THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 721

[Record No. 2022/508JR]

BETWEEN

H

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms Justice Miriam O'Regan delivered on 21 December 2022.

Introduction

1. Leave was afforded to the above-named applicant on 27 June 2022 to maintain the within judicial review proceedings brought by way of statement of grounds of 16 June 2022. The applicant is seeking to quash a decision of the respondent, being a review decision of 11 April 2022 finding that the applicant had contracted a marriage of convenience. The legal grounds relied upon are to the effect that the respondent: -

(1) was in breach of fair procedures and due process in arriving at her decision;

(2) had unduly focussed on peripheral and circumstantial matters without conducting a full and rigorous investigation;

(3) the evidence relied on was wholly circumstantial and was not sufficiently strong bearing in mind the serious and severe consequences for the applicant;

(4) took into account irrelevant matters with undue focus on discrepancies which were not directly germane;

(5) no effort made to conduct any form of interview whatsoever with the applicant's former spouse; and

(6) the finding was arrived on a purely paper-based assessment.

It is argued that there is a high threshold in making a finding which goes to the character and conduct of the applicant and which would have lifelong consequences.

2. Notwithstanding the particularly vague reference in the legal grounds the reality is that the applicant's complaint is to the effect that an oral hearing was required in the circumstances on the basis that central to the decision was an adverse finding of credibility against the applicant.

3. In oral submissions the entirety of the applicant's claim was founded on an application of the decision of Phelan J in *ZK v Minister for Justice & Ors*. [2022] IEHC 278 being a judgment bearing date 16 May 2022. It is argued that based upon judicial comity and the Worldport principles this Court must follow the decision in *ZK* aforesaid.

4. In written submissions it was argued that: -

(1) it was incumbent upon the Minister to consider the applicant's submissions;

(2) there was no interview conducted;

(3) the Minister did not write to the former wife of the applicant nor was there engagement with her; and

(4) the decision was based on a personal credibility assessment of the applicant.

5. The respondent resists the application on the basis that there was no necessity to hold any form or oral hearing and there was an interview with the applicant and contact with his former spouse. Insofar as the jurisprudence is concerned it is argued that the decision of Ferriter J in *SK & JK v Minister for Justice* [2022] IEHC 591 (a decision delivered on 24 October 2022) is later in time than the *ZK* decision, accordingly judicial comity/the Worldport principles apply to the *SK & JK* decision.

Background

6. The applicant is a Bangladeshi national born on 23 January 1987. He arrived in Ireland on 25 April 2007 on a stamp two student visa which was renewed from time to time however was due to expire permanently on 5 April 2014. The applicant met his former spouse in October 2013 who appears to have arrived in Ireland from Romania on 26 September 2013. The parties married on 15 April 2014 (although as was pointed out on behalf of the Minister in the statement of grounds and the affidavits of the applicant and his former spouse the asserted date of the marriage is 15 February 2014).

7. On the basis of the fact that the applicant was married to an EU citizen an application for a residence card was processed bearing date 2 May 2014 and was subsequently granted for a five year period on 24 October 2014. Within the letter of

grant was a paragraph to the effect that the applicant was obliged to advise the Minister of any change in his circumstances.

8. On 18 February 2019 the applicant was returning from a visit to Bangladesh when he was stopped at Dublin Airport by Immigration officials and was interviewed. During the course of the interview two telephone conversations were had by the officials with the applicant's former spouse. Following this interview in June 2019 the applicant consulted his solicitors. By letter of 2 July 2019 the applicant's solicitor wrote to the EU Treaty Rights section identifying that the applicant married the Romanian citizen on 15 February 2014 and secured a resident's card on that basis in November 2014. It is recorded that the former spouse returned to Romania in early 2016 following which the applicant was in periodic contact with her and at an undisclosed date the former spouse informed the applicant that she had obtained a divorce in Romania (the date of the divorce is 6 July 2017, however, this date was not included in the letter). It is recorded that the applicant's marriage was then irretrievably broken down and he wished to make a full and frank disclosure to the Minister by accepting that he did not have the right then to retain his residence card based upon being married to an EU citizen exercising her EU rights in Ireland. On that basis he made an application pursuant to s.4(7) of the Immigration Act 2004 (seeking a variation of his existing right of residence). Ultimately that application was refused on the basis that the applicant did not then hold any right of residence and therefore there was no question of a variation.

By letter of 16 December 2019 the EU Treaty Rights section wrote to the applicant (at the address provided in the aforesaid solicitor's letter of 2 July 2019) in respect of his then current immigration status. It was set out that family members of a

Union citizen may derive a right of residence in circumstances where the Union citizen is compliant with the regulations and resident in the State in exercise of her rights. The applicant's student visa was set out and thereafter the following several points were made in the letter relevant to the applicant's marriage to the Romanian citizen: -

(1) In the form seeking a residence card based upon the marriage it was indicated that the EU citizen arrived in the State on 26 September 2013 and it was noted that she obtained a PPSN number on 1 October 2013. The date of marriage was noted and it was indicated that the date of obtaining the PPSN number warrants concern as the Union citizen obtained same just over three months before the parties were required to submit notice of intention to marry.

(2) The EU citizen obtained her PPSN number on 1 October 2013 and there was no evidence of the EU citizen's presence in the State prior to that date and accordingly the Minister was satisfied that she entered the State on or shortly before that date resulting in the maximum period of time which the parties knew each other before the marriage was just over six months resulting in a relationship for a mere three months prior to submitting the notice of intention to marry which it was asserted was not indicative of the formation of a genuine relationship and was highly accelerated.

(3) It was noted that the applicant's future residence in the State on the student permission would expire on 5 May 2014 and his residence status would be unpredictable thereafter. The Minister had concerns

that the applicant entered into the marriage in order to maintain a residence permission in the State.

(4) In seeking the residence card based on the marriage to a Union citizen it was noted that the applicant provided two payslips for the Union citizen respectively dated 25 April 2014 and 2 May 2014 together with P60 for the year 2013 dated 29 April 2014 in respect of the applicant. The information available to the Minister was to the effect that there was no record of any employment of the EU citizen in 2015 and no record of any activity of the EU citizen in the State after 2017. It was further noted that the EU citizen was on jobseeker's allowance from 23 January 2015 to 24 February 2015 and again from 2 July 2015 to 19 January 2016. On this basis, the Minister's office was not satisfied that the EU citizen was exercising her rights in accordance with Regulation 6(3) of the relevant regulations.

(5) It was noted that the P60 in respect of the EU citizen for the year ending 2013 was to an address that differs from the information provided in the residence application of the applicant of 2 May 2014 (such address was also different from the address provided in the letting agreement document of 15 October 2013 addressed to both the applicant and his former spouse, being for a twelve-month period).

(6) The interview between Immigration officials and the applicant at Dublin Airport on 18 February 2019 was referenced. The applicant had been asked if he was still married, to which he responded he was and he advised that he had been out of the State for three weeks with the EU citizen at home with the address stated as that in the letting

agreement aforesaid. The officer inquired of the applicant as to when he last spoke with the EU citizen and the applicant indicated that it was the previous week. A request was made by the officer to show messages to verify same when the applicant apparently became nervous. The applicant looked through his phone for some time but was unable to provide any correspondence between him and the EU citizen. The applicant was again asked if he was still in a relationship with the EU citizen and the applicant confirmed he was. The EU citizen's phone number was provided and the officer phoned the EU citizen who revealed to the officer that the parties had been divorced for some time and had not spoken in three years. When this was put to the applicant the applicant again insisted that he was still married to the EU citizen. Further questions were raised regarding the applicant's relationship with the EU citizen and he could not provide any pictures of the parties' wedding and when asked who attended the wedding the applicant indicated friends and the EU citizen's mother and cousin. It was indicated that when asked when the applicant and the EU citizen separated that same was in 2017 and the parties last spoke in November to discuss the separation. When asked why he did not advise Immigration of his change in status the applicant indicated that he was going to do so on his return to the State this time. The EU citizen was again phoned and stated that the parties had not spoken for three years and that she did not know the applicant was still living in Ireland. When asked if any of her family attended the wedding the EU citizen indicated that they had not and that it was only friends attended.

It was indicated that the discrepancies raised serious concerns as to the authenticity of the relationship and following interaction between the officer and the EU citizen, the EU citizen forwarded a copy of the divorce certificate granted on 6 July 2017.

(7) It is recorded that on 3 July 2019 an application was made pursuant to s.4(7) of the 2004 Act and that the EU citizen returned to Romania in early 2016. The applicant did not inform the Minister of a change of circumstance and the Minister was of the opinion that failure to disclose such information at any earlier date that same may have an adverse impact on the validity of the applicant's permission to remain. It was further indicated that the Minister was also of the opinion that the marriage may be one of convenience.

9. The applicant was required to provide representations to the Minister within 21 days stating why the applicant's permission to remain should not be revoked, to dismiss concerns that the marriage was one of convenience and to address the issue of the applicant's submissions being false and misleading in respect of his residence card. Any such representation should include details of the immigration history of the EU citizen together with a detailed relationship history and it should also provide any other information or documentary evidence that the applicant might wish to provide.

10. The applicant's solicitor responded to the letter aforesaid by making specific reference thereto in a letter of 8 January 2020 which did not include any documentation. It was indicated that it was of the utmost concern to the applicant that a finding was being proposed of a marriage of convenience which would invalidate

his marriage *ab initio*. It is stated that the applicant made a full and frank disclosure on 2 July 2019 in respect of his marriage and its breakdown. It was submitted that the content of the Minister's most recent letter was quite redundant and although reference was made in the letter to the former wife not having employment in the State in 2017 it was indicated that the applicant had already informed the Minister that she departed the State in 2016. The applicant accepted that the marriage was over and he had no right to a residence card and he did not wish to challenge the revocation of the residence card but did wish to challenge any possible finding of a marriage of convenience.

11. By decision bearing date 24 January 2020 having again recorded the matters of concern in the letter of 16 December 2019 and also the fact that on 9 January 2020 the Minister's office received submissions from the applicant's solicitor, it was concluded that the Minister was satisfied that the applicant's marriage was one of convenience contracted for the sole purpose of obtaining a derived right of free movement and residence. There was also a finding that the application for residence was based on false and misleading information as to a material fact. The applicant's permission was revoked and information was afforded as to requesting a review of the decision.

12. A review was sought by the applicant in or about 15 February 2020. In the document dated 12 February 2020, requesting a review, s.6 required grounds for review to be set out. In that section the applicant handwrote that he did not accept that there was a marriage of convenience and he appealed that finding and made reference to the attached letter. The attached letter was a letter of his solicitor of 15 February

2020. In that letter it was indicated that the applicant was not seeking a review of the decision to revoke his resident's permission but rather, was seeking a review of the finding that his marriage was a marriage of convenience which he emphatically denied. In reference to the EU citizen it was stated that there was various spaces for information pertaining to her to be completed and signed. However, having regard to the particular circumstances, it was submitted that none of those were relevant to the applicant's situation in circumstances where the EU citizen did not reside in the State. It was recorded that the finding of a marriage of convenience had far reaching and drastic future implications for the applicant. It was further argued that given the seriousness of such a finding it was imperative that due process be followed by the Minister in determining that a marriage is one of convenience. It is stated that the applicant is unaware of the process and procedures adopted. It is argued that at the very least the basis upon which the Minister proposed to make such a finding and any information leading to the Minister's suspicions be put and an opportunity be given to the applicant and his former spouse to respond. However, it was argued that neither the applicant nor his wife had been given any opportunity to refute assertions with regard to the nature of their marriage. It is argued that much of the basis of the finding emanated from telephone conversations with the EU citizen on 18 February 2019. Reference is made to the fact that the EU citizen stated that she and the applicant had not been in contact for a period of three years an assertion which is disputed by the applicant. However, it was submitted that that was not particularly germane to the marriage of convenience finding. It was argued that the totality of the evidence was circumstantial, based on the fact that the parties served notice of intention to marriage shortly after the EU citizen arrived in the State and that the applicant's student status was becoming precarious. The letter expressed the view that the foregoing misgivings

and discrepancies between certain versions of events between the applicant and his former wife's accounts seem to ground the basis upon which the finding was made. It was stated that the totality of the Minister's case appears to be based on highly subjective misgivings which then contaminate the applicant's application and extend beyond that in finding the marriage was never valid. There was included an expression of regret on behalf of the applicant that he did not inform the Minister at the earliest opportunity of the fact of the marriage breakdown and he regrets being less than forthright when initially questioned at Dublin Airport which occurred during a period of great stress for the applicant. It was stated that much of the thrust of the Minister's recent correspondence appears somewhat redundant as it traverses again the same ground and deals with the same matters which are not disputed by the applicant and that in fact were brought to the Minister's attention by the applicant (the reference to recent correspondence presumably referred to the first instance decision of 24 January 2020 or the preceding letter of 16 December 2019).

13. The impugned decision is dated 11 April 2022 and upholds the original decision in respect of a finding of a marriage of convenience but sets aside the false and misleading material finding. The review decision consists of the points raised in the letter of 16 December 2019.

14. As aforesaid the applicant is relying on the decision of Phelan J in *ZK*. Both that decision and the parties to the within matter acknowledged that neither the Directive nor the Regulation provides specifically for a right to an oral hearing, although the wording of Regulation 28 is such that it references "either in writing or

in person" giving rise to the potential for an oral hearing which the respondent accepts.

(1) At para. 70 of the *ZK* judgment it was indicated that there was no oral process at all in that matter and reference was made to the Supreme Court judgment in *IX v Chief International Protection Office* [2020] IESC 44 when it was held that there was no necessity for an oral hearing where an interview had taken place during the process.

(2) At para. 76 it was recorded that the applicant's written submissions in reply were substantive.

(3) In para. 77 it was indicated that matters that could be addressed in an oral hearing but not in written submissions was material but less so where personal credibility is at stake especially with language issues and the intervention of a third- party adviser in compiling the submissions. It is the case that there was no request made prior to the decision for an oral hearing in *ZK*.

(4) At para. 64 the court recorded that the case before it does not involve a conflict of fact as between two versions of events but rather the case concerned a conclusion as to credibility which was drawn by the decisionmaker based on his assessment of the likely veracity of an account given in regard to the existence of corroborative evidence. Nonetheless, the Court was of the view that this closely related to the personal credibility of the applicant and his EU citizen wife, and the account given could be true and is not manifestly implausible having regard to the objective material evidence.

(5) The court expressed the view at para. 67 that the Court of Appeal judgment in *Blac v Minister for Justice & Ors.* [2018] IECA 76 (para. 77) was not

authority for the proposition that an oral hearing is never required but rather that it is not always or even usually required.

(6) The Court makes reference to *MM v The Minister for Justice* [2018] IESC 10 at para. 63 and 68 *et seq* and stated at para. 70 that in *MM* procedural fairness was preserved by the availability of an oral hearing at a different stage of the process whereas in the case before Phelan J there had been no oral process at all.

(7) The Court was satisfied because of a finding of a marriage of inconvenience and the provision of false and misleading information where there was nothing demonstrably false in the application that the Minister could only have come to this conclusion based upon an assessment of the applicant's credibility.

(8) At para. 76 the Court indicated that the fact that the applicant did not seek an oral hearing in advance of the decision is not determinative having regard to the Minister's practice of determining reviews on paper seemingly in all cases.

(9) Furthermore, it was stated that the applicant's written submissions in reply were substantive, and these might have been sufficient to alleviate the Minister's concerns.

15.

(1) In *SK & JK* there was a finding of a marriage of convenience in circumstances where the EU citizen was interviewed but the applicant was not. During the EU citizen's interview, he indicated that the marriage was a sham however, he later wrote to the effect that the relationship was based on love and the marriage was genuine. Substantial documents were tendered including evidence of joint travel, joint assessment for tax purposes, wedding

photographs and various letters of support. There was evidence of continued contact between the parties by phone.

(2) At para. 41 Ferriter J noted the authorities and in particular *Abbas v Minister for Justice and Equality* [2021] IECA 16 where Binchy J was satisfied that the Minister was entitled to disregard mere assertions as same were made in the absence of supporting document. Ferriter J was of the view that it was open to the decisionmaker in the case before him to take the view that the contents of the affidavit constituted mere assertion.

(3) At para. 49 the Court noted the argument that it was a breach of the applicant's right to fair procedure by reason of the Minister's decision absent an oral interview. Ferriter J discussed Phelan J's judgment in *ZK* and at para. 59 it was noted that Phelan J did not spell out what precisely is contemplated by an "oral process" other than an interview.

(4) In that matter the applicant argued that *ZK* was dispositive of the case before Ferriter J and on the basis that the applicant stated that her marriage was a genuine one on foot of *ZK* she should have been afforded an interview to allow her credibility to be assessed.

(5) At para. 65 it states effectively that in any decision where a marriage is held to be one of convenience it could be said that, absent an acceptance by the relevant party of the fact of a marriage of convenience, that applicant's credibility is at stake and it would follow from that that an oral process would be required in every case. However, there is no provision for an oral interview as a matter of right. It is indicated that even *ZK* didn't provide for such an entitlement.

(6) At para. 70 it was noted that the applicant had not sought an oral hearing or submitted that she wished to be heard personally so that her *bona fide* or credibility as to the facts would be preferred nor during the course of the judicial review application did she identify any material or position which she could only have advanced at an oral interview which she could not advance in written submissions.

(7) In paras. 72 and 73 Ferriter J sought to distinguish the facts of the case before him from those in *ZK* and indicated that the applicant was on full notice of the fact that the Minister was minded to determine that her marriage was one of convenience on the basis of the interview with the EU citizen.

(8) In para. 73 the Court came to the conclusion on the particular facts of the case before it that the applicant was not entitled as a matter of fair procedure to the exceptional measure of an oral interview and 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 before Ferriter J. The applicant was able to make her case fully through written submissions which was fairly considered and assessed. It was open to the decisionmaker to arrive at the decision, which he did on the basis of the papers before him, including the detailed written submissions and in those circumstances the Court found that there was no unlawfulness in the decision.

16. Insofar as the applicant complains that there was no interview of the EU citizen, in *Alam & Anor. v Minister for Justice and Equality* [2022] IEHC 439 Hyland J at para. 37 addressed this argument and came to the conclusion that (in

circumstances where no address was provided for the EU citizen) the Minister was not required to seek representations from her.

Decision

17. The within matter can be distinguished from the facts before Phelan J in *ZK* namely: -

(1) In *ZK* there were substantive submissions whereas in the instant matter there was bare assertion only.

(2) In *ZK* substantial documents were submitted whereas in the instant matter minimal documents were submitted and none at all to address the respondent's concerns identified. In *Pervaiz v Minister for Justice* [2020] IESC 27 Baker J in the Supreme Court at para. 91 stated that: -

> "It is almost inconceivable in the modern world that a couple would not have many examples which can be established by documentary proof, whether from social media, correspondence, utility bills, photographs, text or email messages, financial transactions, etc., which might establish the closeness of the interconnectedness and the nexus within which the relationship operates."

(3) There was no language issue arising in the instant circumstances.

(4) There was no engagement in the process by the applicant in the instant circumstances.

(5) There was an oral interview with the applicant at Dublin Airport and there were two oral conversations with the EU citizen by an official albeit by phone.

18. In addition to the foregoing: -

(a) The applicant was on full notice of the Minister's concerns as outlined in the letter of 16 December 2019 and the response was at best minimal.

(b) There was no identification of matters which might be dealt with in an oral hearing that could not be dealt with in written submissions.

19. In the particular circumstances of the within matter I am satisfied that there was nothing unlawful in the process adopted by the respondent, a further oral hearing was not required and therefore the relief claimed is refused.

Costs

20. As this judgment is being delivered electronically, with regards to the issue of costs, as the Minister has been entirely successful, it is my provisional view that they should be entitled to their costs, to be adjudicated in default of agreement. As the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words within 14 days of this judgment being delivered should they disagree with the order proposed. In default of such submissions being filed, the proposed order will be made.