



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

**S:AP:IE:2023:000019
[2024] IESC 3**

**Dunne J.
Charleton J.
Woulfe J.
Murray J.
Donnelly J.**

Between/

E.M.

Appellant

AND

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

Judgment of Ms. Justice Elizabeth Dunne delivered on the 21st day of February 2024

Introduction

1. This appeal concerns the appropriate test to be applied by the Minister for Justice when considering the employment prospects of a non-national who is the subject of a Deportation Order pursuant to s. 3(6) of the Immigration Act 1999 (“the 1999 Act”). A

further issue in this appeal is whether the trial judge was correct to dismiss the proceedings on the basis of conduct or lack of candour.

2. Section 3 of the 1999 Act relates to the power of the Minister for Justice (“the Minister”) to deport non-nationals from the State. Section 3(6) stipulates that when exercising the power of deportation, the Minister must have regard to a number of humanitarian factors, *inter alia*, “*the employment (including self-employment) prospects of the person*” (see s. 3(6)(f) of the 1999 Act).

Background

3. E.M. (“the appellant”) arrived in the State on 13th August, 2011 from Pakistan. He made an application for asylum three days later, which was refused by the Refugee Applications Commissioner on 17th November, 2011. An appeal was lodged to the Refugee Appeals Tribunal against this decision but was deemed abandoned on 22nd May, 2012 as the appellant had failed to attend an oral hearing and failed to provide any explanation for his non-attendance. On 31st May, 2012, the appellant was informed of this decision and advised that the Minister proposed to make a Deportation Order in respect of him. However, three months previously, on 15th March, 2012, the appellant married a Latvian national who was resident in Ireland. On 8th October, 2012, he was granted residence in the State pursuant to the European Communities (Free Movement of Persons) Regulations 2006 and 2008 and Directive 2004/38/EC as a spouse of an EU national exercising EU Treaty rights in the State. In effect, this granted the appellant Stamp 4 permission to remain in the State until 28th September, 2017.
4. On the expiry of this permission, the appellant made a second application for permission, again as a spouse of an EU citizen exercising free movement. At this stage, the Minister raised a number of concerns about the legitimacy of the appellant’s relationship, noting in correspondence that the relationship seemed to have blossomed

rapidly, the couple were married within six months of meeting each other, and the EU citizen had spent seven and a half months between April 2017 and March 2018 in Latvia. The Minister also stated that the EU citizen was in a relationship with another man, whom she was photographed with on social media. In a letter dated 8th February, 2018, the appellant was given the opportunity to respond to those concerns but he did not provide any documentation to assuage the Minister's concerns. Subsequently, the Minister made a finding that the appellant had entered a marriage of convenience and his permission was revoked retrospectively and declared void *ab initio*. That decision was affirmed by the Minister on 5th December, 2018.

5. Subsequently, the appellant was notified of a proposal to deport him pursuant to s. 3 of the 1999 Act. The reason for the proposal is set out in the letter of 6th December, 2018 as follows:

“Your most recent application for permission to remain under the provisions of the European Communities (Free Movement of Persons) Regulations 2015...and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States...has been refused/revoked as you have failed to show that you are a family member of an EU Citizen. You have no current permission to be in the State and you are therefore unlawfully present in the State.”

The appellant was invited to make representations to the Minister setting out reasons as to why a Deportation Order should not be made against him.

6. The appellant made submissions to the Minister under each of the grounds set out in s. 3(6), alongside other supporting documentation. Under the heading “*section 3(6)(f) The employment (including self-employment) prospects of the person*”, the appellant states that if he is deported, his business may fail and the State will lose the revenue generated

by the employment created by his business. Over the course of his residence in the State, the appellant held a number of positions of employment. Between 2012 and 2014, he worked as a retail assistant in a grocery shop before opening his own retail business where he employed three to four people. That business closed and in 2015, he opened a takeaway business in County Kildare where he employed up to three people. The appellant had to close his business in April 2021 following the making of the Deportation Order.

7. The Minister informed the appellant on 30th September, 2020 of her decision to deport him. In the examination of file attached to the decision, the Minister noted that she had considered all representations made by the appellant and read all documentation lodged by him carefully. Under the heading of ‘employment prospects’, the Minister stated as follows:

“[The appellant] is currently working in the State in his takeaway business, [business name]. However, [the appellant] does not have the permission of the Minister to reside or work in the State at this time and there is no obligation on the Minister to grant him permission to remain in the State in order to facilitate employment/self-employment in this State.”

High Court Proceedings ([2022] IEHC 413)

8. The appellant sought leave to apply for judicial review to quash the Deportation Order of the Minister and the examination of file on which it was based. It was alleged that the Minister erred in law in considering the appellant’s employment prospects under s. 3(6)(f), and in particular, that the Minister applied the wrong test to the analysis in considering whether the appellant had permission to reside or work in the State rather than consider his employment prospects, thereby failing to reach any conclusion on the actual employment prospects of the appellant.

9. O'Regan J. referred to the recent High Court cases of *M.A.H. v. Minister for Justice* [2021] IEHC 302, *A.N.A. v. Minister for Justice* [2021] IEHC 589, *Huang v. Minister for Justice* [2021] IEHC 630 and *Talukder v. Minister for Justice* [2021] IEHC 835, all of which concerned a challenge to the Minister's consideration of employment prospects under s. 3(6). These judgments will be considered later in the course of this judgment.
10. O'Regan J. was satisfied that the reference to the appellant's lack of permission to reside was not fatal to the validity of the Deportation Order. She summarised her findings at para. 49 of her judgment:

“(1) As in ANA and Huang the reference to lack of permission and lack of obligation to provide such permission comprised a statement of fact only and did not have the effect of a negative evaluation of the prospects for future employment of the applicant;

(2) if it was an error to include the matters of fact aforesaid within the employment prospect paragraph, same was a minor error in the circumstances of this case and does not comprise a basis for condemning the Deportation Order...;

(3) it is necessary to consider the entirety of the evaluation in the round and it is not appropriate to compartmentalise various matters involved in the consideration by the Minister...

(4) The prospect of employment of the applicant was not in my view central to the issue before the Minister...”

Discretionary bar to relief

11. Separately, O'Regan J. concluded that if she was incorrect to uphold the Deportation Order, the appellant was disentitled to relief in light of his conduct. In so doing, she

applied the principles identified by McKechnie J. at para. 98 of his judgment in *P.N.S. v. Minister for Justice* [2020] IESC 11. In that case, McKechnie J. identified four factors relevant to the exercise of the Court's discretion in denying an applicant relief on grounds of their conduct:

- (a) such as to amount to abuse;
- (b) serious and flagrant;
- (c) deliberately engaged in; and
- (d) the applicant had to have shown a clear disregard for the asylum system.

12. O'Regan J. was satisfied that the appellant's conduct satisfied the test set out in *P.N.S.* in light of the following behaviour:

- (a) Entering into a marriage of convenience for the purposes of circumventing the procedures and provisions of the asylum and immigration system;
- (b) applying for a resident's card in 2017 on the basis that he was still residing with the Union citizen, whereas in his application to the Minister in respect of the Deportation Order the applicant has identified that he resided with the Union citizen from 2011 to 2016, and indeed the letter of 2018 from the Union citizen confirms this fact;
- (c) in his application to the Minister vis-à-vis the within Deportation Order the applicant effectively advised the Minister that he could not be returned to Pakistan on the basis of fear of persecution or serious harm thereby raising the principles of prohibition against *refoulement*, whereas the applicant voluntarily returned to Pakistan in November 2021 and continues to reside there;
- (d) the applicant has filed a supplementary affidavit as late as April 2022, however, has not provided a full and candid explanation of the discrepancy identified at para (c);

(e) the marriage of convenience was the basis of the Minister's proposal to deport and therefore the action giving rise to these proceedings; and,

(f) the matters referred to at paras (a), (b) and (c) amount to an abuse, are serious and flagrant, were deliberately engaged in and comprise a clear disregard for the asylum and immigration system.

13. O'Regan J. refused to quash the decision of the Minister. The appellant sought leave to appeal to the Court of Appeal pursuant to s. 5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000, as amended. This was refused by O'Regan J. on 3rd November 2022 (see [2022] IEHC 675).

Submissions

14. The appellant sought leave to appeal to this Court, which was granted in a Determination dated 3rd May, 2023 ([2023] IESCDET 51). The issues remaining at this stage are whether the Minister applied an incorrect test when considering the appellant's employment prospects and whether the trial judge was correct to refuse the appellant relief on the grounds of misconduct/lack of candour.

Employment Prospects

15. The appellant says that the Minister was wrong to rely on the non-existence of his permission to work in the State when considering the strength of his employment prospects for the following reasons:

- a. It is irrelevant to the statutory obligation imposed on the Minister to have regard to the appellant's employment prospects;
- b. It provides no insight into the Minister's conclusion on the strength of the appellant's employment prospects, which meant that the appellant could not be certain how much weight should have been attached to it; and

- c. It creates an impression that it is a negative counterweight to the quality of any employment prospects.

16. The appellant contends that when having regard to the factors set out in s. 3(6) of the 1999 Act, the Minister should come to a discrete, qualitative conclusion on the strength of the appellant's employment prospects and provide independent reasons for that conclusion. To this end, the appellant relies on the approach demonstrated in *Achouri v. Minister for Justice and Equality* [2022] IEHC 576, a decision of Hyland J. that post-dates *Talukder*. In *Achouri*, the Minister concluded that the applicant's employment prospects were weak in light of the economy and employment figures, having regard also to his criminal record and the fact that his skills were not a deficit in the State. In contrast, the Minister did not come to any conclusion as to the quality of the appellant's employment prospects in this case, and instead only concluded that the Minister had no obligation to grant him permission to work in the State. In so doing, the appellant argues that the Minister negated his employment prospects by reference to his lack of permission to remain in the State, and therefore, the decision offends the principle set out in *M.A.H.* and *Talukder*.
17. The appellant does not suggest that the line of case law in *M.A.H.* and *Talukder* is correct and that *A.N.A.* and *Huang* were decided wrongly. Instead, he argues that the distinguishing factor in the cases of *M.A.H.*, *A.N.A.*, *Huang* and *Talukder* is the existence of a material error. While the same formulation of words was used by the Minister in *Huang* and *M.A.H.*, in *Huang* the overarching counterweight to the applicant's employment prospects was that he had entered the State unlawfully and worked without a valid permission. The applicant in *M.A.H.* had never worked unlawfully in the State, and it was found in that case that her employment prospects were nullified using the same observations.

- 18.** The appellant submits that the alleged error in this case is material to the Minister's decision. The Minister could have granted the appellant permission to remain despite her finding that he entered into a marriage of convenience, and the appellant's employment prospects, if considered properly, must be material to the decision because s. 3(6) obliges the Minister to have regard to them.
- 19.** While it is accepted that the Minister is not obliged to consider every ground under the section individually, the appellant submits that there must be some indication in the Minister's decision that the appellant's submissions on each of the s. 3(6) grounds were considered and weighed against the other factors that require consideration. The appellant links this duty to the obligation to provide sufficient reasons. The appellant argues that the Minister reached no conclusion on the appellant's employment prospects, nor was there any analysis of the weight given to that particular factor, nor any explanation as to how it was balanced against the Minister's other considerations. The result, it is said, is a decision that the appellant and the courts are incapable of understanding.
- 20.** The Minister disagrees with the appellant's contention that the Minister was required to reach a conclusion on the quality of his employment prospects. The Minister submits that the obligation placed on her under s. 3(6) is to "*have regard*" to the factors set out therein. It is argued that there is no obligation contained in s. 3(6) to formulaically address each of the humanitarian factors, and the Minister retains wide discretion in weighing the competing interests when making a Deportation Order. To this end, the Minister relies on the comments of Clarke J. in *Kouaype v. Minister for Justice* [2005] IEHC 380, [2011] 2 I.R. 1 at p. 10 to the effect that s. 3(6) requires that an applicant has an opportunity to make submissions to the Minister and for those submissions to be considered. It is submitted that beyond these requirements, the weight prescribed to

various factors specified in s. 3(6) is entirely a matter for the Minister, and the decision to make a Deportation Order can only be reviewed in limited circumstances.

21. The Minister submits that the decisions in *M.A.H.* and *Talukder* are incorrect and should not be adopted by this Court. It is argued that these cases erroneously equate the Minister's "impugned observations" to negating an otherwise positive factor in favour of the various applicants, and that the observations regarding the appellant's present lack of permission to work had no impact on the assessment of his future employment prospects. Separately, the Minister submits that she was entitled to make a Deportation Order on the basis of broader considerations, such as the public policy issues arising out of the appellant's marriage of convenience.
22. If this Court finds that the Minister's analysis of the appellant's employment prospects was incorrect, the Minister submits that the error is not material to the decision. It is submitted that only clear misunderstandings or omissions have been sufficient to reach the threshold of materiality to quash Deportation Orders, citing *Lin v. Minister for Justice (No. 2)* [2017] IEHC 745. It is the Minister's case that the appellant's employment prospects were apparent from the representations made on his behalf and there was no mistake evident in her decision.

Discretionary Bar to Relief

23. The appellant takes issue with the trial judge denying him relief on a discretionary basis for two main reasons. First, he submits that there were weaknesses in the procedure adopted by the Minister when concluding his marriage was one of convenience. While the appellant accepts that the legality of the Minister's finding cannot be challenged, he complains that he was not interviewed, the decision to open an investigation into his marriage was based on tenuous evidence that was not disclosed until a later date, and that it did not take into account explanations offered by his spouse about why she visited

Riga for prolonged periods of time between April 2017 and March 2018. He also argues that the matters used to deny the appellant relief on discretionary grounds in the High Court were not fully pleaded by the Minister, were historical in nature, and had already been considered by the Minister in a different manner when his permission was revoked and a proposal made to deport him. Secondly, the appellant argues that using the marriage of convenience finding to deny him relief creates a circularity that denies a person subject to a Deportation Order who has been found to have entered a marriage of convenience from challenging that Order through judicial review.

24. The appellant submits that the trial judge erred in finding that the appellant advised the Minister he could not be returned to Pakistan as he would face persecution, even though he had voluntarily returned to Pakistan in November 2021 and continues to reside there. The appellant submits that he expressly informed the Minister that he was not seeking to make *refoulement* arguments to avoid deportation, and this was an error on the part of the trial judge.
25. The Minister seeks to uphold the decision of the trial judge denying the appellant relief on the basis of his conduct. She argues that the appellant's engagement with the Minister prior to an investigation into his marriage was abusive as he failed to inform her of material changes to his wife's living arrangements. It is said that the appellant's behaviour led directly to the making of the Deportation Order and his conduct had the effect of undermining the integrity of the immigration system. Further, the Minister argues that she was entitled to take the view that the appellant was raising *refoulement* arguments in his submissions and that by returning to Pakistan, the appellant has acknowledged the validity of the Deportation Order and is estopped from challenging it. In light of these factors, the Minister argues that the trial judge was entitled to refuse

relief on the basis of the principle set out in *P.N.S. v Minister for Justice* and *P.F. v Minister for Justice* [2020] IECA 357.

What is the Requirement of the Minister before making a Deportation Order?

26. Under s. 3(3) of the 1999 Act, where the Minister proposes to make a Deportation Order, he or she must notify the person concerned in writing of the proposal and the reasons for it, and the person concerned is permitted to make representations in relation to the proposal before the Deportation Order is made. The background to this case has been set out previously, but it would be helpful to recall briefly the circumstances. The appellant was a failed asylum seeker who married a Latvian citizen in 2012, and on that basis, he obtained a residence card under, and by virtue of, the Citizens' Rights Directive 2004/38/EC. That right of residence was valid for a period of five years and he, therefore, applied for a renewal of his right of residence on the expiry of that right. He was then notified that the Minister had concerns about the status of his marriage. He responded to those concerns but did not satisfy the Minister in that respect. Accordingly, the Minister took the view that his was a marriage of convenience. The Minister, therefore, refused his application for a further residence card, and further informed the appellant that the previous right of residence was invalid from the outset by reason of the conclusion that his was a marriage of convenience. The appellant requested a review of this decision but, on review, the decision was affirmed. It should be borne in mind that this decision, as to the fact that his was a marriage of convenience, was never challenged by the appellant, although the appellant has made it clear that he disagrees with that conclusion. Thereafter, the appellant was notified of the Minister's proposal to deport him. She sought representations from the appellant as to why he should not be deported.

27. In due course, representations were made to the Minister as to why the appellant should not be deported. The argument in this case has focused to a large extent on one aspect of the representations made by the appellant, and the consideration of that aspect of the matter by the Minister, namely, the representations in relation to his employment prospects. The relevance of a consideration of employment prospects is to be found in s. 3(6) of the Act of 1999, which provides as follows:

“In determining whether to make a Deportation Order in relation to a person, the Minister shall have regard to -”

and a list of matters are then set out, including the age, duration of residence in the State, the employment record of the person (including self-employment), the employment prospects of the person (including self-employment), and the character and conduct of the person both within and outside the State, including any criminal convictions.

28. In this case, the appellant identified the following matters under various headings contained in s. 3(6) of the 1999 Act:

“Section 3(6)(d) - The nature of the person's connection with the State.

The applicant has now been resident in Ireland for some 7 years and has formed strong personal connections in the State. He is primarily a businessman since he opened his own business in 2014. Evidence of his professional activity and personal references are set out below.

Section 3(6)(e) - The employment (including self-employment) record of the person.

He previously worked as a sales assistant in Fogarty Retail Shop from 2012 to 2014. This was a grocery shop.

He then opened his own business, Retail Grocery Shop, New Days in Sallins, County Kildare. He employed between three and four people on an ongoing basis. This shop is now closed. In 2015 he opened a takeaway called Salt & Pepper in Ballymore Eustace. He employed between two and three people on an ongoing basis. This shop is still trading.

We enclose the following supporting documents in respect of his employment record:

Section 3(6)(f) - the employment (including self-employment) prospects of the person.

Should he be deported, his business in particular may fail and the State will lose the revenue generated from it, and the employment created by his business.”

29. It was added on behalf of the appellant in the course of the representations that:

“the granting of this application would be wholly consistent with the common good insofar as the applicant would be placed in a position, whereby he could continue to provide the valuable service that his business provides.”

30. Reference was also made to the status of his marriage, and the conclusion of the Minister that it was a marriage of convenience. Finally, it was stated that the applicant did not wish to raise *refoulement* issues at this juncture.

31. There was also a separate form completed by the applicant personally, in which he set out similar information under the various headings. In that he said, under the heading of s. 3(6)(f), that he had strong employment prospects and would like to continue to operate his business. That form predated his solicitor’s representations by some two days. Curiously, in the form completed by the applicant, he stated that he relied on all

refoulement issues set out in the context of his earlier and unsuccessful asylum application.

32. It should be noted at the outset that the Minister is required to “*have regard*” to the matters set out in s. 3(6) of the 1999 Act before determining that a Deportation Order shall be made.

33. Following the representations made by and on behalf of the appellant, the Minister decided to make a Deportation Order. The letter of the 30th September, 2020, enclosing the Deportation Order, explained the reasons leading to that decision. It was said that:

“In reaching this decision, the Minister has satisfied himself that the provisions of section 3A (Prohibition of Refoulement) of the Immigration Act, 1999 (as amended) are complied with in your case. The reasons for the Minister’s decision are that you have remained in the State without the permission of the Minister for Justice & Equality. Having had regard to the factors set out in section 3(6) of the Immigration Act, 1999 (as amended), including the representations received on your behalf, the Minister is satisfied that the interest of the public policy, and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State.”

34. It is noteworthy that, despite the somewhat contradictory positions taken by the appellant and his solicitors in the representations, the issue of *refoulement* was considered by the Minister and found not to be a bar to deportation.

35. It is also relevant to note that it is explicitly stated that the Minister had regard to the representations made by and on behalf of the appellant but came to the conclusion that the interest of the public policy and the common good in maintaining the asylum and

immigration systems outweighed the features of his case that might tend to support being granted leave to remain in the State.

Discussion of the Relevant Case Law

36. It is necessary to look at the examination of file carried out in this case, and to do so in the context of the case law in this area. Four decisions of the High Court are of particular relevance, and they have been referred to briefly at an earlier stage of this judgment. The first of those was *M.A.H. Burns J.* in that case quashed the Deportation Order made in respect of a Somali national who was a qualified medical doctor. She had previously applied for asylum in Hungary. It would be helpful to refer briefly to what was contained in the examination of the file under s. 3 of the 1999 Act, (hereinafter referred to as the “examination of file”) in that case. At para. 26 of her judgment, the following was stated:

“The “Examination of file under Section 3 of the 1999 Act” document stated the following in relation to s. 3(6)(f) of the 1999 Act, regarding the employment prospects of the proposed deportee:-

“It is submitted on behalf of MAH that she “would easily take up employment in the State as a qualified medical doctor.” It is further submitted that “this is a critical skill in the State at present and she is likely to be a considerable asset to Irish medical services.”

In light of her work history, her age, her work ethic and her apparent good health, her employment prospects would have to be deemed to be reasonable in the current economic climate, in the event that she held an appropriate immigration permission. However, she does not have the permission of the Minister to reside or work in the State at this time and

there is no obligation on the Minister to grant MAH permission to remain in the State in order to facilitate her employment in this State.

It would, of course, be open to a prospective employer to apply for a Work Permit in respect of MAH from outside the State. The process provided for under section 3 of the Immigration Act 1999 (as amended) is clearly not the means by which Ireland's labour market needs should be met."

37. Burns J. then set out the relevant provisions of s. 3(6) of the 1999 Act, and went on to say, at paras. 28 and 29, as follows:

"28. Section 3(6) clearly places a mandatory onus on the Respondent to consider particular, specified issues when determining whether a Deportation Order should issue in respect of a proposed deportee. Whilst the Respondent did consider the Applicant's employment prospects, she reversed the clearly positive outcome in respect of that heading by having regard to the fact that the Applicant does not hold a work visa in respect of such employment prospects, nor has permission to remain in the State. These are inappropriate matters to have regard to under this sub-heading. Had the Applicant a work visa or a permission to remain in the State, a consideration pursuant to s. 3(6) of the 1999 Act would not arise in the first place. Accordingly, what s. 3(6) requires of the Respondent is to initially consider each of the sub-headings on a standalone basis and to then engage in a balancing act to determine whether a Deportation Order should issue having regard to all issues mandated to be considered pursuant to s. 3(6).

29. Incorrectly, the Respondent nullified the separate consideration of the good employment prospects which the Applicant was found to have by reference

to her not having a work visa or permission to be in the State. These issues are separate to her employment prospects: they can clearly be taken into account by the Respondent in the balancing exercise which she must conduct but they should not be utilised in a compartmentalised determination regarding her employment prospects simpliciter. This was an error on the Respondent's part."

38. As can be seen, the primary concern of the trial judge was that the fact that the applicant did not have a visa or permission to be in the State “*nullified*” the consideration of her employment prospects. It was clearly a factor to be taken into consideration, but not in a “*compartmentalised determination*” regarding employment prospects. This was found to be an error on the Minister’s part and one of a number of other errors found to vitiate the Minister’s decision to deport in that case. Clearly, as can be seen from the examination of file in this case, there was a recognition of the fact that the applicant had good employment prospects, but this appears to have been set at nought by the view of the Minister that “*she does not have the permission of the Minister to reside or work in the State at this time*”. It was in those circumstances that the trial judge in that case took the view that the Minister had nullified the separate consideration of the good employment prospects by reference to not having a work visa or permission to be in the State. It is also noteworthy that, in that case, it appears to have been the view that an application could have been made by or on behalf of the applicant therein from outside the State by a potential employer.

39. The second case of relevance is that of *A.N.A.* That was also a judgment of Burns J., which was delivered on the 15th September, 2021. The applicant in this case was refused international protection and he was informed of a proposal to deport him. He made representations pursuant to s. 3(6) of the 1999 Act and said that he had been offered a

job as a full-time chef in a takeaway pizza restaurant. The examination of file stated that the applicant had been offered a job as a full-time chef. Various other matters were set out as to his work ethic, English language skills, and so on. The examination of file concluded, under the heading of employment prospects, as follows:

“I note that Mr. [A] has an offer of job in the State, however, he does not have the permission of the Minister to reside or work in the State at this time and there is no obligation on the Minister to grant him a permission to remain in the State in order to facilitate his employment in the State.”

40. Burns J. made the following comment at para. 15 of her judgment in that case, having noted the reliance placed by the applicant on the judgment in *M.A.H.* and, in particular, the comments set out at paras. 28 and 29 of that judgment, and she said as follows:

“The error which the Respondent fell into in MAH did not occur in the instant case. The fact that the Applicant does not have permission to remain or a work visa is noted as a fact, but it is not utilized to make a determination that the Applicant does not have reasonable work prospects, which was the error which the Respondent made in MAH. Instead, it is noted as a fact to be considered as part of the balancing exercise which the Court referred to in MAH.”

41. Reference was also made in that case to the decision of the High Court in *Lin v. Minister for Justice & Equality (No. 2)*, where it had been found that the respondent made factual errors in the course of the considerations which, it was held, vitiated the deportation decision. Burns J. concluded that no factual error had been made by the Minister in *A.N.A.* Therefore, she refused to quash the Deportation Order in that case.

42. The next case of relevance was that of *Huang*. This was also a judgment of Burns J. delivered on the 30th September, 2021. This case concerned a Chinese national who was unlawfully in the State. A proposal to deport was made in 2019. Representations were

made to the Minister. It appeared that the applicant had initially worked in a takeaway Chinese restaurant. In 2010, he began to operate his own takeaway restaurant. At the time of the proceedings, he was operating two successful restaurants in which he was acting as head chef. In 2017, he was granted an employment permit by the Department of Business, Enterprise and Innovation, but this was subsequently revoked as he did not have a work visa. He subsequently sought permission to remain, which was refused, leading to the proposal to deport. The examination of file in that case set out the background details in respect of the applicant, and under the heading of s. 3(6)(f) the following was stated:

“Mr. Jinping Huang is currently working in the State “as head Chef in a restaurant in [...], which he also runs. He is a Director of the company GHRN which owns the business.” However, Mr. Jinping Huang does not have the permission of the Minister to reside or work in the State at this time and there is no obligation on the Minister to grant him a permission to remain in the State in order to facilitate his employment in the State.”

43. The argument was made in that case that the respondent erred in the consideration of the employment record and prospects of Mr. Huang by observing that he did not have permission to work in the State, and that there was no obligation to grant a visa to facilitate his work. Burns J. in her judgment referred to the decisions in *A.N.A.* and *M.A.H.* Having set out the relevant passages in *A.N.A.*, which referred in turn to *M.A.H.*, at para. 10 of her judgment (those have been set out above), she concluded at para. 11 as follows:

“Accordingly, referring to the fact that the Applicant does not have permission to work in the State and that there is no obligation on the Respondent to grant him such permission, is not an error in approach by the Respondent once an

applicant's employment prospects are not nullified by these considerations. In the instant case, that error did not occur. The Respondent accurately noted the Applicant's employment history and the Applicant's current business endeavours. However, the Respondent's primary focus was that the Applicant had engaged in this activity without permission for such a significant period of time. She determined that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweighed such features of the Applicant's case as might tend to support him being granted leave to remain in the State. This was a finding entirely within the Respondent's remit in respect of which she has sole responsibility and extensive expertise. The decision cannot be described as an irrational or unreasonable finding. It was open to her to make. This Court cannot operate as an appeal Court and must concern itself with the decision-making process rather than the decision made, once the decision made does not fly in the face of fundamental reason and common sense. Accordingly, an error does not arise in relation to this aspect of the Respondent's determination."

- 44.** As can be seen, Burns J. rejected the argument that an error had occurred in that case. She made the point that the court is concerned with the decision-making process, rather than the decision made, and that once the decision made was not one which flew in the face of fundamental reason and common sense, an error did not arise. A further indication of the approach taken by Burns J. can be seen in para. 19 of her judgment, where she stated as follows:

"As already stated, this Court can only review the impugned decision within the confines of judicial review principles. The decision when taken as a whole, is not unreasonable or irrational. The reason for deportation is stated to be that

the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweighs such features of the Applicant's case as might tend to support him being granted leave to remain in the State. That is a legitimate interest for the Respondent to uphold. Having carried out a balancing exercise with respect to the competing interests in the case, she was of the opinion that this interest outweighed permitting the Applicant to remain which was a decision open to her to take."

45. It is, I think, important to bear in mind the observations of Burns J. in that case. In essence, the Minister in such a case is, as Burns J. said, carrying out a balancing exercise "*with respect to the competing interests in the case*". In that particular case, the Minister had concluded that the public interest outweighed the various features of the applicant's case that might have allowed the particular applicant to remain in the State. In essence, that is the role of the Minister. What is required under s. 3(6) is just that, a balancing exercise having regard to various features, including, on the one hand, the matters put forward by a particular applicant and, on the other hand, the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems.

46. The final judgment of the High Court of relevance in this sequence is that of *Talukder*, a decision of Hyland J. delivered on the 21st December, 2021, some months after the three decisions referred to above. It would be helpful to look at this decision in some detail. The applicant in that case had applied for asylum, and this was refused. This led to successful judicial review proceedings leading to the matter being reconsidered and his application was again refused. In the meantime, Mr. Talukder met and married a Hungarian citizen while that process was ongoing, and he was granted a right of residence on the basis of his marriage to an EU citizen in August 2014. In September

2018, the applicant notified the Minister that his wife had left the State. Following further correspondence between the applicant and the Minister, a decision was made on the 13th August, 2019 to revoke his residence card, and a finding was made that his was a marriage of convenience. Ultimately, following a proposal to deport, representations were made on his behalf pursuant to s. 3(6) of the 1999 Act. Under the heading of s. 3(6)(f), the following is stated in the examination of file:

“Sujit Talukder states that his employment prospects are good because he has a strong work record in the State, a strong work ethic and good English-language skills.

Sujit Talukder is currently working in the State in a petrol station. However, Sujit Talukder does not have the permission of the Minister to reside or work in the State at this time and there is no obligation on the Minister to grant him permission to remain in the State in order to facilitate his employment/self-employment in this State.”

47. Hyland J. in her judgment referred in para. 18 to what she described as being at the heart of the applicant’s case, namely, that the reference to the applicant being unable to work or reside in the State indicated that the Minister incorrectly negatively evaluated the applicant’s future employment prospects. She then considered the cases of *M.A.H.* and *A.N.A.*, referred to above. No reference was made to the decision in *Huang*, but nothing, I think, turns on this. Having considered in some detail the decisions in *M.A.H.* and *A.N.A.*, and having referred to the passages which have already been cited therefrom, Hyland J. went on to say, at para. 27, as follows:

“The case of ANA v. Minister for Justice was relied upon in support of the argument that the Minister was entitled to consider the question of permission to remain/work as part of the balancing exercise. The case of MAH v. Minister

for Justice was distinguished on the basis that there was an additional factor not present in this case or indeed in the case of ANA, i.e. that the respondent had noted that the process provided by s.3 of the 1999 Act was not the means by which Ireland's labour market needs should be met and it was this additional consideration that rendered the decision unlawful.

28. *To resolve this issue, it is necessary to consider the nature of the Minister's obligation. Section 3(6) requires that: "In determining whether to make a Deportation Order in relation to a person, the Minister shall have regard to ..." the eleven statutory factors in sub-section 6. The phrase has been considered on various occasions, most recently by Humphreys J. in Cork County Council v The Minister for Housing and Ors [2021] IEHC 683 where he referred back to the case of G.K. (cited by the parties in this case), which considers the term in the context of s.3(6) of the 1999 Act. Humphreys J. observes that the obligation "to have regard to" is treated in G.K. as a synonym for "considering" such factors. He notes that the approach taken by the Supreme Court in G.K. is essentially that where the decision maker says it has had regard to certain matters, there is an evidential onus on the applicant to be overcome to displace that assertion."*

48. Hyland J. then went on, at para. 29, to say as follows:

"To interpret the words "have regard to" to be synonymous with an obligation to carry out an individual analysis and conclusion in respect of each of the 11 statutory guidelines would be a serious error, whether one considers the matter from the standpoint of the natural and ordinary meaning of the words "to have regard to" or by reference to the jurisprudence on the correct interpretation of that phrase. I therefore reject the applicant's argument that the Minister was

under any obligation to arrive at and identify a discrete conclusion in relation to the employment prospects of the applicant, that would then be fed into the overall assessment.”

49. I agree with her conclusions in that regard. The requirement “*to have regard to*” is “to consider” the matters referred to, as observed by Humphreys J. in the case of *Cork County Council*, referred to above. It does not involve the Minister engaging in a “tick box” exercise of examining and setting out a conclusion under each heading. What is required is an overall assessment of the matters set out by an applicant under the headings contained in s. 3(6) of the 1999 Act as a whole, as Hyland J. concluded. As she said (at para. 30), the Minister “*is not absolved from the obligation to have regard to, or consider, each of the statutory factors individually*”. Nevertheless, she went on to identify a concern that the reference by the Minister to the applicant’s inability to work in the State meant that the Minister was treating the factual criteria incorrectly. She went on to conclude, at para. 32 of her judgment, as follows:

“Nonetheless, the statutory criteria require consideration to be given to the employment prospects of the person. I cannot interpret that provision as meaning that only persons who already have a right to reside and work in the State at the time of the proposed deportation are entitled to the benefit of that consideration. There is no such limitation in the wording of s.3(6). If the statute provided that the Minister “may have regard to”, then the position might be different. But that is not what s.3(6) identifies.”

50. I agree with the views expressed by Hyland J. in that passage. The consideration of employment prospects is not predicated on the person concerned having an existing right to work and reside in the State. She went on to say that the Minister was not

entitled to address a statutory factor in such a way as to negate its effect, and she concluded that that was what the Minister had done in this case. What she said was that:

“Identifying the lack of permission to work/remain as a counterweight to employment history or prospects has the effect of wholly undermining the statutory criteria identified under s.3(6)(f), since a lack of permission to work/remain, if a relevant consideration, would inevitably wholly trump even the most glowing prospects of future employment, and prevent any weight at all being given to same.”

51. She, therefore, concluded that the consideration of a person’s employment prospects must take place without reference to the lack of permission to work and reside in the State. She concluded (at para. 35) that the practical effect of the Minister taking the lack of permission into account at the point of considering s. 3(6)(f) considerations was, in effect, to negate the applicant’s positive work record and prospects in that case. She went on to make an observation which is of relevance, at para. 36:

“Separately, the reference to the Minister having no obligation to grant the applicant permission to remain in the State in order to facilitate his employment in the State is also problematic, not because it is tautologous, but because it tends to suggest, albeit implicitly, that the Minister has singled out a particular statutory criteria as being worthy of comment in respect of the limitations of same, despite the fact that that comment could arguably be made equally validly in respect of all of the so-called “personal” grounds under s.3(6). It is an accurate statement as far as it goes but it is difficult to understand why the Minister has considered it necessary to make that observation only in respect of s.3(6)(f).”

52. It is somewhat difficult to reconcile the outcome of the various decisions to which I have referred at length above. At issue in each case was the consideration by the Minister of the various factors set out in s. 3(6) of the 1999 Act, and, in particular, the consideration under s. 3(6)(f) of the employment prospects of the individual concerned. In the submissions, having discussed the various cases referred to above, the appellant suggests that the distinguishing factor in these cases is materiality. In other words, in the *M.A.H.* case, it was material in the court's view that the conclusion that employment prospects were reasonable was unlawfully overborne by the separate "*impugned observations*". In *Huang*, the court was of the view that what counterweighed the employment prospects on the facts of that case was not materially the "*impugned observation*", but rather that, as set out at para. 11, "*the respondent's primary focus was that the Applicant had engaged in this activity without permission for such a significant period of time [being 13 years at the time of the impugned decision]*".
53. The fundamental question in this respect is whether it was, in fact, an error to add in a sentence under the examination of file in respect of employment prospects, to the effect that the appellant did not have the permission of the Minister to reside or work in the State at this time, and that there is no obligation on the Minister to grant him permission to remain in the State "*in order to facilitate his employment/self-employment in this State*". It would be helpful to recall what was said by the trial judge in the course of her judgment. At para. 49 of her judgment, she observes as follows:

"Insofar as the asserted error in respect of the paragraph on the applicant's employment prospects by reason of including the statement to the effect that the applicant did not have a right to reside or work, and the Minister was under no obligation to afford such permission, I am satisfied:

- (1) *As in ANA and Huang the reference to lack of permission and lack of obligation to provide such permission comprised a statement of fact only and did not have the effect of a negative evaluation of the prospects for future employment of the applicant;*
- (2) *if it was an error to include the matters of fact aforesaid within the employment prospect paragraph, same was a minor error in the circumstances of this case and does not comprise a basis for condemning the Deportation Order (SO);*
- (3) *it is necessary to consider the entirety of the evaluation in the round and it is not appropriate to compartmentalise various matters involved in the consideration by the Minister (Hedigan J. in OST).*
- (4) *The prospect of employment of the applicant was not in my view central to the issue before the Minister (Lin)."*

54. She continued, at para. 50, to say:

"By reason of the foregoing, it appears to me that the Deportation Order should not be condemned because of the inclusion of the lack of current permission to reside or work and lack of obligation on the Minister to provide such permission, within the paragraph of employment prospects. Rather in accordance with ANA and Huang such observation did not have a negative evaluation on the applicant's employment prospects. As was stated by Hyland J. each case turns on its own facts."

55. In considering whether the approach of the trial judge was correct, it is perhaps useful to reflect once more on the provisions of s. 3(6) of the 1999 Act. It provides that:

"In determining whether to make a Deportation Order in relation to a person, the Minister shall have regard to -

- (a) the age of the person;*
- (b) the duration of residence in the State of the person;*
- (c) the family and domestic circumstances of the person;*
- (d) the nature of the person's connection with the State, if any;*
- (e) the employment (including self-employment) record of the person;*
- (f) the employment (including self-employment) prospects of the person;*
- (g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);*
- (h) humanitarian considerations;*
- (i) any representations duly made by or on behalf of the person;*
- (j) the common good; and*
- (k) considerations of national security and public policy,*
so far as they appear or are known to the Minister.”

56. In the course of her judgment, O’Regan J. referred to the earlier decision of the High Court in *O.S.T. v. Minister for Justice, Equality & Law Reform & Ors.* [2008] IEHC 384, in which Hedigan J., at para. 26 of his judgment, observed as follows:

“The view of this Court is that it is not incumbent on the Minister to refer to each and every matter that he has taken into consideration. To impose such a requirement would be to enforce a classic formalism which does not, in my view, enhance the quality of a decision; rather, it would encourage the adoption of a mechanistic approach comparable to the ritualistic ticking of boxes. Such an approach would serve only to reduce the depth of analysis given to relevant matters. It is true that no individual sub-headings relating to the matters set out in section 3(6)(a), (b), (c), (d), (e), (f), (j) and (k) were set out in the departmental analysis of the applicant’s file that is before the Court. In my view,

however, the departmental analysis contains a fair and reasonable consideration of humanitarian and other factors set out in section 3(6); each of the representations made on behalf of the applicant was more than adequately considered.”

57. I have already referred to the observations of Hyland J. to a similar effect, and have noted that I agree with those observations. A consideration of the examination of file in this case shows that there was, indeed, a consideration of all the matters put forward on behalf of the appellant in this case. Thus, the consideration under s. 3(6)(f) in this case recited the fact that the appellant was currently working in his takeaway business. Thus, clearly, the Minister had regard to the present circumstances of the appellant. The additional sentence under that heading as to the lack of permission to reside or work in the State, and the fact that the Minister did not have an obligation to grant the appellant permission to remain in the State to facilitate that, is also a statement of fact. In my view, that statement of fact does not serve to negative his employment prospects, which have already been observed by the Minister.

58. As I have already said, there is some difficulty in reconciling the decisions in the cases cited above. Because of the potential for confusion, it seems to me that having observed, as a matter of fact, whether any given individual has permission to reside or work in the State, it would be preferable not to link that observation to employment prospects. It clearly has the effect of causing confusion as to what was, in fact, the consideration carried out by the Minister in particular cases. It would be preferable to deal with such an observation under a different heading, such as the common good, or considerations of national security and public policy. In this case, the appellant undoubtedly has employment prospects, and that has been reflected in the examination of file. It should be borne in mind that employment prospects are one of a number of factors to be taken

into consideration, and the fact that the sentence impugned regarding his lack of permission to reside and work was included under the heading of s. 3(6)(f) is not, in my view, something that can be regarded as negating his employment prospects. I think it is a sentence that could, as I have observed, been better placed in a different heading so as not to create a potentially misleading impression. Far more important in the circumstances of this case would have been the fact that the right of residence which had been granted to the appellant was revoked, in circumstances where a conclusion had been reached that the basis upon which he had obtained that right of residence, namely, his marriage to a Latvian citizen, was incorrect given that the marriage was found to be, in fact, a marriage of convenience.

59. Accordingly, it would be my view that, whilst it would be preferable not to include a statement to that effect in the paragraph dealing with employment prospects, the fact that such a sentence was included under that heading does not amount to an error which could, or should, vitiate the Deportation Order, providing, of course, that the inclusion of such a sentence was not such as to negate the employment prospects of the person concerned.

60. Before leaving the issue of s. 3(6) of the 1999 Act, I should refer briefly to one further decision of the High Court in which the employment prospects of the applicant were under consideration. That is the case of *Achouri v. Minister for Justice & Equality*, referred to above. That was also a judgment of Hyland J. In that case, the examination of file under the heading of employment prospects was as follows:

“Mehdi Achouri states that he has skills in instrumental engineering, which are in short supply and needed by the Irish economy. He states that he has excellent prospects and is a qualified chef and electrician. He states that his degree enables him to work in automation, instrumentation, control, validation,

manufacturing quality, and production in the pharmaceutical, food and beverage industries and in the petrochemical industry. He states that he has always worked and that he is confident in his continuing ability to find work.

Mehdi Achouri is not permitted by the Minister to reside or work or engage in business in a self-employed capacity in the State. In any event, in light of the impact that the COVID-19 pandemic has had on the economy and on employment figures, and as no information or documentation has been submitted to show that Mehdi Achouri has any specialist skills that are in deficit in this State, and taking into account his criminal convictions as set out in section 3(6)(g) below, it is reasonable to conclude that his employment prospects are limited.”

61. Commenting on the examination of file, Hyland J. noted as follows:

“47. It is true that it is stated that the applicant is not permitted by the respondent to reside or work or engage in business in a self-employed capacity. However, immediately following that it is stated that, in any event, it is reasonable to conclude his employment prospects are limited because of (a) the impact that Covid-19 has had on the economy and employment figures, (b) that no information or documentation has been submitted to show that the applicant has any specialist skills in deficit in the State and (c) his criminal convictions arising out of the offences committed in September 2016.

48. In those circumstances, I agree with the respondent that this decision falls into the category of cases identified in ANA i.e. where the lack of permission to work is simply noted as a fact, but it is not used to negate the statutory factor. The three factors listed after the words “in any event” that are likely to negatively impact his employment prospects makes that clear.

Accordingly, the proper interpretation of the respondent's decision is that a stand-alone conclusion was reached to the effect that his employment prospects were limited, based on objective factors referable to the applicant's particular situation and quite separate to his lack of permission to reside or work. That reasoning is capable of sustaining the respondent's decision independently. In the premises, this is not a situation like that in Talukder, where the sole basis for the negative conclusion on employment was the status of the applicant. Accordingly, the applicants cannot succeed on this ground."

62. It seems to be clear from that analysis that Hyland J. was of the view that, where it is clear that a person's employment prospects are limited for specific reasons, any observation to the effect that the person in question does not have the right to reside or work in the State, or to the like effect that the Minister does not have an obligation to grant permission to reside or work in the State, will not have the effect of setting the person's employment prospects at naught. Clearly, the point that she considered to be significant was a situation where the lack of permission to work is "*simply noted as a fact but is not used to negate the statutory factor*". I would agree with that summary of the position, but, as I have already said, juxtaposing the employment prospects and the question of whether the Minister has an obligation to grant permission to work or reside in the State can create confusion. That could be said to be apparent from the case of *M.A.H.* referred to above. In that case, it was expressly stated in the examination of file that "*her employment prospects would have to be deemed to be reasonable in the current economic climate, in the event that she held an appropriate immigration permission*". The examination of file went on to say that she did not have that permission, and further that there was no obligation to grant her such permission. There,

there was a link between the lack of permission and the view taken of the employment prospects. That is not something that should be done.

63. One final point in relation to that case can be made. In *Achouri*, there was a clear assessment of the employment prospects of the applicant. Complaint has been made in this case that there was no similar assessment of the employment prospects of the appellant. As can be seen from the examination of file, the appellant in this case was running his own business and that was accepted to be the case. There is a difference between self-employment and employment, and any requirement to make an assessment as to employment prospects is more relevant to the situation of employment as opposed to self-employment. Having observed that the appellant in this case was running his own business, it is difficult to see what more could have been said.

64. It is acknowledged in a number of the judgments to which reference has been made that a statement to the effect that the Minister is under no obligation to grant permission to reside or work in the State is a statement of fact. That is so. It must be borne in mind that the function of the Minister is to conduct a balancing exercise having regard to the factors set out in s. 3(6) of the 1999 Act. It should be considered along with the other factors, and then weighed in the balance. Granting permission to reside or work in the State necessarily involves the Minister accepting the representations of the person concerned and deciding not to proceed with the proposal to make a Deportation Order. The Minister is entitled to point out that there is no obligation to grant permission to reside and work simply by reference to the fact that somebody has good employment prospects. There are other factors to be borne in mind, such as the common good, and considerations of national security and public policy. That said, it seems to me that it would be much more logical and clear if such a statement as to the obligations of the Minister was considered under the heading of the common good, or indeed public

policy. It does not sit so easily with a consideration under the heading of employment prospects and, as we have seen, it can cause confusion and has been used in some cases to effectively set at nought the employment prospects. That is not appropriate.

65. Coming back to the facts of this particular case, the statement contained in the examination of file under the heading of ‘employment prospects’ was not used to set at nought the employment prospects of the applicant, and therefore, on that issue, it seems to me that the trial judge was correct in her conclusions in this regard. While it may be unhelpful to refer to the fact that the Minister is not under an obligation to grant permission to reside and work in the State under the heading of employment prospects, it is a fact that could be more logically referred to under a different heading. In any event, if it can be described as an error on the part of the Minister, and I would hesitate to go so far, it is not an error such as to vitiate the Minister’s decision.

66. Finally, it should be said that in considering the approach of the Minister in any case, it is important to remember that the examination of file is but one part of the process. Sight should not be lost of the reasoning of the Minister set out in the letter accompanying the decision to deport. In this case, those reasons were as follows:

“that you remained in the State without the permission of the Minister for Justice and Equality. Having had regard to the factors set out in section 3(6) of the Immigration Act 1999 (as amended), including the representations received on your behalf, the Minister is satisfied that the interest of the public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State.”

In the circumstances of this case, the Court can see no reason to quash the decision of the Minister.

Discretionary Bar to Relief

67. In dealing with the question of considering whether the relief sought by the applicant should be refused, even if he would otherwise have been entitled to have the decision of the Minister quashed, the trial judge relied on a number of factors which have been set out previously at para. 17 above.
68. Taken together, the matters relied on were found to amount to an abuse which was described as serious and flagrant, which were “*deliberately engaged in and comprise a clear disregard for the asylum and immigration system*” (para. 58 of O’Regan J’s judgment).
69. A number of authorities were referred to in support of this approach, principally, the decisions in the case of *P.F. v. International Protection Appeals Tribunal* [2020] IECA 357; *P.N.S. v. Minister for Justice* [2020] IESC 11; and *M.K.F.S. & Ors. v. Minister for Justice* [2020] IESC 48. The latter decision was primarily concerned with the question as to whether or not a finding that a marriage was one of convenience was a nullity in all contexts. In that case, McKechnie J., writing for the Court, concluded as follows, at para. 111:

“To conclude in respect of the three questions set out at para. 57, supra, 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; it does not appear that he did so here.”

70. That decision makes the point that a conclusion that a marriage is a marriage of convenience is one that can be considered in the course of the asylum/immigration process but does not have the effect of rendering the marriage a nullity at law for all purposes. It is perhaps useful to refer to one other passage from the judgment of McKechnie J. in that case, at para. 110, where he said:

*“... I have concluded that the learned High Court judge erred in concluding that because it is a marriage of convenience, **no** family/private rights arising from the underlying relationship between the parties arise to be considered in the deportation context; for the reasons set out above, the Appellants’ rights under Article 8 ECHR still require to be balanced in the mix. As a result, it follows that Humphreys J. was incorrect in stating “an absolutely necessary consequence is that no obligation arises under the Constitution, the ECHR or EU law to consider any such ‘rights’”. Given these findings on the points of principle, I would be reluctant to disentitle the Appellants to the reliefs sought on a discretionary basis. Perhaps more fundamentally, I find it difficult to believe that the term “abuse of process” as properly understood, could encompass the situation at hand. The First and Second Appellants have consistently maintained that theirs is not a marriage of convenience and this certainly does not appear to be a typical abuse of process situation. Having regard to what was stated in P.N.S., I am not satisfied that the conduct of the*

Appellants reaches the high threshold for disentitling them to the reliefs sought on this basis.”

71. I would observe that the facts and circumstances of that case are significantly different to the facts and circumstances of this case. Although I accept that, in this case, the appellant disputes the finding that his is a marriage of convenience, he never challenged the decision of the Minister in this regard, and his circumstances are very different to those of the parties in that case (see paras. 12 to 21 of the judgment).

72. Of more significance is the decision in the case of *P.N.S.*, referred to above. A number of passages from that judgment can be usefully referred to. At para. 96, the following was said:

“There can be no doubt but that a judge’s capacity to condemn abusive conduct by the exercise of discretion, is fundamental to the functioning of any legal system. It is certainly part of our national law and where EU rights or entitlements are asserted, it is almost certainly also to have a foundation there. The ‘qualification’ of it being a ‘general principle’ relates only to the manner in which the case law of the Court of Justice has developed: in broad terms it seems to have been sector by sector (Halifax plc and Ors v. Customs and Excise Case (C-255/02) [2006] ECR I-1609 and Cussens and Ors v. T.G. Brosnan (Case C-251/16) [2017] BVC 61). In any event such power is particularly important in the context of refugee and asylum cases, as where an applicant engages in serious abusive practices, they put the integrity of the entire system in jeopardy. That system, to successfully reflect genuine cases depends on fairness, good faith and transparency; all are seriously at risk with such abuse. Therefore, there is and must be the jurisdiction for such behaviour to be recognised and controlled at a judicial level.”

73. He then referred to the latest edition of Hogan and Morgan, *Administrative Law in Ireland* (5th Ed., Round Hall, 2019), at page 1047, and to a view expressed by the authors that a contemporary line of authority suggests that courts have become increasingly less patient with immigrants and asylum seekers who have in some way tried to circumvent the rules of the immigration and asylum system. He added, “*Although understandable, restraint must be exercised in this respect. However, sight must not be lost of the nature of the asserted right.*” He then went on to make the following observations, at paras. 98 to 99 of his judgment:

“98. *In my view, this jurisdiction must be used sparingly and in a cautious manner; it should only be resorted to, where the abuse in question is serious and flagrant; where it has been deliberately engaged in, such that self-evidently the applicant, by his or her actions, has shown a clear disregard for the asylum system. This may take a variety of forms, such to be determined by the trial judge. In this respect, I would tend to agree with the views expressed by Birmingham J., as he then was, in D.W.G v. Minister for Justice and Equality [2007] IEHC 231 (Unreported, High Court, Birmingham J., 26th June, 2007). The applicant in question in that case wished to benefit from subsidiary protection which, at the time, came from European Communities (Eligibility for Protection Regulations, 2006) S.I. 518/2006: however the learned judge felt that his conduct was such that it had disentitled him to any relief in judicial review, he described the backdrop of the applicant’s situation as being one of quite serious delay and ongoing illegality. He was careful to point out however that he reached this decision while also holding the view that only in certain rare cases would the conduct of an applicant disentitle them to relief (pg. 15 of his judgment)*

99. *Given the views which I have expressed in regard to the other issues, it is not necessary to reach a separate conclusion on this ground; but I should add the following. Firstly, a court undoubtedly has jurisdiction to terminate the proceedings on such basis and may do so where it is satisfied that the disclosed facts so demand. However and secondly, given the clear desirability of reaching a conclusion on the facts and the law, particularly where the asserted right is EU derived, a court should be reluctant to exercise this power unless quite satisfied that it should do so.*”

74. Thus, as can be seen, while there is a jurisdiction to refuse relief on a discretionary basis because of an abuse of the asylum and immigration system, it is a jurisdiction that must be used sparingly and cautiously. As McKechnie J. observed, it should only be resorted to where the abuse in question is serious and flagrant, and deliberately engaged in in such a way so as to show a clear disregard for the asylum system.

75. The decision of this Court in *P.N.S.* was further considered by the Court of Appeal in the case of *P.F.*, referred to above. In that case, the Court of Appeal concluded that it would have been appropriate to exercise its discretion to refuse relief on the basis of the conduct of the applicant therein. The following observations were made by the court in that case, at para. 98:

“98. *Firstly, on at least two occasions the appellant sought to leave the State unlawfully, succeeding the second time. If it is true that she actually arrived in Southampton in February 2016 and given that she attended the hearing of her RAT appeal in Dublin on 3 May, she would actually have left the State at least twice. In leaving the State without the consent of the Minister the appellant breached s. 9(4) of the Refugee Act 1996, and in so doing committed a criminal offence (s. 9(7)).*

99. *Secondly, on at least one occasion she unlawfully sought entry to the UK, on at least one other achieved it and thereafter spent an unspecified period of time unlawfully in that jurisdiction.*

100. *Thirdly, the appellant has throughout the progress of these proceedings drip fed information to the Court, most notably in respect of whether she had a sister in the UK. To this can be added the fact that she elected to provide an explanation on affidavit of why she contends her partner could not be located, only after the High Court decision and that she can say no more than that she met her aunt at an unspecified date in “early” 2019, yet only told her solicitor (who was writing correspondence on her behalf in April) of this on 28 May 2019.*

101. *Fourthly, even then the appellant has not provided any explanation as to why she travelled to Southampton once and tried to go there a second time in order to visit a person in London and then Perthshire, as to how long she had been there when arrested, as to what she was doing there and with whom she was staying in Southampton (if she had been staying there). Noting that the appellant attended the hearing of her appeal before the RAT on 3 May 2016, the appellant’s failure to engage with the evidence from the Home Office that she told them she had arrived in Southampton in February 2016 is as striking as it is surprising.*

102. *The Court has no doubt but that the combination of these circumstances is such that in the event that the appellant had established grounds for the grant of any relief, this is a case in which the Court should exercise its discretion to refuse it.”*

76. It should be observed that the Court of Appeal in that case was satisfied that the matters relied on by them fell within the conditions for the exercise of discretion set out by McKechnie J. in *P.N.S.* The Court went on to make one further observation, on which it would be useful to comment, at para. 105 of the judgment:

“As has already been noted, the Court must exercise the greatest of caution in refusing relief because of the conduct of an applicant in proceedings of this kind. The fact that an applicant broke the criminal law of this State and/or disregarded the immigration law of another may well, in appropriate circumstances, be explicable by reference to particular exigencies and may well be such that having regard to humanitarian concerns and the critical importance of ensuring that the State complies with its legal obligations, it should not operate as a barrier to the grant of otherwise appropriate relief. Here, the appellant relies on the length of time it was taking for her applications to be dealt with in this jurisdiction, and the fact that her partner was living in the UK. While noting this (and noting the fact that the appellant never explains why her partner – an Irish citizen – could not visit her for a “short stay”), for two reasons, however, the Court cannot in this case ignore the nature and extent of the appellant’s admitted breaches of the law in this jurisdiction and in the UK.”

77. The two reasons referred to by the Court of Appeal, in particular, were the breach of the law and the fact that the proceedings arose because of her own breach of the criminal law, and therefore it was the view of the Court of Appeal that the discretion of the court must be “*closely engaged*”. The second point raised related to the lack of candour on the part of the applicant. As was stated by the Court of Appeal, having regard to the misconduct identified by the court in relation to the applicant in that case, it was

“incumbent on them to provide a full and candid explanation of the circumstances in which they so conducted themselves. In this case, this did not happen”. The point was made that, despite the fact that there was a litany of questions arising from the evidence, none of them had been addressed in the evidence provided by the applicant. Thus, in that case, the court was of the view that if it were necessary to do so, it should exercise its discretion against granting relief.

78. A number of issues seem to arise from the authorities referred to above. First and foremost, the exercise of a discretion to refuse relief is one that should be exercised carefully and it is a jurisdiction which should only be exercised sparingly. It should not be a default mechanism for refusing relief. As the court in *P.N.S.* observed in para. 105 of its judgment, there may be reasons why an individual broke the criminal law or disregarded the immigration law of this or another State, as may have happened. As the Court of Appeal recognised, the State has legal obligations, and if there were humanitarian concerns, or any issue as to the safety of the applicant were they to be deported to their country of origin, it is difficult to see how it could be appropriate in those circumstances to refuse relief by reason of the misconduct of the applicant in the course of the process. Thus, there will always be cases where it would be inappropriate to exercise such a discretion against an applicant by reason of misconduct. It has to be emphasised always that the jurisdiction to do so is one to be exercised sparingly and with great caution.

79. On the facts of this case, and having regard to the circumstances, I accept that there are unsatisfactory elements to the application made by the appellant herein. There is a finding that he entered into a marriage of convenience, and whatever has been said by the appellant in that regard in these proceedings, the simple fact of the matter is that the finding by the Minister to that effect has not been challenged. Secondly, there is no

doubt that he gave some contradictory information to the Minister in relation to his residence with the Union citizen. Thirdly, there is the issue in relation to his reliance on *refoulement* in his representations made to the Minister before his solicitors then made subsequent representations in which it was not suggested that there should be any prohibition against *refoulement*, and, more to the point, he voluntarily returned to Pakistan and continues to reside there. The trial judge complained of the failure of the appellant to explain that particular discrepancy. While she was of the view that the matters referred to amounted to an abuse which was serious and flagrant, deliberately engaged in, and comprised a clear disregard for the asylum and immigration system, I would hesitate to conclude that they were such as to compel the trial judge to exercise her discretion against the appellant. Many cases of this kind involve an outline of circumstances and explanations as to various matters which are questionable and which do not pass muster. An applicant, after all, has a duty of candour. I would share the concerns of the trial judge in this regard. However, bearing in mind the fact that this is an exceptional jurisdiction, and one which should only be exercised sparingly, I would hesitate to exercise such discretion, save in the clearest of cases, and it is a discretion which should be exercised with great care. To the considerations identified by McKechnie J. in *P.N.S.*, I would add the observations of the Court of Appeal in *P.F.*, that in deciding whether somebody has behaved in such a way as to have abused the system, the Court should nevertheless have regard to the exigencies of the case, to humanitarian concerns, and to the necessity to ensure that the State complies with its legal obligations. On balance, on the facts of this case, I am not satisfied that the circumstances of this case were such as would have merited refusal of relief on discretionary grounds.

Conclusion

- 80.** In conclusion, I am satisfied that the inclusion of a sentence to the effect that the Minister has no obligation to grant permission to reside or work in the State under the heading of employment prospects is not fatal to the decision of the Minister. On the facts of this case, that statement of fact was not used to set at nought the appellant's employment prospects.
- 81.** I am of the view that any statement as to the obligations of the Minister to that effect should be referred to elsewhere in the examination of file, such as under the heading of the common good or considerations of public policy, if at all.
- 82.** In the circumstances of this case, there is no basis for quashing the decision of the Minister.
- 83.** Even if this was a case in which the decision of the Minister should be quashed, I am satisfied that it would not be appropriate to exercise the discretion to refuse relief. Such discretion, while an important aspect of ensuring the integrity of the asylum and immigration system (see para. 96 of the judgment in *P.N.S.*) should only be used "*sparingly and in a cautious manner*". There may be reasons or explanations for the misconduct at issue. In any event, regard must be had to humanitarian concerns and ensuring that the State complies with its legal obligations (see para. 105 of the judgment in *P.F.*).
- 84.** In the circumstances, I would refuse the appeal.