

APPROVED



**THE COURT OF APPEAL
CIVIL**

**Neutral Citation: [2023] IECA 309
Record Number: 2022/284
High Court Record No.: 2021/1018 JR**

**Donnelly J.
Ní Raifeartaigh J.
Power J.**

BETWEEN:

S.K. AND J.K.

APPLICANTS/APPELLANTS

- AND -

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Power delivered on the 12th day of December 2023

Introduction

1. This case raises a question concerning the procedural requirements to be observed when permission to reside in the State is refused to an applicant who had claimed a derived right of free movement and residence on the basis of marriage to a European Union ('EU') citizen under the provisions of Directive 2004/38/EC (hereinafter, 'the

Directive').¹ The Directive has been transposed into Irish Law by the European Communities (Free Movement of Persons) Regulations of 2015 (SI No. 548/2015) ('the 2015 Regulations').

2. Central to this appeal is the fact that the respondent (hereinafter, 'the Minister'), in making her determination on the first appellant's application for a renewal of a residence card, '*disregarded*' the first named appellant's marriage to an EU citizen as a factor bearing upon that determination, because, in the Minister's view, the marriage was one of convenience.

3. The principal complaint of the appellants is that the process by which the Minister reached her decision to refuse residence permission to the non-EU spouse (hereinafter 'SK' or 'the first appellant') and to revoke a previously issued residence card, was not in accordance with law.² In their view, the Minister, wrongly, placed upon them the onus to prove '*the validity of their marriage*'. They say that natural and constitutional justice required that SK be given an oral hearing or an interview³ prior to the Minister's determination of her application for the renewal of her residence card (hereinafter, 'renewal of residence').

4. The High Court (Ferriter J.) refused to grant an Order of *Certiorari* quashing the Minister's decision of 12 November 2021 (hereinafter, 'the impugned decision') wherein the Minister affirmed an earlier decision of 25 July 2018 to refuse SK's application for renewal of residence and to revoke the one that had, previously, been issued to her.

¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

² References to the Minister include references to officials working within the Minister's Department.

³ Throughout these proceedings, various terms are used, including, '*interview*', '*oral process*' '*oral hearing*' and '*oral aspect*'.

5. This is an appeal against the entirety of the High Court's judgment ([2022] IEHC 591) of 24 October 2022. There is no cross-appeal by the Minister in respect of any aspect of the High Court's findings.

Background Facts

6. SK is an Indian national who entered the State on a student visa on 10 September 2006. She was, thereafter, granted a Stamp 2 permission to remain, which she retained until 12 September 2012.

7. The second appellant (hereinafter, 'JK') is an EU national who lived and worked in Ireland since October 2011 in the exercise of his rights under the Treaty on European Union ('the EU Treaty'). The appellants claim to have met in February 2012, while working together, and to have begun a relationship shortly thereafter. They say that they began residing together in SK's house in April 2012. In the same year, they married on 19 September, which was one week after the expiry of SK's Stamp 2 permission to remain. Based on her marriage to an EU citizen, SK then applied for a residence card which was granted to her on 10 April 2013, and which remained valid for five years.

8. On 31 August 2017, SK applied for renewal of residence as the spouse of an EU citizen.

9. The record shows that, whilst that application was pending, JK was interviewed by members of the Garda National Immigration Bureau ('GNIB') on 1 February 2018. A typed memo of that interview records JK's admission that he had married SK because she needed a visa, that he and SK had never lived together, that JK had continued to sign documents for SK because she was a friend, that the marriage was one of convenience, that whilst married to SK, he was in a relationship with his Latvian girlfriend who became

pregnant, and that the memo was a true and accurate reflection of what JK had said in the interview.

The 'Fair Procedures' Letter Proposing to Refuse the Application

10. On 26 March 2018, the Minister wrote to SK and informed her that she proposed to refuse the application for a residence card pursuant to Regulation 27(1) of the 2015 Regulations. The Minister stated that whilst processing the application, information had come to her attention which gave rise to several concerns and that she was providing SK with an opportunity to address those concerns prior to the application being determined. Specifically, the Minister noted that SK had submitted a marriage certificate dated seven days after the expiry of her Stamp 2 visa. The letter continued:

“Information available to the Minister through An Garda Síochána states that your relationship to the EU citizen was not a tangible relationship and that the marriage was based on helping you to obtain a visa in order to reside and work in the state. Further information available to the Minister through An Garda Síochána and the Department of Social Protection and Employment Affairs states that the EU citizen is in a subsisting relationship with a third party dating back to 2012, to which there was a child born in 2013.”

Based on the foregoing, the Minister indicated that she had ‘*significant concerns as to the authenticity of the marriage*’ and was of the opinion that the marriage may be one of convenience, contracted for the purposes of obtaining an immigration permission in the State to which SK would not otherwise have been entitled. SK was invited to make representations to the Minister as to why her application should not be refused.

Submissions Addressing the Proposal to Refuse

11. By letter dated 20 April 2018, SK replied, through her solicitor, asserting that her relationship and marriage to the EU citizen were genuine. A history of the relationship

was outlined. It was said that the couple met in February 2012 while working for the same employer and a P21 confirming the employer's identity was enclosed. A *'signed statement'* from JK, confirming the genuine nature of the marriage, was also enclosed. The letter acknowledged that JK had been interviewed by GNIB on 1 February 2018 but denied that JK had stated that the relationship was based on helping SK to obtain a visa to reside and work in the State. The fast pace of the relationship was due to SK's family's disapproval of the couple living together while unmarried. Following JK's infidelity with his ex-girlfriend and the birth of their son in August 2013, the relationship with SK had broken down and they had started living separately. An attempt at reconciliation was made in 2016 and, in this regard, the letter referred to evidence of the couple's joint travel to Latvia in 2016.

12. In terms of supporting documentation, a PRTB letter and bank statements in JK's sole name (May to October 2012) addressed to him at SK's address were enclosed as were wedding photographs and letters of support. The letter also referred to *'an amended tax credit certificate for 2014 showing evidence of the couple's joint assessment for tax purposes'*. I pause to observe that many of the documents referred to as having been enclosed with the letter of 20 April 2018, including this one, were not among the papers submitted to this Court. It was said that SK had changed her phone and had not kept phone and message records from her old phone, but that some evidence of their ongoing phone contact was included. Whilst separate bank accounts were acknowledged, the appellants claimed that they had jointly contributed to rent, utilities and other costs. The letter confirmed that the applicant (SK) and JK both spoke English and *'would be happy to attend an interview together'* to confirm their familiarity with each other's personal details. A full copy of the notes from the GNIB interview was requested on the basis that

the Minister's summary of that interview was in direct conflict with what SK had instructed.

The First Instance Decision

13. By letter dated 25 July 2018, the Minister, having confirmed that SK's application was examined, decided to refuse her application for renewal of residence. The letter set out several reasons for the decision. It was noted that the marriage had taken place seven days after the expiry of SK's permission to reside in the State. A detailed account of GNIB's report to the Minister was provided. It referred to JK's admission that the marriage had been conducted, hastily, to enable the applicant to obtain a visa, that the relationship was akin to a friendship, and that, throughout the marriage, JK had been in a relationship with his partner who was living in Latvia and to whom he had returned in July 2015 because of her pregnancy with his child. The Minister found it *'highly unorthodox'* that the EU citizen was now denying the information that he provided to the Gardaí. A discrepancy between JK's signature on the *'signed statement'* and his signature on other documents was noted. The Minister did not find JK's statement denying the contents of the GNIB interview to be credible observing that the GNIB interview had been a voluntary one and made under caution, with signed confirmation by JK as to the accuracy of the interview notes. In the Minister's view, she could not *'afford more credibility to a typed letter from [JK] contradicting the entire Garda interview.'* Having considered the submissions of SK and on *'an extensive examination'* of the application and the circumstances surrounding same, the Minister was satisfied that the marriage was one of convenience in accordance with Regulation 28. Accordingly, it was decided that as the marriage was not a genuine one, SK never derived a right of residence and the permission granted to her in April 2013 was invalid from the outset.

14. SK was advised of her right to request a review of the decision made by the Minister. However, it appears that instead of seeking an immediate review of the Minister's decision, SK applied, unsuccessfully, for permission to reside under the State's Special Scheme for Students.⁴ It would appear that separate judicial review proceedings were initiated in respect of that refusal which were adjourned pending the outcome of these proceedings.

The Request for Review

15. On 22 December 2020, SK sought, belatedly, and through a new firm of solicitors, a review of the Minister's decision of 25 July 2018 and further representations were made. The request for review reiterated several points made in the initial application, asserting that the Minister's allegations were based on '*mere speculations*' and '*misguided opinion*' and that they were incorrect as to material fact. It was said that the proximity between the expiry of SK's student visa and her marriage to JK was '*a mere coincidence*'. An affidavit sworn by JK in which he refuted the contents of the GNIB interview was enclosed. Inaccuracies in the dates when JK had left the State and when his Latvian girlfriend was pregnant were also pointed out. SK claimed that she travelled to Latvia twice in early 2016, and that JK had not left the State since then. A schedule of additional documents was included listing copies of JK's P60 and P21 for 2014 and 2015, a letter of employment dated June 2015, JK's bank statement dated December 2020 and boarding passes indicating joint travel in April 2016.

16. On 16 August 2021, SK's solicitors submitted further supplemental representations in support of her request for review. It was denied that JK left the State in July 2015, with

⁴Special Scheme for Non-EEA Nationals who held a Student Permission in the State during the period 1 January 2005 to 31 December 2010.

reference made to JK's amended tax credit certificate to confirm same. The Minister's reliance on the GNIB interview was impugned on the basis that JK had '*limited English*' and had not been provided with an interpreter. Legal submissions were made in respect of the burden of proof being on the Minister to establish that the marriage was one of convenience and, in this regard, reference was made to case law and to 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*' (hereinafter, '*Handbook*').⁵ It was stated that the Minister's finding amounted to an allegation of the commission of a criminal offence and that the obligation to provide reasons was heightened in such circumstances.

The Review Decision

17. By letter dated 12 November 2021, SK was informed that her application for review had not been successful and was furnished with the reasons therefor. The letter began by setting out the first appellant's immigration history and noted that SK had been invited to address, and had failed to allay, the Minister's serious concerns that the marriage had been one of convenience. The evidence submitted by SK in support of a review was also set out as was the history of the marriage and subsequent separation. It was noted that there was '*no evidence*' of the couple's relationship prior to the solemnisation of the marriage. The letter confirmed that the Minister had '*significant ongoing concerns*' as to the legitimacy of the relationship with the EU citizen. The accelerated nature of the marriage and JK's paternity of a child conceived with a third party during the course thereof, was not, in the Minister's view, typical of a genuine marriage. JK's recorded

⁵ SWD(2014) 284 final.

interview with GNIB, the transcript of which he had signed, was also recalled as was his later *'purported'* affidavit denying same. Given his seven years of residence in the State at the time of the GNIB interview, the Minister considered it *'unlikely'* that JK did not possess the language skills required to provide reliable answers. She further observed that SK had *'failed to provide any evidence'* that JK's statements during interview were inaccurate representations of what he had said. Having considered all the information on file and the first appellant's submissions, the Minister was not persuaded that the first instance decision should be overturned.

18. SK and JK initiated judicial review proceedings seeking *certiorari* of the Minister's decision of 12 November 2021 on the basis that it breached fair procedures in not granting SK an oral interview, that the burden of proof had been misapplied and that there was a lack of proper engagement with SK's submissions.

The High Court

19. In a clearly reasoned and succinct judgment, Ferriter J. refused the relief sought by way of judicial review. Having set out the factual background and sketched the rights conferred by the Directive and the 2015 Regulations, he considered the legal issues arising. On the contention that the Minister had improperly imposed a burden of proof on the applicants (now appellants), he found that the Minister had *'squarely put forward a concern that the marriage was one of convenience'*, had set out the basis thereof and had invited SK to address it. He found no error of law in that approach and was satisfied that the Minister had not attempted, inappropriately, to transfer the burden of proof to the applicants.

20. As to the contention that the Minister had not engaged with the applicants' submissions, the trial judge considered that the impugned decision had engaged with

what the *'case lacked in material respects'* in the light of *'other material'* that was before the Minister. The decision had expressly referenced JK's interview with GNIB and his fathering of a child (with a different woman) within a year of his marriage to SK. In no way could such admissions amount to *'circumstantial evidence'* or a *'peripheral matter'*. On the contrary, they went *'directly to the core of the issue being considered by the Minister'* and she was entitled to place *'significant weight'* upon them. The impugned decision had also engaged with SK's submissions on the reliability of the alleged admissions, namely, that JK had disputed them, on affidavit, and had limited English when making them. Ferriter J. took the view that it was open to the Minister to consider the contents of JK's affidavit to constitute a *'mere assertion'*, noting that there was *'no attempt made in the affidavit to set out what it was that [JK] did say in the interview'*. The Minister was entitled to prefer the interview note over the affidavit and there was *'ample basis'* for the Minister to hold that JK had failed to provide any evidence as to why his admissions should be characterised as inaccurate. As to the absence of a translator, the trial judge found that the Minister had *'perfectly legitimately'* relied on information that was available to her, including, the applicants' instructions that they both spoke English and JK's answer of *'No'* to the question *'Do you need an interpreter?'* as recorded in the interview notes.

21. On the contention that the Minister had failed to engage with the positive aspects of SK's submissions, such as, wedding photographs and evidence of joint travel, the trial judge noted that the impugned decision recorded that all of the material and submissions lodged had been considered. Citing *R v. Minister for Justice and Equality and A v. Minister for Justice and Equality* [2022] IEHC 142, he found it *'well established'* that not discussing

specific material in the reasoning of a decision does not mean that the materials submitted were not considered.⁶

22. On the alleged want of fair procedures arising from the failure to interview SK, Ferriter J. first noted that the breach alleged was *not* that SK was entitled to an oral hearing, at which she could cross-examine JK on his admissions to GNIB. Instead, she maintained that she and JK were *ad idem* and that reliance should not be placed on the contents of the GNIB interview. The trial judge considered, in some detail, the High Court's ruling in *ZK v. Minister for Justice* [2022] IEHC 278 in which Phelan J. had taken the view that, on the facts of that case, an oral hearing was required. He distinguished *ZK* from the instant proceedings noting that both parties in *ZK* were '*on the same page*' and had tendered '*a plausible account*' which was, nevertheless, disbelieved. In the instant case, one party had admitted that the marriage had been contracted for the purpose of obtaining a visa for the other party. However, SK did not seek to advance the case that a material conflict of fact arose between herself and JK which could only be resolved by some form of oral process. SK's contentions that JK did not say what was attributed to him and, that if he did, he did not understand what was being asked, were rejected by the Minister. There being no other basis advanced for disbelieving the contents of the interview note, no issues of credibility arose here, and it was open to the Minister to proceed on the basis of the material before her, all the more so in circumstances where objective factors supported the account of the marriage given by JK at interview. Ferriter J. concluded that the '*exceptional measure*' of an oral interview was not required in order for the Minister's decision to be reached, lawfully. SK had been able to make her case, fully, in writing, and that case had been fairly considered and assessed by the Minister.

⁶ An appeal to this Court was subsequently allowed in respect of this case. See *SR and LA v. Minister for Justice and Equality and A v. Minister for Justice and Equality* [2023] IECA 227 which is considered at para. 78 of this judgment.

The Appeal

23. Several grounds of appeal are advanced but, essentially, they come down to the appellants' contention that the trial judge erred in finding that the process by which the Minister reached her decision had been in accordance with law. They say that the process breached fair procedures because the Minister did not grant SK an oral hearing or interview before making her decision, erred in placing the onus on the appellants to prove *'the validity'* of their marriage and did not engage, properly, with the submissions that had been made by the applicants.

24. Opposing the appeal, the respondent denies that the trial judge erred in finding that the Minister's decision was reached in accordance with law. The trial judge was correct to find that the absence of an oral interview did not render the Minister's decision unlawful and that the Minister had not reversed the burden of proof in this case. The trial judge had found that the Minister had set out her reasonable concerns based on the evidence, had sought representations thereon and had engaged with those representations in the course of a detailed written process.

The Law

25. The legislative framework of the Directive and the 2015 Regulations together with the relevant case law thereon have been set out in this Court's judgment in *ZK v. Minister for Justice* [2023] IECA 254 (hereinafter, '*ZK*') which was delivered on 20 October 2023. In *ZK*, this Court considered whether natural and constitutional justice required the Minister to offer an oral hearing prior to *'disregarding'* the applicant's marriage to an EU citizen as a factor in the Minister's determination. The High Court had made an Order of *Certiorari* quashing the Minister's decision to refuse an application for residence because of a failure to provide an oral component in the decision-making process. This Court

allowed an appeal brought by the Minister in respect of the High Court's ruling. Many of the cases considered in *ZK* were opened to the Court in this appeal. I do not propose to review, in any detail, the same legal framework and caselaw here. Rather, I will adopt the principles articulated by the Court of Appeal in *ZK* and consider the submissions made in this appeal in the light thereof.

European Union Law

26. The Directive provides that, subject to certain provisions, '*Member States may restrict the freedom of movement and residence of Union citizens and their family members... on grounds of public policy, public security or public health.*⁷ Any measure taken by Member States in cases of abuse of rights shall be proportionate (Article 35) and subject to the procedural safeguards specified in Articles 30 and 31.

27. Regulation 27(1) of the 2015 Regulations provides that the Minister '*may revoke, refuse to make or refuse to grant*' a right, entitlement or status where she is concerned that it is being claimed '*on the basis of fraud or abuse of rights*'. An '*abuse of rights*' shall include a marriage of convenience.⁸ The term '*marriage of convenience*' refers to a marriage contracted '*for the sole purpose of obtaining an entitlement*' under the 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.⁹

28. Where the Minister suspects '*on reasonable grounds*' that a right is being claimed, or has been obtained, on the basis of fraud or an abuse of rights, then she is entitled to

⁷ Article 27(1).

⁸ Regulation 27(4).

⁹ Regulation 28(6).

'make such enquiries and to obtain such information as is reasonably necessary to investigate the matter'.¹⁰ Of importance to this case is the fact that in making her determination of any matter relevant to the 2015 Regulations, the Minister may, pursuant to Regulation 28(1), *'disregard a particular marriage as a factor bearing on that determination where [she] deems or determines that marriage to be a marriage of convenience'*.

29. The European Commission's *Handbook* reflects the general principle that he who alleges must prove. It confirms that the burden of proof rests on the national authorities who suspect that a non-EU national has entered into a marriage of convenience for the sole purpose of obtaining a derived right of free movement and residence.¹¹ However, a national authority may formally adopt a decision restricting EU rights to residence on the grounds of a marriage being a marriage of convenience where the authority has *'sufficient evidence'* to conclude that the marriage is one of convenience.

Irish Law

30. As noted above, the Court of Appeal in *ZK* considered the key legal principles emanating from the case law on the question of whether the Minister was required, as a matter of natural and constitutional justice, to provide for an oral component in the decision-making process under the 2015 Regulations.¹² With reference to *Balc v. Minister for Justice* [2018] IECA 76 (*'Balc'*), the Court in *ZK* observed that neither the 2015 Regulations nor the Directive mandates that an oral hearing be conducted in every case. Whilst, undoubtedly, the Minister must ensure that fair procedures are observed in the decision-making process, she is not prevented from following an established practice

¹⁰ Regulation 27(2).

¹¹ Section 3.2, p. 28

¹² *ZK*, paras. 59 to 81.

provided that there is no fettering of the authentic exercise of her discretion (*Mishra v. Minister for Justice and Another* [1996] 1 IR 189). The Court in *ZK* also recalled that those who are the subject of decisions under the Directive and the 2015 Regulations have responsibilities, too. They are obliged to be truthful and to update the Minister on changes in their circumstances that may impact upon any derived rights acquired on foot of their relationship to an EU citizen.¹³

31. There is no hard and fast rule of constitutional justice which dictates, invariably, that an oral hearing is always required before natural and constitutional justice can be respected. The thrust of the case law indicates that the need for an oral hearing will be higher where issues of conflict arise and where a decision-maker is called upon to prefer one version of the evidence over another (*Galvin v. Chief Appeals Officer* [1997] 3 IR 240 ('*Galvin*')). Where, for example, two witnesses before a decision-maker give entirely irreconcilable and contradictory accounts of events, then it would be rare that a decision believing one account over the other could be made, fairly, without an oral hearing having been held in which the parties were cross-examined, and their accounts tested against each other (*MM v. Minister for Justice* [2018] 1 ILRM 361 ('*MM*')). On the other hand, where events and facts are of a kind *that could have taken place* but were rejected because an applicant's account of them was disbelieved, then fairness would require the availability to such an applicant of 'an opportunity of persuading the deciding authority that he or she is personally credible in the matter' (*SUN (South Africa) v. Refugee Applications Commissioner* [2013] 2 IR 555).

32. The Supreme Court in *Ezeani and Another v. Minister for Justice, Equality and Law Reform & Ors* [2011] IESC 23 ('*Ezeani*') confirmed that fair procedures require the parties

¹³ Regulation 11(2).

concerned to be aware of the substance of matters which are adverse to their interests, and to have an opportunity to respond thereto. It is not always necessary to have an oral stage to the decision-maker's process. In *Ezeani*, Fennelly J. noted (at para. 39) that the 'requirements of fair procedures are not set in stone' and that the 'overriding requirement is that the person affected be given reasonable notice of matters which are of concern to the decision maker'. An administrative procedure is not adapted 'for the intervention of the intrinsically adversarial procedure of cross-examination'. In Fennelly J.'s view, requiring the administrative decision-maker to devise procedures approximating to a courtroom would be 'a drastic step', and 'cumbersome, potentially lengthy and inconvenient and would open up further avenues for judicial review' (*Ezeani* at para. 44).

33. The parties to this appeal referred the Court to some additional cases, including, *Casey v. Minister for Housing* ([2021] IESC 42) ('*Casey*') and *Environmental Trust Ireland v. Bord Pleanála* ([2022] IEHC 540) ('*ETI*') on the requirement that the rules governing pleadings in judicial review proceedings be applied, strictly. *Balz v. An Bord Pleanála* ([2020] 1 ILRM 367) was cited as authority for the requirement that a decision-maker must address relevant submissions made during the decision-making process. The Court was also referred to Case C-417/11 *Bamba* ([EU:C: 2012:718]), *S v. Minister for Justice* ([2020] IESC 48) ('*S*'), *AKS v. The Minister for Justice* ([2023] IEHC 1) ('*AKS*'), *Saneechur v. Minister for Justice and Equality* ([2021] IEHC 356) ('*Saneechur*'), *RA v. Minister for Justice* ([2022] IEHC 378) and *SSA v. Minister for Justice* ([2023] IEHC 32). Finally, in addition to *BB & ors v. Minister for Justice* ([2022] IEHC 536) and *Irish Bank Resolution Corporation v. McCaughey* ([2014] IESC 44), this Court's recent judgment in *Abbas v. Minister for Justice and Equality* ([2021] IECA 16) ('*Abbas*') was relied upon by the respondent to confirm that the Minister is not required to accept mere assertions made on affidavit in the absence of supporting evidence.

Discussion

34. The appellants contend that several issues fall to be decided in this appeal and they set these out as nine alleged errors on the part of the trial judge referring, in this regard, to: - his holding that the Minister's finding on the marriage of convenience was reached in accordance with law; his finding that the Minister engaged adequately with the appellants' case; his finding that the Minister did not act unlawfully in failing to interview both parties to the marriage; his finding as to the sufficiency of one interview with one party; his finding that there was no obligation to interview the other party; and his finding that the decision-maker had considered all the information and submissions (because the impugned decision said so). The appellants also say that the trial judge erred by not rejecting a submission to the effect that he was not bound by the High Court's ruling in *ZK* (which was then under appeal) and by departing from that ruling which had held that where a credibility assessment was made in the context of a marriage of convenience finding, then an oral hearing was required. They say he also erred in characterising JK's affidavit as '*mere assertion*'.

35. There is considerable overlap in the matters complained of by the appellants and I do not propose to traverse each one in turn. As already noted, the central issue is whether the trial judge erred in determining that the Minister's impugned decision was made in accordance with law. In considering the requirements of natural and constitutional justice, it is imperative to recall that the issue before the Court is *not* whether the Minister was correct in her decision that the appellants' marriage was one of convenience and could, therefore, be disregarded as a factor in her determination of SK's application. It is, rather, whether the process which led to the Minister's determination was vitiated by an error of such significance that the impugned decision ought to be set aside. That is the central issue on which the appeal turns.

36. It is fair to say that the principal complaint of the appellants concerns the failure to conduct an oral hearing with SK prior to deciding that hers was a marriage of convenience and thus one that could be '*disregarded*' as a factor in the Minister's determination. Second to that is their complaint that the Minister failed to consider all of the information and submissions that had been made to her during the course of the application. Since this Court has already allowed an appeal in respect of the High Court's ruling in *ZK*, I do not propose to address the appellants' complaints concerning the trial judge's alleged failure to consider himself bound by that ruling.

On the Absence of an Oral Hearing or Interview

37. Whether natural and constitutional justice will require an oral component will depend, invariably, on the facts of a given case and, as held by this Court in *ZK*, there are several matters that will fall to be considered when examining whether an oral hearing is required. These include the legal framework within which an administrative decision was taken, the subject matter of that decision, the overall circumstances of a given case, the nature of the inquiry undertaken by the decision-maker and, whether an oral hearing was requested before the impugned decision was made (*Galvin*).

On the Failure to Request an Oral Hearing or Interview

38. The appellants say that the finding that theirs was a marriage of convenience was '*irreparably and fatally tainted*' by a lack of fair procedures evident in the fact that SK was not afforded an oral hearing or interview. They say that by not engaging with SK's request for an oral hearing/interview, the Minister denied SK an equivalent opportunity to put

forward her case, *pari passu*, in circumstances where JK's GNIB interview had been used against SK.¹⁴

39. The respondent takes issue with this contention on two fronts. First, the Minister submits that the first time that any reference was made to a '*request for an oral hearing*' (as distinct from an interview) was in the appeal, such a point not having been argued before the High Court and leave not having been granted on such ground. The Minister makes a preliminary objection to this and relies upon several authorities, including *ETI* and *Casey*, to argue that the Court should adopt a strict approach to the rules governing pleadings in judicial review proceedings. In the Minister's view, no request for an oral hearing was made at any stage of the process that led to the impugned decision.

40. Second, insofar as the appellants' claim is based on the suggestion in correspondence that the appellants '*would be happy to attend an interview together*', the Minister makes several points. That suggestion was made, not to impugn the fairness of the process, but in order to confirm the couple's familiarity with each other and in the context of a claim that they had cohabited together '*for many years*'. This, the Minister submits, is not the same thing as is now being suggested, namely, that the first appellant requested an oral hearing at the review stage '*as a matter of fair procedures*'. Nor did the solicitors who later came on record for SK suggest that an oral hearing or interview was required in order for fair procedures to be observed.

41. Having reviewed the correspondence on file and bearing in mind the appellants' failure to identify when such a '*request*' was made, I am satisfied that it has not been established that SK requested an oral hearing in advance of the impugned decision. No such request, whether '*at the review stage*' or at all, is evident in the correspondence

¹⁴ Emphasis here and throughout the judgment is mine unless otherwise indicated.

before the Court. At best, a willingness (not a request) to demonstrate the appellants' alleged familiarity with each other was expressed but this was not in the context of challenging the fairness of the process being undertaken by the Minister. I am further satisfied that leave to seek judicial review was not granted in respect of any ground relating to the absence of an oral hearing. Pleadings matter and in judicial review proceedings the rules in respect of pleadings should not be applied in a loose or slipshod manner.

42. Notwithstanding my finding in this regard and whilst acknowledging that a failure to request an oral hearing or interview could be fatal to a subsequent challenge in certain circumstances, I do not consider that the appellants' failure to request an oral hearing or interview, in this case, is, in itself, determinative of the appeal. As in *ZK*, I consider that it is but one of several factors to be weighed in the balance when determining the requirements of natural and constitutional justice. It is, in my view, a material consideration of which account should be taken when determining the overall fairness of the decision-making process.

43. The weight to be attributed to that consideration is influenced by several factors. As in *ZK*, the first appellant in this case was represented, at every stage of the process, by solicitors who are experienced immigration lawyers. Nevertheless, she elected to wait until the review decision had issued before raising any complaint about the absence of an oral component. Moreover, SK could not but have been aware that well-founded concerns existed on the part of the Minister as to the genuineness of her marriage to JK and that the evidence she submitted to allay those concerns was, at a minimum, problematic. Once notified of the Minister's doubts, SK was '*at large*' with regard to the information she could choose to present (see *mutatis mutandis Rehman v. Minister for Justice and Equality* [2018] IEHC 779). Apart from some correspondence relating to JK's

work and tax situation (sent mainly to show an error in the date when he was alleged to have left Ireland for Latvia) and some evidence of joint travel some years after she had separated from JK, the height of what SK offered by way of evidence of a genuine marriage was a short affidavit from JK denying the statements attributed to him in the GNIB interview but without offering any evidence as to what it was that he *did* say.

44. SK was not entitled to presume that this would be sufficient to dispel the Minister's well-founded concerns. It should have been clear to her and to her solicitors that the probative value of the evidence adduced in respect of a genuine marriage was tenuous, to say the least. If, in the light of the evidence she had at her disposal, SK considered that the Minister could not make a decision, fairly, without an oral component, then she was obliged to have indicated this and to have requested to be heard in person. Since the appellants now contend that constitutional fairness required the holding of an oral hearing, it was incumbent upon them, in my view, to have said so at the relevant time.

45. If such a request had been made, that would have provided the Minister with an opportunity to consider it and to reflect upon the reasons provided for same. In the face of the appellants' silence, the Minister was entitled to follow her established practice and to proceed to a full consideration of all the information, submissions and documentation which had been gathered during the course of the investigation.

46. Any applicant seeking to impugn a process based on an alleged unfairness in procedures is required, in principle, to alert the decision-maker to the unfairness alleged. Applicants are not entitled to '*sleep on their rights*'. As observed by this Court in *ZK*, the notion that an applicant, advised by lawyers, may remain silent and wait for a process to conclude before raising any complaint about the fairness thereof is, quite simply, untenable. The failure on the part of SK to request an oral hearing or interview, in this case, is a significant factor, in my view, in that it suggests that neither she nor her solicitor

considered that the procedure in which she was engaged was unfair for want of an opportunity to participate, meaningfully, and to be heard in the decision-making process.

On the Legislation Governing the Impugned Decision

47. The legislative framework within which the Minister's determination was made has been set out in detail and considered by this Court in *ZK*. The parties agree that there is no express provision mandating the holding of an oral hearing in the Directive or the 2015 Regulations. Whilst conceding that it may not always be necessary to hold an oral hearing to secure fairness, the appellants say that, in this case, there was an obligation on the Minister to conduct an oral hearing in order to adhere to the principles of natural and constitutional justice.

48. An oral hearing does not arise as a 'right' under the Directive or the 2015 Regulations and, subject to compliance with certain procedural safeguards, the Minister is entitled to reach a determination on the basis of a paper-based assessment. That said, there is nothing in either instrument to prohibit the Minister from inviting an individual to an interview if, in the exercise of her ministerial discretion, she considered that fair procedures required an oral component in any given case.

49. The Minister was, of course, at all times under an obligation to observe fair procedures so as to ensure that the appellants had an opportunity to address any well-founded concerns that arose and to respond, fully, thereto. Any measure taken by a Member State in cases involving an abuse of rights must comply with the procedural safeguards set out in Articles 30 and 31 of the Directive. Those procedural safeguards are, in turn, reflected in the 2015 Regulations.¹⁵ Having reviewed the papers in this

¹⁵ See, in particular, the provisions of Regulations 25, 27 and 28 of the 2015 Regulations.

appeal and considered the submissions of the parties, it is clear that the process by which the impugned decision was made, involved a number of procedural steps. These included the issuing of a proposal letter to the first appellant, an invitation to SK to address the concerns raised by the Minister therein, a first instance decision issued in the light of SK's response, together with confirmation of the right to request a review of that decision which said right SK, in turn, chose to exercise. The Minister's review decision issued only after SK had been invited to, and did, provide further input and information, through her legal representatives. I am satisfied that the decision-making process in this case incorporated all the required procedural safeguards as set out in Articles 30 and 31 of the Directive and that the impugned decision was taken only after SK had been offered an opportunity to be heard at each stage of the process.

On the Subject Matter of the Decision

50. The Minister's determination of an application for renewal of residence under the 2015 Regulations falls within the ambit of the State's right to control its immigration procedures and to curtail a potential abuse of rights. Self-evidently, the subject matter of the decision was of significance both to the Minister and to the appellants.

51. In submitting that an oral hearing ought to have been conducted, the appellants argue that since there is an actual marriage in existence, the finding of a marriage of convenience constitutes '*a denial of a formal position*'. Relying on the Supreme Court's judgment in *Zalewski v. An Adjudication Officer and Ors.* [2021] IESC 24 ('*Zalewski*'), the appellants submit that the '*decision to declare the marriage to be in effect invalid for all purposes, or at least for all relevant immigration law purposes, involved the administration of justice*' and that there was '*no involvement of the courts*'.

52. The appellants further contend that the impugned decision concerns '*fundamental rights*' and that the denial of EU Treaty rights may have '*extremely serious consequences*' for the persons concerned. Additionally, they say that a '*bad character*' finding has been made against SK and, notwithstanding that she has since been granted permission to remain in the State, that '*bad character*' finding will have '*downstream consequences for any future immigration applications*', including, an application for citizenship. For his part, JK maintained before the High Court that the decision implicates him in '*a very dishonest enterprise*'. Citing *Lawlor v. Flood* [1999] 3 IR 97, *Saneechur, Damache v. Minister for Justice* [2021] 1 ILRM 121, *UP v. Minister for Justice* [2014] IEHC 567, *Odum & ors v. The Minister for Justice and Equality* [2023] IESC 3 and *S*, the appellants submit that given the adverse effect of the Minister's decision upon them, the onus was on the Minister to establish and defend her position, to probe the contradictions in JK's stance and to conduct '*a rigorous investigation*' which included an oral process (*MM*). SK, they submit, was entitled to '*the full panoply of rights of procedural protections*' because she had been accused of serious misconduct.

53. It is necessary to clarify that a finding of a marriage of convenience made within the context of a determination under the Directive and 2015 Regulations does not constitute a general finding in respect of the '*validity*' of a marriage, nor is it, as the appellants contend, a declaration that, effectively, the marriage is '*invalid for all purposes*'. The Supreme Court in *S* corrected an error on the part of the High Court as to the consequence of such a finding. In *S*, the Minister had determined that the applicant had entered into a marriage of convenience. That finding was never challenged by *S*. He did challenge a later deportation order that had been made against him, complaining that it had been made without any prior consideration of his rights under Article 8 of the European Convention on Human Rights ('the Convention'). In the High Court, Humphreys J. found

that the Civil Registration (Amendment) Act, 2014 provided that a marriage of convenience was a 'nullity' and that the unchallenged finding in respect of S's marriage meant that no rights could arise out of the relationship which could then be asserted. On appeal, the High Court's ruling was set aside.

54. The Supreme Court (McKechnie J.) in *S* confirmed that it was not the appropriate case in which the legal question of whether a finding of a marriage of convenience means that a marriage is a nullity, fell to be determined. At para. 111 of the judgment, he stated as follows:

*"I would hold (i) that the Minister's determination (made in the context of the residence application under the 2015 Regulations) that a marriage is one of convenience, may be relied upon by the Minister in the context of the subsequent deportation process; (ii) that the said determination made by the Minister under the 2015 Regulations **does not have the effect of rendering that marriage a nullity at law**; rather, such determination is limited to the immigration/deportation context the sole consequence thereof is that it entitles the Minister to "disregard" the marriage in the very specific context as set out above; and (iii) although the Minister is entitled to import the earlier decision into the deportation process, he must nonetheless have regard, in operating that process, to the Article 8 rights of the Appellants as founded on the underlying relationship between the parties; [. . .]."*

55. It is clear from the judgment of the Supreme Court in *S* that the Minister's competence to deem a marriage one of convenience is for the sole purpose of deciding whether the marriage should be 'disregarded' as a factor in deciding an application for residence. The Minister can 'go no further' than to 'disregard' or 'ignore' the marriage for the purpose of making such a determination. McKechnie J. was satisfied that, in *S*, the Minister, quite rightly, in making a finding under the 2015 Regulations, did not purport to make any consequent far-reaching decision that the marriage in question was a nullity at law.

56. I am equally satisfied with respect to the impugned decision in this case. The Minister's decision, in my view, does not purport to make the type of far-reaching finding contended for by the appellants and, in my view, their reliance on *AKS* does not assist them in this appeal. That case concerned a minor whose right to citizenship, it was argued, was impacted by the Minister's finding that her father had entered a marriage of convenience and, on its facts, is entirely distinguishable from the issue arising in this appeal. Nor does the Minister's decision constitute '*the administration of the justice*' as asserted by the appellants. It was, in my view, the lawful exercise of a statutory discretion conferred upon the Minister and reviewable by the courts and, in this regard, I am satisfied that the appellants' reliance on *Zalewski* is also misplaced. There is no evidence, whatsoever, in this case that the Minister's finding went beyond disregarding SK's marriage to JK for the sole purpose of determining SK's application for renewal of residence based on an asserted EU-based derived right of residence under the Directive.

57. Nor, indeed, has the stage been reached where an alleged breach of the appellants' rights, if any, under Article 8 of the Convention falls to be considered. The Minister '*disregarded*' the marriage as a factor in determining SK's application for residence. She did no more than that. Whilst any measure taken by Member States in cases of abuse of rights must be proportionate (Article 35) and subject to the procedural safeguards set out in Articles 30 and 31, it would be inappropriate, in my view, to impugn the review decision because it was not preceded by the type of assessment that would be required if the appellants' Article 8 Convention rights were engaged. If, as in *S*, the Minister were to proceed to import the review decision into any future deportation process, then she would, at that stage, be obliged to have regard to any Article 8 rights asserted by the appellants on the basis of their relationship. That was acknowledged by the Minister in the penultimate paragraph of the impugned decision wherein it is stated, unequivocally,

that in any subsequent proposed decision where an interference with Constitutional or Convention rights may arise, *'a full and proper consideration'* will be given to such rights. That stage has not been reached and, as already noted, SK has since been granted permission to remain in the State under the Long-Term Undocumented Migrants' Scheme.

58. As to the *'serious consequences'* argument advanced to support the claim that fair procedures required that an oral hearing be held in advance of the impugned decision, that argument has already been considered by this Court in *ZK*. Serious consequences may arise, immediately or *'downstream'*, for any person whose permission to reside in the State is revoked because of an abuse of rights. As matters stand, however, there would appear to be no immediate impediment to SK's lawful residence in the State based on the permission granted to her as a long-term undocumented migrant. In any event, the mere fact that adverse consequences flow from the revocation of residence is not, in itself, a basis for contending that the person affected is entitled, automatically, to an oral hearing as part of the decision-making process. The same can be said in respect of the fact that the Minister's decision reflected, indirectly, upon the first appellant's credibility (*Ezeani*). That, in itself, does not require that an administrative decision-making process has imported into it *'the application of criminal-trial-type rights as in In re Haughey'* (*Shatter v. Guerin* [2021] 2 IR 415 (*'Shatter'*), at p. 537). What is required is that the decision-making process be fair.

On the Overall Circumstances of the Case

59. The Commission's *Handbook* endorses what might be described as a *'holistic'* approach to the evidence before the decision-maker. The evidence collected must be

considered *'in its entirety'* and assessments must be founded *'on a combination of all information collected during the course of investigation'*.

60. In this case, it is true that JK's bank statements, tax certificates, letters of support, photographs and evidence of travel were submitted by SK to allay the Minister's concerns. However, alongside such evidence certain 'objective matters' were particularly striking, principal among which were JK's admissions made during the GNIB interview. His affidavit in which he subsequently denied the statements attributed to him at interview exhibited nothing by way of evidence to support his denial, which is a matter to which I will return.

61. There were also other objective factors that were weighed in the decision-making process, including, the failure on the part of SK to provide any evidence of the alleged relationship and cohabitation prior to the marriage together with the very close proximity of the date of the marriage to the date of the expiry of SK's student visa.

62. Additionally, there were the factors set out (at para. 71) by Ferriter J. in his judgment. They included *'the accelerated nature of the relationship, the fact that the second applicant had fathered a child by another woman during the course of the relatively short marriage relationship and was in a relationship with that woman, the absence of a body of evidence supporting an ongoing intimate emotional relationship between the applicants (such as texts, photos, regular romantic social outings)'*. It is difficult to disagree with the trial judge's view that such objective factors *'very much supported the account of the marriage given by [JK] at interview'* and that this interview *'lay at the core'* of the review decision.

63. In view of the overall circumstances of the case, it was well within the scope of the Minister's discretion to accord significant weight to all the objective factors outlined above when determining SK's application for renewal of residence.

On the Nature of the Inquiry

64. It is important to note, as emphasised in *ZK*, that the nature of the inquiry in issue under the 2015 Regulations is not of the type to be found in a criminal investigation and, when it comes to administrative decision-making processes, ‘*an endless slide into the application of criminal-trial-type rights as in In re Haughey [1971] IR 217*’ is to be avoided’ (see *Shatter* at p. 537, and *Ezeani*).

65. As I see it, the ‘road map’ in the administrative inquiry at issue herein under the 2015 Regulations may be summarised as follows. The starting point is that an applicant enjoys the benefit of the assumption that his or hers is a genuine marriage without being obliged to prove as much. However, the Minister may have a well-founded suspicion that the marriage is one of convenience. Where this occurs, the Minister sets out her concerns, in writing, and invites an applicant to produce further information or evidence sufficient to dispel such concerns. An applicant, at this point, is obliged to cooperate with such a request for further information or, as Richards L.J. put it in *Rosa v. Home Secretary* [2016] 1 WLR 1206 at para. 27, ‘*the evidential burden shifts to the applicant*’. The Minister then considers whether the further information provided is sufficient to dispel her concerns and, if it is, the inquiry ends there. If it is not, the applicant’s failure to provide such evidence may be taken into account with all other relevant circumstances in assessing the genuineness or otherwise of the marriage.¹⁶

66. The appellants contend that because JK’s position was found to be contradictory, this ought to have prompted the Minister to extend an invitation to SK to attend for an oral interview so as ‘*to find out the reasons for the contradiction*’ as well as to provide ‘*an equal opportunity*’ to SK, given that JK had already been interviewed by GNIB. Relying on

¹⁶ The Commission’s *Handbook*, s. 3.2, p. 28.

the High Court's ruling in *ZK* and citing *Galvin*, they say that the conflict of facts between them, in the context of a marriage of convenience, '*could only have been resolved by both being afforded an oral interview*'. I find this argument unconvincing.

67. As the trial judge noted, correctly, the case before the court below was *not* that SK and JK had given materially different accounts. On the contrary, it was their case that they were *ad idem* as to the genuineness of the marriage and that it was the GNIB interview that should be disregarded. There was, therefore, no conflict of fact between the parties that could only be resolved by the Minister preferring one party's version over the other's. This was not a case involving an assessment of credibility in the '*classic sense*' as described by O'Donnell J. (as he then was) in *MM*. This was a case in which the Minister had a unanimous account of the marriage from the parties concerned. As the trial judge observed, the type of material conflict as to fact between the parties to the marriage which might necessitate an oral interview or other oral process in an appropriate case did not arise on the facts in this one.

68. Apart from the absence of any conflict between the parties, in conducting the inquiry in this case the Minister was confronted with additional and compelling information in the form of the report provided by GNIB. It was for the parties to explain why JK's signed statement, which had been made under caution, should be disregarded. Apart from an assertion denying that he had made it, no explanation was offered as to how that statement had come about nor, as already noted, was anything exhibited in JK's affidavit to support his contention that GNIB had incorrectly recorded what he had stated. One might, for example, have expected that having left the GNIB interview, he might have texted or messaged SK to apprise her of what had transpired and to inform her of what he had said, particularly, given that '*the couple still have a large amount of emotional attachment to each other*'. Yet not even something as basic as this was exhibited to

support his denial of the statements attributed to him. Instead, there was a mere reiteration of his earlier 'signed statement'.

69. Moreover, notwithstanding an assertion that the couple had been '*cohabiting as spouses for many years*', there was nothing by way of persuasive evidence of the couple's joint residence either prior to or during the tenure of the marriage. Even allowing for the claim that SK had changed her phone and had not kept her messaging records, the Minister was confronted with a dearth of evidence that a genuine couple might, reasonably, be expected to have had, such as, shared utility bills or other financial transactions to show that the marriage was a genuine one (*Pervaiz v. Minister for Justice & Equality* [2020] IESC 27). It is implausible, in my view, that nothing more by way of documentary evidence would have been available to the parties as objective verification of the genuine nature of their marriage during which they had, as the *Handbook* puts it, '*jointly administered their household*'.¹⁷

70. It is in the context of the foregoing that the question of the inquiry's overall fairness falls to be considered and, in particular, whether the failure to provide an oral component thereto rendered the decision-making process unfair. There being no contradictory testimony between the parties to the marriage, the Minister was engaged in an assessment of all of the information and evidence that was before her. If the appellants lacked more persuasive and convincing evidence to dispel the Minister's concerns, then that speaks for itself. The trial judge came to the view that, having rejected the arguments advanced by SK as to the reliability of the contents of the interview, it was open to the decision-maker to proceed on the basis of all the material that was before the Minister

¹⁷ The Commission's *Handbook*, s. 4.5, p. 42.

without the necessity, as a matter of fair procedures, to orally interview the first appellant.

71. I agree. The trial judge was entirely correct to find that the approach taken by the Minister did not constitute an unlawful shifting of the burden of proof and I find no error of law in this regard. The Minister was entitled to seek further information from SK in the light of her well-founded suspicion about the genuineness of the marriage. The first appellant was not deprived of an opportunity of persuading the Minister that she was credible, and I find that there was ample occasion for SK to provide objective evidence to show that the marriage was genuine. An ‘*opportunity*’ to persuade is not to be equated with an invitation to meet the decision-maker, in person, in order to have matters other than objective evidence, such as, personality, general appearance or demeanour, assessed.

72. The conditions for providing an opportunity to persuade are met where the reasons for a decision-maker’s concerns about an applicant’s account are put, clearly, before the individual in question and where he or she is then invited to address and dispel those concerns (*Ezeani*). Where, as here, there is a failure on the part of an applicant to provide evidence sufficient to dispel the Minister’s well-founded suspicions, the Minister is entitled to take that failure into account in combination with the entirety of the information collected during the decision-making process.¹⁸

The Alleged Failure to Consider All Information and Submissions

73. The appellants complain that in reaching her determination on SK’s application for renewal of residence, the Minister failed to consider, properly, or at all, several matters

¹⁸ The Commission’s *Handbook*, s. 3.2, p. 28.

and submissions that had been placed before her. They say that the trial judge, wrongly, found that the impugned decision's recitation that all information, documentation and submissions on file had been considered, was proof of same. They also point to errors in the impugned decision which, they say, demonstrate a lack of care in how the decision was reached.

74. For her part, the Minister submits that the claim in respect of the alleged failure to engage with submissions is not borne out by the evidence. Having been sent the 'fair procedures' letter prior to any decision being made, the first appellant offered only a '*mere denial*' coupled with a repeatedly cited legal point that '*the onus fell on the Minister*'. Instead of providing contemporaneous evidence of the genuineness of the marriage, the approach taken was not to avail of the opportunity to furnish evidence to the Minister but simply to deny and point to the fact that the onus fell on the Minister to prove that the marriage was one of convenience.

75. The trial judge addressed the issue of typographical errors in some of the correspondence emanating from the Minister and noted that the appellants' counsel had characterised the decision as '*sloppy*'. Whilst Ferriter J. accepted that there was some force to the contention that greater care should have been taken to ensure that material dates in the decision were correct, he did not think that the errors were such as to vitiate the lawfulness of the decision. I agree with his observation and conclusion in this respect.

76. I have already noted that once SK had been invited to provide further evidence to dispel the Minister's concerns about the genuineness of the marriage, the Minister was entitled to '*require*' such information as was reasonably necessary to satisfy her that the marriage was not one of convenience.¹⁹ Having reviewed and considered all the papers

¹⁹ Regulation 28(2).

in this appeal, it strikes me as somewhat remarkable that so little evidence as to the genuineness of the marriage was placed before the Minister in response to her 'fair procedures letter' which set out her concerns. The same can be said in respect of the material placed before the Minister upon SK's request for a review of the first instance decision. That is not to say that there was nothing at all put forward by the appellants but rather, that what was submitted could not be said to be of high probative value when viewed against the other information that was before the Minister together with other objective factors. At its height, the evidence of SK consisted of some correspondence addressed to JK at SK's address, an amended tax credit certificate for 2014 showing a joint assessment (which was not among the papers before the Court), wedding photographs, boarding passes for joint travel several years after JK had moved out and a short affidavit of JK denying the contents of the GNIB interview.

77. Against that there was the significant evidence in the form of the GNIB report, the objective factors in respect of JK's relationship with his Latvian partner and the fathering of their child during the course of the marriage to SK, together with the dearth of any persuasive evidence in respect of the appellants' joint residence and administration of their household. It was for the Minister to exercise her discretion in a considered fashion and to reach a decision on the basis of an assessment of all of the evidence, information, submissions and circumstances that presented in the instant case. It is not for this Court to second guess the Minister's assessment or to substitute its view for the view of the Minister. The trial judge was correct, in my view, when he held that just because specific materials are not discussed in an administrative decision, that, in itself, does not mean that the materials submitted were not considered.

78. Whilst an appeal against the decision to which Ferriter J. referred (see para. 21 above), has since been allowed by this Court, I am satisfied that the narrow basis on which

that appeal was allowed does not arise here. In *SR and LA v. The Minister for Justice* [2023] IECA 227 (hereinafter, 'SR'), Faherty J. (for the majority) confirmed (at para. 72) that the issue in the case was whether the appellants had demonstrated that they fell within the criteria for the State's Special Scheme for Students. In her judgment, she held that the presumption that the decision-maker had considered all the material submitted by the appellants had been displaced. This was because the penultimate paragraph of each of the impugned decisions suggested that the review engaged in by the decision-maker was something less than what was required. The assurance given (that all the documentation had been considered) was undermined by the penultimate paragraph of each review decision, '*by dint of the review decision-makers' statement that she arrived at her decision by reviewing the procedures applied by the first instance decision-maker*' (para. 126). On the face of the impugned decisions there was '*uncertainty*' as to whether there had been any engagement with the '*merits*' of the appellants' submissions. Faherty J. also found that it was not the function of the trial judge to opine on the merits of the appellants' case as made in their review applications. It was, thus, on the '*narrow basis*' that arose in that case that she allowed the appeals in *SR* and directed that the review applications be remitted for re-consideration.

79. The impugned decision in SK's application for renewal of residence not only expressly confirmed that the decision-maker considered all of the material and submissions lodged in the matter but identified many of the documents (the marriage contract, the utility bills, bank statements and JK's affidavit) which had been provided in support thereof. The Minister's decision was not cast in '*boiler plate language*' (see concurring judgment of Haughton J. in *SR* at para. 12). Having considered and probed all the information and evidence provided and having viewed that evidence in the light of

the overall circumstances, the Minister was not satisfied that what SK had submitted was sufficient to persuade her that the marriage was not a marriage of convenience.

80. The judgment of the High Court shows that the trial judge examined, carefully, the appellants' complaints about the alleged failure to engage with '*countervailing indicators which pointed to a genuine relationship*'. He demonstrated that the impugned decision, from its terms, had engaged with their case and with what their case lacked in material respects when viewed in the light of other material that was before the Minister. He also addressed, specifically, the challenge made in respect of the reliability of JK's alleged admissions during the GNIB interview by assessing, first, the claim that JK's denial had been placed on affidavit. He was correct, in my view, to find, *per Abbas*, that it was open to the decision-maker to regard the contents of JK's affidavit as mere assertion and that there was no evidence to show that JK's statements at interview were an inaccurate representation of the facts. The trial judge then went on to assess the second challenge made by the appellants in respect of the reliability of the GNIB interview, namely, that JK had limited English and ought to have been offered an interpreter. The trial judge was correct to find that the decision-maker could perfectly legitimately rely on the material before her which indicated that both appellants spoke English and that JK had answered '*No*' when asked by the GNIB interviewer if he needed an interpreter.

81. The Minister was entitled to consider the evidence and the dearth of evidence that was before her and to take that into account when reaching her decision on the genuineness of the appellants' marriage. Having reached that decision, she was then entitled under the 2015 Regulations to disregard the marriage as a factor in her determination of SK's application for renewal of residence.

82. I find no error in the trial judge's rejection of the appellants' claim that the Minister had failed to engage properly with the case that was before her and I, too, am satisfied

that the appellants have not established that there was any want of fair procedures in this regard.

Summary

83. In view of the foregoing, I am satisfied that the trial judge was correct in his finding that SK was not entitled, as a matter of fair procedures, to the exceptional measure of an oral interview prior to the Minister's decision in this case. The approach adopted by the Minister did not constitute an improper reversal of the burden of proof. The Minister's decision to reject SK's application for a renewal of a residence card and to revoke the one previously issued, was not vitiated by error for having been made in the absence of an oral process or for any want of engagement with the appellants' case.

84. The legal basis of the Minister's decision was clear, and the procedural safeguards required by law were observed. The first appellant was notified of the Minister's proposed decision, in writing, and in such a way as to enable her to comprehend its content and its implications. She was informed of the matters which gave rise to the Minister's well-founded suspicion that her marriage may have been one of convenience and was afforded a meaningful opportunity to provide additional information and evidence to dispel the Minister's concerns and to furnish any explanations or representations she wished to make in relation thereto.

85. The first appellant was advised by solicitors at each stage of the process. Having been notified of the Minister's well-founded suspicion as to the genuineness of the marriage, she was under an obligation to provide the Minister with information or evidence to dispel her concerns. The fact that no evidence was provided to support JK's mere denial of serious admissions attributed to him during an interview with GNIB and that such other evidence as was provided by the appellants was of such low probative

value in support of their claim of a genuine marriage, were matters within the control of the appellants. That the evidence and explanations provided were found, reasonably, to be unconvincing is not a reason to impugn the Minister's decision.

86. The Minister's determination in respect of SK's application for renewal of residence was made having taken into account SK's failure to provide information or evidence to dispel the Minister's concerns, and in combination with all of the other relevant information which had been collected during the course of the investigation.

87. The appellants' failure to identify the evidence or matters which SK would have raised at interview but which she could not address in writing is a material consideration in determining the fairness of the procedures involved. The fact that SK did not request to be interviewed prior to the impugned decision, whilst not determinative of the appeal, is also a material consideration in that it suggests that SK herself did not regard the process as in any way prohibiting her from participating, meaningfully, in the decision-making procedure.

88. Finally, the trial judge was correct to find that the appellants had not established that the Minister's decision was vitiated by error because of a failure to engage with their case.

Decision

89. In view of the foregoing, the appellants have not made out a case of unlawfulness in the Minister's determination made under the 2015 Regulations or in the decision-making process on which that determination was based. There was a sufficient basis before the Minister which entitled her to reach the decision that was made and the appellants' right to natural and constitutional justice was not breached by the failure to provide for an oral component in the decision-making process. The Minister's decision to uphold the

revocation of the applicant's residence card was not vitiated by an error amounting to a denial of constitutional justice.

90. For the reasons set out above, I am satisfied that there was no error on the part of the trial judge in refusing the relief sought by the appellants in their judicial review proceedings.

91. The appeal is, therefore, refused.

92. As the appellants have failed in their appeal, it is my provisional view that the Minister is entitled to her costs. Should the appellants wish to contend otherwise, they should apply to the Registrar within 21 days for a hearing date to deal with the issue of costs.

93. As this judgment is delivered electronically, Donnelly J. and Ní Raifeartaigh J. have indicated their agreement with the reasoning and the conclusions reached herein.

APPROVED