THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 591

[2021/1018 JR]

BETWEEN

S.K. AND J.K.

APPLICANTS

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr. Justice Cian Ferriter delivered on the 24th day of October 2022

Introduction

1. In these judicial review proceedings, the applicants seek an order of *certiorari* quashing the decision of 12 November 2021 in which the respondent ("the Minister") refused the first applicant a residence card pursuant to the provisions 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 ("the Directive") and the European Communities (Free Movement of Persons) Regulations 2015 (the "2015 Regulations") (which implement the Directive into Irish law) arising from the finding that the applicants had contracted a marriage of convenience ("the decision").

2. The applicants' case is that the decision was arrived at in breach of fair procedures and due process. The applicants lay particular emphasis on the fact that, while the second applicant was interviewed by members of the Garda National Immigration Bureau ("GNIB") as part of the process that led to the finding of a marriage of convenience, the first applicant (the non-EU national claiming EU residence rights as a result of her marriage to the second applicant, an EU national) was not interviewed or otherwise afforded any oral process in the decision-making process that led to the decision. The applicants also contend that the decision was arrived at by the misapplication of the appropriate burden of proof and in the absence of a sufficiently robust engagement with the evidence and submissions put forward on behalf of the applicants in refutation of the Minister's case that the applicants' marriage was one of convenience.

3. I should note that the first applicant has also issued separate judicial review proceedings challenging a decision of the Minister refusing her permission to reside in the State pursuant to a special scheme for non-EEA nationals who previously held student

permissions, on the basis that she has demonstrated bad character by engaging in a marriage of convenience. Those separate judicial review proceedings have been adjourned pending the determination of this judicial review on the basis that the determination of this judicial review as to the lawfulness of the marriage of convenience decision is likely to be dispositive of those separate judicial review proceedings.

Background

4. The first applicant is a citizen of India. She arrived in the State on 10 September 2006 on foot of a student visa. She was thereafter granted a "stamp 2" permission to remain in the State, a status which she retained until 12 September 2012. One week after expiry of that permission, on 19 September 2012, she married the second applicant, a national of Latvia. The first applicant says that she met the second applicant in February 2012, while they were working together in the same place of employment, and they formed a relationship shortly thereafter. The first applicant says that they began living together in April 2012 before marrying in September 2012.

5. As a result of her marriage to the second applicant, the first applicant was *prima facie* entitled to apply pursuant to the 2015 Regulations for a permission to reside in the State as a family member of an EU citizen also residing here. The first applicant was granted her residence card as a family member of an EU citizen on 10 April 2013, pursuant to the provisions of the 2015 Regulations.

6. It is useful at this juncture to briefly sketch the rights afforded by the Directive and the 2015 Regulations to non-EU national members of the family of an EU citizen. In broad terms, the Directive secures the right of EU citizens to be joined in a member state by family members (such as spouses), including those family members who are third country nationals. The 2015 Regulations provides, subject to satisfaction of certain criteria, that a family member of an EU citizen who is not a national of a member state may be granted permission to reside in the State. Pursuant to regulation 27 of the 2015 Regulations, the Minister may revoke a residence card of a non-EU national where the card was claimed on the basis of fraud or abuse of rights. Abuse of rights includes a marriage of convenience. A marriage of convenience is defined by regulation 28 of the 2015 Regulations as meaning a marriage contracted for the sole purpose of obtaining an entitlement (such as a residence card) under, *inter alia*, the Directive or the 2015 Regulations.

7. On 1 September 2017, the first applicant applied for a renewal of the residence card that had been issued to her pursuant to the 2015 Regulations. It appears that, in the context

of an assessment of that application, the second applicant was interviewed voluntarily and under caution by members of the GNIB on 1 February 2018. During the course of that interview, a typed note of which was in evidence before the Court, the second applicant admitted that the marriage was a sham marriage, that he had not been in a real relationship with the first applicant, that he had married her to enable her get visa papers and that they had not lived together. He also admitted that, during the currency of the marriage to the first applicant, he had been in a relationship with a Latvian woman and that she had become pregnant following his marriage to the first applicant. This child was born in August 2013, making it clear that this child was conceived during the course of the second applicant's marriage to the first applicant.

8. Specifically, in answer to a question as to why the marriage happened so fast, the typed note of the interview records that the second applicant said that it was because the first applicant "needed a visa." He said that the first applicant said to him when they first met that they could get married so that she could get a visa. In answer to the question "*were you in a relationship with* [the first applicant]", the second applicant answered "*no*". He admitted that while he was married to the first applicant, he was in a relationship with his Latvian girlfriend. In answer to a question as to whether he accepted that his marriage the first applicant was a marriage of convenience, he answered "*yes*", saying it was to allow her get a visa and that he explained to his Latvian girlfriend that the marriage to the first applicant was not real. The interview note also records him as saying that he and the first applicant had never lived together.

9. Following this interview, the EU Treaty Rights Unit of the Irish Naturalisation and Immigration Service Division of the Minister's Department (for ease, "the Department") wrote to the first applicant by letter of 26 March 2018. This letter informed the first applicant that the Minister proposed to refuse her application for a residence permit, under regulation 27(1) of the 2015 Regulations i.e. the regulation that permits refusal of a residence card on the basis of abuse of rights, including a marriage of convenience.

10. This letter stated that:-

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

was a child born in 2013. The above information raises significant concerns as to the authenticity of the marriage and any subsisting relationship between you and the EU citizen. Based on the information above, the Minister is of the opinion that the marriage may be one of convenience in accordance with Regulation 28, contracted for the purposes of obtaining an immigration permission in the State, to which you would not otherwise have an entitlement."

11. The letter invited submissions from the first applicant. Solicitors on behalf of the first applicant tendered detailed written submissions on 20 April 2018 in which it was asserted on behalf of the first applicant that her marriage to the second applicant was a genuine marriage. The submission enclosed a signed statement from the second applicant which asserted that "*this relationship was truly based on love and our marriage is genuine*". This statement asserted that the second applicant cheated on the first applicant with his ex-girlfriend and that the first applicant found out about this and the birth of the second applicant's child which "*understandably started the trouble in the relationship*." It is asserted that they started living separately at the end of 2013 and that they tried to get back together in around 2016.

12. The submission stated that the first applicant's family in India would not approve of her being in a relationship outside of marriage and that her family members were in the process of beginning to make marriage arrangements for her in India. The submission stated that the applicants were living as a married couple from September 2012 to the end of 2013 but that the relationship ultimately broke down due to the second applicant's infidelity and the birth of his son with his previous partner. The submission stated "*we are instructed that the couple tried to resolve their issues and make the marriage work in 2016 and travelled together for a holiday to Latvia in 2016 but these efforts did not work and the couple are now permanently separated*."

13. Various documents were tendered in support of the first applicant's case including evidence of joint travel to Latvia in February and April 2016, PRTB and bank statements addressed to the second applicant at the residence in Dublin that the applicants claimed they shared, documents evidencing the applicants' joint assessment for tax purposes in 2014 and wedding photographs and various letters of support. This submission noted that "*We are instructed that* [the first applicant] *has changed her phone and has not kept her phone and message records of her old phone*" although some available evidence of continued contact by phone between the applicants was tendered. The submission addressed the various factors set out in regulation 28(5) of the 2015 Regulations including an assertion that, while the applicants had kept separate bank accounts, "*they assisted each other financially and jointly contributed to rent, utilities and all joint costs*". The submission noted that the applicants "*would be happy to attend an interview*

together" to confirm that they were familiar with each other's personal details. The submission also noted that each of the applicants "*speak the English language having lived in Ireland for many years*".

14. I should note for completeness that this submission requested a full copy of the notes of the meeting of the second applicant with GNIB on 1 February 2018 on the basis that the summary of that interview in the letter of 26 March 2018 was in direct conflict with the first applicant's instructions. This request appears to have been refused by the Department on the basis that the Department no longer had the notes and that the applicants could get the notes directly from GNIB. The second applicant appears to have made a subject access request pursuant to GDPR for the audio, video and note records of the interview. The typed notes of the interview appear to have been disclosed to the second applicant at the end of September 2020 on foot of this request. There is a suggestion in the papers that the first applicant may have had sight of the interview notes before then but that is not entirely clear. Ultimately, no point was taken by the applicants in these proceedings based on an absence of access to the interview notes.

15. By letter of 25 July 2018 (the "first instance decision"), the Department wrote to the first applicant informing her that it had decided to refuse her application for a residence card. The first instance decision relied on the fact that the second applicant had told the GNIB at the interview on 1 February 2018 that the relationship was not real, that they had never lived together and that, throughout the period of the applicants' marriage, he had been in a relationship with a third party. The first instance decision recorded the second applicant's answers in that interview to the effect that the reason the marriage had been conducted so hastily was that the first applicant needed a visa in order to continue to reside in the State. The first instance decision referenced the submissions made on the applicant's behalf on 20 April 2018 and the statement given by the second applicant but set out that the decision maker favoured the contents of the Garda interview over the typed letter supplied by the second applicant. The first instance decision concluded that the marriage was not a genuine marriage and that the applicant was not entitled to a right of residence.

16. Following separate judicial review proceedings, the first applicant was permitted an opportunity to make submissions in support of a review of the first instance decision.

17. A submission in support of a review of the first instance decision was lodged with the Minister by solicitors on behalf of the first applicant on 22 December 2020. This submission noted that the solicitors had requested the script of the interview with the

second applicant through a Freedom of Information Act request and reserved the right to make further submissions on receipt of that. The submission attached a sworn affidavit from the second applicant in which the second applicant asserted that he never stated during the course of his interview with GNIB that the first applicant was only his friend or that he had married her for the purposes of her obtaining an immigration permission in the State. He also asserted that he had never stated that he and the first applicant had not lived together as man and wife. This submission reiterated points made in the April 2018 submission filed in support of a review of the first instance decision including the fact that the applicants travelled to Latvia in February and April 2016. The submission asserted that "*the Minister's hollow allegations are based on pure speculations and misguided opinion, and, therefore incorrect as to material fact*." This submission also refuted the suggestion that the letter from the second applicant provided prior to the first instance decision did not contain the second applicant's real signature. The second applicant's affidavit also sought to address this matter.

18. In a further submission lodged by solicitors on her behalf on 16 August 2021 in support of her application for a review of the first instance decision, it was submitted on behalf of the first applicant that it was wrong of the Minister to rely on the second applicant's interview with GNIB on the basis that the second applicant "*has limited English and he was not facilitated with an interpreter to provide accurate information as a matter of fair procedure*".

19. This submission also advanced arguments as to the burden of proof, asserting that the burden of proof was on the Minister to demonstrate that the marriage was not one of convenience.

20. It was submitted that the Minister's investigation was "*disproportionately lacking in rigour and not capable of yielding a safe finding by discounting the extensive documents of the representations of the applicant, without explaining properly or adequately why it reached its conclusion*". It was submitted that "*no proportionality assessment was conducted nor was a thorough review carried out*."

Decision

21. The Minister communicated her decision on the review application to the first applicant by letter of 12 November 2021.

22. I will come to the terms of the decision in more detail when discussing the applicants' grounds of challenge to the decision. For present purposes, it suffices to note that the decision concluded that the Minister was not persuaded that the first instance decision should be overturned. It is fair to say that the decision-maker's assessment of the significance of the admissions made by the second applicant at his interview GNIB lay at the core of the decision.

Discussion

Alleged error as regards burden of proof

23. The applicants pleaded that the Minister erred in placing the onus on the applicants to prove the validity of the marriage. The applicants' written submissions quoted from the judgement of Cooke J. in *El Menkari v the Minister for Justice* [2011] IEHC 29 as follows:

> *"…, if the implication of the respondent's query in relation to the discrepancy in the addresses is that the marriage is a sham, the onus lay with the Minister to so state and to so prove once the applicants had furnished the above explanation."*

24. In fairness, this argument was not pressed in oral submission but I will briefly deal with it for completeness.

25. In my view the contention that the Minister improperly imposed a burden of proof on the applicants is not borne out by the facts. The Minister conducted her own investigations into the applicants' marriage with a view to ascertaining whether the marriage was a genuine one. Having received a note of the interview conducted by the GNIB with the second applicant and having investigated further information relevant to his personal circumstances during the period of the applicants' marriage, the Minister, in her letter of 25 March 2018 to the first applicant, squarely put forward a concern that the marriage was one of convenience, and the basis for that concern, and invited the first applicant to address that concern. Having considered the submissions received, the Minister through an official then delivered a decision determining that the marriage was one of convenience and setting out a reasoned basis as to why that was said to be so. I do not see that there was any inappropriate attempt to transfer the burden of proof in the circumstances. Setting out of a preliminary view or concern, based on evidence, that the marriage was one of convenience with an invitation to make submissions on that view does not constitute a shifting of the burden of proof. Both the first instance decision and the decision following review involved the Minister seeking to discharge the burden of

proof on her and being satisfied on the facts that such burden was met and I see no error of law in that approach.

Alleged failure to engage with applicants' case

26. The applicants pleaded, in their statement of grounds, that the Minister:-

> *"did not conduct a full and rigorous investigation, as is required by law. The evidence relied on was wholly circumstantial in nature. No balancing exercise was carried out, there was no meaningful engagement with countervailing indicators which pointed to a genuine relationship and there was undue focus on those aspects which tended to undermine the applicants' contention, and a disregard of those aspects which were favourable to the applicants."*

27. A further plea, in similar terms to the above, was also made in the statement of grounds, as follows:

> *"A marriage of convenience finding demands of a rigorous investigation of all material facts, which did not occur. Instead, unlawful subjective interpretations were placed on various peripheral matters and based on these a finding was made. A detailed review application had been submitted, with submissions, which said representations were not engaged with to a sufficient degree."*

28. In support of this ground of challenge, the applicants placed reliance on the following passage from my judgment in *R.A. v. The Minister for Justice* (delivered on 21 June 2022), where I said, at para. 66:

> *"While accepting that the decision-maker should not be under an undue onus of proof, in light of the gravity of the consequences of a determination pursuant to the provisions of the 2015 Regulations that the marriage is one of convenience, or that a person has otherwise obtained EU family right benefits by fraud, it is important that fair procedures are properly adhered to and that the decision-making process is sufficiently rigorous to ensure that an adverse finding is arrived at only following a careful evaluation of all of the evidence and submissions put before the decision-maker."*

29. In my view, for the reasons set out below, the applicants' contention that there was a failure to properly engage with the evidence and submissions before the Minister is not made out. The decision relied on relevant evidence, including the contents of the interview note, and fully engaged with the first applicant's case including her case as to why the contents of the interview note should not be relied on by the Minister.

30. The decision, from its terms, engaged with the applicants' case and what the decision-maker believed that case lacked in material respects in light of the other material before the Minister. The decision commenced by noting that "*You indicate that you met the EU citizen in March 2012, moved in together in April 2012 and got married in September 2012. The accelerated nature of your relationship is not typical of a genuine marriage or civil partnership particularly as it noted that the EU citizen is the biological father of a child conceived with a third party during your marriage to him. In addition you have failed to submit any evidence of your relationship to the EU citizen prior to the solemnisation of your marriage*."

31. The decision then states that "*The evidence available to the Minister strongly indicates that your marriage to Union citizen* [the second applicant] *was one of convenience in accordance with Regulation 28 of the Regulations that was contracted in an attempt to obtain an immigration permission to which you would not otherwise be entitled. The marriage was never genuine, and the Minister of the view that it should be disregarded for the purposes of immigration*."

32. The decision then expressly references the second applicant's interview with members of the GNIB and states "*During this interview he confirmed that you were in a friendship relationship with the EU citizen and that you never resided together in a romantic relationship…* [and] *that you got married solely so that you could secure an immigration advantage in the State that you would not otherwise be entitled to". The decision also notes that the second applicant* "confirmed that throughout your marriage he was in a relationship with a third party". The decision also notes that the second applicant "*left the State to return to Latvia in July 2015*". This latter date was a typo and should have read 2012. I do not believe that this error is of an order such as to vitiate the lawfulness of the decision.

33. The decision then relies on the fact that the second applicant was named as the biological father of a child born "*less than one year after the applicants were married on 19 September 2012*". The decision references the fact that there was a signed transcript of

the interview. Again, there is a typo in the decision in that it references the first applicant signing a transcript of that interview as opposed to the second applicant. However, in my view, it is very clear from the content of the decision as a whole that the reference to a transcript of the interview was a reference to the transcript of the GNIB interview with the second applicant.

34. The decision-maker placed significant weight on the contents of the second applicant's interview with GNIB, where the second applicant squarely admitted that the marriage was one of convenience and was not a genuine marriage. On no view could the contents of the interview be said to amount to "*circumstantial evidence*", or a "*peripheral matter*" as pleaded by the applicants. The admissions made by the second applicant to GNIB under caution at an interview went directly to the core of the issue being considered by the Minister i.e. whether or not the marriage was a genuine one or was one of convenience. These admissions were matters which the Minister was entitled both to take into account and to place significant weight on.

35. It is also clear from the decision that the decision-maker engaged with the applicants' case in relation to the reliability of the alleged admissions. The case advanced on behalf of the first applicant in relation to the interview, was, firstly, that the second applicant had sworn an affidavit (which she tendered with her submissions) in which he disputed that he admitted at the interview that the marriage was not a genuine marriage and, secondly, a contention that he had limited English and was not facilitated with an interpreter, such that the interview's contents should not have been relied upon.

36. The decision addressed the affidavit submitted by the second applicant which sought to refute the contents of the Garda interview. The second applicant's affidavit, which was a short one at just over one page, stated that:-

> *"I never stated during the course of my interview with GNIB Office that [the first applicant] is only my friend nor I stated I married her for the purpose of facilitating her to obtain her immigration permission to stay. I also never stated that we had never lived together as man and wife on any addresses provided to the Minister of Justice."*

37. The affidavit went on to state that the second applicant married the first applicant:-

"out of mutual love and respect notwithstanding we have been separated since 2014, we remain husband and wife as we have not initiated divorce proceedings as yet… My marriage with [the first applicant] is genuine and bona fide."

38. The decision fully engaged with the submission based on this affidavit. The decision dealt with the affidavit as follows:

"An affidavit dated 22/12/2020 purported to be from the EU citizen, refuted the contents of the Garda Interview on 28/02/2018. At review, your legal representatives state that the EU citizen was not interviewed with a translator present and as such the interview cannot be considered reliable. As per the EU1 form however, it is noted that the EU citizen had resided in this State for almost 7 years prior to the interview taking place and it is therefore unlikely that he did not possess the language skills required to provide reliable answers to the questions asked of him. Regardless, you have failed to provide any evidence that the statements that were made during that interview can be denied or that they are an inaccurate representation of the facts by means of documentation, evidence to the contrary."

39. The applicant's statement of grounds pleaded that the Minister "*failed to give proper weight to the unimpugned affidavit evidence of the second named Applicant*".

40. In my view, it was open to the decision maker to take the view that the contents of this affidavit, as set out above, were mere assertion and to prefer the contents of the interview note. There was no attempt made in the affidavit to set out what it was that the second applicant did say in the interview which supported the case that the marriage was genuine and how it was that the record of the interview was so fundamentally wrong. (The typed note of the interview records the question "*Is this memo a true and accurate reflection of what has been said in this interview*?" and the answer of the second applicant being "*Yes*")

41. It is clear from the authorities (e.g. *Abbas v. Minister for Justice and Equality* [2021] IECA 16, Binchy J., at para. 83) that the Minister is entitled to disregard mere assertion when dealing with claims made either in unsworn statements or affidavits where assertions are made in the absence of supporting documentation. Having considered the contents of the affidavit, I am quite satisfied that it was open to the decision-maker to take the view that the contents of the affidavit constituted mere assertion and that there was ample basis for the decision maker to find that the second applicant had "*failed to provide any*

evidence that the statements that were made during the interview can be denied or that they are an inaccurate representation of the facts" whether by means of documentation or other evidence to the contrary.

42. Insofar as criticism is made of the decision maker referring to the second applicant's affidavit as being a "*purported*" affidavit, in my view, the gist of what was being said by the decision-maker in the decision was that the affidavit purported to refute the contents of the Garda interview but did not convincingly do so. That was a characterisation which was open to the decision-maker to make.

43. It is also clear from the terms of this section of the decision, as set out above, that the decision-maker engaged with the submission made that the interview could not be considered reliable as the second applicant was not interviewed with a translator present. The decision noted that it was said in the supporting documentation that the second applicant had resided in the State for almost seven years prior to the interview taking place and "*it is therefore unlikely that he did not possess the language skills required to provide reliable answers to the questions asked of him*". The decision – perfectly legitimately – relied on contents of correspondence from the applicants' legal representatives dated April 2018 in which it was asserted "*We are instructed that* [both of the applicants] *speak the English language having lived in Ireland for many years*". The note of the interview of 1 February 2018 records the second applicant as answering "*No*" to the question "*Do you need an interpreter*?". The second applicant swore an affidavit in these proceedings in English and the applicants' solicitor swore an affidavit in these proceedings in which he expressed the view that the second applicant had "*sufficient proficiency in the English language to understand the advice given to him and to swear an affidavit in that language*".

44. The first applicant also complained that there was a failure in the decision to engage with positive aspects of her submissions, such as evidence of the fact that the applicants travelled to Latvia (the home place of the second applicant) in February and April 2016 which evidenced the genuineness of their relationship. The first applicant also complained of a failure to record or give positive weight to wedding photographs and other material submitted to support her case that the marriage was a genuine one.

45. However, the decision itself records that the decision maker considered all of the material and submissions lodged in the matter: the decision states that "*having considered all of the information, documentation, and submissions on all of your files, the Minister is not persuaded that* [the first instance decision] *should be overturned*". It is well established

that just because specific materials are not discussed in the reasoning of a decision, this does not mean that the materials submitted were not considered. As set out by Phelan J. in the recent decision of *R. v. Minister for Justice and Equality* and *A. v. Minister for Justice and Equality* [2022] IEHC 142, at para. 37:-

> *"There is a presumption that material has been considered if the decision says so, albeit that this presumption may be displaced on the basis of factors in the case (G.K. v. Minister for Justice [2002] 2 I.R. 418 & MH (Pakistan) v. IPAT & Anor [2020] IEHC 364) such as, for example, where a reason given is not reconcilable with the material without further explanation."*

46. There were no factors identified here which suggested that the foregoing presumption should be displaced. Counsel for the applicants sought to contend that on one reading of an earlier section of the decision, the decision-maker appeared to be unaware of the April 2018 submissions filed on behalf of the first applicant before the first instance decision was handed down; however, the express reference in the decision to one aspect of the April 2018 submission (addressing the applicants' proficiency in the English language), coupled with the decision maker's statement in the decision that he had "*considered all the information, documentation and submissions on all of your files*" in my view makes clear that the decision maker did not overlook the contents of the April 2018 submission.

47. Counsel for the applicants pointed to other typographical errors in material parts of the document leading him to characterise the decision as a "sloppy" one. While I think there is force in the contention that greater care should have been taken by the decision-maker in ensuring material dates in the decision were correct, I do not think that the errors were such as to affect the lawfulness of the decision.

48. In my view, there was no failure of the Minister, through her official, to properly engage with the evidence before the decision-maker or the case made on behalf of the applicants, including the case made as to why the Minister should not rely on the contents of the second applicant's interview with GNIB. I do not believe there has been any want of fair procedures made out under this heading. It is clear that the contents of the second applicant's interview with GNIB weighed heavily in the decision- maker's consideration of the submissions made. The decision-maker was entitled to take that view on the evidence before him and it is of course not the role of this Court on a judicial review to interfere with the decision-maker's assessment of the merits of the application.

Right of first applicant to an oral interview?

49. I turn then to a consideration of the final argument advanced on behalf of the first applicant, namely that there was a breach of the first applicant's right to fair procedures in arriving at the review decision by a failure of the decision maker to interview her before making the decision. It will be noted that the alleged breach of fair procedures was said to lie in the failure to afford an oral *interview* to the first applicant; the case made was not, for example, that the first applicant was entitled to an oral hearing at which she could have the second applicant cross-examined on the statements made by him at the GNIB interview as to the true nature of the marriage.

50. Since the pleadings closed in this case, Phelan J. handed down judgment (on 16 May 2022) in the case of *Z.K. v. Minister for Justice and Equality, Ireland and the Attorney General* [2022] IEHC 278 ("*Z.K.*"). On the facts in *Z.K.*, Phelan J. held that the applicant's right to fair procedures in the process leading to a decision that the applicant had been party to a marriage of convenience had been breached in circumstances where the Minister arrived at an adverse assessment of the applicant's credibility without any "oral process" such as an interview. Phelan J. held (at para. 71):

"In the present case, the First Named Respondent has made a finding that the Applicant's marriage is one of convenience and that he knowingly provided false and/or misleading information but without any oral process. As there is nothing demonstrably false in the application, I am satisfied that the First Named Respondent can only have come to this conclusion based upon an assessment of the Applicant's credibility and a position taken as to the likely veracity of the account given, albeit that it could be true."

51. In her analysis of the issue in that case, Phelan J. stated at para. 60:

"It is clear that it is not always necessary to have an oral stage to the decision-making process to secure the right to fairness. It is also common case in these proceedings that neither the Directive nor the Regulations require an oral hearing in all cases. In issue is whether or not an oral hearing was required in this case where the decision of the First Named Respondent turned on the credibility of the Applicant."

52. Phelan J. records (at para. 61) that the applicant's primary contention in that case was that *"depending on the nature of a given case, fairness may only be achieved by affording an applicant with an oral process."*

53. Phelan J. (at para. 65) had regard to the judgment of O'Donnell J. (as he then was) in *M.M. v. Minister for Justice and Equality* [2018] IESC 10 ("*M.M.*"). In *M.M.*, the Supreme Court was applying to the facts before it an answer by the CJEU to a reference to it by the Supreme Court on the following question:

'Does the "right to be heard" in European Union law require that an application for subsidiary protection, made pursuant to Council Directive 2004/83/EC, be accorded an oral hearing of that application, including the right to call or cross-examine witnesses, when the application is made in circumstances where the Member State concerned operates two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection, respectively?'

54. The question had been referred in the context of the system which then applied whereby an applicant for asylum obtained an oral interview, at which credibility could be assessed, and where a separate assessment of that applicant's application for subsidiary protection proceeded, following a decision on their asylum application, without a separate interview.

55. Phelan J., having stated that "*resolving conflicting factual accounts…may come down to a determination of which account is more believable and hearing parties' testimony may be the most appropriate means of determining which account is preferred*" then quoted from the following passage of the judgment of O'Donnell J. in *M.M.* (at para. 26):

"In its core meaning, credibility can mean that the account given by a witness of disputed facts is not believed by an adjudicator. If two witnesses as to fact give contradictory accounts of events which cannot be reconciled, then a resolution of the dispute may require an adjudicator to come to a conclusion as to which of the witnesses he or she believes, and to explain why. It is an ingrained part of the law of fair procedures that Irish Courts consider it is only very rarely that such a conclusion could be arrived at on paper alone: normally the choice between disputed accounts of contested facts requires an oral hearing so that those accounts can be tested against each other, and, their own inherent internal

consistency, and be tested in turn by the opposing party. In most cases, it is inevitable that this will lead to an oral hearing with cross-examination."

56. Phelan J. at para. 65 of the judgment in Z.K. also cited the following dicta of Cooke J. in *N.(S.U.) (South Africa) v. Refugee Applications Commissioner* [2013] 2 IR 555:

"Where, as here, the events and facts described by an applicant are of a kind that could have taken place (as opposed to matters which are demonstrated to be impossible or contradicted by independent evidence), but have been rejected purely because the applicant has been disbelieved when recounting them, it is, in the judgment of the Court, clear that the effectiveness of the appeal remedy as a matter of law is dependent upon the availability to the applicant of an opportunity of persuading the deciding authority on appeal that he or she is personally credible in the matter." (Cooke J. at p. 574)

57. Phelan J. also referenced the Court of Appeal's decision in *Balc v. Minister for Justice* [2018] IECA 76 ("*Balc*"). *Balc* concerned an asserted right to an oral hearing in the process leading to the making of a removal order against a non-national pursuant to the provisions of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. 656 of 2006). Phelan J. held (at para. 67) that:

*"The right to an oral hearing under the Directive [*i.e. Directive 2004/38/EC addressing the rights of EU citizens and their family members to freedom of movement within the EU*] has been considered in the context of a challenge to a removal order. The Court of Appeal in* Balc v. Minister for Justice & Equality *[2018] IECA 76 found (at para. 77) that the right to an effective remedy contained within Article 47 of the Charter did not require in every administrative decision that an aggrieved party must have a review with an oral hearing before an independent judicial tribunal. Peart J. held that if an oral hearing was required, the Directive would have made that intention clear. Balc is not authority for the wider proposition, however, that an oral hearing is never required but rather that it is not always or even usually required."*

58. In *Balc*, Peart J. held (at para. 77) : *"….. Quite apart from the fact that the appellants never sought an oral hearing when seeking a review (which might affect standing to challenge on that ground, but is neither here nor there as far as the proper interpretation*

of the Directive is concerned), I am satisfied that an oral hearing is not mandated or even required to be available if sought….".

59. On the facts before her in *Z.K.*, Phelan J. took the view that an oral process was required. She laid particular emphasis on the fact that there was nothing demonstrably false in the application, and that the Minister had taken an adverse view of the applicant's credibility and the likely veracity of the account given in circumstances where that account could have been true, without affording an interview or any other oral process. The judgment of Phelan J. does not spell out what precisely is contemplated by an "oral process" other than an interview; it is not clear whether, for example, an oral process to resolve two conflicting accounts of fact as between different witnesses would require those witnesses to be cross-examined in an oral hearing, although it would appear to follow from the judgement of O'Donnell J. in *M.M*. that where two witnesses as to fact give contradictory accounts of events which cannot be reconciled then an oral hearing with cross-examination may be required.

60. It should be noted that the decision in *Z.K*. is under appeal to the Court of Appeal, but at the time of this judgment, the Court of Appeal had not yet dealt with the appeal.

61. Counsel for the applicants submitted that *Z.K.* should be followed by me and that it was effectively dispositive of the case in their favour: in circumstances where the decision maker was effectively rejecting the credibility of the first applicant's contention that her marriage to the second applicant was a genuine one, he submitted that it followed from *Z.K.* that she should have been afforded, at a minimum, an oral interview to allow the credibility of her claim be assessed. He submitted that it made no logical sense, and was fundamentally unfair, to arrive at an adverse conclusion on whether or not the first applicant's marriage was a genuine one or a marriage of convenience by reference to what her – by then separated – husband had said in an interview (at which she was not present) without affording her an interview also so that she could address what he said about the marriage at his interview.

62. Counsel for the Minister submitted that as *Z.K.* was under appeal it was not binding on me and in any event he submitted that both *Balc* and *M.M*. were authority for the proposition that, in processes akin to the process for determining whether or not a marriage said to confer EU residence rights is a genuine marriage or a marriage of convenience, the default position is that there is no entitlement *per se* to an oral interview or oral process; it is consistent with fair procedures (both as a matter of Irish and EU law) for there to be a paper-based application which builds in the flexibility in exceptional

circumstances to permit an oral interview where fairness requires same but that no such exceptional circumstances arose here.

63. Counsel for the Minister submitted that this was not a true credibility case, in the sense addressed by O'Donnell J. in *M.M.;* it was not a case of the Minister having to resolve inconsistent accounts or resolve conflicts of fact, which could only be fairly resolved through an oral process. He submitted that the second applicant had been given an oral interview. The contents of that interview were said to fatally undermine the first applicant's (paper-based) assertions that the marriage was not one of convenience; the first applicant had every opportunity to make detailed written submissions on that issue and availed of such opportunity. He submitted that, in fact, the first applicant's position in her affidavit grounding this judicial review was that, as she was not present at the second applicant's interview with the GNIB, she was not in a position to comment meaningfully on what was or was not said by the second applicant at that meeting so that an oral interview of her would not have advanced that issue in any event.

64. Counsel for the Minister submitted that the nature of the arguments she sought to advance were such that they could as easily have been made on paper as in an oral interview, whereby she would have made the same points which would have been transcribed so as to have the same impact as a written submission in any event. The first applicant did not seek to say that the second applicant had given a differing account from her account and that her account should be believed over his; rather the first applicant had sought to challenge reliance on the contents of the interview with the second applicant by contending variously that the second applicant had sworn that he did not make the statements attributed to him in that interview and/or that his English was sufficiently lacking such that the contents of his answers at interview were unreliable.

65. While it can be said on one view that the Minister was rejecting the first applicant's credibility in not accepting her assertions that the marriage was a genuine one, that could be said of any decision under the 2015 Regulations where a marriage is held to be one of convenience in the face of a contention by one or both of the parties to the marriage that the marriage was in fact genuine. It would follow on such an analysis that an oral process would be required in every case in which an allegation of a marriage of convenience is disputed. However, no provision for an oral interview or other form of oral process as a matter of right is contained in the Directive or the 2015 Regulations. None of the authorities relied upon by the applicant (including *Z.K.*) provides for such an entitlement as of right.

66. As the entitlement to an oral interview does not arise as of right under the Directive, the 2015 Regulations or as a matter of Irish or EU law, it is necessary to carefully assess the context in which the first applicant contends that such a right arose on the facts of this case. In that regard, in my view it is significant that, in the case made by the first applicant in support of her review of the first instance decision, she was not contending that there was a contradiction between herself and the second applicant on the material facts of the marriage. Rather, she sought to make the case that herself and the second applicant were asserting a consistent position as regards the fact of the marriage, the nature of the relationship and the proper characterisation of the marriage as a genuine one and that his purported statements to the contrary in the GNIB interview should be disregarded.

67. It will be recalled that the first instance decision relied on the admissions as to the true status of the marriage said to have been made by the second applicant in the GNIB interview. The first applicant on her application for review of this decision asserted as a matter of fact that she and the second applicant had lived together; that they shared utility bills and expenses; that the marriage broke up as a result of the second applicant's infidelity and his fathering a child with a third party, and that they had travelled together to Latvia in 2016 to try and repair the relationship. The second applicant gave evidence under caution at the GNIB interview which put each of these asserted facts in issue. On one view there were therefore "contradictory accounts of events which cannot be reconciled" (to deploy the language of O'Donnell J. in M.M.) as between the two parties to the marriage being the two most relevant witnesses as to facts concerning the nature of the relationship. If matters had rested there, the first applicant may have had a stronger case for an oral interview to allow these contradictory matters to be put to her so that the veracity of her account could be properly assessed. However, that is now not how the first applicant sought to approach matters. Rather than say "*my former husband may have said those things in interview but they do not represent the true state of affairs and my account should be believed over his for the following reasons*", the first applicant contended that the contents of the GNIB interview with the second applicant should be disregarded. She did not seek, or otherwise assert that she needed, an oral interview or other oral process to advance that case.

68. The argument in fact made in the first applicant's first set of submissions on the review was not that the second applicant had been lying in the interview and that she should be believed over him but, rather, that the second applicant had not made the admissions attributed to him in the typed note of the interview at all i.e. it was not her case that herself and her former husband had given materially different accounts of fact which needed an oral process to resolve; her case was that the two of them were *ad idem* and that the contents of the interview should be disregarded. She tendered an affidavit from the second applicant to support that case. In her affidavit grounding this judicial review,

the first applicant stated that "*reference* [in the decision] *is made to the interview which* [the second applicant] *gave to the gardai in February 2018 and those are matters which are more correctly and appropriately to be addressed in his own affidavit, as I was not present during that interview and was not interviewed at any stage with regard to our marriage*." As addressed earlier in this judgment, the decision-maker took the view in essence that the affidavit tendered by the second applicant in support of the first applicant's application for review of the first instance decision amounted to mere assertion and that meaningful evidence had not been advanced as to why the contents of the interview should be disregarded.

69. The first applicant then separately contended, in her supplemental submission on the review, that the contents of the interview should be disregarded because the second applicant had limited English and was not afforded a translator at the interview. This was also rejected by the decision-maker as not objectively standing up and I have held that the decision-maker was legally entitled to arrive at that view on the materials before him.

70. Importantly, the first applicant did not seek to make the case that if the second applicant had said what was attributed to him in the interview note that he was not telling the truth in relation to same, that there were reasons why he might be trying to sabotage her position (e.g. because there relationship had broken up acrimoniously) and that her account should be preferred over his and accepted as the more credible account. She did not seek an oral interview for herself or submit that she wished to be heard personally in an oral process so that the *bona fides* or credibility of her position as to the facts of the marriage and the relationship would be preferred over that of the second applicant. She did not in the course of this judicial review identify any material or position which she could only have advanced at on oral interview which she could not (or did not) advance by written submission.

71. Having rejected the arguments advanced by the first applicant as to the reliability of the contents of the interview, it seems to me that it was open to the decision-maker to proceed to a decision on the basis of the material before him without the necessity as a matter of fair procedures to orally interview the first applicant. This was all the more so in circumstances where objective matters (such as the accelerated nature of the relationship, the fact that the second applicant had fathered a child by another woman during the course of the relatively short marriage relationship and was in a relationship with that woman, the absence of a body of evidence supporting an ongoing intimate emotional relationship between the applicants (such as texts, photos, regular romantic social outings)) very much supported the account of the marriage given by the second applicant at interview.

72. In my view, the facts of this case are distinguishable from those in *Z.K.* and the decision in *Z.K.* does not avail the applicants in the circumstances. In *Z.K.,* both parties to the marriage were "on the same page". They had tendered a plausible account, not demonstrably false, which was supported by documentation. The decision-maker nonetheless disbelieved them. In marked contrast, on the facts before me, one party to the marriage said under caution at interview that the marriage was a sham and was for the sole purpose of obtaining a visa for the other party to the marriage. The first applicant was on full notice of the fact that the Minister was minded to determine that her marriage was one of convenience on the basis of what the other party to that marriage had told members of GNIB in unequivocal terms in an interview. The first applicant did not seek to set up the case that the second applicant's account should be disregarded because he was not telling the truth and that therefore there was a material conflict of evidence as to fact between them which needed an oral process to resolve. Rather, with the benefit of advice, she chose to contend that the second applicant had not said what was attributed to him in the interview note at all or had not understood what he was saying and that they were in fact ad idem as to the genuineness of the marriage. Once those contentions had been rejected (and an oral interview was not said to be required to advance those contentions which were fully made in detailed written submissions), and no other basis for disbelieving the second applicant's account was advanced, the necessity for an oral interview of the first applicant did not arise.

73. In the circumstances, in my view, on the very particular facts of this case, the first applicant was not *entitled* as a matter of fair procedures to the exceptional measure of an oral interview (or other oral process) in order for the decision to be lawfully arrived at. The type of material conflict as to fact between the parties to the marriage which might necessitate an oral interview or other oral process in an appropriate case did not arise on the facts here. The first applicant was able to make her case fully through written submissions and the case she made was fairly considered and assessed. It was open to the decision maker to arrive at the decision which he did on the basis of the papers before him, including the detailed written submissions made on behalf of the first applicant.

Conclusion

74. For the reasons set out above, the applicants have not made out a case in unlawfulness in the decision or the decision-making process and, accordingly, I refuse the relief sought.