THE COURT OF APPEAL

Record No.: 2023/21

Donnelly J. **Neutral Citation Number [2023] IECA 267**

Ní Raifeartaigh J.

Power J.

BETWEEN/

M.H.

APPELLANT

-and-

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on this 3rd day of November, 2023.

1. This is an appeal against a decision of the High Court ([2022] IEHC 721, O'Regan J.) refusing the application for judicial review of the Minister's decision of the 11 April 2022 that the appellant had contracted a marriage of convenience within the meaning of the Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (the "2004 Directive"), as implemented by the Regulation 27 of the European Communities (Free Movement of Persons) Regulations, 2015, S.I. 548/2015 (the "2015 Regulations"). The term '*marriage of convenience*' refers to a marriage contracted '*for the sole purpose of obtaining an entitlement*' under the 2004 Directive or the 2015 Regulations or under any measure adopted by a Member State to transpose the Directive, or under any national law concerning the entry and residence of foreign nationals. This judgment deals with the question of whether the Minister ought to have held an oral process/hearing prior to making her decision.

Background

2. The appellant is a Bangladeshi national who came to Ireland on 25 April 2007 on a student visa. This visa was regularly renewed up to the point in time when the student visa scheme was amended to prevent such repeated renewals of student visas. He remained in the State on foot of a Stamp 2 permission. His student visa was due to expire on 5 May 2014 and could thereafter not be renewed.

3. The appellant claims that in October 2013 he met a Romanian national at a party in Dublin. The Romanian national had arrived in Ireland in September 2013 and the two got married on 15 April 2014 in Dublin. The appellant subsequently applied for and was granted a residence card on the foot of his status as the spouse of an EU national pursuant to the provisions of the Directive as implemented by the Regulation 27 of the 2015 Regulations. His application for that residence card was approved by the Minister on 24 October 2014, and was valid for five years with an expiry date of 23 October 2019. In that letter notifying him of the grant of the residence card, the appellant was informed that he was obliged to advise the Minister of any change in his circumstances.

4. On 18 February 2019, the appellant was stopped at Dublin Airport by an Immigration Control Officer. The appellant was questioned by the Border Management Unit about the status of his marriage, the whereabouts of his EU national spouse, her employment status, as well as details of his last contact with his spouse. He was then asked to provide contact information for his spouse, specifically, a phone number. Contact was made with her by the Immigration Control Officer. The EU national stated that she had been divorced from the appellant for three years (the actual date of the divorce is 6 July 2017), that she did not know that he continued to live in Ireland and had not spoken to him since the divorce.

5. The exact exchange which occurred between the Immigration Officials and the appellant, as well as with his former spouse over the phone, remains in dispute. However, the appellant accepted that, ultimately, he told the immigration officers that his marriage was no longer subsisting. The appellant was allowed to proceed through Immigration having been held there for a period of hours, and he was informed that the information gathered by the Immigration Officials at the Airport would be forwarded to the EU Treaty Rights Investigation Unit.

6. The appellant than engaged a solicitor who wrote to the Minister in July 2019 seeking to vary the basis for his permission to remain in the State. He accepted that he was no longer entitled to a residence card on the basis of his status as the spouse of an EU citizen. The appellant had, by that time, been living in Ireland for over 12 years. Over the following months, there was an exchange of correspondence between the appellant and the Minister.

7. On 16 December 2019, the Minister wrote to the appellant outlining matters of concern regarding the granting of the appellant's residence card and the nature of his marriage. The letter referred to the proximity between the arrival in the State of the EU citizen and the marriage, the *highly accelerated* nature of their relationship, the fact that the appellant's student permission was due to expire on 5 May 2014 and the unpredictable nature of his residence status thereafter. The concerns of the Minister in respect of these were set out. It was noted that, in the application for the residence card, two payslips dated April and May 2014 for the EU citizen were provided, and her P60 certificate for the year ending 2013. There was no record of any employment in the State for the EU citizen in 2015 and no further record of her in the State after 2017. The Minister was not satisfied his former wife was exercising her EU Treaty rights. The 2013 P60 of the EU Citizen had been issued to a different address from the

information provided in the residence application of May 2014 which was also different from the letting agreement document of October 2013 addressed to both the appellant and his former spouse being for a 12-month period. The interview between the Immigration Officials and the applicant was also referenced, it being noted that the applicant had said he was still married and that the EU citizen was at home in the address of the letting agreement. The appellant was unable to provide any evidence of communication between himself and his (now) former spouse. The failure to inform the Minister of any change of circumstances was noted. The letter indicated that the Minister was, *inter alia*, of the opinion that the marriage may be one of convenience and if so found, it was stated that the Minister will disregard the marriage for the purpose of the 2015 Regulations. The appellant was given 21 days in which to respond and was invited to provide any other information or documentary evidence that he might wish to provide.

8. The appellant's solicitor responded on 8 January 2020 emphatically denying that the appellant's marriage was one of convenience. The letter did not contain any documentation. It was stated, however, that the appellant had made a full and frank disclosure in his letter of 2 July 2019 in respect of his marriage and breakdown.

9. On 22 January 2020, the appellant was notified by the Minister that his application to vary a permission to reside under s. 4(7) of the Immigration Act 2004 could not be accepted for consideration as he did not hold a permission under that Act capable of being renewed or varied; thus, his application was misconceived from the outset.

10. By letter dated 24 January 2020, the appellant was informed that a finding had been made that he had contracted a marriage of convenience and the Minister had revoked his residence card on the basis of Regulations 27(1) and 28(1) of the 2015 Regulations. In that letter ("the first instance decision letter") the Minister said she was satisfied that

the information and/or documentation submitted in 2014 in respect of the EU citizen's residence and employment in the State was false and/or misleading as to material fact.

11. The appellant sought a review of the finding that his marriage was one of convenience by letter dated 15 February 2020. He did not seek to review the revocation of his EU Treaty residence permission. He submitted, however, that the finding of a marriage of convenience had been far reaching and had drastic implications for the appellant. He said due process ought to have been followed and, at the very least, the basis upon which the Minister proposed to make such a finding ought to have been put to him and an opportunity ought to have been provided for himself and his former spouse to respond. At no point did the appellant or his legal representatives request an oral hearing as part of the first instance decision-making or review processes.

12. The solicitor's letter went on to state that much of the basis for the finding emanated from the phone call with his former wife in February 2019 in which she said that they had not been in contact for three years. It was submitted that this was not particularly germane to the marriage of convenience finding. It was argued that the totality of the evidence was circumstantial, based upon the relatively early marriage and the immigration position of the appellant. The appellant expressed regret at not having informed the Minister at an earlier stage of the breakup of his marriage.

13. The Minister informed the appellant by letter dated 11 April 2022 that the first instance decision had been upheld. That letter discussed the reasons given by the Minister in the first instance decision letter for her conclusion that the appellant's marriage was one of convenience. The reasons given included the accelerated nature of the relationship, the lack of shared assets, the precarious immigration status of the appellant given that his residence card was due to expire shortly after the date of their marriage, and concerns regarding false and/or misleading representations made by him at the time of

the initial application. The review decision maintained the finding of a marriage of convenience, stating that the marriage was never genuine in light of the accelerated nature of the relationship with the EU citizen (a decision to marry was made within three months of meeting), the precariousness of the immigration status and the little documentation or information in respect of the relationship in the case. The Minister, however, set aside the finding that the documentation submitted had been deemed false and/or misleading. It was held that any immigration permissions that were provided on the basis of the marriage were not valid permissions and were revoked by the Minister. Thus, the EU Treaty Rights permission was revoked.

14. The appellant disputes the finding that his marriage was one of convenience and contests the manner in which that finding was arrived at. This was the impugned decision of which the appellant sought judicial review before the High Court.

The High Court Judgment

15. The High Court judge identified the appellant's core legal complaint as one to the effect that an oral hearing was required on the basis "that central to the decision was an adverse finding of credibility against the applicant."

16. The trial judge stated that the entirety of the appellant's claim in oral submissions was founded on the application of the decision of Phelan J. in *ZK v Minister for Justice & Ors* [2022] IEHC 278 *("ZK*"). The appellant argued that judicial comity and, in particular, the principles set out in *In re Worldport* [2005] IEHC 189 ("*Worldport*") required the court to follow the decision in *ZK*. On the other hand, the trial judge identified the arguments in the written submissions as being:

a) It was incumbent on the Minister to consider the appellant's submissions,

b) That no interview was conducted,

c) The Minister did not write to the former wife nor was there any engagement with her,

d) The decision was based upon a personal credibility assessment of the appellant.

17. The relevant details of the correspondence between the appellant and the Minister are set out in the judgment.

18. The High Court judge summarised the findings of Phelan J. in *ZK* and made extensive reference to the decision of the High Court in *SK & JK v Minister for Justice* [2022] IEHC 591 *("SK & JK")* delivered by Ferriter J. In that decision, Ferriter J. also considered the *ZK* decision. His view was that even in *ZK*, it was not stated that there was an *entitlement as of right* to an oral interview or other form of oral process under the 2004 Directive or in the 2015 Regulations (para 65). Ferriter J. distinguished the facts in *ZK* saying that, in *ZK*, both parties to the marriage had been "on the same page" and had tendered a plausible account, not demonstrably false, which was supported by documentation. In *SK* & *JK*, the facts were that one party had said in interview that the marriage was a sham and was for the sole purpose of obtaining a visa. In that case, the applicant had not sought to set up a case that her husband's account should be disregarded because what he said was not the truth. Instead, the applicant sought to say that the admission attributed to her husband was not said by him or that he had not understood what he was being asked. Once those contentions had been rejected, and no other basis for disbelieving the husband's account had been advanced, the necessity for an oral interview of the applicant did not arise. He held, therefore, that there was no entitlement as a matter of fair procedures to an interview.

19. The trial judge in this case also referred to the High Court decision in *Alam v Minister for Justice & Equality* [2022] IEHC 439 where it was held that in circumstances where

no address had been provided for the EU citizen, the Minister was not required to seek representations from her.

20. The trial judge distinguished the present case from that of *ZK*. She referred, *inter alia*, to the minimal documents submitted in support of the genuine nature of the marriage. She said there was no language issue in the present case and no engagement in the process by the appellant in the instant circumstances. She also held that there was an oral interview with the applicant at Dublin Airport and two oral conversations with the EU citizen by an official, albeit by phone.

21. The trial judge also said that the appellant was on full notice of the Minister's concerns as outlined in the letter of 16 December and there was minimal engagement at best. There was also no identification of matters which might be dealt with in an oral hearing that could not be dealt with in written submissions. In light of the foregoing, she was satisfied that there was nothing unlawful in the process adopted by the Minister and that a further oral hearing was not required.

Grounds of Appeal

22. The appellant submitted that the High Court erred in fact and/or law in:

- **a.** Holding that the procedure leading to the finding that the appellant had contracted a marriage of convenience was carried out in accordance with law.
- **b.** Failing to find the respondent had erroneously placed the onus on the appellant to prove the validity of his marriage.
- **c.** Concluding that the respondent adequately engaged with the case made by the appellant.
- **d.** Finding that the respondent did not act unlawfully in failing to interview both the appellant and his former spouse.

e. Determining, where dealing with two (apparently) conflicting High Court judgments on an issue, that the correct approach was to follow that which was most recently decided, thus misapplying the *Worldport* principles of the doctrine of judicial comity in deeming that the judgment in *ZK* had been superseded by the more recent High Court judgment in *SK & JK*, the appeal of which was heard alongside this appeal.

f. Finding that there was nothing unlawful in the process adopted by the respondent, and that a further oral hearing was not required; the appellant disputed that any form of oral hearing was effected (emphasis by appellant). The appellant maintained that neither his questioning at Dublin Airport nor the telephone conversation(s) between the Immigration Officials and his ex-wife amounted to an oral hearing. The contents of such conversations remain in dispute and the Minister's reliance on such interactions in making her finding was characterised as a reliance on hearsay.

22. The Minister opposed the appeal in full, asserting that the conclusion that a marriage of convenience was contracted between the appellant and his ex-spouse was arrived at lawfully and followed due process, as found by the trial judge.

The Issues

23. An issue arose as to whether the appellant was making a different case not only from the pleaded case but also from the case made before the High Court. Counsel for the Minister noted that the pleadings had dealt with the failure to conduct any form of interview whatsoever with the appellant's former spouse. Instead, the appellant's focus was now on the absence of an oral hearing where his credibility was being assessed. I am satisfied, however, that as appears from the High Court judgment, the entire focus of the submissions in the High Court was on *ZK*, which had dealt with the issue of

having an oral process as part of the decision-making procedure. I am also satisfied that the reference to a "purely paper-based assessment of the Applicant's immigration history" in the pleadings, together with the claims of breach of fair procedures and due process, is, in all the circumstances, sufficient to demonstrate that the case was made *at the application for leave stage* that no oral process had occurred. Nonetheless, it must be said that the claim could have been made with greater clarity in the pleadings. Applicants who do not plead their claims with clarity run the risk that a court may find that the argument they wish to make at the hearing does not come with the grounds on which leave was granted. In this case, while the claim for an oral hearing may (just) have been made on the pleadings, I am not convinced however, that such claim was made in the course of pre-decision and pre-review correspondence with the Minister. That will be discussed later.

24. A second issue arising was that the High Court failed to apply judicial comity in failing to follow *ZK*. It is not necessary to address this point in the circumstances of this appeal. This Court has, since the hearing of this appeal, given judgment in *ZK*. The parties to this appeal were aware that the judgment was pending. Full argument was made as to whether the principles set out by the High Court therein ought to be applied to this appeal. This Court must now, of course, apply the principles set out in its own judgment in *ZK*.

The Appellant's Submissions

25. Counsel for the appellant confirmed at the hearing that the only issue before the Court related to the finding of marriage of convenience. He accepted that the Minister had been entitled to revoke the EU Treaty Rights permission as the marriage was over. Counsel informed the Court that there was a separate immigration-related appeal pending. Even if he were to succeed in relation to the marriage of convenience issue,

counsel submitted that the appellant would not have an automatic entitlement to a residence card. Nonetheless, he was concerned about the finding as it was one which would follow him during his entire immigration process.

26. Counsel submitted that the issue in the case was one which was more "legal than factual". The issue was identified as whether, given the circumstances, he was entitled to an interview or an oral hearing before the decision-makers made their decision. In essence, counsel relied upon the manner in which that issue had been decided by the High Court in *ZK*. Counsel also submitted that the interview at the airport could not be considered an interview for the purpose of fair procedures.

27. Counsel noted that there was no question of fraudulent documents having been submitted in this case. In those circumstances, he submitted, it was difficult to see the case as anything other than a question of credibility, and thus an interview was required.

28. Counsel relied upon the decision of Cooke J. in *N (SU) (South Africa) v Refugee Applications Commissioner* [2013] 2 IR 555 and in particular the reference to the importance of the opportunity to persuade. He referred to the decision of O'Donnell J. in *MM v Minister for Justice and Equality* [2018] IESC 10 regarding the requirement of an oral hearing where matters came down to credibility. Counsel referred to the Supreme Court decision in *Ezeani & Allen v Min for Justice and Ors* [2011] IESC 23 ("*Ezeani*") where it was stated that factual disputes cannot really be resolved on paper.

29. Counsel submitted that as the real question was whether the oral hearing was necessary, or to put it another way, whether this was a case which could have been decided summarily. He submitted that there was at all times a dispute between what his former wife said and what the immigration official noted was said during the telephone call at the airport. He did not accept that an informal conversation on the telephone was an interview. He submitted that his ex-wife said that this was not a marriage of

convenience. It must be noted, however, that his wife did not submit or make any statements during the procedure in which the appellant's entitlement to the EU Treaty Rights residence permission was in question. She only became involved at the judicial review stage when she filed an affidavit on behalf of the appellant in which she stated that the marriage was not one of convenience.

30. The appellant maintained that due to contradictions between the information provided by the appellant and by his ex-wife and the manner in which information was obtained, the Minister should have elected to afford both the appellant and his ex-wife an oral hearing to assess the credibility of both parties. The appellant submitted that a credibility assessment could not be carried out in written submissions alone, and that only an oral hearing could resolve such concerns, particularly where there is a potential language-barrier. The appellant contended that an interview should have been afforded as a matter of due process and he contested the reasoning of the trial judge that little was to be gained from such an interview. The fact that the Minister chose not to afford such an interview to the appellant and his ex-spouse demonstrates, in the appellant's submission, that she afforded undue weight to the information/evidence obtained by the Immigration Officials at Dublin Airport.

31. The appellant submitted that the interview at Dublin Airport was not an oral hearing or a credibility assessment, but rather questioning that occurred "on spec". Thus, rather than seeking a *further* oral hearing, the appellant contended that no form of oral hearing had ever taken place.

32. The appellant recognised that there is no express provision for an oral hearing in Directive 2004/38/EC or in the 2015 Regulations but cites *Mooney v An Post* [1998] 4 IR 288 to support the submission that a duty to conduct an oral hearing may arise even where not expressly provided for, based on the severity of the consequence of a

decision. The appellant cited *Galvin v Chief Appeals Officer* [1997] 3 IR 240 ("*Galvin*") as authority for the indispensability of an oral interview when seeking to achieve constitutional justice and fair procedures in situations concerning a conflict of fact and credibility issues. The appellant also referred to *Damache v Minister for Justice* [2020] IESC 63 on this point. The appellant submitted that the trial judge erred in finding that nothing would have been gained from interviewing the appellant and/or his ex-wife.

33. The appellant submitted that the trial judge erred in failing to find that the Minister erroneously placed the onus on the appellant to prove the validity of his marriage, and that requiring the appellant to justify his own marriage and to establish that it was genuine amounted to an impermissible reversal of the burden of proof.

34. Although the appellant recognised that the Minster engaged with some elements of the application, the appellant ultimately submitted that the trial judge erred in concluding that the Minister adequately engaged with the case made by the appellant. In support of this assertion, the appellant submitted that the Minister failed to engage adequately with the contradiction of facts recorded in the interaction at Dublin Airport and the written representations made at the review stage, such as discrepancies in the accounts of the appellant and his former spouse regarding the contact that was made at the Airport. In written submissions, the appellant characterised this as the Minister relying on a disputed hearsay account of details of the appellant's marriage obtained via a telephone conversation between the appellant's former spouse and Immigration Officials in order to make a finding that was suitable to the Minister's desired outcome. The appellant averred that an oral hearing was essential to the resolution of the arising contradictions between the Minister, the appellant, and the appellant's ex-wife.

35. The appellant submitted that, in line with *Lawlor v Flood* [1999] 3 IR 107, he is entitled to the "full panoply" of procedural protections because he has been accused of serious misconduct. He submitted that the need for such protection is even more pronounced when considering the serious nature of the Minister's findings, which he characterised as having the effect of "stripping away several years of lawful (and reckonable) residence in the State" and bringing him "outside the ambit and protection of EU law in the event that the Minister seeks to expel him from the State".

36. Ultimately, the appellant submitted that where a finding of bad character emanating from an adverse credibility finding is to be made in respect of the appellant, he should be afforded an oral hearing. At the hearing, counsel submitted that while the Court could have regard to the fact that no oral hearing was explicitly sought, it must also have regard to the fact that the Minister does not usually provide such hearings.

37. Counsel referred to the burden of proof. He relied upon the European Commission's *Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens*' Staff Working Document (2014) 284 ('the Handbook'). The appellant, in his grounds of appeal, had asserted that the Minister had reversed the onus of proof and he expanded on that in written submissions. In oral submissions, it was not the subject of any specific submission save for the reference as above to support the proposition that an oral hearing ought to have been provided. I am satisfied that the Minister's objection to the Court dealing with any assertion that the Minister had reversed the onus of proof is well-founded in the absence of it having been pleaded as a specific ground in the judicial review. I will, however, consider the burden of proof as part of the issue concerning the requirement of an oral hearing in this case as the two issues are not entirely unrelated.

The Minister's Submissions

38. Responding to the claim that there was a lack of fair procedures, the Minister submitted that the appellant was given notice of the intention to revoke his residence card in advance of any decision being taken by letter dated 16 December 2019, and that the appellant was erroneously asserting that he did not have the opportunity to refute the allegations that his marriage was one of convenience. The appellant responded to the letter of intention to revoke residency via his solicitor by letter dated 8 January 2020 merely denying the Minister's concerns with no accompanying supporting documentation. The Minister submitted that neither the appellant nor his ex-spouse took the opportunity at that stage of the review to engage with the Minister's findings or to submit any supporting documentation or information to allay the concerns regarding their marriage, which the Minister characterised as a failure to engage with the process.

39. Thus, the Minster submitted that despite the appellant's core contention being that he ought to have been afforded an oral hearing, the trial judge was entirely correct in finding that a) he did not meaningfully engage with the process that was available to him and b) he did not identify any particular matter which actually required an oral hearing. The Minister relied on the authorities of *Pervaiz v Minister for Justice* [2020] IESC 27, *Abbas v Minister for Justice* [2021] IECA 16, and *SK & JK*. The Minister cited *BB & Ors v Minister for Justice* [2022] IEHC 536, in which Heslin J. held at para 55 "no respondent decision-maker can be expected to regard submissions as to a particular factual position as the same as being evidence which establishes the facts to which those submissions relate".

40. The Minster further cited *Balc v Minister for Justice* [2018] IECA 76, the relevant EU Directive provisions, and the 2015 Regulations to attest to the fact an oral hearing is

not an essential element of fair procedures in such decision-making processes. The Minister submitted that the appellant's failure to request a hearing is of detriment to his line of argument in respect of such, referring to jurisprudence (including *Murphy v Attorney General* [1982] IR 241, *A v Governor of Arbour Hill Prison* [2006] 4 IR 88 and *DPP v Bolger* [2013] IECCA 6) which denote that a person cannot seek to invalidate a decision by raising an issue for the first time after the decision has been reached.

41. The High Court finding in *ZK* that the absence of a request for an oral hearing in that case was not determinative of the issue was under appeal at the time of the oral hearing of this case. The Minister in her submissions noted that while the appellant sought to rely on *Galvin v Chief Appeals Officer*, the applicant in that case had requested an oral hearing five months prior to the review decision issuing and the social welfare legislation expressly provided for an oral hearing. It is significant that neither Directive 2004/38/EC nor the 2015 Regulations mandate nor preclude an oral hearing.

42. The Minister submitted that the appellant's case is not exceptional and that he has not been able to demonstrate prejudice or fundamental denial of justice caused by the absence of an oral hearing, such as was found in *Z v Minister for Justice* [2002] 2 ILRM 215. In this respect, the Minister highlighted that the requirements of justice vary depending on the type of decision at hand, citing *Ezeani* and *Atlantean v Minister for Communications and Natural Resources* [2007] IEHC 233. In *Ezeani*, it was found that offering an interview was "reasonable", but not necessary to satisfy the requirements of natural and constitutional justice.

43. The Minister further gave examples of other administrative decisions within the immigration sphere where important rights and entitlements are at issue, including naturalisation applications under the Irish Citizenship and Nationality Act, 1956, as

amended, the deportation process under section 3 of the Immigration Act, 1999, and visa/residency applications under the Immigration Act, 2004, in which contexts it is well-settled that fair procedures are complied with by the paper-based applications/reviews together with the availability of judicial review thereafter if required.

44. Responding to the appellant's reliance on *Mooney v An Post*, the Minister highlighted that an oral hearing was not required where the dismissal of a postman, being an employee in a position of trust, was in issue, despite acknowledging that "[d]ismissal from one's employment for alleged misconduct with possible loss of pension rights and damages to one's good name, may, in modern society, be disastrous for any citizen".

45. The Minister submitted that although a personal credibility assessment is often carried out in respect of International Protection applicants, this is fundamentally different to the present context given the particular features of the International Protection procedure, and the characterisation by the High Court in *ZK* that the Minister was engaging in this context in such an assessment was erroneous. There is no suggestion of this in the Directive or the 2015 Regulations, and a similar suggestion was rejected in the *Ezeani* case. Nevertheless, the Minister submitted that even in the context of a finding of incredibility incidental to a revocation of a residence card, appeals and reviews may lawfully be conducted solely on the papers without an oral hearing.

46. The Minister submitted that *Z v Minister for Justice* is relevant here despite three points of factual distinction between it and this case: an assessment of the applicant's credibility was required, the applicant in *Z* had not challenged the factual matters in the papers provided to him, and he had been interviewed at first instance. In *Z*, the applicant's claim for refugee status was found to be manifestly unfounded because, *inter alia*, he "gave clearly insufficient details or evidence to substantiate the

application" which essentially amounted to the applicant's account being disbelieved. McGuinness J. rejected the claim that the applicant was entitled to an oral hearing in the appeal, stating:

> "He may certainly wish to expand on either his own evidence or independent evidence concerning the conditions prevailing in his country of origin but it is open to him to provide this information in writing".

47. The Minister, like the appellant, relied on *MM v Minister for Justice* in which the CJEU went on to find that applications for subsidiary protection did not breach EU law for lacking an oral hearing component to the process (C-277/11 *MM v Minister for Justice*). The Minister cited O'Donnell J. who stated: "it was permissible to make that decision on the basis of a written procedure, so long as the procedures adopted were sufficiently flexible to allow the applicant to make his case. That was plainly the case here. Exceptionally, it may be necessary to permit an oral interview".

Discussion and Decision

48. On 20 October 2023, the Court of Appeal, comprising the same panel of judges as in this appeal, delivered judgment in *ZK v Minister for Justice*. As in that case, the first issue to determine is whether the failure of the appellant to request an oral hearing is determinative of the issue. For the reasons set out in *ZK*, I agree "it would be imprudent for this Court to conclude, by way of a definitive and general principle, that the applicant's failure to request an oral hearing was, in and of itself, so entirely detrimental as to be determinative of the entire appeal" (para 111). Instead, as in the approach of Costello P. in *Galvin*, "account should… be taken" of that absence in determining whether fair procedures required such an oral hearing.

49. In her judgment, Power J. (with whom Donnelly and Ní Raifeartaigh JJ. agreed) set out the principles applicable when considering whether an oral hearing was necessary in this administrative decision-making process. At para 136 thereof, Power J. held that a) there is no hard and fast rule of constitutional law requiring an oral hearing in every case, b) neither the 2004 Directive nor the 2015 Regulations mandate a hearing in every case, c) it is the responsibility of the Minister to ensure that fair procedures are observed in the decision-making process, and d) those who are the subject of decisions under the 2004 Directive and 2015 Regulations have responsibilities to be truthful and to keep the Minister apprised of changes in their circumstances which may impact on the rights acquired on foot of their relationship to an EU citizen.

50. At para 137, Power J stated that the starting point for consideration of the factors to be considered in assessing whether an oral hearing is required are those set out by Costello P. in *Galvin*. Power J. later noted that the legislation did not require an oral hearing and that the Minister had provided fair procedures which gave the applicant an opportunity to address any concerns that arose and to respond fully. It is noted that in the present appeal, the appellant was informed of the concerns of the Minister and was given an opportunity to address those concerns. He did avail of that opportunity, albeit in a limited manner.

51. Power J. gave extensive consideration to the implications of a failure to request an oral hearing. While a failure to request a hearing may not always be determinative, it may carry significant weight. In that case it was held that it did carry significant weight. As in *ZK*, the present case is one where the appellant was legally represented but his solicitor made no specific request for an oral hearing. While saying he was unaware of the Minister's practises and policies and referred to due process as an imperative, the solicitor did not refer to, or request, an oral hearing. Indeed, he did not do so in the

immediate aftermath of the review decision. It was only at the judicial review stage that he referred to the failure to interview his former wife and the fact that his decision was made after a paper-based review. As the decision in *ZK* makes clear, he is not entitled to *sleep on his rights* and that is a factor to be taken into account.

52. Although his solicitor did not confirm expressly that the Minister had all the information available as the solicitor did in *ZK*, the solicitor took the view that "the totality of the Minister's case appears to be based on highly subjective misgivings around the marriage in question and these misgivings then contaminate the entirety of our client's application, and extend beyond that to find that the marriage itself was never valid". I pause here to note that the submission that there was a finding by the Minister that the marriage itself was never valid was incorrect. In *S & Ors v Minister for Justice & Equality* [2020] IESC 48, McKechnie J. (speaking for the Supreme Court) clarified that the finding of a marriage of convenience is limited to the immigration/deportation context and does not amount to a finding of nullity.

53. On behalf of the appellant, the solicitor made certain assertions about the genuineness of the marriage but never forwarded any documentary proof of the genuineness of the relationship either before or after the marriage. He presented no evidence of any kind of financial and emotional relationship with the appellant's wife. Such an approach was surprising in the context of all the factors that were clearly in issue; the accelerated nature of the relationship, the precarious immigration status of the appellant, and the failure to notify the Minister of changes to his circumstances which had occurred a number of years earlier (a failure which was not contested). Indeed, one would say that the approach taken by the appellant was to say, in effect, to the Minister 'you have no proof, only suspicions'. In that regard he was clearly mistaken; the Minister was entitled under the 2004 Directive and the 2015 Regulations to have regard to those

factors in assessing whether the marriage was one of convenience. While undoubtedly the burden remained on the Minister to establish the existence of an abuse of rights, the Minister had placed her cards on the table and told the appellant of her suspicions. He chose not to interact save in a most legal and technical fashion. Not engaging with the process by failing to present evidence to demonstrate the genuineness of the marriage (that is, to dismiss concerns that it was a marriage of convenience) is a high- risk strategy. That it was a deliberate strategy is apparent from the totality of the interactions.

54. In the course of his solicitor's letter of 15 February 2020 seeking a review of the Minister's decision, it was asserted that the appellant and his wife had never been given an opportunity to refute the assertions made regarding the nature of their marriage. That was an entirely erroneous statement as the Minister's letter of 16 December 2019 had clearly indicated that he was being given an opportunity, *inter alia*, "to dismiss concerns that your marriage is a marriage of convenience in accordance with the provisions of the … Regulations …". The reality was that the appellant, for whatever reason, chose not to present any material whatsoever that might have supported the view that his relationship with his wife was one which did not have as its sole purpose the obtaining of an immigration entitlement. This was all the more surprising as the letter of 16 December 2019 had referred to the inability to provide photographs of the wedding to the Immigration Officer at Dublin Airport. Photographs would have been among the type of documentary evidence that a genuine couple might reasonably be expected to have been in a position to furnish to the Minister. The dicta of Baker J. giving judgment in the Supreme Court in *Pervaiz* rings especially true in this case:

> "It is almost inconceivable in the modern world that a couple would not have many examples which can be established by documentary proof, whether from

> social media, correspondence, utility bills, photographs, text or email messages, financial transactions, etc., which might establish the closeness of their interconnectedness and the nexus within which the relationship operates."

55. In my view, for similar reasons as set out in *ZK*, the lack of a specific request for an oral hearing also carries with it significant weight in this case. In this case, this appellant, like the applicant in *ZK*, also "struggles to establish that the merits of his application could not have been presented, reasonably and viably, in writing, by way of corroborative documentation and written submissions to the Minister." That struggle led, it seems to me, to the presentation of the appellant's case as being one where "the right to an oral hearing was a legal rather than a factual issue". In truth, the legal right can only be established on a consideration of the individual facts of each case. There is no legal right to an oral hearing regardless of factual circumstances. There is of course a right to fair procedures. He was given an opportunity "to make his case" by the Minister and he failed to engage.

56. While counsel for the appellant acknowledged in the appeal that a failure to request an oral hearing could carry weight, his view was that this was theoretical only in his case. This was, he asserted, because this was a case concerning pure credibility i.e. whether his assertion that his marriage was not one of convenience was to be believed. That repeated reference to credibility in a most general sense does not assist with undertaking the required assessment of the individual facts. In *ZK*, Power J. discussed in detail at paras 160 to 188 the case law concerning the nature of the inquiry that is at issue in this particular decision-making activity. I adopt that analysis and it is not necessary to repeat it here. The appellant was given an opportunity to provide further evidence to dispel the Minister's doubts. In this case, like in *ZK*, the appellant was given every opportunity to submit evidence to demonstrate that he was personally credible and

thereby to dispel the doubts of the Minister. As stated by Power J. at para 182: "To the extent that the Minister concluded that she was not satisfied on the basis of the documentation submitted and the overall circumstances of the case that the marriage was not one of convenience, she was impugning the quality of the evidence offered by the applicant before the first instance decision-maker and on review and I am satisfied that the impugned decision reflected '*only indirectly'* upon the credibility of the applicant (*Ezeani* at para. 55)".

57. In cases such as this one, the Minister is not engaged from the outset in an assessment of an applicant's credibility but in an assessment of the weight or probative value of the evidence he adduced (Power J., *ZK*, para 194). Thus, in the present case what is at issue is whether, having considered and probed all the information and evidence provided and having viewed what this appellant submitted to her, the Minister's decision that she was satisfied that the marriage was one of convenience was one which she was entitled to reach, fairly, in the absence of an oral component. This Court is not concerned with the issue of whether the marriage was or was not genuine but only whether the decision was taken fairly and in accordance with law by the Minister.

58. If there was any single issue that the appellant pointed to beyond his "general credibility", it was to say that the Immigration Officer's account of the interactions at Dublin Airport was incorrect. The extent of that disagreement is not entirely clear. In written submissions, it was said that the Minister relied upon a disputed account from the appellant's former wife in a telephone call "certain aspects of which she herself has since disputed on affidavit". It is difficult to see from that affidavit any precise area of disagreement. She does assert that she was asked if she had contracted a marriage of convenience and that she answered no. That information is not recorded in the letter of 16 December 2019. She confirmed, however, that she had said that they had not been

in contact for several years and were divorced. It is striking that the main dispute that the appellant has with the account of the interaction is that he disputes his former wife's statement that "she and our client had not been in contact for a period of 3 years".

59. What is of particular significance is that the appellant does not at any time in his correspondence with the Minister dispute that he said things to the Immigration Officer that were premised on the basis that the relationship was still in existence. The furthest he puts it on affidavit is to say he was nervous at the airport, was being shouted at and accused of lying, and goes on to say that he "reject[ed] the characterisation of this interaction as set out in the Minister's letter and [did] not accept that [he] gave misleading information during that interaction". It is quite significant that in his response dated 15 February 2020 he did not dispute the account asserted in the Minister's letter of 16 December 2019. On the contrary, the letter stated "our client accepts and wishes to have recorded the fact that he did not inform the Minister at the earliest opportunity of the fact that his marriage had broken down. He regrets this and also the fact that he was less than forthright when initially questioned at Dublin airport".

60. Furthermore, in that letter of February 2020, he "noted with concern the fact that much of the bases for the Minister's finding emanate from telephone conversations with [his] former wife". Thus, on the facts before the Minister, apparently the only discrepancy that was at issue was that which related to whether it was correct to say that they had not been in contact for a period of three years. It is clear from the first instance decision and the review decision that the time period subsequent to the marriage in which they had not been in contact was not in dispute. Furthermore, it was asserted in the February 2020 letter that the appellant could not account for his former wife's activities from 2016 onwards. Indeed, in his earlier letter he accepted that his former wife had left the State in 2016. Therefore, by the time of the interaction at the airport, three years had

passed since his wife had been in the State. Nothing turned on the length of time since there had last been contact with his wife, since it was perfectly clear that for a period of at least three years prior to the interaction at Dublin Airport she had left the jurisdiction and the relationship was over. That was the key matter which ought to have been notified to the Minister and the dispute about the length of time since last contact was irrelevant.

61. The High Court's reference to "a further interview" was the subject of much comment in the written submissions as the appellant did not accept that either the telephone call with his former wife or the interview with himself at Dublin Airport constituted an interview. In applying the principles set out in *ZK*, it is clear that the decision-maker must be concerned with the fairness of the decision-making process. The fact that an interview process has been carried out at an investigatory stage and whether that interview has been a formal or a more informal one is a matter to be considered in the overall assessment of what is required to satisfy fair procedures. The issue of whether an oral process before the decision-maker is required must take into account all the circumstances of the case. It is not correct to say that *merely* because an interview has taken place that no further oral hearing is required. The real issue is whether one is necessary in order to ensure procedural fairness. Much will depend on the particular circumstances of each case.

62. In the instant case, the appellant cannot point to a single issue where there was any real factual dispute. I have dealt with the apparent discrepancy between his former wife's view of the time period since their last contact and his own. This was not in any way relevant to the real issue which was always whether their marriage was one which had solely been contracted for the purpose of acquiring immigration entitlements. Many of the indicia of marriages of convenience were present in the case, such as short

relationship before marriage, recent entry into the State by the EU citizen, precarious immigration status, lack of truthfulness in interactions with the immigration authorities, and a failure to provide documentation supporting the genuine nature of the relationship either before or after the marriage.

63. The Minister's decision was based on the information before her. That information did not reveal any conflicts of evidence of the type that would necessitate an oral hearing before the central issue could be resolved; namely, whether the marriage was one of convenience. The appellant's assertion that he was entitled *per se* to an oral hearing for the purpose of persuading the deciding authority of his credibility is not correct. Fair procedures had been followed in this case because he had been given the opportunity to dispel the clearly articulated concerns of the Minister that the marriage was one of convenience. Despite that opportunity, he chose not to engage in any substantive factual way with the Minister. Instead, he persisted in an argument that circumstantial evidence – which in this case was quite compelling – could not form the basis for a conclusion that the marriage was one of convenience. He failed to submit any documentation that spoke to the ordinary daily lives of their marital relationship. Indeed, even in a break-up of a relationship, one would not be surprised to see evidence of, perhaps, text or other messages expressing sadness, recrimination, or anger (as the case may be) at how the relationship had changed and/or how any personal possessions/financial commitments must be dealt with. There was nothing like that here.

64. Applying the observations of Power J. on whether an oral hearing is necessary to assess the demeanour of an applicant, it is clear that in the present case it was not necessary. What was required was that the decision-maker weigh up the evidence submitted to

them prior to making the determination. The facts of the case demonstrate that the Minister did so.

65. In all the circumstances, the appellant was not entitled to an oral hearing because the absence of such a hearing did not prevent the decision-maker from reaching a fair determination on the issues before her.

Conclusion

66. For the reasons set out above, the appeal is dismissed.

67. As the Minister has been entirely successful in this appeal, it would appear the Minister is entitled to the costs of the appeal. Should the appellant wish to contend otherwise, they should apply to the Registrar on or before 17 November, 2023 to seek a short hearing date on the issue of costs.

As this judgment is being delivered electronically, my colleagues Ní Raifeartaigh and Power JJ. have authorised me to record their assent.