finding that she engaged in a marriage of convenience.
18. In November 2018, the first applicant applied for immigration permission pursuant to the Scheme. That application was refused on the basis that the first applicant had previously held a permission (a residence card) after her student permission and that, accordingly, she did not meet the stipulated criteria in the Scheme. That refusal was upheld on review on the same grounds by letter dated 20 June 2019. The first applicant sought judicial review of the refusal on the basis that her residence card had been revoked. Those judicial review proceedings were subsequently compromised, permitting the consideration of the first applicant’s application under the Scheme.
19. Her application was refused under cover of letter dated 4 September 2020. This decision advised that the respondent had revoked the first applicant’s residence card in 2018 on the basis that she had entered into a marriage of convenience and that,

accordingly, the respondent had determined that the first applicant did not therefore meet the criterion in para. 3.7 of the Scheme that she has been of good character and conduct prior to and since her arrival in the State. The 4 September 2020 correspondence referred to the fact that the Minister had contacted the first applicant on 20 April 2018 outlining her concerns and had afforded her an opportunity to respond within 15 days. It noted that no submissions or correspondence had been received and that, therefore, the permission to remain granted pursuant to the Regulations had been revoked. The first applicant was advised that, as a result, her application for permission to reside in the State on Stamp 4S conditions (i.e., pursuant to the Scheme) was refused for the reasons set out in the 4 September 2020 letter.

20. The first applicant duly sought a review of 4 September 2020 decision. Her review application detailed her history and circumstances (described more fully later in this judgment). Additionally, the first applicant submitted character references.

21. By letter dated 23 October 2020 (“the Review Decision”), the first applicant was informed that the 4 September 2020 refusal decision was upheld. The Review Decision advised as follows:

“I refer to your above application...I have considered all of the information and documentation contained in your Scheme application, your immigration records as held by INIS, and the additional material provided in your application for a review. Please note eligibility criterion 3.7 of [the Scheme] states that you can apply for this permission if you *‘have been of good character and conduct prior to your arrival and since your arrival in this State’*. 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 Scheme] which is available on the INIS website.”

22. On 30 November 2020, by Order of the High Court (Burns J.) the first applicant obtained leave to apply for judicial review of the decisions of 4 September 2020 and 23 October 2020.

The second applicant

23. The second applicant is a citizen of Pakistan. He arrived in the State on 15 January 2007 on foot of a student visa. Thereafter, he was granted a Stamp 2 Student Permission, which he renewed from time to time until its expiry on 2 January 2013. In September 2012, he married V.K., an Estonian citizen. Miss K. had previously had a child in Estonia who remained there.

24. The second applicant subsequently sought a residence card on the basis of the marriage and his asserted EU Treaty rights. In October 2012, he was granted temporary permission pending the determination of his application.

25. In April 2013, his application was refused. He applied for a review of that decision in May 2013. In aid of his review application, he submitted payslips in respect of a takeaway restaurant called “Tasty Spice” which, it was said, showed that his EU citizen spouse was then employed there. The wage slips were dated 10 March 2013, 17 March 2013 and 24 March 2013. The review application was refused on 6 January 2014 on the basis that information provided to INIS by the EU citizen’s employer was to the effect that the EU citizen had left her employment in “Tasty Spice” “some months ago” and that the second applicant had “not provided any documentary evidence to show that [his] EU citizen spouse continues to exercise EU Treaty Rights in the State”.

26. In April 2014, the second applicant renewed his application for a residence card and was again granted a temporary permission for six months pending the determination of his application. The documents furnished by the second applicant as evidence of the exercise

by his EU spouse of her rights in the State included six payslips dated 9 December 2013 to 17 March 2014 from an entity “Rana Foods Limited”

27. On 9 October 2014, the second applicant was granted a permission based on asserted EU Treaty rights for a period of five years. However, when he attended at GNIB for his passport to be stamped, GNIB refused to stamp it believing that the second applicant’s marriage to the EU Estonian citizen was one of “convenience”.

28. By letter dated 13 November 2014, the second applicant was informed by the respondent of her intention to revoke his permission granted on 9 October 2014 on the basis that the EU Estonian citizen was no longer resident in the State. He was invited to make written submissions as to why his permission to remain in the State should not be revoked. On 25 November 2014, his then solicitors wrote to INIS advising that they were instructed that the second applicant’s EU spouse was resident at a named address in Dublin 11 and in employment with “Indian Taste”, an entity located at a named address in Dublin 3. The letter advised that the writer was instructed that documentation to confirm the EU spouse’s residence and employment “was previously submitted to you” and that the EU citizen had met with INIS to confirm that position.

29. On 18 December 2014, INIS responded to the solicitors’ letter advising that it had received information from the Estonian Embassy which stated that the second applicant’s EU citizen spouse “lives in Estonia [with her Estonian partner] and their son...” The letter further advised that the EU citizen had submitted her 2013 Declaration of Income to the Estonian Tax & Customs Board declaring her residence at a named address in Estonia. The letter went on to advise:

“Based on the above, the Minister has reason to believe that your client has submitted documentation which was intentionally misleading as to a material fact and that this constitutes a fraudulent act within the meaning of Regulation 24 and

25 of the Regulations and Article 35 of the Directive, which provides that Member States may refuse, terminate or withdraw any rights conferred under the Directive ‘in the case of abuse or fraud, such as marriages of convenience.’”.

30. The second applicant was invited to make submissions in relation to the matter within ten working days. No such submissions were made by the second applicant.

31. The second applicant’s permission based on asserted EU treaty rights was revoked by the Minister by letter dated 17 February 2016 on the basis of the Minister being satisfied on information available to her that the second applicant’s EU spouse was not resident in the State and thus had not been in the State in exercise of her EU Treaty rights. It went on to state that the Minister believed that the documentation submitted regarding the second applicant’s EU citizen spouse’s employment in the State “was intentionally misleading as to a material fact and that this constitutes a fraudulent act within the meaning of Regulation 24 and 25 of the Regulations and Article 35 of the Directive...”. The second applicant was advised that he could seek a review of the decision within 15 working days. No such review was sought.

32. On 27 January 2017, the second applicant’s immigration consultant applied pursuant to s.4 of the Immigration Act 2004 (or alternatively pursuant to the Minister’s executive discretion to grant permission to remain) for permission for the second applicant to remain in the State on the basis that he had exhausted the seven-year period for residence as a student and on the basis that he had been resident in the State for a number of years. He referred, *inter alia*, to the fact that he had not come to the attention of the authorities and had no criminal convictions in the State or elsewhere. There was no engagement by the second applicant with the revocation of his residence card.

33. On 3 March 2017, the second applicant was advised of the Minister’s proposal to issue a Removal Order pursuant to Regulation 20(1)(a) of the European Communities

(Free Movement of Persons) Regulations 2015. On 5 April 2017, he was advised that he was not eligible to qualify for leave to remain as his case fell under the aegis of the Regulations.

34. The Removal Order was challenged by the second applicant by way of judicial review. The judicial review proceedings were compromised, and the Removal Order was quashed.

35. By letter dated 19 June 2018, the Minister refused the second applicant's application for leave to remain on Stamp 4 conditions pursuant to s.4 of the Immigration Act 2004 on the basis that the applicant "had been out of valid permission since 2011". On the same date the Minister issued a proposal to make a deportation order in respect of the second applicant pursuant to s.3 of the Immigration Act 1999. ..." This decision was challenged by the second applicant by way of judicial review and the proceedings were ultimately compromised.

36. In November 2018, the second applicant made an application pursuant to the Scheme. That application was refused by letter dated 13 February 2019. The basis for the refusal was that as the second applicant had had his student permission/immigration stamp changed from a student type permission and been granted permission to reside in the State pursuant to the Regulations he did not meet the criteria stipulated in the Scheme. A review of that refusal was sought on 1 March 2019. The review decision issued on 19 June 2019 upholding the first-tier decision on the same grounds.

37. The second applicant sought judicial review of that decision on the basis that his residence card had been revoked. Those proceedings were subsequently compromised which led to an agreement that the Minister would consider the second applicant's application under the Scheme.

38. The application was refused by the respondent under cover of letter dated 3 September 2020. The letter advised as follows:

“I am directed by the Minister... to refer to your application under [the Scheme].

Your application has been assessed in accordance with the Scheme criteria and all information available and documentary evidence provided.

...

Information available to the Minister shows that an application pursuant to [the Regulations] and [the Free Movement Directive] was submitted by you in April 2014. Having examined the application, it was approved under the Regulations and Directive. You were issued with the appropriate permission by letter dated 09 October 2014. However, this permission was revoked on 17 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 Regulations 24 and 25 and Article 35.

You did not submit a review of this decision.

As a result, your application for permission under [the Scheme] is refused because your case does not meet the stipulated criterion for the above reason...”

The stipulated criterion referred to in the respondent’s correspondence was para. 3.7 of the Scheme, namely that the second applicant had to “have been of good character and conduct” prior to and since his arrival in the State.

39. Following the 3 September 2020 refusal, on 29 September 2020 the second applicant’s solicitors submitted a short review application. This submission gave details of the second applicant’s education and work experience in the State since his arrival in 2007. The review application also detailed his history and circumstances (although it erroneously referred to a finding of a marriage of convenience as having been made against him which

was not the case). The second applicant also submitted character references and gave details of his charitable works and participation in community activities. It was emphasised that the second applicant had not come to the attention of the authorities whether in the State or in Pakistan or elsewhere.

40. By letter dated 23 October 2020 (“the Review Decision”), the second applicant was informed that the Scheme refusal decision of 3 September 2020 was upheld. The Review Decision was in the same terms as that which issued to the first applicant.

41. The second applicant duly commenced the within judicial review proceedings and by Order of the High Court (Burns J.) dated 30 November 2020 obtained leave for judicial review to quash the decisions of 3 September 2020 and 23 October 2020.

The judgment of the High Court ([2022] IEHC 142)

42. The applicants’ challenges to their respective Scheme decisions were heard together in the High Court. On 15 March 2022, Phelan J. delivered a composite judgment, dismissing the applications in each case.

43. As noted by the Judge, the challenges brought by the applicants to the Scheme refusals were in similar terms, summarised as follows at para. 23 of the judgment:

- (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, and
- (ii) The Minister erred in law in failing to properly assess the applicants’ 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 residence permission

in assessing whether the applicants had been of good character and conduct for the purpose of the Scheme.

44. In their submissions in the High Court the applicants also sought to advance a fair procedures argument to the effect that it was incumbent on the Minister to alert the first applicant to the proposal to rely on the previous finding that she had engaged in a marriage of convenience and to alert the second applicant of the Minister's intended reliance on the previous finding that he had submitted intentionally misleading documents. Albeit that the Judge did not propose to entertain this argument on the basis that it was not a ground upon which leave was granted, she noted that each of the first-tier Scheme decisions had clearly referred to a finding of a marriage of convenience (the first applicant) and the submission of intentionally misleading information (in the case of the second applicant) as the basis for the revocation of the applicants' respective residence cards, such that "it must have been obvious [to the applicants] that it was a feature of the [applicants'] immigration history which was relevant to a good character and conduct consideration" for the purposes of the Scheme. Thus, "it must have been clear to the applicants that these findings would inform the Minister's considerations and they had an opportunity to address such submissions as they wished to these findings".

45. With regard to the first ground of challenge (the allegation of the operation of a fixed policy), the Judge found that the contention that the Minister operated a fixed policy was easily disposed of. She noted that it was not contended on behalf of either applicant that a finding that residence had been improperly obtained either in reliance on a marriage of convenience or on a misleading document was not relevant to a consideration of character and conduct and could not on its own provide a basis for a refusal under the 3.7 criterion. She went on to state: "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.” (at para. 26)

46. The Judge found no evidence of a fixed policy. She stated, at para. 27:

“In these cases the only evidence presented [by the applicants] 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.”

47. The Judge next turned to the applicants’ argument that in each case there was a failure to properly assess their good character and conduct because of the Minister’s allegedly flawed approach in failing to have regard to all relevant considerations, in particular, the failure to have regard to all the evidence adduced in relation to character and good conduct.

48. The applicants had placed reliance on a series of cases taken in the context of citizenship applications pursuant to s.15 of the Irish Naturalization and Citizenship Act, 1956 (as amended) (“the 1956 Act”), namely *Hussain v. Minister for Justice* [2013] 3 I.R. 257 (“*Hussain*”); *GKN v. Minister for Justice* [2014] IEHC 478 (“*GKN*”); *Talla v. The*

Minister for Justice & Equality [2020] IECA 135 (“*Talla*”) and *M. N.N. v. The Minister for Justice & Equality* [2020] IECA 187 (“*M. N.N.*”).

49. The Judge considered *Hussain* authority for the proposition that the Minister must measure the concept of good character and conduct by reasonable standards of civic responsibility and must afford an opportunity to an applicant to address the factual basis for an adverse character finding. She found that unlike in *Hussain* where an opportunity to provide an explanation for the Minister’s concerns had not been provided, here, the decisions to revoke the applicants’ residence cards had been taken on notice to the applicants and had not been challenged. Furthermore, during the decision-making process under the Scheme, reference had again been made to the basis for the revocation of the permission which had been addressed by the applicants for the purposes of their review of those decisions.

50. Similarly, the Judge found that reliance on *GKN* could not assist the applicants. In that case, MacEochaidh J. had 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 s.15 of the 1956 Act) was wider in scope than an assessment of whether an applicant had criminal convictions. Thus, while criminal convictions might be considered in assessing good character it could not be done mechanically and inflexibly and there had 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*”. The Judge found that, unlike the position in *GKN*, where the submission to the Minister omitted mitigating factors, in the present cases the decision-maker knew exactly the nature of the concerns as to character which arose, and had available to her contrary evidence demonstrating good character in the form of the material

submitted by the applicants, but was nonetheless satisfied that in the circumstances the good character and conduct criterion under the Scheme was not met.

51. The Judge then turned to what had been at issue in *Talla*. In that case, Haughton J. (writing for this Court) had also adopted the findings of Lang J. in *Hiri* and had added to them as follows:

“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.” (at para. 37)

52. Here, the case advanced on behalf of the applicants in the High Court was that the Minister had not undertaken a comprehensive assessment of each applicant’s character as an individual and that the Minister was not entitled to rely on previous findings as regards a marriage of convenience or the submission of misleading documents *in and of themselves* to determine that an applicant was not of good character and good conduct. The Judge disagreed with this submission finding that while the Minister must not ignore other evidence of character, the fact that she had concluded that the applicants had 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 did not mean that the Minister “has engaged in a tick box exercise and has failed to consider to other information before her.” The Judge went on to state:

“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.’

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.' (paras. 34-35)

53. The Judge went on to note that the Review Decisions in issue here did not refer to the factors relied upon by the applicants in seeking a review of the first instance decisions. She noted that the Review Decision did not reflect a balancing of the employment history of the applicants in the State in positions of trust and responsibility as against the evidence of bad character underpinning the findings of a marriage of convenience (and presumably the submission of fraudulent documentation). She noted however that “while the good character evidence is not engaged with, an assertion is made that all information submitted was considered”. In his submissions to the High Court, counsel for the applicants described that assertion as “boiler plate”. Counsel for the respondent, on the other hand, cited the decision in *Olakunori (A minor) v. Minister for Justice and Equality* [2016] IEHC 473 where Humphreys J. opined that an applicant’s submissions should “*in the absence of evidence to the contrary, be regarded as having been considered if the decision-maker states they were considered...*”.

54. The Judge noted that the Review Decision expressly recorded that the additional information submitted as part of the review had been considered. She stated:

“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.” (para. 37)

55. The Judge rejected the reliance the second applicant had placed on *Saneechur v. Minister for Justice and Equality* [2021] IEHC 356 in suggesting that the conclusion that documents were false was unsustainable 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 seemed to the Judge that there was no similarity between the facts and circumstances in *Saneechur* and those with regard to the second applicant. In *Saneechur*, there was a wealth of evidence favourable to the applicants in that case which had been ignored for no good reason. As regards the second applicant, she found that he did 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”. The Judge found that the second applicant had not attempted to explain how his spouse could have had a child with another man unbeknownst to him. She stated:

“[The second applicant] 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.” (para. 38)

56. The Judge accepted the respondent's argument that the test for eligibility for naturalisation prescribed in statute (the 1956 Act), namely that an applicant be "of good character" was not the same as the test under the Scheme, and that the case law relevant to the naturalisation was not directly applicable. She stated:

"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."

She went on, however, to qualify her remarks, stating:

"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.

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”

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.” (paras. 40-42)

57. Accordingly, the Judge concluded that the appropriate approach to the assessment of good character was as set out in *Talla* and in *M.N.N.* and required the respondent to

“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 was clear to the Judge, however, that where such a finding had 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”.

58. Albeit the Judge adopted the same approach established in respect of s.15 of the 1956 Act, she did not see anything in that case law to support a finding that the decision-making process in the present 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. She stated:

“...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". (at para. 44)

59. In the view of the Judge, the cases here were not like *Talla* or *GKN* where submissions were not brought to the attention of the respondent, or *M.N.N.* where there was a full exculpatory account of events. In her view, in the present cases there was no real dispute as to the facts which led to adverse findings. The Review Decisions expressly confirmed that the additional material submitted by the applicants was considered and there was no evidence to the contrary. Thus, 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 as disqualifying the applicant in each case". In her view, the evidence of a previous finding of involvement of 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."

60. Her conclusion was expressed in the following terms:

"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.” (para. 47)

61. Accordingly, she duly dismissed the applications in each case.

The grounds of appeal

62. In summary, the following grounds of appeal are advanced in the notices of appeal.

- (1) Whilst the Judge accepted (at para.43 of the judgment) that the appropriate approach for the assessment of character for the purpose of the Scheme was as set out in *M.N.N. v. Minister for Justice* [2020] IECA 183 and *Talla v. Minister for Justice & Equality* [2020] IECA 135 in respect of naturalisation applications, the Judge erred in finding that the respondent adopted that approach in her assessment of good character and conduct in relation to the applicants.
- (2) The Judge made irreconcilable findings, finding on the one hand that the level of wrongdoing associated with marriages of convenience and/using documentation in a certain way is on a spectrum and thus required assessment while at the same time finding that engaging in a marriage of convenience or furnishing misleading documentation was *in and of itself* sufficient to ground the respondent’s refusals, at first instance and on review, of the applicants’ applications under the Scheme.
- (3) The Judge erred in speculating how the respondent had made her findings that the applicants were not of good character by the Judge herself assessing the weight of the submissions and supporting documentation supplied by the applicants and dismissing them as insufficient and speculating that the respondent had made the same assessment, and/or in finding that there was not

a fixed policy to refuse applications under the Scheme on the basis of previous findings of a marriage of convenience in a different context.

Arguments

63. Essentially, two broad arguments are canvassed on the part of the applicants in these appeals. First, whilst it is accepted that it fell to each of the applicants to show that they had been of good character/conduct since their arrival in the State and that the issue for the Minister in considering the applicants' applications under the Scheme was, *inter alia*, whether their respective circumstances constituted a failure to meet the criterion set out at para. 3.7 of the Scheme, the applicants contend that the Minister did not conduct the requisite assessment of their character and conduct. It is submitted that the question of whether the applicants met the para. 3.7 criterion should have been considered in the round which, it is said, appears not to have been done. The second argument advanced is that the approach of the review decision-maker in each case was impermissibly narrow such that the first-tier decisions and the Review Decisions cannot be permitted to stand. The claim that the Minister operated a fixed policy was not pursued on appeal.

64. The applicants say that in respect of their initial applications and the review applications that followed, they furnished materials and submissions as evidencing their good character in respect of which, it is said by their counsel, there is no evidence of same having been considered in the context of the requisite assessment of the applicants' character in the round, save a bald assertion in the first instance decisions and the Review Decisions that all documents furnished had been considered. Counsel submits that there was no analysis of the applicants' circumstances, or of other aspects of their character, or of the nature and effect of the earlier findings made against them, and the standard of proof involved, in either the first instance decisions or the Review Decisions. It is submitted that the determinations that the applicants were not of good character were based solely on the

previous findings made against them, namely that the first applicant had engaged in a marriage of convenience and the second applicant had knowingly furnished misleading documentation.

65. In summary therefore, the applicants say that notwithstanding the failure on the part of each of them to seek a review of the revocation of their residence card, or otherwise challenge the revocation, for the purpose of arriving at the Scheme decisions of 3 and 4 September 2020 and the 23 October 2020 Review Decisions there should have been some consideration by the Minister of the applicants' entire circumstances, which was not undertaken in their cases. The nub of the applicants' case is that within the context of para. 3.7 of the Scheme, the Minister did not assess matters in the round, or engage in the requisite weighing exercise.

66. The second argument the applicants advance is that it is evident from the very terse Review Decisions which issued on 23 October 2020 that the decision-maker treated their review applications merely as an old-fashioned review. It is argued that this is evident from the face of both Review Decisions. Counsel submits that the sole ratio of each of the Review Decisions is merely a confirmation of the first-tier decisions of 3 September 2020 /4 September 2020 decisions. It is said that it thus must follow that the merits of the review applications submitted by the applicants were not considered by the decision-maker charged with reviewing the first-tier decisions.

67. The Minister's position is that there is no merit in the arguments advanced on behalf of the applicants. Counsel asserts that their submissions revolve around a central argument, namely that their circumstances, as set out in the representations made to the Minister, were not considered. Counsel, however, points to the fact that in each case, the first instance refusal decisions under the Scheme expressly stated that the applications had been

assessed “in accordance with the Scheme criteria, all information available and documentary evidence provided” and that the review decision-maker stated likewise.

Discussion

68. Before delving further into the arguments advanced on behalf of the applicants, and the response of the Minister thereto, it is apposite to first consider the nature of the Scheme and the Minister’s obligations thereunder.

69. What is in issue here is an administrative scheme in the context of immigration. The Scheme presents an opportunity for non-nationals to secure permission to reside in the State. The administration of the Scheme involves the exercise of the executive power of the State to control the entry and residence of non-nationals in the State. The Scheme is not a statutory scheme where the full panoply of an applicant’s rights might otherwise require to be invoked.

70. In adopting the Scheme, the Minister was at large as to the eligibility criteria once same were rational. It has not been suggested by the applicants that the terms of the Scheme are irrational.

71. The eligibility requirements are set out in para. 3. Insofar as para. 2 refers to a decision being made solely on the merits, what that means is either an applicant meets the criteria set out in the Scheme or he/she does not. As put by Denham J. in *Bode v. Minister for Justice* [2008] 3 IR 663, “it was the duty of the Minister to consider each application, to see if it met the criteria of the scheme”. Similarly, that is the overarching obligation of the Minister in respect of the Scheme.

72. The issue here is whether the applicants have demonstrated that they fall under the criteria for the operation of the Scheme. As regards both applicants, the relevant criterion for the purposes of the issues that arise in these appeals is para. 3.7 of the Scheme which

requires an applicant to “*have been of good character and conduct prior to and since arrival in the State*”.

73. How is good character and conduct to be assessed? The Judge accepted that the appropriate approach to the assessment of good character for the purposes of the Scheme was that as set out in *Talla* and *M.N.N.* (albeit these cases relate to naturalisation applications under the 1956 Act), which required the Minister to consider the aggravating and mitigating circumstances relevant to the question of whether an individual can be deemed to have been of good character and conduct. As the Judge put it, what was required was “a moral judgment...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”. The Judge was of this view “even though the test under the Scheme is directed to narrowing eligibility and is parsed in restrictive terms...”

74. Counsel for the respondent argues that that is not the approach which the Scheme requires. He submits that the applicants’ analogy with jurisprudence such as *Talla* and *M.N.N.*, which relates to the 1956 Act, is not apt. He says that in relying on that jurisprudence, the applicants wrongfully seek to have the Court review their cases through the prism of naturalisation jurisprudence. He contends that what was required is that the applicants establish that they “have been of good character and conduct...”.

75. Whilst it is accepted by the respondent that there has to be some consideration of the merits of an application in the sense of that the decision made must be rational, counsel nevertheless argues that where an individual has been found to have proffered false documentation (the second applicant), or entered into a deception by a marriage of convenience (the first applicant), they cannot complain at all about a finding that they have not been of good character or conduct prior to or since their arrival in the State. Once such a finding has been made, that is it, counsel for the respondent says.

76. It was acknowledged on behalf of the Minister that there may be “borderline” cases where wrongdoing may be considered so minor as would warrant an assessment of an applicant’s character and conduct in the round. Counsel argues, however, that that is not the position here where there has been undoubted bad character/conduct on the part of the applicants. That having already been established in the revocation decisions made in respect of the applicants’ residence cards, for the purposes of the present applications pursuant to the Scheme the Minister was not required to embark on any weighing exercise. This, counsel argues, is because as far as eligibility for the Scheme is concerned, what was required of the decision-maker was to making findings as to what has occurred in the *past*. He contends that the word “conduct” in the para. 3.7 of the Scheme copper fastens that this is the requisite approach.

77. Essentially, the respondent’s position is that the decisions refusing the applicants immigration permission pursuant to the Scheme were not required to be any way discursive given the circumstances that pertained as regards each of the applicants. Hence, it was not necessary for the decision-maker to refer to any element of their behaviour which may show that they have been of good character, or which suggests in the round that they have been of good character. Counsel acknowledged, however, that there has been no judicial pronouncement on the scope of the Minister’s discretion under the Scheme.

78. I cannot accept the limited interpretation given by the respondent to the words “have been of good character and conduct”. I agree with counsel for the applicants that if the respondent is correct in her interpretation it would lead to automatic refusals under the Scheme, which cannot be correct. In my view, in considering whether the criterion in para. 3.7 has been met everything relevant is required to be looked at by the Minister including of course what is in the past. The assessment is to be made “in the round”. Character is

not to be assessed by reference to one specific event: it requires to be assessed in the round with all relevant factors to be weighed.

79. Thus, insofar as the Judge determined that the guidelines set out in *Talla* and *M.N.N.* were helpful in assessing the good character requirement in para.3.7 she was correct in so deciding, in my view. Adopting the approach of Power J. in *M.N.N.*, what was required was that:

“...the Minister must undertake a comprehensive assessment of an Appellant as an individual and must consider all aspects of character”. (at para. 52)

80. I would agree with the applicants’ submission, effectively, that the fact that the first applicant was found to have previously engaged in a marriage of convenience or the second applicant had engaged in the furnishing misleading information did not operate as a bar to the Minister’s obligation to consider whether the applicants met the criterion in para. 3.7 of the Scheme. Indeed, the Judge found that a marriage of convenience finding (at issue here as regards the first applicant) would have to be considered in the context of a spectrum of wrongdoing. She was correct in so finding, in my view. That required some assessment of where on the spectrum of wrongdoing the first applicant’s marriage lay. Equally, as regards the second applicant, the 17 February 2016 finding made against him fell to be assessed in the round. As the Judge opined, “in any area of life, there is a spectrum of wrongdoing”.

81. However, it goes without saying that the weight to be attributed to any particular factor (including the prior findings made in respect of the applicants) is entirely for the Minister. Indeed, it was not argued before this Court that the Minister would not be entitled to rely on previous findings as regards a marriage of convenience or the furnishing of misleading documents to make a finding that an applicant under the Scheme has not been of good character or conduct prior to or since his or her arrival in the State, once it was

established that such a conclusion was arrived at rationally after a consideration of all relevant matters.

82. As can be seen, the applicants' claim is that the Minister failed to assess their respective character and conduct in the round insofar as she failed to have regard to factors put forward by each of the applicants and said to weigh in favour of a positive assessment of their character and conduct, and failed to have regard to the "context" in which the respective findings which led to the revocation of the applicants' residence cards had been made.

83. It is instructive firstly to look at the first instance decisions. In both cases, the decision-maker expressly stated at the outset of the decisions that the application under the Scheme had been assessed in accordance with the Scheme criteria and "all information available and documentary evidence provided". The bases for the first instance refusals were expressly rooted, in the case of the first applicant, in the previous finding that she had entered into a marriage of convenience to secure a residence card, and, in the case of the second applicant, in the fact that his residence card had been revoked on the basis that documentation he had provided in connection with securing the residence card "appeared to be intentionally misleading".

84. Thus, it is apparent from the first instance decision that the refusal of an immigration permission for the first applicant was premised on her residence card pursuant to EU Treaty rights having been revoked on the basis that she had entered a marriage of convenience. Albeit not spelt out expressly, for that reason the first applicant was found not to have met the criterion in para. 3.7 of the Scheme.

85. As regards the second applicant, the first instance Scheme refusal found that he did not meet the criterion in para. 3.7 given that his EU Treaty rights residence card had been revoked on the basis that he had provided documentation which appeared to be

intentionally misleading in order to circumvent immigration rules, which constituted as fraudulent under the meaning of the Regulations.

86. The question is whether it is discernible from the first instance decisions that the decision-maker had regard to the matters relied on by the applicants in their on-line application. Albeit the first instance decisions are relatively brief and would have benefited from a clearer exposition of the rationale employed by the decision-maker in each case, it seems to me that had those decisions been the only decisions in issue here the applicants would have difficulty in establishing that there was a failure on the part of the decision-maker to weigh all relevant factors. That is because it is expressly set out at the outset of each decision that all information furnished was considered in the context of the Scheme criteria *and* because the *reason* each of the applicants were found not to have met the “have been of good character and conduct...” threshold is set out in the decision in each case, albeit, it has to be said, in a somewhat shorthand and non-discursive fashion.

87. In *Olakunori v. Minister for Justice & Equality* [2016] IEHC 473, Humphreys J. considered the extent to which a decision-maker’s analysis of submissions made by an applicant must be evident on the face of the decision. He stated:

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

88. In my view, there was a sufficient narrative in the respective first instance decisions for the applicants to comprehend why their applications under the Scheme were refused. Moreover, the decision-maker’s reference in each of the first instance decisions to the applicants’ failure to seek a review of their respective revocation decisions suggests that the decision-maker engaged in the requisite weighing exercise and did not just rely on the

findings previously made against the applicants. The applicants have not alluded to any specific matter in their respective on-line applications (save to argue to the effect that the Minister ought to have embarked on a consideration of the “context” in which the revocation decisions were made) which they say the first instance decision-maker ignored such as would amount to an arguable case for impugning the first-tier decision-maker for failing to take specific matters into account. As to the “context” argument, the applicants (who had knowledge from para. 2 of the Scheme that a decision on their applications would be made not only on the merits of the information they supplied but also on any ancillary checks that INIS may perform) have not pointed to specific information they had provided in their on-line applications pertaining to the “context” of the May 2018 and February 2016 findings which had not been considered by the first instance decision-maker. As said by Hardiman J. in *G.K. v. Minister for Justice* [2002] 2 IR 418:

“A person claiming that a decision-making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case.”

89. In aid of their argument, the applicants cited the *dictum* of O’Donnell C.J. in *Balz v. An Bord Plenala* [2019] IESC 90 that *“the introductory statement in the Board’s decision that it has considered everything it was obliged to consider, and nothing it was not permitted to consider, may charitably be dismissed as little more than administrative cloth clearing before proceeding to the substantive decision”* and his view that such statements have *“an unfortunate tone, at once defensive and circular”* which could lead to *“the less desirable consequence of...repelling the understanding and comprehension which should be the object of any decision”*. For the reasons already set out, I am not convinced that the aforesaid *dictum* has any resonance as far as the first instance decisions here are concerned.

90. Thus, insofar as the applicants seek to impugn the first instance decisions on the basis that their representations were not considered, they have not displaced the onus on them to show how the first instance decision-maker failed to consider their representations.

91. It is, however, the case that both applicants sought a review of their respective first instance refusals, as provided for at para. 11 of the Scheme. Each applicant submitted documentary support for the purposes of their review applications, and which was said to evidence the applicants' good character prior to and since their arrival in the State.

92. In the case of the first applicant, the grounds advanced in the review application were that the Minister's finding that the first applicant engaged in a marriage of convenience was disproportionate and unreasonable. Her solicitors submitted that the onus was on the Minister to engage in a balancing exercise between that finding and other evidence as to the good character of the first applicant. It was said that the finding of a marriage of convenience was all "circumstantial" and that the use of this finding in the absence of other considerations was in breach of natural justice and fair procedures. The letter also outlined the first applicant's work history in the State in the eleven years since her arrival and her role as a manager for a number of years of a food takeaway establishment. It was said that had she not been a person of good character she would not have retained her important employment managerial role. Her educational achievements were also outlined. The Minister was advised that the first applicant had married her EU spouse after eight months of dating and that the first applicant was adamant that it was "a genuine relationship and that while her immigration status may have been a consideration in their decision to get married it was not the sole purpose for so doing".

93. The letter went on to explain that the first applicant had engaged an immigration consultant to review the 18 May 2018 revocation of permission, but this had not been done. I note that the first applicant repeats this assertion in her grounding affidavit and

avers that she has now requested her solicitors to appeal the finding that she engaged in a marriage of convenience (albeit she says that she is not seeking to set aside the revocation of her residence card). The letter went on to state that in circumstances where the first applicant's and her spouse's relationship was no longer subsisting, and where the time for a review had expired, the reason for not appealing was now moot. The letter also outlined the first applicant's personal circumstances post the ending of her relationship with her spouse and referred to her having commenced a relationship with an abusive partner (the father of her child). Reference was also made to her life and circumstances prior to leaving India. The letter concluded by again highlighting the first applicant's achievements while in the State and various other matters said to evidence her contribution to the good of the wider community. Reference was made to her concern for her child if she were to return to India. Included with the letter were the first applicant's P60 for 2018 together with a number of references.

94. In the context of the requirement on the Minister to assess all relevant circumstances, the case advanced before this Court on behalf of the first applicant is that the first issue which arises is the basis for the revocation in May 2018 of her residence card. According to the letter of 18 May 2018 revoking the residence card, information was available to the Minister that the first applicant had given birth to a child in October 2016 the father of whom was an Indian national who had student permission to reside in the State, and that the first applicant was in receipt of child benefit since November 2016. It was also stated in the letter that the first applicant's Lithuanian EU spouse "is linked to and resides with his Lithuanian partner since 28 February 2011". Counsel submits that the basis upon which the Minister made a finding that the first applicant's EU spouse resided with his Lithuanian partner has never been furnished to the first applicant.

95. Counsel thus queries why the finding set out the 18 May 2018 letter was relied on by the Minister for the purposes of refusing the first applicant's application under the Scheme in circumstances where the 18 May 2018 letter did not say in clear terms that the first applicant's EU spouse was not in the State and/or not exercising his EU Treaty rights.

96. It is submitted that in so far as the first instance Scheme refusal decision of 4 September 2020 is concerned, the question that arises is how could the May 2018 assessment that the first applicant engaged in a marriage of convenience have been made in the absence of any clear findings about the whereabouts of the first applicant's EU spouse. Counsel says that the only basis upon which the marriage of convenience finding was reached was that the first applicant's spouse was residing with his Lithuanian partner. He emphasises that the first applicant has now made clear both in her grounding affidavit and her written submissions that she and her husband only separated after approximately a year of marriage. He also says that the first applicant's spouse is still in the State and there is no suggestion that he has returned to Lithuania. Counsel also points to the fact that very quickly after the 18 May 2018 letter issued and the revocation of her residence card in March 2019, the first applicant sought to avail of the Scheme.

97. As her counsel readily conceded, the first applicant did not seek a review of the 18 May 2018 decision (where she could have advanced many of the arguments she now seeks to make) or seek to judicially review that decision in the High Court. In my view, in default of so doing she cannot now seek by way of collateral challenge to go behind the 18 May 2018 findings in the context of her present challenge to the Scheme refusals. In May 2018, the Minister determined that the permission previously granted to the first applicant pursuant to EU Treaty rights had been obtained with a marriage of convenience – a fraudulent act for the purposes of Regulation 28.6 of the Regulations and which the first applicant did not challenge either by internal review or judicial review. To paraphrase

Humphreys J. in *K.P. v. Minister for Justice and Equality* [2017] IEHC 95 (at para. 19), the May 2018 finding against the first applicant is unchallenged and, as with any unchallenged decision, the first applicant has to live with such a conclusion for the purposes of these proceedings. It can hardly be said (and in fairness counsel for the applicants does not suggest) that the Minister's May 2018 finding (or the first instance decision-maker's reliance on that finding as a basis to conclude that the para. 3.7 criterion was not met) was in any way irrational. It is not for the first applicant, at this juncture, and in the absence of having sought a review the May 2018 decision, to now seek to impugn that decision.

98. Thus, the avenue available to the first applicant, in the context of her review application pursuant to the Scheme, was to seek to persuade the Minister that irrespective of the May 2018 finding that she engaged in a marriage of convenience (which led to the revocation of her residence card), there were other facets to her life and character which warranted a conclusion (for the purposes of para. 3.7 of the Scheme) that she has been of good character and conduct prior to and since her arrival in the State. As the Judge observed, given the finding that had been made against her in May 2018, in the context of her application pursuant to the Scheme the second applicant "has a steep hill to climb, and properly so".

99. Turning now to the second applicant, somewhat curiously, the second applicant's review application dated 29 September 2020 characterised the basis of the first instance Scheme refusal as the Minister having previously found the second applicant to have engaged in a marriage of convenience when in fact, as the first instance refusal shows, that was not the basis upon which it was found that para. 3.7 of the Scheme had not been satisfied. Rather, the first instance decision makes reference to the February 2016 finding that documentation provided by the second applicant "appeared to be intentionally misleading in order to circumvent immigration rules" and that this constitutes as

“fraudulent” within the meaning of Regulations 24 and 25 of the Regulations and Article 35 of the Free Movement Directive.

100. In any event, the solicitor’s review submission characterised the marriage of convenience finding as “circumstantial”. The submission argued that the conclusion that the second applicant was not of good character was disproportionate and unreasonable and it was urged on the Minister that she had to engage in a balancing act as between the adverse finding that had been made against the second applicant and “the other known characterizations of our client”. The letter went on to outline the second applicant’s educational and work history prior to leaving Pakistan, his educational accomplishments following his arrival in Ireland, his work history in the State, his involvement in community activities and the fact that he had not come to the attention of the authorities and had no criminal record either in the State, Pakistan or elsewhere. A number of references were also furnished under cover of a letter of 2 October 2020.

101. As with the first applicant, the second applicant did not seek to review the 17 February 2016 revocation of his residence card. His counsel submits that this was because the second applicant accepted at that stage that his spouse had left the State. There was, counsel says, no point in the second applicant seeking a review of the review decision of 17 February 2016 (or otherwise judicially reviewing it) since given his spouse’s departure from the State the second applicant could not qualify for a permission based on EU Treaty rights. Counsel also says that the Minister was apprised *via* the submissions the second applicant made on 27 January 2017 that the second applicant and his spouse were divorced in April 2017.

102. In their submission of 29 September 2020 seeking a review of the 3 September 2020 Scheme refusal decision, the second applicant’s solicitors did not explain to the respondent the reason the second applicant now says he did not seek to review the 17 February 2016

decision. Before this Court, his counsel nevertheless argues that the previous finding to the effect that the second applicant had provided misleading information made no sense as there was no basis for that finding. He submits that the documentation previously furnished by the second applicant in the context of seeking permission based on EU Treaty rights indicated that the second applicant's EU spouse had been working in the State for long periods (albeit it is accepted that the EU spouse ultimately left the State). Thus, he says, there was no basis for the finding that the second applicant had furnished false and misleading documentation. Counsel points to the fact that the second applicant had his EU spouse's payslips for the period December 2013 to 17 January 2014, and also a P60 indicating that she was paying tax in this jurisdiction. He points out that the second applicant was never prosecuted on foot of the finding made in the 17 February 2016 decision, a factor, he says, that should have been taken into account by the Minister in the context of the balancing exercise she was required to carry out. He also says that the fact that the second applicant did not seek to review the revocation of his EU Treaty rights permission (rather he sought to obtain a different type of permission) did not absolve the Minister of her obligation to view the alleged "offence" in the round and then consider it in the wider context of character.

103. Counsel also submits that the second applicant's EU spouse was only required to have some four months' work in order to obtain a residence card. He says that the Rana Foods Limited documentation shows the *de facto* residence of the spouse in the State. In those circumstances, counsel says, that the information previously provided by the Estonian Embassy to the Minister in connection with the revocation decision had to be considered with some caution given that there was strong information to suggest that the EU spouse was resident in the State at the relevant time. This, he contends, should have

been considered by the respondent in assessing the second applicant's application under the Scheme.

104. The case is also made that in that entire time (some 15 years) the second applicant has been in the State he had no offences of any type and was never charged with an offence, indicative, counsel says, of the second applicant's good character. Yet, he was refused a permission under the Scheme on the basis of not having met the criterion set out in para. 3.7 of the Scheme.

105. Again, I would observe that insofar as it is sought to impugn the findings made in the 17 February 2016 decision (and which led to the revocation of the second applicant's residence card), the time to do so has long since expired and the second applicant (for the reasons I have already given at para. 96 above) must live with the consequences. As in the case of the first applicant, for the purposes of his review application pursuant to the Scheme, the way forward for the second applicant was to seek to convince the Minister that, the 17 February 2016 finding notwithstanding, he was someone, when assessed in the round, who should be considered to have been of good character and conduct prior to and since his arrival in the State. In that endeavour, again as the Judge observed, given the nature of the finding made against him the second applicant "has a steep hill to climb...".

106. Before further considering the frailties said by the applicants to attach to the Review Decisions, it is instructive to set out again the full text of those decisions which read:

"I refer to your above application... I have considered all of the information and documentation contained in your Scheme application, your immigration records as held by INIS, and the additional material provided in your application for a review. Please note eligibility criterion 3.7 of [the Scheme] states that you can apply for this permission if you '*have been of good character and conduct prior to your arrival and since your arrival in this State*'. 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 Scheme] which is available on the INIS website.”

107. Clearly, the relevant Review Decision made no reference at all to the marriage of convenience finding which had been made in May 2018 with regard to the first applicant. Nor did it engage substantively with the information submitted with the review application as to the first applicant’s character, work ethic and involvement in the community, or the submission that she and her spouse had dated for some eight months prior to the marriage and, albeit her immigration status might have been a consideration in the decision to get married, it was not the sole purpose for so doing. Similarly, with respect to the second applicant, his Review Decision did not refer to the finding that had been made against him in February 2016, or substantively engage with information provided in his review application as to his character and circumstances.

108. As the High Court judgment shows, albeit acknowledging that the Review Decisions did not refer to the factors upon which the applicants relied in their review submissions, or reflect any balancing of those factors against the adverse findings previously made against them, the Judge was nevertheless satisfied that the matters relied on by the applicants had been considered given that each of the Review Decisions stated that all of the information and documentation contained in their Scheme application, their immigration records as held by INIS, and the additional material provided in their review applications had been considered.

109. In essence, the Judge was not satisfied that the applicants, on whom the onus lay, had established that the Minister had ignored their respective representations. In this regard, she applied the *dictum* of Hardiman J. in *G.K.*

110. Notwithstanding that the opening statement in each of the Review Decisions suggests that the Minister has met the test set by Humphreys J. in *Olakunori*, I nevertheless find merit in the applicants' contention that the Court cannot be satisfied on the face of the Review Decisions that the review decision-maker engaged in the requisite assessment of the submissions made by the applicants in their review applications or the requisite weighing exercise.

111. Before explaining my reasons for concluding that the presumption that the review decision-maker has considered all the material submitted by the applicants has been displaced, it is perhaps appropriate, at this juncture, to comment on the respondent's submission as to the parameters of the review provided for in para. 11 of the Scheme.

112. Counsel for the Minister says that what is provided for in the Scheme, if an applicant is unsuccessful at first instance, is that the applicant may submit a request for a review of the refusal *decision*. Counsel argues that the review provided for is not an appeal and that there is no entitlement to a *de novo* hearing: the only entitlement is to a review as provided for at para. 11 of the Scheme. He emphasises that the review is not a reconsideration of the application, and the Scheme does not say that the decision-maker on review is required to review the *application* made pursuant the Scheme. Counsel asserts that as the applicants were found at first instance not to be eligible under the Scheme, the function of the decision-maker at the review stage was to see if the first instance decision maker erred in the context of the Scheme. This, it is argued, did not require the type of weighing exercise with might occur in other immigration cases such as a decision to deport.

113. Asked by the Court whether, in circumstances where the applicants had been given an opportunity to provide documentary evidence in support of their review application, and in circumstances where both applicants submitted such documentation, the decision-maker

was obliged to engage with that new material, counsel accepted that engagement with the documentary evidence was required. He submitted, however, that such engagement did not change the nature of the review. While counsel acknowledged that in the case of the first applicant the decision-maker on review was not entitled to ignore the case made by her that her relationship with her spouse was at all times a genuine one, he nevertheless argued that as a finding of a marriage of convenience had already been made in May 2018 and had not been subjected to challenge by the first applicant, it was not open to the decision-maker in the review process to disturb that finding. This applied equally to the finding made against the second applicant that he had provided intentionally misleading documentation.

114. The Minister's position therefore is that the submission on behalf of both applicants of further documentation during the review process under the Scheme did not change matters since it was not open to the decision-maker on review to say that the earlier decisions to revoke the applicants' residence cards were wrong given that those decisions had not been challenged. Hence, the reviews conducted in respect of the applications pursuant to the Scheme could not constitute a new decision-making layer to the decision of 18 May 2018 in respect of the first applicant or that made on 17 February 2016 in respect of the second applicant.

115. I accept the respondent's argument that neither the decisions at first instance nor the requisite reviews pursuant to para. 11 of the Scheme constitute a new decision-making layer to the previous decisions revoking the applicants' residence cards. However, that is not the end of the matter. The review provided for in para. 11 of the Scheme required a consideration by the review decision-maker of the merits (whatever they may be) of the review applications. This is in circumstances where the first instance decisions specifically advised the applicants that any case they wished to make on review "should be supported

by documentary evidence”. Moreover, I note that the requisite SSS Review Form states, *inter alia*, that an applicant seeking a review “must submit new supporting documentation as appropriate”. Furthermore, section 2 of the Form provides that an applicant “may include any new information” that is believed relevant. Accordingly, I cannot accept the respondent’s argument that the fact that the Minister may have chosen to give a second chance to the applicants to submit material did not mean that the Minister was not obligated to reassess “character and conduct” in the light of the additional material and undertake the requisite weighing exercise.

116. The assessment pursuant to the Scheme which was required to be conducted by the decision-maker on review was required to be made in the round, particularly in circumstances where in the first tier Scheme refusal decisions the applicants had been advised of their entitlement to seek a review and, moreover, invited to state why they disagreed with the decision to refuse which was to be supported by the submission of documentary evidence. In each case, the applicants duly set out their case on review and furnished documentary in support of the case they were making. At the risk of repetition, it goes without saying that the weight to be given to the previous findings and the review submissions and documentation furnished by the applicants was entirely a matter for the decision maker on review (as was the assessment of where on the spectrum of wrongdoing the previous findings lay), subject only to the requirements of fair procedures and rationality.

117. I return now to the question of whether the Court can be satisfied that the requisite assessment and weighing exercise was engaged in by the review decision-maker: counsel for the applicants described the Review Decisions here as “boiler plate” or template decisions. He argued that the statement set out in the penultimate paragraph in each of the Review Decisions, namely, that “the appropriate procedures were applied and the first-tier

decision-maker applied the correct eligibility criteria” demonstrates that the decision-maker on review treated her task solely as a review of the *process* engaged in by the first instance decision maker, but with no commensurate assessment of the materials and submissions upon which the applicants relied.

118. In arguing that the Review Decisions did not reflect that the decision maker carried out the requisite assessment of the applicants’ submissions and the material they furnished with their review applications, the applicants say that the Review Decisions are to be contrasted with an earlier review decision of 19 June 2019 relating to the Scheme which issued to the second applicant. That review decision was in respect of submissions made by the second applicant following the earlier refusal (13 February 2019) of his application pursuant to the Scheme. That refusal was premised on a finding that the second applicant did not meet criterion 3.4 of the Scheme as his student stamp had changed during his time in the State.

119. In the 19 June 2019 review decision, albeit he rejected the arguments advanced by the second applicant, the decision-maker engaged in a detailed assessment as to why the review application was being refused. The applicants contend that the detailed consideration afforded by the June 2019 decision-maker to the second applicant’s submissions constitutes the type of consideration that ought to have been engaged in the Review Decisions in issue here.

120. Counsel for the respondent takes issue with the applicants’ reliance on the June 2019 review decision. He points out that while fair procedures required that reasons be set out in the review decision of 19 June 2019 for rejecting the arguable points raised by the second applicant as to the proper interpretation to be given to criterion 3.4. of the Scheme, the applicants have not made the case that there was anything in their respective review submissions that called for similar discursive engagement in the Review Decisions. He

submits that the criterion set out in para. 3.7 (at issue in these proceedings) did not require discursive consideration given the nature of the criterion and, more particularly, the findings that had been made in respect of the first applicant and the second applicant, in May 2018 and February 2016 respectively. Counsel accepts, however, that had an issue been raised by the applicants about the meaning or interpretation of para. 3.7, then the impugned Review Decisions of 23 October 2020 would have had to engage with any such argument, but no such issue of interpretation had arisen. He submits that as far as the Review Decisions are concerned, the matters at issue were self-evident and the questions presenting pursuant para. 3.7 of the Scheme vis-à-vis the applicants were not “borderline”.

121. The respondent also maintains that the fact that the review decision of 19 June 2019 chose to engage in a more thorough fashion than the decisions in issue here did not create an entitlement on the part of the applicants to a more discursive consideration in the 23 October 2020 Review Decisions. In this regard, counsel relies on the fact that what is at play as regards the Scheme is an exercise of the sovereign power of the State where the issue of rights does not arise.

122. Without necessarily having to determine whether the review decision-maker here was required to be as discursive as the 19 June 2019 review decision-maker, I agree with the applicants’ submission that what was required, on the face of the Review Decisions, was unambiguous evidence that the review decision-maker had engaged in any real way with the arguments and materials advanced by the applicants in their review applications, together with some indication that the review decision-maker had engaged on the requisite weighing exercise. That does not mean that there had to be an overly discursive analysis. Indeed, given the nature of the submissions made on behalf of each of the applicants in their respective review applications, I would venture to suggest that an overly discursive analysis was not required once there was clear and unambiguous evidence that the *merits*

of their submissions and the material the applicants relied on were considered. In my view, however, no such sufficiently unambiguous indication of the requisite engagement with the merits appears on the face of the Review Decisions.

123. The fact of the matter is that because of the wording of the Review Decisions the Court cannot be certain that that exercise occurred. Whilst it is certainly ascertainable that the decision-maker refused the review applications by reference to para. 3.7 of the Scheme, I am not satisfied that Review Decisions, as they stand, are sufficiently clear and unambiguous such that the Court could determine that the review decision-maker was correct to conclude that the applicants had not met the criterion in para. 3.7 of the Scheme.

124. Even though it is expressly stated at the outset of each Review Decision that the additional material the applicants provided with their review applications had been considered by the decision-maker, I am constrained to agree with counsel for the applicants that that cannot suffice as evidence that the requisite assessment of the applicants' characters has been conducted. This is because, on their face, the Review Decisions also suggest that the decision-maker's conclusions have been arrived at by way of a review of the *process* adopted by the first-tier decision-maker.

125. Thus, albeit that each of the Review Decisions is prefaced with the statement by the decision maker that she has considered all information and documentation contained in the Scheme application, as well as the immigration records held by INIS and the additional material provided by the applicants, the penultimate paragraph of each Review Decision suggests that the review engaged in by the decision maker was something less than what was required. It is also of note that in neither of the Review Decisions does the decision-maker say that she found that para. 3.7 of the Scheme was not met.

126. The frailty that attaches to the Review Decisions is that the assurance given at the commencement of each of the decisions that all documentation has been considered is

undermined by the penultimate paragraph of each Review Decision, by dint of the review decision-maker's statement that she arrived at her decision by reviewing the procedures applied by the first instance decision-maker and the interpretation the first tier decision-maker applied to the eligibility criteria under the Scheme. There arises, therefore, from the face of the Review Decisions uncertainty as to whether the review decision-maker engaged with the *merits* (whatever they may be) of the applicants' respective review submissions. Consequently, the applicants (and the Court) cannot reasonably be expected to take comfort from the review decision-maker's statement at the outset of the decisions that the material they furnished with their review applications has been considered.

127. In the course of his submissions, counsel for the Minister asserted (without conceding that the materials furnished by the applicants in their review applications were not considered – counsel relying in that regard on what the review decision-maker says at the outset of the Review Decisions) that notwithstanding any perceived frailty in the Review Decisions, there was nothing in the materials and information furnished by the applicants which would have caused the decision-maker on review to find that the first-tier decisions were wrongly decided.

128. This indeed appears to be the view adopted by the Judge. As set out at para. 44 of the judgment, the Judge was of the view that the character references relied upon by the applicants “did not raise matters of such moment or weight as might require to be specifically addressed to ensure a sustainable decision”. She was of the view that 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 conclusions 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.”

129. The applicants argue that the assessment made by the Judge regarding the additional material was for the review decision maker to determine and not the Judge.

130. In the circumstances of these cases, I find myself again in agreement with the applicants. While the Judge might well have been perfectly entitled to express the views she did had it been sufficiently clear on the face of the Review Decisions that the review decision-maker had conducted a similar assessment to that conducted by the Judge (and once satisfied that no irrationality or procedural unfairness attached to the review decision-maker's conclusions), the fact of the matter is that that it is not sufficiently clear from the Review Decisions that the review decision-maker had so engaged. Hence, for the reason I have already set out above (namely the contradictory evidence on the face of the Review Decisions as to the nature of the review carried out by the review decision-maker), I find that there was an insufficient basis for the Judge to have been satisfied that the review decision-maker had engaged with the requisite assessment of the applicants' respective characters.

131. Nor can the Court find any comfort in the affidavits sworn by Ms. O'Reilly (who was the Review Decision-maker in both cases) in these proceedings that she engaged with the merits of the applicants' review submissions: her affidavits do not elaborate on the process she engaged in when conducting the review or on why she refused the review applications.

132. Thus, in the absence of an unambiguous indication on the face of the Review Decisions that the requisite assessments of the merits of the applicants' review submissions had been undertaken, it was not the function of the Judge to opine on the merits of the case being made by the applicants in their review applications. On this narrow basis, I would allow the applicants' appeals and direct that their respective review applications be remitted to the respondent for re-consideration by a different reviewer.

Costs

133. The applicants have succeeded in their appeals. It follows that they should be awarded their costs. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 28 days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 28-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.