THE HIGH COURT

[2022] IEHC 582

[2020/965 JR]

BETWEEN

K.

APPLICANT

AND

MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Bolger delivered on the 21st day of October 2022

1. The applicant is a national of Pakistan who seeks an order of *certiorari* quashing the review decision of the Minister dated 18 September 2020 which found firstly that the applicant's marriage to an EU citizen was a marriage of convenience in breach of Regulation 28 of the European Communities (Free Movement Of Persons) Regulations 2015 and secondly that the applicant had submitted false and misleading documentation in support of his application in February 2015 for a residence card which constituted a fraudulent act. The Minister therefore affirmed an earlier decision to revoke the applicant's residence card in accordance with Regulation 27 (1) and Article 35 of the Directive 2004/38/EC.

2. For the reasons set out below I am granting an order for *certiorari* quashing the decision of 18 September 2020.

Background

3. The applicant is a national of Pakistan and has been in the State since 16 June 2004, having arrived here first on a student visa. He married a Latvian citizen of the EU on 15 November 2005 and applied for a residence card on 12 June 2006. In May 2007 he was granted a five-year permission to reside in the State.

4. The applicant was divorced by his then wife by way of an application to the District Court in Riga on 26 May 2008 which was finalised on 26 January 2009. In September 2012 the Minister made a deportation order against him.

5. On 14 May 2014 the applicant married another Latvian citizen in Dublin and on 23 April 2014 he made a further application for a residence card. He was notified in September 2014 that the deportation order made against him had been revoked and on 16 October 2019 he received his five-year permission to reside in the State. This residence card expired in October 2019 and on 1 November 2019 the applicant made an application for a further permission. On 11 December 2019 the Minister advised him of her intention to revoke his expired residence card due to his spouse not having exercised her rights in the State since 2015, and the Minister's opinion that the information furnished by the applicant to evidence his spouse's residence in the State and her exercise of her rights in

the State were false and misleading, and that the marriage was one of convenience. On 21 January 2020, the applicant's residence permission was revoked by a deciding officer on the basis that his spouse had not exercised her rights in the State since 2015, that he had entered into a marriage of convenience contrary to Regulation 28, and had given false and misleading information contrary to Regulation 27.

6. On 11 February 2020 the applicant sought a review of the deciding officer decision and furnished a submission via his solicitors on 8 February 2020 and a later personal letter in which he refuted that his marriage was one of convenience and explained why his spouse had left Ireland in 2015. He included documentation confirming his spouse's residence and employment in Ireland up to 2015. His submission challenged the Minister's requirement for him to discharge the burden of proving that his marriage was a genuine one and highlighted the Minister's failure to have regard to Regulation 28 (5) which identifies matters to determine a marriage to be one of convenience.

7. The review decision issued on 18 November 2020 and confirmed that the applicant had submitted additional documentation and that all of the documents and information in the applicant's files had been considered. The decision found:

    i. That the applicant's marriage was one of convenience in accordance with Regulation 28 and

    ii. That the applicant had submitted false and misleading documentation in support of his application February 2016 for a residence card and this constituted a fraudulent act.

    The earlier decision of the deciding officer to revoke the applicant's residence card was affirmed in accordance with Regulation 27 (1) and Article 35 of the Directive.

8. It is significant that the review decision contained a number of factual errors which the parties agreed are as follows:

    i. Paragraph 3 of page 2, where the Minister noted that at no time throughout the review process has the applicant asserted that his marriage to the EU citizen was not one of convenience nor has he asserted that the documentation and information submitted was not false and misleading.

    ii. Paragraph 4 on page 2 incorrectly identifies the date of the deciding officer decision as 21/02/2020. The correct date was 21/01/2020.

    iii. Paragraph 6 on p. 2 incorrectly identifies the date of the applicant's application for residence card as 27/02/2015. The correct date was 23/04/2014.

9. The error at i. above was addressed by the Minister at para. 4 of her statement of opposition which states as follows:

"While it is accepted that the Respondent's statement that the Applicant had not asserted the validity of his marriage for the purpose of the review process is not correct, any error contained there is not material in the context of these proceedings given that the respondent, in the decision dated 18th September, 2020, confirmed that the finding was based on the decision making *having considered all of the documentation and informed of all of the [the Applicant's] files*".

The applicant's submissions

10. The applicant challenges the Minister's review decision as unreasonable, irrational and a breach of fair procedures on the following grounds.

    1. The review decision wrongly claims that the applicant did not assert that his marriage was not one of convenience or that the documents he submitted were not false and misleading. The applicant had furnished submissions in which he expressly refuted the finding of the deciding officer that the marriage entered into was one of convenience and that false and misleading documentation was submitted. The Minister either ignored the submissions or proceeded on the basis that they were never made.

    2. The applicant does not know what documents and information were found to be false and misleading or how they were deemed to have been false and misleading. The applicant relies on the decisions of *Hill v. Criminal Injuries Compensation Tribunal* [1990] ILRM 36, *AMT v. Revenue Appeals Tribunal* [2004] 2 IR 607, *L. v. Minister for Justice, Equality and Law Reform* [2020] IEHC 362 and *HR v. Refugee Appeals Tribunal* [2011] IEHC 151 in submitting that a court can quash a decision in judicial review for material errors of fact.

    3. The review decision failed to provide reasons or cogent reasoning and/or is void for uncertainty. The applicant relies on the decision of the Court of Appeal in *VK & Ors v. The Minister for Justice, Equality and Law Reform*; *Can & Ors v. The Minister for Justice, Equality and Law Reform* [2019] IECA 232 where the need for cogent reasoning in a case such as this was emphasised and in particular para. 110: "[T]he application of the test must be done in a rational manner and the decision maker must give reason that are transparent and involve an objectively reasonable engagement with the facts".

11. The applicant criticises the Minister for providing retrospective reasons for the decision in her statement of opposition. The applicant highlighted the absence of an affidavit from the decision maker to support the Minister's explanation proffered in the statement of opposition.

12. The applicant further took issue with the explanation proffered at para. 4 of the statement of opposition for the finding that the information was false and misleading and relied on the well settled law that the provision of reasons after the event will not rescue the legality of the decision, citing Humphrey J. in *PS Consulting Engineers Ltd v. Kildare*

County Council [2015] IEHC 113 at para. 109 where he said, "Clearly there can be no retrospective creation of reasons". The applicant further cited Hutchinson J. in *R. v. Westminster City Council Ex Parte Vrakov* [1996] 2 All ER 302 in submitting that the court should be very cautious about submitting evidence to litigate or exceptionally correct or add to the reasons. This dicta was approved by McDermott J. in *GRA v. Minister for Justice Equality and Defence* [2014] IEHC 385 and the Court of Appeal in *MN v. The Minister for Justice and Equality* [2020] IECA 187. The applicant submitted that a proper approach was exemplified by Cooke J. in *JDS (Nigeria) v. The Minister for Justice, Equality and Law Reform* [2012] IEHC 291 where he noted the dicta of McMenamin J. in *Clare County Council v. His Honour Judge Harvey Kenny* [2009] 1 IR 22, [2008] IEHC 177 at para. 53:

> "[A] court in judicial review proceedings cannot act on what must be, at best, a hypothesis as to the possible rationale for the decision, particularly so in the context of the array of possible reasons, some of which would go beyond jurisdiction: this was not a decision where reasoning was desirable. The situation required a decision so that all the parties would be aware precisely of their positions. The reason or rationale for the decision as to jurisdiction unfortunately cannot be inferred by what was said by the respondent."

The Minister's submissions

13. The Minister accepted that there were errors in the review decision but submitted that they did not invalidate or undermine the decision and had no material impact on the validity as the decision maker's analysis was on the basis that the applicant was maintaining the validity of his marriage. The Minister accepted that the applicant had submitted additional documentation to the review process but argued that the applicant's substantive approach to the review was to place the onus on the Minister to vindicate the earlier finding of the deciding officer that the marriage was one of convenience. Counsel for the Minister contended that this was not a substantive response as much (if not all) of the documentation had already been before the deciding officer and that the new documentation forwarded to the review process did not allay the Minister's concerns. In relation to the finding of the review process that the applicant had submitted false and misleading documents, counsel for the Minister in his oral submissions contended that the Minister was saying that the import of the documentation advanced to verify the validity of the marriage was false and misleading as the documents themselves were not forgeries but were assembled to create a false and misleading impression.

14. The Minister submitted that it is well established that judicial review is a discretionary remedy, whereby a court is not compelled to find against a state or public body where an error has been made, once the error does not undermine the overall reasonableness and validity of the decision. The Minister cited *Meadows v. the Minister for Justice* [2010] IESC 3 where Murray C.J. endorsed the reasoning of Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] IR 39, who in turn applied the reasoning of the decision in *State (Keegan) v. Stardust Compensation Tribunal* [1986] IR 642.

15. Specifically regarding asylum law, the Minister submitted that judicial discretion has been applied to uphold findings in circumstances where some infirmities were present in the decision-making process. The decision of Humphreys J. in *Li v. Wang and Minister for Justice and Equality* [2015] IEHC 638 was cited as an example.

16. The Minister submitted that the applicant had failed to properly participate in the process and cited Faherty J. in *Khan v. Minister for Justice, Equality and Law Reform* [2017] IEHC 800 and the decision of Baker J. in the Court of Appeal in *A.R. v. Minister for Justice and Equality* [2019] IECA 328 to confirm an applicant's obligation to engage fully with the immigration process. Here the Minister argues that the applicant did not attempt to address her concerns but instead took a legalistic approach whereby he effectively stood back and placed the Minister on proof that the marriage was not valid.

17. Finally, the Minister submitted that the applicant has been residing illegally in the State, in breach of the 2015 Regulations, as his spouse had returned to Latvia in 2015 and therefore was not exercising her EU Treaty rights. At the very least, the Minister argued, the applicant failed to comply with Regulation 11 of the European Communities (Free Movement of Persons) Regulations 2015, which required him to inform the State about any change in his marital status or if his EU citizen spouse was not exercising EU Treaty rights.

18. The Minister cited Humphreys J in *MKFS (Pakistan) v Minister for Justice and Equality* [2018] IEHC 103, reiterating the views expressed by Judge Baker in the Court of Appeal regarding the Court's entitlement to use its discretion to deny a remedy sought by way of judicial review in circumstances where he believed that the applicant's engagement with the process had been less than satisfactory:

"If I am wrong in relation to any of the foregoing, I would uphold the proposition advanced by the respondent's deponent Alan King at para. 24 that the applicants 'have been guilty of an egregious lack of candour and wrongful conduct in their interactions with the respondent' and would refuse relief on a discretionary basis (see *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 per Lord Carnwath, *Li v. Minister for Justice and Equality* [2015] IEHC 638 [2015] 10 JIC 2102 (Unreported, High Court, 21st October, 2015)".

19. The Minister went on to cite Humphreys J in *Li & Wang v Minister for Justice and Equality*, who identified three grounds upon which he would apply his discretionary powers, the third of which concerned the fact that the applicants in that case had unlawfully continued to reside in the State:

> "The third factor is the applicant's disregard of the immigration system by being unlawfully in the State at the time these proceedings were instituted and remaining there unlawfully ever since".

20. Furthermore, the Minister cited Humphreys J in *TA (Nigeria) v The Minister for Justice and Equality* [2018] IEHC 98 where the judge set out his view that the court can use its

discretion to deny relief in judicial review proceedings where an applicant has not engaged honestly with the State.

The impugned decision-making process

21. The applicant and the Minister have both criticised each other's decisions and submissions. I have examined the following four documents to establish whether the conclusions reached by the Minister were properly reached:

    i. The Minister's proposal to revoke the applicant's residence permission of 11 December 2019.

    ii. The deciding officer decision of 21 January 2020.

    iii. The applicant's submissions to the review process.

    iv. The decision of the review of 18 September 2020.

i. The Minister's proposal to revoke the applicant's residence permission of 11 December 2019

22. This letter:

    i. Outlined the applicant's residence history in the State based on his first marriage, subsequent deportation order and second marriage.

    ii. Stated the Minister's opinion that the applicant's second spouse had not exercised her rights in the State since 2015, as a result of which it was proposed to revoke the applicant's permission that had been based on his marriage.

    iii. Noted the applicant's failure to inform the office of any change in the circumstances of his relationship with his spouse as per Regulation 11.

    iv. Set out information obtained from the Latvian authorities that the applicant's spouse had been self-employed in Servuda from August to November of 2016, employed with Atlax from April 2016 to June 2019 and in receipt of payments in Latvia from 2014 to date.

    v. Advised the applicant that he had not provided an explanation as to how he supported himself in the State from the date of the invalidity of his earlier permission until registration of permission to remain based on his second marriage.

    vi. Set out the Minister's opinion that the applicant entered into marriage with his second spouse for the sole purpose of obtaining a further residence permission as the spouse of an EU citizen which raised concerns regarding his relationship with his second spouse given the short time between his marriage and submitting a residence application.

    vii. Referred to the documentation submitted by the applicant to evidence the residence and exercise of rights by his spouse and to an examination of his spouse's social media profile indicating that she resides in Latvia with no mention of

her ever residing in Dublin. The letter said that her relationship/family profile makes no mention of her ever being married to the applicant, that there were no photographs of the wedding and that the applicant did not appear in any photographs of his spouse taken within a couple of days either side of the date of the wedding.

viii. Confirmed the Minister's opinion that the information and documentation the applicant provided in support of his application to evidence his and his spouse's residence and exercise of rights by his spouse in the State were false and misleading as to material facts.

ix. Required the applicant to provide representations to the Minister stating why his permission should not be revoked, to dismiss concerns that his marriage was a marriage of convenience in accordance with provisions of Regulation 28 (2) and to address his submission of false and misleading information in order to obtain a residence card.

x. Advised that any representation should include a detailed immigration history of the EU citizen and a detailed relationship history along with any other information or documentary evidence that the applicant may wish to provide as to why his information should not be revoked.

ii. The deciding officer's decision of 21 January 2020

23. The deciding officer's decision is very similar to the earlier letter in which the Minister set out what was proposed to be done. The deciding officer reiterated the Minister's view expressed in the earlier letter that the applicant's spouse had not exercised her rights in the State since 2015. However, whilst the deciding officer referred to Regulation 11 in noting that the applicant had not informed the office of any changes in the circumstances of his relationship with the EU citizen, the decision to revoke the applicant's submission was pursuant to Articles 27 and 28.

24. Like the earlier letter, the deciding officer's decision commences (at the sixth paragraph of page 2) with a reference to the documentation the applicant had submitted to support the residence and exercise of rights by his spouse in the State. The decision then discusses his spouse's social media profile which the deciding officer says indicates that the applicant's spouse resides in Latvia and that "there is no mention of her ever residing in Dublin". The decision goes on to question the absence of wedding photos or any reference to the applicant during the month of April 2014 when they were married.

25. The deciding officer confirms that the Minister is satisfied that the applicant's spouse has not exercised her rights in the State since 2015. This position is reiterated at para. 13 of the Minister's statement of opposition where it is stated "there is clear evidence that his EU spouse has not been exercising her EU Treaty rights since 2015." Both statements seem to implicitly confirm the Minister's acceptance that the applicant's spouse did exercise her EU Treaty rights in the State up to sometime in 2015. This does not sit comfortably with the deciding officer's apparent doubt that the applicant's spouse ever

resided in Dublin from the review of her social media. The deciding officer seems to prefer the conclusions she draws from the contents of the applicant's spouse's social media over the documentation submitted by the applicant.

26. The deciding officer's decision confirms:

    i. The Minister's satisfaction of the veracity of the opinion expressed in the earlier letter i.e., that the documentation the applicant provided in support of his application to evidence the residence of him and his family member and the exercise of rights by his family member are the State is false and misleading as to a material fact.

    ii. That this constitutes a fraudulent act within the meaning of the Regulations and Directive.

    iii. The Minister has therefore decided to revoke the applicant's permission to remain in accordance with Regulation 27.

    iv. The Minister was also satisfied that the applicant's marriage is one of convenience and therefore, in accordance with Regulation 28, the Minister has disregarded the marriage and the residence card permission held by the applicant since 14 October 2014 on the basis that that marriage was never valid and is now revoked.

    v. The applicant's right to request a review under Regulation 25.

iii. The applicant's submission to the review section

27. The applicant's solicitors sent a written submission to the EU community rights review section by letter dated 8 February 2020. The Minister has pleaded at para. 14 of her statement of opposition that the applicant "failed to engage in a full or proper manner with the review process". The Minister further pleaded at para. 7 that

> "the applicant adopted a legalistic approach whereby the Minister was placed on full proof of establishing that the marriage was not a valid one. Indeed, in his submission for the purpose of the review procedure the Applicant's solicitors clearly set out the position as follow: '*It is not for our client to establish that the relationship was a genuine and lasting one. It is for the Minister to establish that it was indeed a marriage of convenience*'.

28. An examination of that submission to the review section confirmed that whilst much of it is taken up with the argument that the burden of proof to prove a marriage of convenience rests on the authorities rather than on a party to the marriage (comprising some two pages of a four-page letter), the submission also addresses the following other issues:

    i. Refutes the finding that the marriage entered into was one of convenience and that false or misleading documentation was submitted.

ii. Emphasises that the applicant's spouse was employed and residing in Ireland up to September 2015, refers to "verifiable evidence" of this and identifies her employer at that time.

iii. Condemns the Minister's commentary on the short duration of the relationship prior to or following the marriage.

iv. Criticises the Minister's use of social media to assess the situation and condemns the evidence relied on by the Minister as unreliable as she only has access to that part of the social media account that is made available to the public.

v. Addresses the Minister's concerns about how the applicant supported himself from the date of the invalidity of his permission based on his first marriage to the registration of his permission to remain based on his second marriage, which he says can be independently verified through his PPSN number.

vi. Notes that the Minister has failed to have regard to those matters proscribed in Regulation 28 (5) which said matters are to be identified in determining a marriage to be one of convenience.

vii. Enclosed documentation including 2014 and 2015 Revenue and employment documentation for the applicant and his spouse, and shared utility bills from 2014.

29. Subsequently the applicant furnished a personal letter which

i. Explained why his spouse returned to Latvia in 2016.

ii. Referred to his spouse's employment in 2014 and 2015.

iii. Explained his financial situation at that time in response to the Minister's concerns as set out in the deciding officer's decision.

iv. Explained why his spouse's social media did not include photos of him or his wedding.

v. Attached wedding photographs.

iv. The review decision dated 18 September 2020

30. This is the decision that the applicant seeks to quash in the within proceedings. In accordance with Regulation 25(5) (which I consider further below), the officer carrying out this review was required to have regard to the information contained in the applicant's application for a review which I take to include his solicitor's submission of 8 February 2020, the applicant's own letter of 29 January 2020, and the documentation attached to both.

31. The decision maker confirmed that all of the documentation and information on the applicant's file was considered. He noted that at no time has the applicant asserted that his marriage to the EU citizen was not one of convenience or that the documentation and

information submitted was not false and misleading. That has been conceded by the Minister to be an error but in her statement of opposition she pleads at para. 4 that any such error is not material

> "…any error contained therein is not material in the context of these proceedings given that the Minister, in the decision dated 18th September, 2020, confirmed that the finding was based on the decision maker having considered all of the documentation and information on all of [the applicant's files]."

32. The legal basis for the decision of the review officer is identified in the following passage:

> "The decision revoke your Residence Card is hereby affirmed in accordance with the provisions of Regulation 27 (1) of the Regulations and Article 35 of the Directive. Further, the Minister hereby confirms the decision to deem any and all permission to remain in the State on the basis of your marriage to the EU citizen in this matter invalid from the outset."

33. It would appear that the Minister's concern as communicated in the deciding officer's decision about the applicant's failure to inform the office of any change in the circumstances of his relationship with his spouse in accordance with provisions of Regulation 11, does not form part of the review decision.

Critique of the Review Decision

34. The following issues arise from the review decision:

i. What is required by Regulation 25(5)

ii. The impact of the errors in the decision.

iii. The Minister's claim that that the applicant failed to engage with the process.

iv. Whether the decision maker afforded the applicant fair procedures.

v. Whether the decision maker engaged with or had regard to the applicant's submissions.

vi. Whether the decision maker gave adequate reasons for the decision.

i. What is required by Regulation 25(5)

35. Regulations 25 (5) of the Regulations set out the obligations of the officer carrying out the review as follows:

> "(5) The officer carrying out the review shall have regard to the information contained in the application and may make or cause to be made such enquiries as he or she considers appropriate and may—

(a) confirm the decision the subject of the review on the same or other grounds having regard to the information contained in the application for the review, or

(b) set aside the decision and substitute his or her determination for the decision".

36. What is meant by the phrase "can have regard to" has been considered by the superior courts previously. The Supreme Court in Glencar Exploration v. Mayo Council (No. 2) [2002] 1 IR 84 had to consider whether the respondent had acted in breach of his statutory obligations pursuant to s. 7 (1) (a) of the Local Government Act, 1991 to

> "have regard to …
>
> (e) policies and objectives of the Government or any Minister of the Government in so far as they may affect or relate to its functions…"

37. Keane C.J. held that this obligation to have regard to policies and objectives of the Government or its particular ministers does not mean that, in every case, it is obliged to implement the policies and objectives in question. He highlighted the absence of any evidence to indicate that the Minister had ignored a particular letter from the Minister for Energy and found that "on the contrary, it adjourned the meeting at which it was to make the vital decision so that the Minister's views could be considered." In the later High Court decision of *McEvoy v. Meath County Council* [2003] 1 IR 208, Quirke J. had to consider the meaning of a similar phrase in s. 27 (1) of the Planning and Development Act, 2000 which provided that "a planning authority shall have regard to any reasonable planning guidelines in force for its area by making and adopting a development plan". Quirke J, held as follows:

> "Manifestly, s. 27(1) of the Act of 2000 must be construed as imposing some obligation upon the respondent. It is implicit in the judgment of Keane C.J. in *Glencar Exploration plc. v. Mayo County Council (No. 2)* [2002] I.R. 84 and it follows from the application of reason, that the provisions of the subsection do not permit the respondent to ignore the guidelines and proceed as if they did not exist.

In seeking to assess or measure the extent of the obligation which is imposed by the subsection it is difficult to disagree with the view expressed by McNeill J. in *R. v. Police Complaints Board, ex parte Madden* [1983] 1 W.L.R. 447 that the statutory obligation to "have regard to... means precisely that, no more and no less."

I am satisfied that the duty or obligation imposed by s. 27(1) of the Act of 2000 upon a planning authority when making and adopting a development plan is to inform itself fully of and give reasonable consideration to any regional planning guidelines which are in force in the area which is the subject of the development plan with a view to accommodating the objectives and policies contained in such guidelines" (at p.224).

38. It follows from and *Glencar Exploration* and *McEvoy* that Regulation 25 (5) requires the officer carrying out the review to inform themselves fully of, and give reasonable

consideration to the applicant's submissions and personal letter with a view to accommodating the content thereof.

39. For the reasons set out below, I am not satisfied that the officer who carried out this review decision properly complied with their obligation pursuant to Regulation 25 (5) to have regard to the information contained in the applicant's application for a review.

ii. The impact of the errors in the decision.

40. The decision maker was under a statutory duty to have regard to the applicant's application for review. In addition, the decision maker expressly stated that he had considered all of the documentation and information. The court would accept that statement unless there was a basis to believe otherwise (as per Hardiman J in *GK v Minister for Justice* [2002]2 IR 418 at 427). The decision maker found that the applicant had not asserted that his marriage was not one of convenience or that the documentation and information the applicant submitted was not false and misleading. This is now acknowledged by the Minister to be an error which means the court has to question the veracity of the decision maker's statement about having considered all of the documentation and information. In addition, there is no affidavit from the decision maker confirming and/or explaining this error, which causes further concern about this error. Those concerns are not assuaged by the Minister's plea at para. 4 of the statement of opposition that it was not a material error.

41. There are additional errors in the decision, which are not referred to in the statement of opposition, about the date of the deciding officer's decision and the date of the applicant's application for a residence card. Neither of those errors are as serious as the error sought to be addressed at para. 4 of the statement of opposition. Nevertheless, the culmination of careless errors questions the extent and quality of the decision maker's review of the documentation and information and his compliance with Regulation 25 (5) to have regard to the information contained in the application for a review.

42. Even if I did find the plea at para. 4 of the statement of opposition to be reassuring (which I do not), I would still have concern at the Minister's retrospective creation of reasons within these proceedings, which cannot be permitted (*P.S. Consultant Engineers Ltd v. Kildare County Council* [2016] IEHC; *R. v. Westminster City Council Ex Parte Ermakov* [1996] 2 All ER, approved by McDermott J. in *TAR v. The Minister for Justice, Equality and Defence* [2014] IEHC 385 and by the Court of Appeal in *M.N. v. The Minister for Justice and Equality* [2020] IECA 187).

iii. The Minister's claim that that the applicant failed to engage with the process.

43. The Minister relies on the decision of Baker J. in the Court of Appeal in *A & R. v. Minister for Justice and Equality* [2019] IECA 328 which also involved a finding that a marriage of convenience had taken place. Baker J. stated:

> "48. The judicial review is made to a large extent on the grounds that the Minister failed to give reasons or acted irrationally or in breach of fairness. I agree with the approach adopted by Humphreys J. that by not engaging fully with the statutory opportunity to clarify the matters which had given rise to the concerns articulated

> by the Minister, the appellants are precluded from advancing these heads of challenge.
>
> …
>
> 50. It could scarcely be said that the Minister had failed to give reasons when his concerns were not further addressed, or that the decision was irrational or unreasonable, where the Minister had not been provided with answers that might have clarified some of the factual concerns raised, or that there was a lack of fairness or transparency when the appellants had failed to themselves engage with the process which contained an in-built opportunity to achieve fairness in a substantive and concrete way".

44. Further support for this approach can be found in the decision of Humphreys J. in *P.H. (Pakistan) v. International Protections Appeals Tribunal and M.J.E.* [2020] IEHC 364 wherein Humphreys J. stated:

> "If the applicant does not give any information as to his detailed personal circumstances, he cannot object to the Minister stating that no such information is provided. To dress that up as a fair procedures complaint is simply a misuse of language".

45. It is important to note the complete lack of engagement found to have occurred in those cases in that neither applicant furnished any information to the decision maker in advance of the decision being made, in spite of having had the opportunity to do so. In this case the applicant did engage with the decision maker in a way that is criticised by the Minister as a legalistic approach putting the Minister on full proof of establishing the marriage was not a valid one. In fact, the applicant's submissions were not solely engaged with the legal submissions on the burden of proof (legal submissions which I consider the applicant was entitled to make albeit I make no comment on whether they were correct or not). Other submissions were also made (as set out at paras. 25 and 26 above) and documentation was furnished which the applicant claimed could be verified. That brings the applicant's engagement in this case significantly beyond the engagement, or lack thereof, in *A and R.* and *P.H.*

46. The fact that some parts of the applicant's submission were relevant does not mean that the overall submissions were perfect. The applicant's submission did not address the detailed immigration history of the EU citizen or the detailed relationship history, both of which had been requested by the Minister in her letter of 11 December 2019. The applicant never made any realistic attempt to furnish that information that had been requested by the Minister. Neither did the applicant ever seek to address the matters set out at Regulation 28(5)(b) such as the nature of the ceremony of marriage, the extent to which the parties had been sharing income and outgoings or dealing with other organs of the State as a married couple, the nature of the relationship between them prior to the marriage, and whether they speak a language understood by both of them. They are all omissions to which a decision maker would be entitled to give weight, but the absence of

all that relevant information did not mean that a decision maker could disregard different, but still relevant, matters that were included in the submissions, which is what occurred here.

iv. Whether the decision maker afforded the applicant fair procedures.

47. The applicant claimed that the principle of *audi alterum partem* was breached in how the Minister conducted the review. I have found the decision of Charleton J. on behalf of the Supreme Court in the decision of *P.O. v. Minister for Justice* [2015] IESC 64 to be helpful in determining the extent which the decision maker complied with the obligations imposed on him by fair procedures. Here, a Nigerian parent and Irish-born son, neither of whom were entitled to Irish citizenship, were refused asylum applications and applied to the Minister for Justice to revoke resulting deportation orders. This was refused by the Minister. The applicants sought judicial review in the High Court which was also refused, and subsequently appealed to the Supreme Court, claiming *inter alia* a breach of fair procedures by the Minister. Charleton J. sets out as follows at paras. 25 and 26 regarding fair procedures:

> "25. These principles are related both to each other and to ordinary sense. Firstly, the person affected by a decision has an entitlement to put forward their side of the case and, secondly, the administrative or quasi judicial tribunal must fairly consider such representations. The Court of Justice stated, at paras. 87 and 88 of the decision:
>
> '*The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely (see, inter alia, Case C-287/02 Spain v Commission [2005] ECR I-5093, paragraph 37 and case-law cited; Sopropé, paragraph 37; Case C-141/08 P Foshan Shunde Yongjian Housewares & Hardware v Council [2009] ECR I-9147, paragraph 83; and Case C-27/09 P France v People's Mojahedin Organization of Iran [2011] ECR I-13427, paragraphs 64 and 65)*.
>
> *That right also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision (see Case C-269/90 Technische Universität München [1991] ECR I-5469, paragraph 14, and Sopropé, paragraph 50); the obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person to understand why his application is being rejected is thus a corollary of the principle of respect for the rights of the defence*'.
>
> *26. The form of any procedures in relation to applications for refugee status or subsidiary protection or in relation to deportation orders is not laid down by European legislation. Instead, as the court indicated at para. 94 of its judgment 'it will be for the referring court to determine whether the procedure followed in the examination ... was compatible with the requirements of EU law ... [on the] ... right to be heard ...' On this appeal, it is to be noted that that is what happened in*

relation to that case when the matter came back before Hogan J, MM v Minster for Justice Equality and Law Reform, Ireland and the Attorney General *[2013] 1 IR 370".*

48. Similarly, it is a matter for this court to determine whether the procedure followed by the review decision was compatible with the requirements of European law and the applicant's right to be heard. I do not think it was. The decision maker failed to have any or any proper regard to the applicant's submissions and failed to give a sufficiently detailed statement of reasons for his decision that documentation and information submitted by the applicant in support of his application for a residence card in 2015 was false and misleading.

v. Whether the decision maker engaged with or had regard to the applicant's submissions.

49. Regulation 25(5) of the Regulations requires the officer carrying out the review to have regard to the applicant's application for a review. In addition, there are two decisions of the Supreme Court confirming the obligations on a decision maker to engage with the submissions furnished by a party to a process. In *Balz v. An Bord Pleanála and Cork County Council* [2020] 1 ILRM 637, the applicant had made submissions to the respondent board suggesting that they should depart from certain guidelines. O'Donnell J. (as he then was) for the court described the submissions in less than complimentary terms as containing "something of a scattergun approach", an "extreme version" and that "it would not have been unreasonable to continue to give weight to the existing guidelines, and to be slow to depart radically from them". Nevertheless, O'Donnell J. quashed the board's decision because even those less than perfect submissions were entitled to a level of engagement that had not occurred, holding (at para. 51):-

> "A decision-maker must engage with such a submission".

Later at para. 57 he held:-

> "It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live".

50. In *PO and SO v. Minister for Justice and Equality* [2015] IESC 64, a statutory obligation arose from s. 3(b)(i) of the Refugee Act 1996 which required the Minister to "take into consideration any representations to be made to him or her…". This duty was described by MacMenamin J. (at para. 11) as one which:-

> "falls on the Minister's officials in considering an application for revocation is to ensure that all relevant up to date information available is considered fairly".

The duty was described by Charleton J. as involving "reading the representations made under section 3(3) on behalf of an applicant and, where the revocation of a deportation order is sought, considering any new representations made under section 3(11)" (at para. 23).

51. In this case, the decision does not demonstrate sufficient compliance with the decision maker's obligations pursuant to Regulation 25(5) "to have regard to the information contained in the application" or to properly engage with or address the applicant's submissions, at least some of which were relevant to the concerns raised by the Minister in the deciding officer's decision. The very first point made in the submission was to refute the finding that the marriage entered into was one of convenience and that false or misleading documentation was submitted. Nevertheless, the decision maker found that the applicant had not asserted the validity of his marriage or that the documentation and information was not false and misleading, a finding now conceded by the Minister to have been an error. Even if the Minister is correct in maintaining that the error was not material (and I do not accept that for the reasons already set out above), the fact of the error suggests that the decision maker did not have regard to the applicant's submissions and did not adequately engage with or address them.

52. The decision maker did not address the applicant's submission that his spouse was working and residing in the State during 2014 and 2015. The decision maker found that the applicant had submitted documentation and information that was false and misleading but did not give any commentary on the documentation that the applicant had submitted, including Revenue documentation and other documentation that the applicant said was verifiable. It is unclear from the decision whether the decision maker considered all of the documentation and information furnished to have been false and misleading or just some of it and, if so, why. There is no reference in the decision to the specific documentation furnished by the applicant at all. This seems similar to the situation in the decision of Ferriter J. in *A v. Minister for Justice* [2021] IEHC 774 where a Declaration of Responsibility was furnished as part of an application for family reunification but was not mentioned in the decision refusing the application. Ferriter J., in quashing the decision,. stated at para. 33:

> "33. The Declaration of Responsibility was a core part of the grounds for family reunification advanced by the applicant in respect of her family reunification application for her niece and nephew; it was clearly integral to the short submission made in support of the Application and was therefore a material consideration to which regard should have been had in arriving at the Decision. However, it is nowhere referenced or engaged with in the Decision refusing the application. In my view, the decision maker fell into the error in the circumstances in failing to advert at all in the Decision to the Declaration of Responsibility and the submission grounded on the same".

This decision was recently upheld by the Court of Appeal where Donnelly J stated at para. 17:

> "The Minister submitted that it was entirely permissible for the civil servant, Mr. Ward, in charge of a decision-making unit, to make averments as to what was before a decision-maker in that unit and that "[t]o the extent Ferriter J found otherwise, he erred in law." With due respect to that submission, I do not accept that it reflects what Ferriter J. found; he found that there was no evidence that the decision-maker had considered the file. On the facts of this case, Ferriter J. was entitled to find as he did so find: that there was no evidence that the decision-maker had considered the Declaration of Responsibility. The most important factor was that the decision did not refer to it at all. That was compounded by the fact that the letter accompanying that decision did not acknowledge that the Declaration had been received as part of the application. No amount of explanation from Mr. Ward as to what may have been before the decision-maker, or as to the files being split and the Declaration 8 being placed on the file of the husband's application could make up for the simple fact that there was no evidence that the Declaration had, as a matter of fact, been considered by the decision-maker".

53. In addition, there was no attempt made by the decision maker in this case to address the submission made by the applicant in relation to the burden of proof. The Minister's view of that submission was later set out in her statement of opposition but that cannot constitute satisfying the requirement of Regulation 25(5) to have regard to the information contained in the application or the need (as confirmed by the Supreme Court in *Balz*) to engage with the submissions, address relevant submissions, and give an explanation as to why they are not accepted.

54. The applicant's submission had also contended that the Minister failed to have regard to the matters prescribed in Regulation 28(5) identifying the matters determining a marriage to be one of convenience. This point is not addressed by the decision maker and there is no evidence that he had regard to it.

55. I wish to make it clear that my criticism is of the decision maker's failure to properly have regard to the information contained in the applicant's submission and to engage with and address the submissions made. Having had regard to them, addressed them and engaged with them, it would then be a matter for the Minister to determine the weight to be attached to their contents and, indeed, whatever weight the Minister might consider appropriate to attach to the applicant's failure to include certain information therein, including the issues set out in Regulation 28(5).

vi. The failure to give reasons

56. The decision of the Supreme Court in *Balz* requires a decision maker to provide an explanation as to why relevant submissions are not accepted by them. The need to identify a basis for a decision pursuant to the Regulations was also confirmed by Baker J. in *V.K. & ors v. The Minister for Justice and law Reform/Kahn & ors v. Minister for Justice and Equality* [2019] IECA 232, when she stated:-

> "A person receiving correspondence communicating a decision is entitled to know the basis for the decision and to be apprehensive if the decision appears to be

based on a negative rather that positive approach to the test to be applied. Further, it appears to me that the application of the test must be done in a rational manner and the decision maker must give reasons that are transparent and involve an objectively reasonable engagement with the facts."

That was essentially a reiteration of a long-held principle of law in asylum cases confirmed by Cooke J. in *JDS and PTDS v. The Minister for Justice, Equality and Law Reform* [2012] IEHC 291, where he stated, at para. 20:-

> "It is necessary in the view of the Court that the decision should explain why the deportation order is being made and why, in particular, it is concluded that the deportee faces no risk to life or to person on repatriation contrary to the prohibition in s. 5."

57. In this case the reasons that can be gleaned from the review decision is that the applicant failed to substantially address any of the concerns raised, had not allayed the Minister's concerns that his marriage was one of convenience and had submitted false and misleading documentation. I do not consider those reasons satisfy the requirement set out by the Court of Appeal in *R and Kahn v. Minister for Justice and Equality* of transparent reasons involving an objectively reasonable engagement with the facts.

58. It is clear from the review decision that the Minister's opinion that the marriage is one of convenience and that the applicant had submitted false and misleading documentation were not allayed/assuaged by the applicant. The difficulty is that the decision maker does not explain why this is so. The decision maker may have reviewed all of the documentation and information on the file as he says he did, but this is not an explanation as to why he concluded that the Minister's opinions and concerns were not assuaged.

Conclusions on the Review Decision

59. It seems that the Minister accepted that the applicant's spouse had exercised her EU Treaty rights in the State up to some time in 2015 but not thereafter. All the documentation the applicant submitted to confirm his spouse's residence and employment in Ireland dated from 2014 and 2015 which covers the time for which the applicant's spouse's presence in Ireland was not disputed by the Minister. Nevertheless, the decision maker condemned this documentation as false and misleading without any attempt to particularise which document is false and misleading, and how they are false and misleading.

60. Counsel for the Minister sought to reduce the level of condemnation of the documentation in the review decision by submitting that the decision maker had simply found the "import" of the documentation to have been false and misleading. That is not supported by the review decision which clearly and repeatedly condemned the documentation that the applicant submitted in 2015 to secure a residence permit as both false and misleading.

61. I am satisfied that;

    i. The review officer did not comply with his statutory obligation pursuant to Regulation 25(5) to have regard to the information contained in the applicant's application for a review.

    ii. The decision maker's error was a material error of fact, the decision maker acted irrationally and unreasonably in making it, and the explanation afforded for it was made retrospectively by a person other than the decision maker.

    iii. The Minister's criticism of the applicant's lack of engagement with the process is not well founded and whilst his engagement may have been far from perfect, it was not at the minimum or non-existent level such as would justify such a criticism.

    iv. The decision maker did not afford the applicant fair procedures in failing to have regard to the applicant's submissions and failing to give a detailed statement of reasons for his decision that documentation and information submitted by the applicant in support of his application for a residence card in 2015 was false and misleading.

    v. The decision maker did not engage with or have proper regard to the applicant's submissions.

    vi. The decision maker did not give adequate reasons for his decision.

62. It is the Minister's prerogative to determine whether her concerns were assuaged by the applicant. That determination may require the decision maker to assess the validity of documentation and the cogency of an applicant's case. The decision maker is entitled to question and ultimately not accept an applicant's submissions and explanations, but must do so on a reasonable, rational and transparent basis. Where an applicant furnishes information and documentation, including official State documentation, that the decision maker finds was false and misleading, it is incumbent on that decision maker to identify a basis for that conclusion. This will likely require identifying which of the information and documents submitted were found to be false and misleading and why.

63. The Minister is entitled to make a finding of fraud in an appropriate case but only where there is an identified, reasonable and rational basis for the finding and where the conclusions are formulated in a way that enables the person found to have engaged in such fraud to identify and understand what information and/or documentation was found to be false and misleading and why, along with some understanding as to why their submissions as to the veracity (and possibly the potential verifiability) of the information and documentation has not been accepted.

64. In all the circumstances I am satisfied that the applicant is entitled to an order for certiorari quashing the review decision of 21 January 2019.

The exercise of discretion

65. The Minister has urged me to exercise my discretion to refuse the reliefs sought due to what the Minister claims is the applicant's failure to (i) comply with Regulation 11 of the Regulations; and (ii) engage in the process.

66. It is not clear to me that the applicant has been in breach of Regulation 11, as contended for by the Minister. There was a change in his spouse's residence status when she left the State in either 2015 or 2016 to return to Latvia. Whilst the applicant's personal letter submitted to the review process conceded that the marriage did not last, it does not appear that the marriage has yet been dissolved or annulled. That being so, the obligation on the applicant by virtue of Regulation 11(2)(a)(ii) to advise the Registration Office of a change of his civil status (being a dissolution or annulment of his marriage or entry into a marriage or civil partnership) does not seem to apply here.

67. Even if I am wrong on that, I am not satisfied that the applicant's breach of Regulation 11 should persuade me to exercise my discretion to refuse the relief sought. The issue of the applicant's compliance with Regulation 11 was clearly raised by the Minister in the letter of 11 December 2019. That letter set out the Minister's opinion that the applicant's spouse had not exercised rights in the State since 2015, as a result of which the applicant had ceased to derive a right of residence. The letter noted that the applicant had not informed the office, as required in accordance with the provisions of Regulation 11, of any changes in the circumstances of his relationship with his spouse. The decision of the deciding officer of 21 January 2020 similarly records the Minister's satisfaction that the applicant's spouse has not exercised rights in the State since 2015 as a result of which he had ceased to derive a right of residence. Whilst the review decision proposed to revoke the permission held based on his marriage, in the light of his spouse not having exercised her rights in the State since 2015, and goes on to identify the applicant's failure to comply with Regulation 11, ultimately, the decision made as set out towards the end of the letter was not grounded on a breach of Regulation 11. Thus, the decision maker did not purport to remove the applicant's right of residence in the State as a direct consequence of a breach of Regulation 11. Exercising my discretion to refuse relief in those circumstances would, in my view, sit uncomfortably with the decision of the Court of Justice of the European Union in *Chencholliah v. Minister for Justice and Equality* C-9/18, ECLI:EU:C:2019:693 where the Court held that an Irish resident third-country national married to an EU citizen was covered by the Directive even where their EU citizen spouse had moved to a different country. Article 15 still applied to all decisions restricting the family members of EU citizens.

68. Therefore I do not consider it appropriate to exercise my discretion against quashing a decision grounded on Regulations 27 and 28, due to a claimed breach of Regulation 11.

69. The Minister also urges that I should exercise my discretion to refuse the relief sought on the basis that the applicant has not engaged fully with the immigration process. Baker J. in *A.R. v. Minister for Justice and Equality* [2019] IECA 328 held that "the failure of an applicant for judicial review to engage with the decision maker can, in the discretion of a court, result in a refusal of relief". The applicant in *A.R.* had been invited to make written

representations before a final decision would be made but he did not do so (as confirmed by Baker J. at para. 24). I do not consider that this applicant's engagement with the decision maker, in particular, through his solicitor's written submissions, his own personal letter and the documentation attached to both, constitutes a failure to engage with the review decision at a level that would justify the court exercising its discretion to refuse relief.

70. Given the extent of the applicant's submissions set out at paras. 28 and 29 above, I am satisfied that the applicant did engage with the review process. His engagement was not perfect and failed to address some of the issues identified by the Minister early in the process. Nevertheless I am satisfied that there was sufficient engagement by him to render it inappropriate for this court to exercise its discretion to refuse relief on the basis of a failure by the applicant to engage with the decision maker.

Decision

71. For the reasons set out above, I will grant the order of *certiorari* quashing the review decision of 21 January 2019 and remitting the matter for fresh consideration by the Minister.

Indicative view as to costs

72. As the applicant has succeeded in his claim, it seems to me, in principle, that this is a case in accordance with s. 169 of the Legal Services Regulation Act, in which costs should follow the event and the applicant is entitled to his costs. I will list the matter for mention before me at 10:30am on 4 November for the parties to make submissions, if they wish, on costs and the final orders to be made.