

THE HIGH COURT

[2022] IEHC 284

[Record No. 2021/632 JR]

BETWEEN

MANDEEP SINGH AND W.W.

APPLICANT

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered electronically on the day 10th of May, 2022.

Introduction.

1. The first named applicant in these proceedings is an Indian national, born 30th December, 1989. The first applicant entered the State in or about 2013. He married a Portuguese national, Ms. Sousa, in February 2015.
2. By letter dated 14th November, 2014, the first applicant was granted permission to remain in the State for a period of five years as a family member of an EU citizen, being Ms. Sousa, residing in the State and in exercise of her EU Treaty Rights.
3. On 28th November, 2016, that membership status was revoked by the respondent on the basis that the first applicant's marriage to Ms. Sousa was a marriage of convenience, contracted for the sole purpose of obtaining residence status in the State. This decision was later affirmed on review.
4. On 14th December, 2016, the first named applicant applied for residence in the State as a family member of an EU citizen, being the second named applicant in these proceedings, with whom he claimed to be in a loving and durable relationship. The second named applicant is a Polish national born in 1995. The name of the second applicant has been redacted, as it will be necessary later in the judgment to refer to her medical history.
5. By letter dated 19th April, 2018, the respondent refused the first applicant's application for residency in the State. The grounds upon which this decision was reached will be elaborated upon later in the judgment. On or about 8th June, 2018, the first applicant sought to review this decision.
6. By letter dated 29th March, 2021, the respondent affirmed its earlier decision of 19th April, 2018 to refuse the first applicant residency in the State. The reasons for this decision will be elaborated upon later in the judgment.
7. It is both the decisions of 19th April, 2018 and 29th March, 2021, that the applicants seek to have set aside by the court. The applicants also seek an extension of time within which to bring the present proceedings, as they were initiated outside of the time limit provided for in the Rules of the Superior Courts.

Background.

8. The first applicant entered the State in or around March 2013. On or about 7th March, 2013, he was granted a student permission to remain in the State, valid until 27th

January, 2014. This permission was renewed on 31st January, 2014 to 30th September, 2014.

9. On or around 15th April, 2015, the first applicant applied for a residence card as the spouse of a European Union citizen, Ms. Sousa. The couple had married on 9th February, 2015. As previously mentioned, the first applicant was granted residency on 14th November, 2015 on foot of this application.
10. The first applicant and Ms. Sousa attended at the office of the Garda National Immigration Bureau on 27th November, 2015, for the purpose of registering the first applicant's permission to remain in the State (and obtaining the issue of a residence card). Ms Sousa was interviewed as part of that process. During the interview, Ms. Sousa admitted to marrying the first applicant for money. Under caution, she told Detective Garda Keith Cleary and Sergeant David Kennedy that the first applicant had asked her to come to Ireland from Portugal to enter into a marriage contract. She stated that he had promised to pay her in exchange for the marriage, so that he could obtain residency in the State.
11. Ms Sousa further stated that she had never been in a relationship with the first applicant. Her visits to Ireland were solely for the purpose of helping the first applicant to obtain a residence card, in exchange for payment. She stated that after he obtained residency, she was to return to Portugal and had no intention of returning to Ireland. Ms. Sousa returned to Portugal the day after that interview.
12. In light of that interview, the respondent decided on 1st December, 2015 to defer the registration of the first applicant's residence card.
13. By letter dated 18th June, 2016, the respondent indicated to the first applicant that the interview given by Ms. Sousa had led her to believe that the first applicant's marriage may have been one of convenience, as set out in Regulation 28(2) of the European Communities (Free Movement of Persons) Regulations 2015 ("the 2015 Regulations"). In light of this, the respondent proposed to revoke the first applicant's permission to remain in the State in accordance with the provisions of Regulation 27(1)(b) of the 2015 Regulations.
14. In response, on 19th July, 2016, the first applicant's solicitors wrote to the respondent and indicated that Ms. Sousa spoke very poor English and had been both confused and upset while being interviewed. It was stated that she was forced to sign a document she did not understand and was forced to return to Portugal, or her husband would be arrested. The solicitors stated that the decision of the respondent had been made unfairly and unreasonably.
15. By letter dated 26th July, 2016, the respondent refuted the claims made on behalf of the first applicant in the letter of 19th July, 2016.
16. On 28th November, 2016, the respondent notified the first applicant that she had been satisfied that his marriage to Ms. Sousa was one of convenience in accordance with

Regulation 28(2) of the 2015 Regulations. The respondent revoked the first applicant's permission to reside in the State as a family member of an EU citizen residing in the State. In light of that finding, the respondent was satisfied that the first named applicant no longer enjoyed any right of residence in the State.

17. On 14th December, 2016, the first applicant sought a review of the decision to revoke his permission to remain. On the same day, he applied for a residence card as a "permitted family member" of the second named applicant, an EU citizen, on the basis that he was her de facto partner.
18. By letter dated 13th April, 2017, the respondent informed the first applicant that, because the decision of the respondent to revoke the applicant's permission to reside in the state remained under review, per the applicant's request of 14th December, 2016, the application for a residence card submitted on 14th December, 2016, would not be processed any further, until such time as the review had concluded.
19. Solicitors for the applicant wrote to the respondent in relation to his application made as a permitted family member of the second applicant, submitting supporting documents to that application on 12th June, 2017; 17th October, 2017; 3rd November, 2017; 12th February, 2018; and 6th March, 2018.
20. It was submitted in that correspondence that the first and second applicant had been in a relationship since April 2015, having met through their joint employment at a fast food outlet in or around October 2014. Evidence was provided to substantiate both the first and second applicants' employment at the outlet. It was submitted that their colleagues at the retailer knew of their relationship.
21. It was submitted that they began to live together in June/July 2015. A number of bills were provided for an address at which they claimed to cohabit. Some of the bills were addressed to both the first and second applicant, notably many electricity bills, which appeared to have been paid out of a joint account held by the applicants. Bank statements in the joint names of the applicants were furnished to the respondent, as proof of the existence of their holding a joint bank account.
22. It was submitted that the first applicant had been of great support to the second applicant throughout her health difficulties. The applicants submitted a letter from a Community Nurse in Tallaght Cross, Primary Care Team, supported that assertion. Several medical bills were also submitted, addressed to the second applicant at the address she shared with the first applicant.
23. Several photographs, including social media posts dating back to 2015, were furnished to the respondent in support of the applicants' claim of a genuine relationship between them. These included: photographs of them together at birthday parties, popular tourist attractions in Ireland and other social events.

24. On 16th November, 2017, the respondent confirmed its initial decision to revoke the first applicant's permission to remain in the State, made on 28th November, 2016. The first applicant was duly informed by letter that the review of his application had been unsuccessful.
25. On 15th January, 2018, the respondent indicated to the first applicant that she intended to refuse his application for permission to remain as a de facto partner of the second applicant, on the basis that the relationship between them was not believed to be genuine and that the information provided had been false and misleading. Solicitors for the applicant replied to that, by providing further details of the nature of the relationship between the first and second applicant on 12th February, 2018 and 27th March, 2018. The claims of fraud were strongly refuted in that further correspondence.
26. In a decision dated 19th April, 2018, the respondent refused the first applicant's application for residency on the basis of a durable relationship with the second applicant, for the following reasons:
- The respondent noted that the applicant had previously had his permission to remain in the State revoked on the basis that his marriage to Ms. Sousa was one of convenience.
 - It was noted that the applicant continued to maintain that he resided with Ms. Sousa up to and after his marriage, despite her evidence that she was paid to marry him; that she had never resided in the State and that she had never been in a relationship with him.
 - The respondent noted that the second applicant had had several pieces of correspondence addressed to an address other than that provided by the first applicant as their shared address and place of cohabitation. Therefore, the respondent was not satisfied that the first and second applicant were residing together, as submitted.
 - The respondent noted that the first applicant was claiming to have been in a relationship with the second applicant in April 2015, though he had applied for a residence card based on his marriage to Ms. Sousa on 15th April, 2015. The respondent noted that throughout the process of obtaining permission to remain on the basis of his marriage, the first applicant did not mention a new relationship with the second applicant. For that reason, the respondent had serious concerns about the *bona fides* of the first applicant's application.
 - The respondent was of the view that the first applicant's relationship with the second applicant was brought about with the sole objective of obtaining permission to remain in the State.

27. On 22nd May, 2018, the respondent issued a proposal to deport the first applicant pursuant to s. 3 of the Immigration Act 1999, on the basis that he had no right of residence in the State.
28. On 11th June, 2018, the Immigration Services Centre submitted a request for review of the decision to refuse the first applicant a residence card on the basis of his relationship with the second applicant, including the relevant Form EU4. By letter, on the same date, the Immigration Services Centre also wrote to the respondent requesting that no action be taken on foot of the Deportation Order issued on 22nd May, 2018, while the review of the decision of 19th April, 2018 remained pending.
29. By letter dated 16th December, 2020, the respondent wrote to the first applicant seeking up-to-date information in relation to his activities and circumstances, and the second applicant's activities and circumstances at that time. The applicants provided same by letter dated 21st December, 2020.
30. On 29th March, 2021, the respondent issued a decision to refuse the first applicant's application for review of the decision of 19th April, 2018. The reasons set out in that decision were as follows:
 - The respondent outlined the circumstances of the marriage of convenience that the first applicant had been involved in. The respondent noted that this constituted a fraudulent act within the meaning of the 2015 Regulations and Directive 2004/38/EC.
 - The respondent noted that there had been a discrepancy in the date at which the applicants claimed they began to live together, as the applicants' landlord had stated they began living at the address in August 2015 and the RTB letters on file indicated that they began living together at that address in February 2015.
 - The respondent also noted the letters and documents on file that had been addressed to the second applicant at an address other than that at which she claimed to cohabit with the first applicant, being the address of her mother and step-father.
 - The respondent accepted that the applicants had submitted a number of documents showing that the applicants lived together, and a number of photographs and social media conversations between them. However, the respondent considered there to be few indicia of commitment between the applicants. It was noted that they had not made financial commitments to each other, nor did they have any joint assets or liabilities, nor had they travelled or lived together outside the State.
 - The respondent also noted that the first applicant was now trying to assert that he had been in a relationship with the second applicant at a time when he had claimed to be married to Ms. Sousa.

31. On the basis of this information, the respondent concluded that the applicants were not in a committed relationship, akin to marriage. It was also concluded that the first applicant sought to rely on information he knew to be misleading or false in order to obtain a right of residence in the State under the 2015 Regulations. The respondent refused to overturn the decision of 19th April, 2018.
32. The arguments of the parties are set out below.

Submissions on behalf of the Applicants.

33. The principal relief sought by the applicants is an order of *certiorari* quashing the respondent's decisions of both 19th April, 2018 ("the first decision") and 29th March, 2021 ("the second decision").
34. Counsel for the applicants, Mr. Femi Daniyan BL, accepted that an extension of time was required to mount the application for judicial review of the decisions of the respondent. It was submitted that there existed good and sufficient reasons for so doing, in accordance with Order 84, rule 21(3) of the Rules of the Superior Courts. Those reasons are as follows:
 - It was submitted that both the first and second decision of the respondent were inchoate, unreasonable and in breach of fair procedures.
 - It was submitted that the respondent had failed to provide a full and adequate response to the applicants' Access Request pursuant to GDPR 2018 in July 2020. It was submitted that that request had been subjected to several extensions, and remained outstanding on the date of the hearing.
 - It was submitted that there had been difficulty in obtaining full instruction and detail in this matter in light of the Covid-19 restrictions.
 - It was submitted that the second decision should be viewed as a part of a process commenced in 2018.
 - Finally, it was submitted that the respondent had suffered no prejudice because of the delay of proceedings.

In light of the foregoing, counsel for the applicants submitted that the time allowed to bring an application for judicial review should be extended to allow the within application to proceed.

35. Turning to the substantive issues in the proceedings, counsel submitted that the decisions of the respondent to refuse the first applicant a residence card on the basis of his relationship with the second applicant were unreasonable and/or in breach of EU law and the 2015 Regulations. In that regard, it was submitted that the extensive reference to the first applicant's marriage to Ms. Sousa in both decisions was an irrelevant consideration, which should not have been taken into account when deciding on the credibility of his relationship with the second applicant.

36. It was submitted that the decisions were inchoate, unreasonable and in breach of fair procedures in circumstances where the said decisions failed to include any engagement with the second applicant at any stage. The respondent had failed to interview both parties to the relationship.
37. It was submitted that the reference to an inconsistency between RTB letters and dates provided by the applicants' landlord in the second decision cannot be ground for refusing the first applicant's application. It was submitted that relying on such a minor detail to refuse the application amounted to a breach of the principles of fair procedures and was a denial of natural and constitutional justice.
38. It was submitted that the respondent had applied the incorrect test in the second decision, in stating that "*there are few indicia of commitment*" between the applicants. It was submitted that requiring further indicia of commitment, beyond those which had been provided amounted to a breach of the principles of fair procedures and natural and constitutional justice. It was submitted that both the applicants lived together in rented accommodation, which was not disputed by the respondent, save for the minor inconsistency mentioned above.
39. Further, it was submitted that there was no basis in law to hold that "financial commitments" to one another, were necessary in order to prove the durability of a relationship in the context of the 2015 Regulations. It was submitted that the applicants were of modest means, and, in particular, the first applicant did not have a residence card and would face serious difficulty in obtaining substantial assets or liabilities in the State. Further, it was submitted that the first applicant could not have travelled abroad with the second applicant, as suggested by the respondent as indicia of a durable relationship, as there would exist uncertainty as to whether he could return to the State, due to his residency status. It was submitted that the test of a relationship applied by the respondents was unreasonable in that it was impossible to satisfy, even for many Irish citizens.
40. It was further submitted that the applicants had provided all the information to the respondents that was required of them, as stated on the respondent's website and on the EU1A form. It was submitted that travel documents were merely one type of document that could be used as indicia of a durable relationship, but a lack of such documents could not be determinative of the issue. It was submitted that the respondent's decisions were irrational, unreasonable and unlawful.
41. It was submitted that the respondents had failed to consider the personal factors relating to the applicants' relationship, such as the extensive photographs and social media posts which had been provided. It was submitted that the respondent had erroneously confined the consideration of the review to commercial factors, such as joint assets and liabilities.
42. Finally, counsel submitted that the respondent had failed to indicate any reasons why the abundance of personal documentation provided by the applicants in support of their application had been discounted in reaching her decision.

43. On the basis of the foregoing, counsel urged the court to set aside the first and second decisions of the respondent to refuse the first applicant a residence card as a permitted family member of the second applicant.

Submissions on behalf of the Respondents.

44. Counsel for the respondent, Ms. Katherine McGillicuddy BL, submitted that the applicants were long out of time to challenge the first decision of the respondent, and that there was no good or sufficient reason to extend that time and allow the challenge to be brought.
45. It was submitted that the time limitations applied in judicial review proceedings cannot be extended on the basis of outstanding data requests, as suggested by the applicant. The respondent relied on the decision of *Roche v Teaching Council of Ireland* [2021] IEHC 712, in that regard.
46. Counsel further submitted that the applicants could not rely on the impact of the Covid-19 pandemic as an excuse for their delay, when the pandemic began in March 2020, nearly two years after the first decision of the respondent.
47. It was also submitted that the first applicant had initiated judicial review proceedings in relation to the first decision in February 2021, wherein he sought leave to challenge the first decision and an order of mandamus compelling the respondent to make a decision on the then-outstanding review. Those proceedings had displayed Record No. 2021/99 JR. Those proceedings were struck out with no order, on consent of the parties, on 14th May, 2021. It was submitted that in consenting to that order, the first applicant had effectively abandoned his right to challenge the first decision. It was submitted that it would be an abuse of process to allow the first applicant to proceed on the present challenge, in circumstances where he had withdrawn his previous proceedings.
48. In relation to the second decision, it was submitted that the respondent had not based her decision in relation to the first applicant's relationship with the second applicant, solely on his marriage to Ms. Sousa. It was submitted that the respondent had been entitled to note that the first applicant had previously claimed to be in a legitimate marriage to Ms. Sousa at a time when he subsequently claimed to have been in a relationship with the second applicant, as an indicator of the first applicant's credibility.
49. It was submitted that Regulation 5(5)(d) of the 2015 Regulations required the respondent to have regard to the "*nature and duration of the relationship*", when an applicant applies for residency on the basis of a 'durable relationship' with an EU citizen. In that regard, it was submitted that the respondent had had regard to the overlap of the alleged relationship with the second applicant and the marriage to Ms. Sousa, as was required of her under the regulations.
50. It was submitted that the application was considered entirely on its own merits. Counsel submitted that the respondent carefully weighed the documents provided to her in support of the application. Counsel submitted that on the evidence before her, it had been open to the respondent to make the finding that the applicants were not in a relationship

akin to marriage, within the meaning outlined by Baker J. in *Pervaiz v. Minister for Justice* [2020] IESC 27.

51. Counsel rejected the assertion that the decisions were inchoate, unreasonable or in breach of the principles of fair procedures. It was submitted that the bar for judicial review on the grounds of unreasonableness was high, in accordance with the decisions in *Meadows v. Minister for Justice* [2010] 2 IR 701 and *The State (Keegan) v. Stardust Compensation Tribunal* [1986] IR 642. It was submitted that the applicants had failed to prove that the respondent's decisions were unreasonable in accordance with the high standard set in those cases. It was not sufficient to say that the respondent could have taken a more favourable view of the applicant.
52. It was submitted that the respondent had not been obliged to interview the second applicant in order to reach her decision and the applicants had not requested that such an interview take place. Counsel submitted that the respondent had fulfilled all her investigative obligations, as outlined in *Shishu & Miah v. Minister for Justice and Equality* [2021] IECA 1.
53. It was submitted that the respondent had not placed undue weight on the date discrepancy between the RTB letters and the letters from the applicants' landlord. Rather, it was submitted that the respondent had noted that letters had been addressed to the second applicant at an address other than that at which she claimed to live with the first applicant and there was a contradiction between the RTB letters and the letter from the landlord. It was also pointed out that the respondent had ultimately accepted that they had lived together, but held that not enough evidence proving commitment to one another had been provided. Relying on the *Pervaiz* decision, it was submitted that cohabitation alone was not enough to prove durability of a relationship.
54. Although it was accepted that the applicants had provided financial documentation in support of the application, it was submitted that the applicants had failed to provide evidence that they were sharing/pooling their income, or transferring money between each other; evidence of joint savings between them; joint loans/liabilities; divisions of joint-outgoing/expenditure; gifts to each other; joint household purchases; or joint policies between them, all of which may have been held as being indicative of a durable relationship.
55. It was submitted that, on the evidence that had been presented to her by the applicants, the respondent had applied the correct legal test and had been entitled to make the findings that had been reached in her decision. It was submitted that all the documents provided by the applicants had been taken into consideration.
56. On the basis of the foregoing, counsel submitted that the applicants were not entitled to any of the reliefs sought in their notice of motion.

The Law.

57. The issues in this case involve the interpretation and application of 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 (known as “the Citizens Directive”), which was transposed into Irish law by the European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548/2015) (hereinafter “the 2015 Regulations”).
58. Article 3 of the Citizens Directive is the relevant provision for the purposes of this application. The relevant provisions of that Article provide as follows:
- “1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.*
- 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:*
- ...
- (b) the partner with whom the Union citizen has a durable relationship, duly attested.*
- The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.”*
59. The scheme of the Citizens Directive provides for different approaches to two categories of family members. Family members who come within the definition in Article 2 (2) are afforded the right of entry and residence in the Union citizen’s host member state, provided certain conditions are met. A family member in that category is a spouse, civil partner, direct descendant under the age of 21, or dependent, and those of the spouse or partner, and any dependent or direct relatives in the ascending line of the Union citizen and of the spouse or partner.
60. The present case concerns the category of family members provided for in Article 3(2), who are more remote from the Union citizen and whose application for entry and residence in the host member state is to be “facilitated”, but who cannot be said to have an automatic right of entry or to remain. The Irish implementing regulations use the term “permitted family member” for this category of more remote family members to whom Article 3(2) of the Citizens Directive applies, and the term “qualified family member” for those family members who have a right to enter and remain.
61. Regulation 5 of the 2015 Regulations deals with “permitted family members”. It provides that Regulation 5 applies to a person who, irrespective of his or her nationality, is a member of the family (other than a qualifying family member) of a Union citizen to whom para. (2) applies and who, in the country from which the person has come, ... *“(b) is the partner with whom a Union citizen has a durable relationship, duly attested”.*

62. Regulation 5 (2) provides that where a person applies to remain in the State as being a “permitted family member” of a Union citizen, he or she shall produce to the Minister: (a) where the applicant is not a national of a Member State, a valid passport; (b) evidence that he or she is a member of the family of the Union citizen, and (c)(iii) documentary evidence of the existence of a durable relationship with the Union citizen.
63. Regulation 5(5) provides that the Minister, in deciding under para. (3) whether an applicant should be treated as a permitted family member for the purpose of the Regulations, shall have regard to, *inter alia*: where the applicant is a member of the household of the Union citizen concerned, the duration of the period during which he or she has been living within the household of the Union citizen; where the applicant is in a durable relationship with the Union citizen concerned, the nature and duration of the relationship; and whether the relationship was brought about with the objective of obtaining permission to remain in the State or a Member State.
64. The parties were agreed that the principles which should be applied by the Minister when considering an application under the 2015 Regulations have been authoritatively set out by the Supreme Court in the *Pervaiz* case. It is not necessary to repeat all of the principles that were set out by Baker J. in delivering the judgment of the Supreme Court in that case. Instead, the court will summarise some of the core principles that were enunciated in that case, which are of particular relevance to the issues that arise in this case.
65. In relation to the approach which should be adopted by the Minister when considering such applications, the Supreme Court, having referred to the decision of the CJEU in *Secretary of State for the Home Department v. Rahman* (Case C 83/11) noted that that court had come to the conclusion that member states must “make it possible” for applicants to “obtain a decision on their application”, and that that application must involve an “extensive examination of their personal circumstances”, and that a refusal was to be justified by reasons. The court noted that the obligation to “facilitate” an application by a person to be a permitted family member, does not mean that the requirements for such, have to be easily met. The Supreme Court noted that the Minister must assess the documentary evidence furnished by the applicant and examine all the individual and personal circumstances of the particular case, without applying a blanket or general approach. The court further noted that the phrase used in the Citizens Directive that the durable relationship be “duly attested”, did not sit easily in domestic legal parlance. Baker J. read that expression as requiring that the applicant provide evidence, in whatever form was relevant and suitable in light of his or her circumstances, and that the Minister was to engage with that evidence, not by the application of a general policy, but by reference to the individual facts and indicia of the relationship put forward by the applicant and established by evidence.
66. The Supreme Court noted that the evidence produced by an applicant need not always be documentary in form. Baker J. stated as follows at para. 114:

"That is not to say that the evidence must always be in documentary form, but can be a narrative explaining the context of the relationship, how it arose, how long it was endured, where the couple have lived, what elements of their life have been and are still interconnected, and any personal factors which they may wish to show to establish their commitment to one another. In that regard, it should be remembered that while many of the indicia of commitment are self-evident, some may be personal to the couple. They may, for example, celebrate the day they met, have particular places which have a special importance to them, and commitment is shown not only by formal public events such as an engagement to marry but by many other indicia, all of which are likely to be recognisable by members of the community in which the couple live and by society generally."

67. The court went on to note that what was required from an applicant, was something more than mere assertion. To say that the relationship must be "duly attested" required that it be "evidenced" and it may, in a suitable case, be evidenced by oral evidence or narrative. What was required was evidence by which the relationship was proved or substantiated, and a proper reading of the Directive meant that the criteria, whatever they are and however they are stated, must not impose too high a standard and make it impossible for a person to meet that standard.
68. In relation to the meaning of the word "partner", the court noted that the ordinary literal meaning of that word was capable of being readily understood without any technical knowledge, especially when one had regard to the context of its use in Reg. 5 (2) of the 2015 Regulations. The court held that a partner was intended to denote a person with whom one was in a family type relationship, a relationship short of marriage, but at some level akin to a marriage relationship.
69. In relation to the issue of the durability of the relationship, the court noted that the partner must be someone with whom the Union citizen has a durable relationship. "Durable" did not mean "permanent", a test that required permanence in that sense would be an impossibly burdensome hurdle and would not be in accordance with any modern understanding of intimate relationships. Baker J. stated that what was meant by the term durable relationship, was that the relationship be one which has continued for some time and to which the parties are committed, with an intent that the commitment continues; one, therefore, which carries the indicia of commitment such that, at the present time, each of the parties to the relationship would express a view and a hope that the relationship would continue for the foreseeable future. Later in the judgment, Baker J. stated as follows at para. 76:

that the couple live a life where each of them is connected to the other by a number of identifiable threads, such as their social life and social network, their financial interconnectedness or interdependence, their living arrangements, and the extent to which they are recognised and acknowledged by their family circle and their friends as a couple."

70. In looking at the indicia of a durable relationship that was akin to marriage, the Supreme Court looked at the issue as to whether cohabitation was necessary. It came to the conclusion that cohabitation was a useful yardstick by which the durability of a relationship could be assessed. It was a means by which it was possible to test whether persons were genuinely in a committed partnership.
71. The court also considered whether it was necessary that there should be a sexual element to the relationship. It held that the existence of a present sexual or intimate relationship did not appear to be mandated, but normally, the couple will either be in a sexual relationship, or intend such a relationship in the future. The court went on to note that very often where a couple is in a durable relationship, there will be evidence that there is an interconnectedness between them in relation to their financial affairs. However, that is not a mandatory requirement. Baker J. stated as follows at para. 91:

"I agree with the trial judge that there will be many cases of persons in a durable relationship with a Union citizen who do not have a joint bank account or who do not own or rent property jointly. The factors in the lives of the couple that connote durability may well be factors of such commercial type, but there may also be wholly or mainly personal factors, such as their social network, their living arrangements, how they care for children if they have children, how each of them has integrated into the broader social and family network of the other. It is almost inconceivable in the modern world that a couple would not have many examples which can be established by documentary proof, whether from social media, correspondence, utility bills, photographs, text or email messages, financial transactions, etc., which might establish the closeness of their interconnectedness and the nexus within which the relationship operates."

72. Thus, the overall position is that when considering an application that a person be deemed a "permitted family member" on the basis that they are in a durable relationship with the EU citizen, the Minister can have regard to a very wide range of matters that may indicate one way, or the other, whether the couple is in fact in a durable relationship. It has been reiterated a number of times, that each individual case must be looked at on its own facts. It is also clear that the Minister must engage in a meaningful way with the evidence that has been presented on behalf of the applicant and the EU citizen. There are statements to a similar effect in *Subhan v. Minister for Justice* [2020] IESC 78 and in *Shishu and Miah v. Minister for Justice and Equality* [2021] IECA 1, which deal with the not dissimilar issue of whether the applicant is part of the household of the EU citizen.

Conclusions.

73. The court will first deal with the issue of time in these proceedings. Order 84, rule 21(1) and (3) of the Rules of the Superior Courts is as follows:

"An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.

[...]

(3) *Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:*

(a) *there is good and sufficient reason for doing so, and*

(b) *the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:*

(i) *were outside the control of, or*

(ii) *could not reasonably have been anticipated by the applicant for such extension.”*

74. The first decision was taken by the respondent on 19th April, 2018. The applicants were granted leave to apply by way of judicial review against that decision, on 12th July, 2021.

75. The parties are agreed that the applicants are out of time to challenge the decision of the respondent, and require an extension of time in accordance with Order 84, rule 21(3), as outlined above, in order to challenge its validity.

76. The court is not satisfied that there is good and sufficient reason to extend the time within which a challenge may be brought to the first decision. The delay period represents a time of over 3 years, which is very significant. Furthermore, the court has not been given any concrete reasons as to why the commencement of the proceedings was delayed for such a significant period of time.

77. It is accepted that the Covid-19 pandemic must provide parties with significant leeway in terms of time limits, as it may have been difficult to obtain instructions, swear affidavits, file papers, etc. However, the first decision was taken in April 2018, meaning that by the time the limitation period expired, in July 2018, the pandemic had not begun. This excuse does not satisfy the court that the time limit should be extended.

78. Accordingly, the court refuses to extend time to allow the applicants to challenge the first decision of the respondent.

79. The second decision of the respondent was taken on 29th March, 2021 and the court granted the applicants leave to proceed by way of judicial review on 12th July, 2021. By the court's calculations, this leaves the applicants out of time to challenge the decision by roughly two weeks.

80. In this instance, the court is satisfied that there is good and sufficient reason to extend the time allowed to challenge the second decision of the respondent. In reaching this conclusion, the court is mindful that the country had been in and out of Covid-19 lockdowns at that time, which may have created difficulty in bringing the proceedings. Furthermore, the Whit vacation period fell within that three month time frame.

81. The court is also mindful that a delay of less than two weeks is unlikely to have caused the respondent any significant prejudice. Accordingly, the court will extend the time allowed to bring the within proceedings against the second decision of the respondent, pursuant to Order 84, rule 21(3).
82. Turning to the substantive challenge to the decision made by the Minister on 29th March, 2021, one has to begin by noting that the Minister's earlier decision to the effect that the first applicant's marriage to Ms. Sousa was a sham marriage of convenience, which was contracted between them solely for the purposes of enabling him to obtain a right of residence within the State, has not been challenged by the first applicant.
83. In his very able submissions, Mr. Daniyan BL submitted that 2015 was "a problematic year" for the first applicant. That was putting it mildly. It is worthwhile remembering the relevant dates. The applicant had married Ms. Sousa in County Meath in February 2015. When he and Ms. Sousa went to collect his residence card in November 2015, Ms. Sousa made a cautioned statement in which she admitted that she had been paid by the first applicant to enter into a sham marriage with him. She stated that she had flown from her home in Lisbon to Ireland for the marriage. She had departed for her home shortly thereafter. She stated that she had then returned to Ireland a second time at the request of the applicant and at his expense, to obtain the residence card for him in November 2015. She stated that she had never been in a relationship with him and did not intend to enter into any relationship with him. That statement was made at a time when she was not under arrest; it was made under caution and it was signed by her.
84. It is noteworthy that by letter dated 19th July, 2016, the first applicant's former solicitors, wrote on his behalf, complaining that Ms. Sousa had been badly treated at the time that she had been interviewed. It was stated that she was both confused and upset at that time. It alleged that she had been forced to sign a document that she did not understand and that she was told that she had to return to her home country of Portugal, or her husband would be arrested. The letter continued "Again and in summary, Mr. Singh and his wife are now being forced to effectively appeal a decision that was made entirely unfairly and unreasonably at first instance". Thus, as late as July 2016, the applicant, through his former solicitors, was clearly stating that he was validly married to Ms. Sousa.
85. The dates of those events and the assertions made on behalf of the applicant in 2016, are completely contrary to the narrative that he put before the Minister in support of his application for a residence card on the basis of his being in a durable relationship with Ms. W. In support of that application, the applicant and Ms. W., maintained that they first became acquainted with each other in or about October 2014, when the first applicant came to work in the same fast food outlet where Ms. W. was employed. They state that some short time thereafter, they started going out with each other and in or about June/July 2015, Ms. W. started cohabiting with the first applicant, by moving into the house which his sister rented in Tallaght, Dublin 24. Indeed, in an Instagram post on 11th December, 2015, Ms. W. stated that she had got engaged and posted a photograph of her wearing her engagement ring. None of these assertions are compatible with the case that

was being made at that time by the first applicant in relation to his marriage to Ms. Sousa.

86. In argument, counsel for the respondent pointed out that the first applicant had never admitted that his marriage to Ms. Sousa had been a sham, or a marriage of convenience. While that is true, the court can understand his reluctance to do so, having regard to Reg. 30 of the 2015 Regulations, which makes it an offence for a person to give or make any statement, declaration or information, which is, to his or her knowledge, false or misleading in a material particular for the purposes of seeking an entitlement conferred by the Regulations.
87. In argument at the Bar, Mr. Daniyan BL submitted that the marriage between the first applicant and Ms. Sousa was of absolutely no relevance to the application made by the first applicant based on his relationship with Ms. W. The court does not accept that assertion. The fact that there was a finding by the Minister that the marriage between the first applicant and Ms. Sousa was a marriage of convenience and the stark contradiction between the narratives put forward by the first applicant in relation to that marriage and the narrative put forward by him in relation to the commencement and progress of his relationship with Ms. W., were matters that the Minister was entitled to take into account, when considering the first applicant's application. However, that is not to say that the view of the Minister that the first applicant had entered into a marriage of convenience with Ms. Sousa, was determinative of his subsequent application based on his relationship with Ms. W. While it was not determinative of the application, the Minister was certainly entitled to have regard to it, as being a serious negative mark against the credibility of the first applicant.
88. When one reads the decision of the Minister of 29th March, 2021, one cannot avoid the impression, but that the Minister laid excessive weight on the view that she held in relation to the marriage between the first applicant and Ms. Sousa. That issue was the first issue dealt with in the first page of the decision. The decision maker went on to note that the first applicant had sought a review of the Minister's decision to revoke his residence card on the basis that the marriage to Ms. Sousa was a sham, on the same date that he had submitted his application to be considered as a permitted family member, based on his relationship with Ms. W. The decision then went on to outline the case made by the first applicant in relation to his relationship with Ms. W. and pointed out certain discrepancies in relation to the dates on which he and Ms. W. may have commenced cohabiting at the address in Tallaght.
89. Having referred to what the Minister regarded as being the paucity of evidence in relation to financial commitments between the first applicant and Ms. W. and the absence of joint assets or liabilities between them, or to any evidence that they had travelled or lived together outside the State, the decision then reverted back to the first applicant's alleged marriage to Ms. Sousa. The decision went on to record that the Minister was of opinion that his application in relation to that marriage had constituted an abuse of rights in accordance with Reg. 27 of the 2015 Regulations. This was referred to twice in the

remaining part of the decision. Thus, it is fair to say that the Minister's opinion of the applicant's alleged marriage to Ms. Sousa, seems to have figured strongly in her decision to reject his application based on his relationship with Ms. W.

90. Insofar as the Minister looked at the relationship between the first applicant and Ms. W., she seems to have focused on two matters. Firstly, she focused on certain discrepancies in relation to the dates on which the applicants may have commenced cohabiting. Some of this confusion was due to the fact that the landlord of the property in Tallaght, had given an incorrect date as to when the second applicant moved into the property. This was subsequently corrected. It was an easy mistake to make, given that the first applicant's sister had been the head tenant of the property from as far back as 2011. It was only subsequent to that, that the second applicant was registered as a co-tenant of the property. Even allowing for the discrepancies in relation to the actual commencement of their cohabiting, the Minister acknowledged that the applicant had submitted a number of documents showing that he and the Union citizen had shared a residence. Even taking it at its worst from the first applicant's point of view, it seems to have been accepted that they were cohabiting at the address in Tallaght, from 2016 onwards. This means that by the time the decision was taken in March 2021, they had been cohabiting for in or about five years at the very least.
91. The court is of the view that the emphasis placed by the Minister on the lack of evidence of joint financial commitments was somewhat unrealistic and indeed unfair for a number of reasons. Firstly, once the initial residence card based on his marriage to Ms. Sousa had been revoked or refused, the first applicant could not work legally in the State. Any work that he may have done, would have been paid in cash. Thus, it is unlikely that he would have had extensive joint financial commitments with the second applicant. Secondly, it would not have been possible for the applicants to obtain joint loans, as, given the fact that the first applicant was effectively undocumented and unable to work, he would not have been able to obtain a loan from a bank, or other lending institution. There was evidence of some financial connection between them, in that they had a joint bank account and statements had been furnished in relation to it. In addition, one of the utilities had been paid directly out of that account. There were also other utility bills in their joint names, addressed to him at the address in Tallaght.
92. Insofar as the Minister had stated as a ground for the refusal of the application, that there was very little evidence of jointly owned assets, it appears to the court that this was also somewhat unfair. Given that the first applicant could not work in the State and that the second applicant appeared to have relatively low paid employment in a fast food outlet and subsequently in a retail outlet and appears to have been unemployed for some period, it is unrealistic to expect that they would have had the financial means to acquire jointly owned assets of any substance.
93. Similarly, in relation to the assertion that there was no evidence of joint foreign travel, that is explicable by virtue of the fact that (a) they did not have the funds to engage in foreign travel and (b) more importantly, given that the first applicant had no extant

permission to be in the State, he would have been very unwise to have left the country, for fear that he may not have been allowed back in. Furthermore, the Minister does not seem to have taken account of the fact that evidence was submitted of the applicants going on holiday within Ireland. There were a number of photographs showing them at different scenic spots at different times.

94. The court is satisfied that, contrary to the principles laid down in the *Pervaiz* case, the Minister did not engage in a detailed analysis of the evidence that had been furnished on behalf of the applicants. There was no mention of the letters that had been furnished by the second applicant's mother which confirmed the existence of the relationship between the applicants. There were also letters from the applicants' colleagues, stating that they were aware that they had been in a relationship from in or about 2014/2015. In argument at the Bar, Ms. McGillicuddy BL stated that there was no evidence from friends to that effect. The court does not regard that as a *bona fide* criticism of the evidence that was presented.
95. Of more concern, the Minister did not appear to engage at all with the personal circumstances of the second applicant. She is an EU citizen, who is currently 26 years of age. She came to the State when she was eleven years of age. She attended primary school and secondary school in the State. Thereafter, she completed a PLC course and commenced in employment in various retail outlets. The uncontested evidence is that she has been in a relationship with the first applicant since in or about 2015 and that they have lived together since probably at some time during that year. While not explicitly stated, it is fair to assume that they are in a sexual relationship. There is no reason why Ms. W. would engage in any sham relationship with the first applicant, as she would have nothing to gain thereby. Thus, when looked at from her point of view, the evidence is quite strong that she is in a genuine relationship with the first applicant.
96. Evidence of that is borne out by the fact that during 2016, and in the months and years thereafter, the second applicant had relatively serious health difficulties. Documentary evidence in relation to these difficulties had been submitted to the decision maker. There was written evidence from Dr. Koniorczyk, of the Phibsboro Dental and Medical Clinic, that the second applicant had had gynaecological surgery in August 2016. Thereafter, she had had various difficulties, including suspected cardiac difficulties, for which she was referred for an ECG stress test on 25th September, 2016.
97. There was also documentary evidence from Dr. Barry Quinn, that on 29th September, 2016, the second applicant had attended his clinic in Tallaght. It was noted that she had had multiple visits to the clinic in the previous weeks. She had attended on 28th September, 2016 complaining of shaking, crying, headaches, jelly feeling legs, chills, diarrhoea and feeling weak. She also complained of having vomited on the previous day. She was started on medication for anxiety symptoms and was put on a course of antibiotics for sinus infection. She was also noted to be having a problem with a wound from a pilonidal abscess, for which she had been attending another clinic. The doctor was concerned about the cause of these symptoms. He queried whether she was suffering

from anxiety/depression. He also queried other pathology; in particular, he was concerned about the headache and vomiting and queried whether it would be necessary to have a CT brain scan.

98. It appears that during these health difficulties, the first applicant was of considerable support to the second applicant. In this regard, there was a significant letter dated 23rd February, 2018 from Ms. Emma Whelan, a community nurse attached to the Tallaght Cross Primary Care team. In that letter, she confirmed that she had known the first applicant since August 2016, when his girlfriend, the second applicant, was referred to her wound dressing clinic. She stated that the first applicant accompanied the second applicant on her first visit to the dressing clinic and also accompanied her many times since. She stated that the second applicant had attended her clinic on a daily basis initially and had only recently been discharged from care. She stated that during that time, the first applicant had assisted in the care of the second applicant's wounds by carrying out dressings when required, often over the weekends. It appears to the court that this letter is very significant evidence of a committed relationship between the first and second applicants. It is entirely normal that when a person's spouse or partner gets ill, that the other person will assist in helping to get them better. That is exactly what the first applicant did when the second applicant was sick. This was not adverted to at all by the decision maker in her decision.
99. That the second applicant's medical condition was serious in nature, was a matter that was known to the decision maker, because in a letter dated 12th February, 2018, the first applicant's solicitor informed the Minister, that Ms. W. had returned to Poland from 1st February, 2018 until 1st May, 2018. She had gone there to act as godmother for her cousin's daughter. She had also used that opportunity to obtain a second opinion in relation to her ongoing health issues, which related to her ovaries. During the time that she was in Poland, she was unable to obtain some of the medication that had been prescribed for her in Ireland. To that end, she contacted the first applicant, who sent over the required medication. There was evidence of texts and other messages passing between them in relation to the production of the medication that she needed. Thus, there was strong evidence before the decision maker that the first applicant continued to provide significant support to the second applicant in relation to her health issues. This was not adverted to in the impugned decision.
100. The Minister was also aware of these matters from a statement made by the second applicant in the form EU4, which she had completed when requesting a review of the initial decision, wherein she stated as follows:

"Me and Mandeep met in Dominos Tallaght. We were working together as we have shown you through papers including all the letters from colleagues. My whole family knows about Mandeep, my parents, all aunties and uncles in Poland and grandparents, who went to see him. I've been through rough times as I had three surgeries. Mandeep has been with me through all this time, being loving and supporting. We need each other still. The whole thing with Mandeep's visa problems

has been giving me so many panic attacks I had to start counselling. It's not fair that as a couple, we can't live normal lives."

101. In support of those assertions, a number of receipts in respect of counselling visits had been put before the Minister. However, none of this aspect and, in particular, no mention of the health difficulties of the second applicant, were adverted to in the impugned decision.
102. There was also a considerable volume of material before the Minister comprising texts and social media posts showing *inter alia*: the applicants enjoying various family and birthday celebrations together; texts showing the normal kind of communications that would take place between people in a committed relationship in relation to matters of health and other more mundane everyday matters. It is clear from the photographs that were produced, that these were taken on different dates and were not in any way staged, such as in "Hello" magazine, where people are photographed on the same day, but in different clothing in different rooms. It is clear from the photographs produced, that they were taken on different occasions, as the overall appearance of the applicants changed over time.
103. In conclusion, the court is satisfied that the impugned decision of 29th March, 2021, will have to be set aside, due to the fact that the Minister did not engage with the evidence that had been produced and did not carry out an extensive examination of the applicants' personal circumstances, as required by the Directive and the 2015 Regulations and the principles set down in the Pervaiz case. Accordingly, the court will make an order setting aside the decision of the Minister dated 29th March, 2021 and remitting the matter back to the Minister for a fresh consideration.
104. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.