APPROVED

REDACTED

THE HIGH COURT

[2024] IEHC 333

Record No. 2023/100JR

BETWEEN/

I AND PI

APPLICANTS

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 29th day of May 2024

INTRODUCTION

Preliminary

1. This application for judicial review is concerned with claims surrounding the *derived rights of free movement and residence* of a third country national family member[1] to join an EU citizen[2] in Ireland,[3] with such derived rights being based on whether or not that EU citizen residing in the State has exercised their Treaty Rights in accordance with law.

2. In summary, the Minister for Justice ("the Minister"), and officials on her behalf, were not satisfied that the Second Named Applicant was exercising her Treaty Rights – in this case, in the context of employment – and accordingly it was determined that no derived right or entitlement to reside, and move freely in the State (as a qualifying family member of an EU citizen) accrued to the First Named Applicant and his application for a residence card was refused.

3. This judicial review challenge, therefore, centres on the manner in which that decision to refuse a residence card was made by the departmental officials on behalf of the Minister.

4. Conor Power SC, together with Ian Whelan BL, appeared for the Applicants. Alexander Caffrey BL appeared for the Minister.

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[1] The First Named Applicant.

[2] The Second Named Applicant.

[3] The host Member State.

Background

5. The First Named Applicant, a Nigerian national, and the Second Named Applicant, a British national, were married in Malaysia on 9th February 2012 and have been living in Ireland since in or around May 2018. In the correspondence referred to in this judgment, the reference to "EU citizen" or "UK citizen" is a reference to the Second Named Applicant.

6. On 15th October 2018, the First Named Applicant – on the basis of his marriage to the Second Named Applicant, who was at that time (pre-Brexit)[4] an EU citizen alleged to be working in a hair salon and therefore, by virtue of the Citizens' Rights Directive (2004/38/EC) was exercising her EU Treaty rights – applied for a Residence Card, as a family member of an EU national pursuant to the provisions of the European Communities (Free Movement of Persons) Regulations 2015 ("the 2015 Regulations"). The Minister refused the Residence Card application by decision dated 29th August 2019.

7. The First Named Applicant sought a review of this decision and a ministerial refusal of the Residence Card application, as part of this review, issued on 5th December 2022. It is the lawfulness of that '*reviewed decision*' on 5th December 2022 which is challenged in this application for judicial review.

[4] The entitlements under Directive 2004/38/EC to move freely and reside within the EU ceased to apply to family members of UK nationals at the end of the transition period on 31st December 2020. In this case, the First Named Applicant's request for a review was received before the end of the transition period and by that date, as a determination on his review application had not been made, the review was assessed under the provisions of Regulation 19 of the European Union (Withdrawal Agreement) (Citizens' Rights) Regulations 2020 and Regulation 25 of the European Communities (Free Movement of Persons) Regulations 2015.

THE PROCESS

8. The application for a Residence Card is made pursuant to the 2015 Regulations. The timeline in this application addressed the following matters.

15th July 2019

9. Consequent upon the First Named Applicant's application for a Residence Card, by letter or *ministerial notice of intention to refuse* under Regulation 27(1) of the 2015 Regulations dated 15th July 2019 (referred to on behalf of the Applicant as "*the minded-to-refuse*" letter) an official in the EU Treaty Rights Division of the Irish Naturalisation & Immigration Service notified the Applicant, on behalf of the Minister, *inter alia* stating that having examined the application based on the documentation on file, the Minister proposed to refuse his application for a Residence Card.

10. The reasons given were that during the processing of the application, information had come to the Minister's attention which had led to a number of concerns and the letter added that "[i]*n this regard, the Minister will provide you with an opportunity to address these concerns prior to making a determination*".

11. The letter then detailed what those concerns were. First, upon examination of the following documentation, which the First Named Applicant had supplied in support of his application, the letter advised that same were found to be *false, fraudulent or intentionally misleading as to a material fact*: three numbered payslips in the name of the EU citizen; a letter of employment in the name of the EU citizen dated 2nd October

2018 and 7th May 2019; an amended Tax Credit Certificate in the name of the EU citizen dated 8th May 2019; a sworn declaration given in the High Commission of the Federal Republic of Nigeria in Malaysia in the name of the First Named Applicant dated 31st January 2012; a letter confirming residency in the names of the First Named Applicant and an EU citizen.

12. Second, the letter sought clarification in relation to information available to the Minister from the UK authorities during his visa application in the UK dated 13th December 2017, which indicated that the First Named Applicant was married to a third party in Nigeria and had a child born in 2012, whereas he had provided a sworn declaration given in the High Commission of the Federal Republic of Nigeria in Malaysia on 31st January 2012 stating that he was not married in Nigeria or elsewhere. In terms of their relationship, the letter stated that the First Named Applicant had provided 13 undated photographs of his relationship with the Second Named Applicant and two dated photographs of their wedding in Malaysia which referred to 16th July 2013, despite the Applicants' wedding taking place on 9th February 2012. The letter advised that the First Named Applicant had failed to provide any written details of his "*relationship, immigration history of the EU citizen, photographs with verifiable dates, evidence of joint travel, dated email or text correspondence as requested by letter dated 27/05/2019*" and added that "[b]*ased 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, which you would otherwise not have an entitlement to and that the documentation supplied in support of this application is false and misleading as to material fact*."

13. Third, the letter requested clarification on any revenue returns for 2018 for the EU citizen and payments from her employer and as to whether the named hair salon, which the Second Named Applicant was stated to be in the employment of, was registered in the Companies Registration Office.

14. Fourth, the letter stated that upon contacting the First Named Applicant's landlord on 13th June 2019, the landlord was able to confirm the First Named Applicant as a tenant but did not know his wife's name "*despite writing a letter of tenancy in her name dated* [7th May 2019]" and clarification was sought in relation to this matter.

15. The letter of 15th July 2019 then stated that:

> "*Based on the information above, the Minister is of the opinion that the documentation supplied in support of this application is false and misleading as to material fact.*
>
> *This constitutes as an abuse of rights within the Regulations. If this is found to be the case, the Minister will proceed to refuse your application in accordance with the provisions of Regulation 27 and 28 of the Regulations and Article 35 of the Directive.*
>
> *It is now open to you to make representations to the Minister as to why your application should not be refused. Such representations must include the particulars set out below and must be made within 21 working days of the date of issue of this letter*".

16. The letter then set out (six) particulars to be included in representations under Regulation 27(3); referred to the onus on the First Named Applicant to advise of any change in circumstances, while his application was being processed, and that failure to do so may result in the Minister drawing inferences from such omissions in any future decisions; and a general warning was given in relation to non-compliance by any person with the Regulations and the possibility of an offence as set out in Regulation 30 of the 2015 Regulations.

17. Despite being requested to do so, no submissions were in fact made by the First Named Applicant arising from the Minister's letter of notification dated 15th July 2019.

29th August 2019

18. Following the ministerial notice of intention to refuse dated 15th July 2019, on 29th August 2019 an official from the EU Treaty Rights Unit, Residence Division of the Irish Naturalisation & Immigration Service wrote to the First Named Applicant, on behalf of the Minister, informing him that the Minister had decided to refuse his application for the following reasons.

19. The letter stated that during the course of the application "*a number of concerns were raised which called into question the credibility of the application*."

20. The letter, first, listed the following documentation which was supplied in support of the First Named Applicant's application: thirteen undated photographs and two photographs dated 16th July 2013 of the Applicants' wedding in Malaysia as evidence

of his relationship with the EU citizen; the declaration to the Nigerian High Commission based in Kuala Lumpur, Malaysia dated 31st January 2012 in the name of the First Named Applicant; letters from employer dated 2nd October 2018 and 7th May 2019 in the name of the Second Named Applicant; payslips dated 29th September 2018, 17th September 2018 and 10th September 2018 in the name of the Second Named Applicant; a tax credit certificate dated 8th May 2019 in the name of the Second Named Applicant; a letter of tenancy from their landlord dated 7th May 2019 in the names of both Applicants. The letter stated that the photographs referred to above were dated 16th July 2013, despite the fact that the Applicants' wedding date of 9th February 2012 was on their marriage register certificate. It then stated, in response to the letter dated 27th May 2019, that the First Named Applicant failed to provide any written details of "*his relationship with the EU citizen, photographs with verifiable dates or dated email or text correspondence.*"

21. Second, the letter referred to information available to the Minister from the UK authorities during his visa application dated 13th December 2017, which indicated that the First Named Applicant was married to a third party from Nigeria with whom he had a child, born in 2012. Reference was made to a copy of the declaration that the First Named Applicant made to the Nigerian High Commission in Kuala Lumpur dated 31st January 2012 in which he stated that he was not legally married to anyone in Nigeria or elsewhere.

22. Third, it was stated that documents provided by the First Named Applicant comprising a letter of employment, payslips and a Tax Credit Certificate to support the claim that the Second Named Applicant ("the EU citizen spouse") was employed

by a named hair salon were contradicted by information available to the Minister from the Department of Employment Affairs and Social Protection ("DEASP"), which indicated that the EU citizen had no revenue returns for the entire year of 2018, had never received payments from her employment with the named patron of the named hair salon and that no company by the name referred to was registered in the Companies Registration Office.

23. Fourth, reference was made to contact with the First Named Applicant's landlord on 13th June 2019, who confirmed that the First Named Applicant was residing with him but stated that he could not name the EU citizen despite having written a letter of tenancy to confirm her residency dated 7th May 2019 in support of his application.

24. The letter of 29th August 2019 then stated as follows:

> "*A notice was issued by this office on* [15th July 2019] *informing you of the Minister's intention, under Regulation 27(1) of the Regulations, to refuse your application for a residence card on the basis of fraud or abuse of rights. No representations have been received by this office to date. The Minister is satisfied that you should now cease to be entitled to any right of residence in accordance with Regulation 27(1) of the Regulations and Article 35 of the Directive.*
>
> *Based on the foregoing information, your application is refused under Regulations 27(1) and 28(1) of the Regulations on the basis that your marriage is one of convenience contracted for the purpose of obtaining an immigration permission which you would not otherwise be entitled. It is further refused on the basis that you have provided*

documentation and information which is false, fraudulent and intentionally misleading as to a material fact.

The decision to refuse you a residence card for a family member of a Union citizen does not interfere with any rights which you may have under the Constitution or Article 8 of the European Convention on Human Rights. In any subsequent proposed decision where such interference may arise, please note that full and proper consideration will be given to those rights".

25. In similar format to the *ministerial notice of intention to refuse* under Regulation 27(1) of the 2015 Regulations dated 15th July 2019, the letter of 29th August 2019 gave general warning in relation to non-compliance by any person with the Regulations and the possibility of an offence in Regulation 30 of the 2015 Regulations.

26. The letter then sets out information in relation to the *review process* under Regulation 25 of the 2015 Regulations and Form EU4.

27. Through his solicitor, the First Named Applicant applied for a review in or around September 2019.

5th December 2022

28. The reviewed decision of 5th December 2022 essentially treats of two matters: the First Named Applicant was successful on the marriage of convenience ground of review but was unsuccessful in relation to the argument based on a derived right of

residence arising from the exercise by the Second Named Applicant ("the EU citizen") of her Treaty rights *i.e.*, in this case, the right to work.

29. The reviewed decision in fact substitutes and effectively replaces the first instance deciding officer's decision of 29th August 2019 with the following decision:

> "*Having considered all of the information, documentation, and submissions on all of your files, the Minister finds that the decision of* [29th August 2019] *should be set aside and substituted with the following decision.*
>
> *The Minister is not satisfied that it has been established that your marriage to UK citizen* [Name given] *was one of convenience in accordance with regulation 28 of the Regulations, this element of the decision makers determination has been set aside.*
>
> *However, the Minister is satisfied that you submitted and sought to rely upon documentation and/or information that you knew to be false and/or misleading in order to obtain a derived right of free movement and residence under EU law to which you would not otherwise be entitled. This is an abuse of rights in accordance with Regulation 27 of the Regulations.*
>
> *Moreover, the Minister is satisfied that you have failed to establish that* [the Second Named Applicant's name] *is exercising her Treaty Rights in the State through employment, self-employment, the pursuit of a course of study, involuntary unemployment, or the possession of sufficient resources in conformity with Regulation 6(3) of the Regulations.*

As such, you do not have a derived entitlement to reside in the State as a qualifying family member of an EU citizen [sic.] *Regulation 6(3) of the Regulations and your application for a residence card has been refused.*

The decision to refuse you a residence card for a family member of a Union citizen does not interfere with any rights which you may have under the Constitution or Article 8 of the European Convention on Human Rights. In any subsequent proposed decision where such interference may arise, please note that full and proper consideration will be given to these rights.

Your EU Treaty Rights application is now closed. It is noted that you now have no immigration status in the State. Your file will now be referred to the Repatriation Division for consideration."

30. As in the correspondence dated 15th July 2019 and 29th August 2019, the letter of 5th December 2022 also contained a general warning in relation to non-compliance by any person with the Regulations and the possibility of an offence in Regulation 30 of the 2015 Regulations.

31. In relation to the first issue concerning the Applicants' marriage, I have set out earlier in this judgment how the ministerial notice of intention to refuse dated 15th July 2019 and the first instance decision dated 29th August 2019 addressed these matters. To recap, information provided to the Minister from the UK indicated that the First Named Applicant had declared in a UK visa application made on 13th December 2017 that he was married to another woman from Nigeria and that he had a child born in

2012, whereas he had made a declaration before the Nigerian High Commission in Kuala Lumpur on 31st January 2012 that he was not legally married to anyone in Nigeria or elsewhere. In the decision of 29th August 2019, the Deciding Officer determined that the Applicants' marriage was one of convenience, contracted for the purpose of the First Named Applicant obtaining a derived right of free movement and residence under EU law as a spouse who would not otherwise have such a right and his application for a residence card was refused in accordance with the provisions of Regulation 28(1) of the 2015 Regulations.

32. The letter of 5th December 2022 refers to the response by the First Named Applicant to those matters in the context of his application for a review as follows:

> "*In respect of these matters, you advise that a third party submitted your UK visa application for you. You advise that you had, indeed, had* [sic.] *a child with a third party while in Nigeria and had taken part in a 'native ceremony' with this woman so that your child could use your name and could be 'recognised' locally*".

33. While the letter of 5th December 2022 states that the Minister shared many of the concerns outlined by the deciding officer with regard to the probity of the First Named Applicant's marriage, the official from the EU Treaty Rights Review Unit in the Immigration Service Delivery, on behalf of the Minister, was not satisfied that a sufficient case had been made that the Applicants' marriage was one of convenience. Therefore, the First Named Applicant was partially successful in the review in that the '*reviewed decision'* set aside, because of insufficiency of evidence on file, that part of the first instance deciding officer's determination dated 29th August 2019 which

supported a finding under Regulation 28(1) of the 2015 Regulations that the marriage was one of convenience.

34. However, in relation to the second issue *i.e.*, the argument based on a derived right of residence arising from the exercise by the Second Named Applicant of her Treaty rights in the area of employment, a different view was taken.

35. Again, to recap, the First Named Applicant had applied on 15th October 2018 for a residence card as a family member of an EU citizen, the Second Named Applicant (who was a British national) and it was stated that they had been married since 9th February 2012, that the Applicants were living together in County Dublin and that the Second Named Applicant (the EU/UK citizen) was employed in a named hair salon in Dublin City. In the deciding officer's first instance decision on behalf of the Minister dated 29th August 2019, the First Named Applicant's residence card application was refused because the deciding officer was of the opinion that the information or documentation which the Applicant had provided in support of his application was "*false and misleading as to a material fact. This constituted a fraudulent act within the meaning of the Regulations and Directive, and the deciding officer decided to refuse your application in accordance with the provisions of Regulation 27(1) of the Regulations and Article 35 of the Directive*"[5] (in addition to finding that the marriage was one of convenience and refusing the application in accordance with Regulation 28(1) of the 2015 Regulations).

[5] This extract is quoted from the department/ministerial letter dated 5th December 2022.

36. In relation to the argument based on a derived right of residence, arising from the exercise by the Second Named Applicant of her Treaty rights in the area of employment, the letter of 5th December 2022 stated that the First Named Applicant had "*not provided any further information or documentation in respect of the UK citizen's recent economic activities in the State, and there is no record of her employment on DEASP records since 2019*" and "[a]s *there is nothing to suggest that the UK citizen*[6] *in this case is exercising her Treaty Rights in the State, you do not have an entitlement to a derived right of residence.*"

37. On this second issue, the Minister had decided that she was not satisfied that the Second Named Applicant ("*the UK citizen*") was exercising her Treaty Rights in the State by being employed with the named hair salon, stating that if this was the case, the fact of this alleged employment would be reflected in data provided by DEASP and the fact that it was not "*strongly suggests that the UK citizen's alleged employment with this company was neither genuine nor effective*."

38. The basis for this finding was by reference to the following documentation and information. The letter stated that in contrast to the First Named Applicant's application where he had advised that the UK citizen (the Second Named Applicant) was working in a named hair salon, had submitted a letter of employment, a tax credit certificate and pay slips dated September 2018, information provided by DEASP indicated that the UK citizen (the Second Named Applicant) had made just one revenue return of €155 in 2018. The letter stated that the Second Named Applicant had never received any payment from the named patron of the hair salon for whom

[6] The Second Named Applicant.

she was alleged to have worked and the sums set out in the pay slips on file were not reflected in DEASP records and that information provided to the Minister by the Companies Registration Office indicated that there was no company registered in Ireland with the name of the hair salon.

39. The letter dated 5th December 2022 also stated that "[m]*ore recently, the UK citizen has advised that she lost her job before the COVID 19 lockdown and has since been unable to work for medical reasons. She advises that you are now supporting her. She has not, however, provided any explanation for why her purported employment with the named hair salon was not reflected in the State's records*."

40. It was after considering these matters the letter then stated "[h]*aving considered all of the above documentation, information and submissions, the Minister is not satisfied that the UK citizen in this case was exercising her Treaty Rights in the State with the* [named] *Hair Salon. It follows, therefore, that the documentation and/or information that you submitted as putative evidence of the UK citizen's exercise of rights in the State at that enterprise was submitted with the intention of misleading the Minister into thinking that the UK citizen was exercising her Treaty Rights in Ireland when this was not the case.*

It is considered that you submitted and sought to rely upon information and/or documentation that you knew to be false and/or misleading in order to obtain a derived right of free movement and residence under EU law to which you would not otherwise be entitled. This is an abuse of rights in accordance with Regulation 27 of the Regulations."

SUMMARY OF THE APPLICANTS' POSITION

41. On behalf of the Applicants, issue is taken with the finding that the First Named Applicant submitted and sought to rely upon information and/or documentation *that he knew to be false and/or misleading* in order to obtain a derived right of free movement and residence under EU law to which he would not otherwise be entitled and that this was an abuse of rights in accordance with Regulation 27 of the Regulations.

42. Mr. Power SC (on behalf of the Applicants) makes two central points: first, there has been no finding that 'the documents' relied on by the First Named Applicant were themselves false or were forgeries; second, in the previous decisions of 15th July 2019 and 29th August 2019, a similar contention was made which at that time also included the alleged marriage of convenience which finding was subsequently set aside and there has been no distinction made as to what 'documents' are now being referred to.

43. Mr. Power SC submits that the decision, particularly as set out above, is circular and 'puts the cart before the horse' by making a conclusion – that the Minister was not satisfied that the UK citizen (the Second Named Applicant) was exercising her Treaty Rights in the State by being employed in a named hair salon – based on documents which have not been *objectively* found to be erroneous, flawed or fraudulent and in circumstances where the Respondent never sought to contact the employer. He says that the ministerial decision of not accepting that the Second Named Applicant was working as alleged and the subsequent reduction ("[i]*t follows, therefore*") that the documentation and information was submitted with the intention of misleading the

Minister into thinking that the Second Named Applicant was exercising her Treaty Rights in Ireland when this was not the case, is circular because the basis for that conclusion should have been premised firstly on a finding in relation to the documentation which had been submitted.

44. He contends that the letter dated 7th May 2019 from the Second Named Applicant's employer states, by reference to naming the Second Named Applicant, that she is working for the employer's company and also states that he can be further contacted, and his contact number is given. Mr. Power SC makes the point that no contact, however, was made with this person and he compares this lack of contact with the contact which was made with the Applicants' landlord. He submits, therefore, that the Minister had not objectively found that that the documentation submitted in relation to the Second Named Respondent's was, for example, a forgery or incorrect.

SUMMARY OF THE RESPONDENT'S POSITION

45. Mr. Caffrey BL (for the Minister) submits that the assessments carried out and decisions made on behalf of the Minister, at each stage of the process (including the letter dated 15th July 2019 proposing to refuse the application and the matters upon which further clarification was sought, the first instance refusal dated 29th August 2019 and the reviewed decision dated 5th December 2022) confirms that all relevant matters were in fact considered and assessed. He submits that the Applicants' application generally was not a very carefully considered one.

46. Mr. Caffrey BL contends that the Minister was entitled to make inquiries as to the status of the company and put those matters to the First Named Applicant and then reach a determination after considering the response. The reviewed decision dated 5th December 2022 stated that the Second Named Applicant had never received any payment from the named employer for whom she was alleged to have worked and the sums of money set out in the pay slips on file were not reflected in DEASP records and that information provided to the Minister, by the Companies Registration Office, indicated that there was no company registered in Ireland with the name of the particular hair salon.

47. It was submitted that the Applicants had a number of opportunities to make their case to the Minister in respect of the Minister's concerns about the Second Named Applicant's employment and at no point, prior to filing the opposition papers in this case, did the Applicants submit further information.

48. It was suggested that the Applicants' reliance on the decision of this court (Ferriter J.) in *RA v Minister for Justice* [2022] IEHC 378 was misplaced, as in that case it was held that the Minister had erred in making a circular finding that there was a marriage of convenience within the meaning of the 2015 Regulations and that therefore, documentation referencing that marriage was fraudulent. In *RA* the Minister had not pointed to any specific material which he suggested was false or misleading and Ferriter J. held that the "*self-standing finding of fraudulent submission of documentation or information, separate from the finding that the marriage was one of convenience, does not seem to have been justified on its own terms in the circumstances.*" Mr. Caffrey BL submits that this is distinguishable from the facts of

the case before me in that the Minister identified that the Applicants had submitted a letter of employment, a tax credit certificate and pay slips and stated that "[i]*t follows, therefore, that the documentation and/or information that you submitted as putative evidence of the UK citizen's exercise of rights in the State at that enterprise was submitted with the intention of misleading the Minister into thinking that the UK citizen was exercising her Treaty Rights in Ireland when this was not the case*."

49. On behalf of the Minister, it was submitted that she acted in a proportionate manner both in refusing to grant a residence card and in circumstances where she had raised concerns regarding the Applicant's alleged employment in the State and had done so prior to the first instance decision. It was submitted that decisions of this court in *AKS (a minor) v The Minister for Justice* [2023] IEHC 1 and *Imran v Minister for Justice* [2023] IEHC 338 were distinguishable on the basis that they involved the revocation of residence cards previously granted and therefore concerned vested rights acquired prior to revocation.

50. It was submitted that in the case before me, false and misleading information was submitted in relation to the Second Named Applicant's alleged employment and that parallels could be drawn with the decision of the Court of Appeal in *A & R v Minister for Justice and Equality* [2019] IECA 328, where Baker J. held that the appellants were precluded from arguing before the court that the Minister's 'reviewed decision' in that case, which had found that there was a marriage of convenience, failed to give reasons or was irrational or was in breach of fairness because they had not fully engaged with the statutory opportunity to clarify matters which had given rise to the Minister's concerns, *i.e.*, the appellants in that case had failed to respond to the

Minister's notification that he believed that the marriage was one of convenience and that statements had been submitted which were false and misleading as to a material fact. In those circumstances, therefore, a review decision was issued which was substantively the same as the first decision.

51. Mr. Caffrey BL submits that in the 'reviewed decision', in the case before me, the Minister was mainly focused on the fact that there were corresponding State records addressing the Second Named Applicant's alleged employment in the named hair salon.

52. Further in the 'review application', while it was submitted that no details of the changed position where the Second Named Applicant was in "*involuntary unemployment*" and "*residing with sufficient resources*" (other than ticking the relevant boxes on the form) were provided in the EU Form 4, it was clear that the Minister was aware of this changed position because the reviewed decision referred to the fact that more recently "[t]*he UK citizen has advised that she lost her job before the COVID 19 lockdown and has been unable to work for medical reasons. She advised that you are now supporting her. She has not, however, provided any explanation for why her purported employment with* [the named] *Hair Salon is not reflected in the State's records*", and having found in the review decision that the Applicants submitted false or misleading evidence, the reviewed decision finds that "[m]*oreover, the Minister is satisfied that you have failed to establish that* [the Second Named Applicant] *is exercising her Treaty Rights in the State through employment, self-employment, the pursuit of study, involuntary unemployment, or the*

possession of sufficient resources in conformity with Regulation 6(3) of the Regulations."

53. At paragraph 16 of her Affidavit sworn on 19th May 2023, in addressing the 'reviewed decision' of 5th December 2022, Katherine Grace, Assistant Principal of the EU Treaty Rights Division, Immigration Delivery Service of the Department of Justice avers that the Minister was "*evidently aware that the Applicants changed the basis of the application from the Second Applicant being in "employment" at first instance to being in "involuntary unemployment" and "residing with sufficient resources" on review. However, in circumstances where there is very strong evidence to suggest that a person is relying on information which they know to be false or misleading, such as occurred here, the Respondent is entitled to refuse the application on that basis and not proceed further in assessing same*."

54. In her further Affidavit of 29th February 2024, in relation to the Second Named Applicant's reference to her employment in a hair salon, Ms. Grace exhibits three payslips, a letter from the Second Named Applicant's employer and a tax credit certificate dated 8th May 2019, all of which had been submitted by the First Named Applicant and referenced but, through inadvertence, had not been exhibited in her first Affidavit. Ms. Grace also avers at paragraph 4 in relation to her previous Affidavit that "*I should clarify (for the avoidance of any doubt) that the comments at paragraph 16 of my previous affidavit should not be interpreted as constituting a suggestion from me that the Respondent did not, <u>in fact</u>, consider the review application in full. Rather, it was a general statement that there is very strong evidence to suggest that a person is relying on information which they know to be false or misleading, such as*

occurred here, the Respondent is otherwise entitled to refuse the application on that basis and not proceed further in assessing same albeit that in the case, and is clear from the terms of the decision, she did."

55. In this regard, Mr. Caffrey BL draws a distinction between the 'point of principle' where a Respondent is entitled to refuse an application without proceeding further once it has been determined that a person is relying on information which they know to be false, compared to the situation in this case where the changed position of 'sufficient resources' and 'involuntary employment' were in fact considered as part of the review application and 'reviewed decision.'

ASSESSMENT & DECISION

56. Whilst paragraph (e)(i) of the Applicants' Statement of Grounds dated 7th February 2023 seeks to argue that the Minister's decision of 5th December 2022 was unlawful because of the failure to offer the First Named Applicant an interview or oral hearing, Mr. Power SC fairly accepted that this argument was rejected in the decision of the Court of Appeal in *ZK v The Minister for Justice & Others* [2023] IECA 254.[7] Between the hearing of the application and the delivery of this judgment, the Supreme Court in its determination dated 23rd April 2024, in *Z.K. v The Minister for Justice and Equality* [2024] IESCDET 43, refused the Applicant leave to appeal from the decision and judgment of the Court of Appeal.

[7] The Court of Appeal comprised Donnelly, Ní Raifeartaigh and Power JJ. Judgment was delivered by Power J. and was agreed with by Donnelly J. and Ní Raifeartaigh J.

57. Leave to apply for judicial review was granted by this court (Meenan J.) on 6th March 2023 for the reliefs set out at paragraph (d) on the grounds set out at paragraph (e) of the Statement of Grounds.

58. Unless an application is made for an amendment and granted, the order of 6th March 2023 fixes the parameters within which this application for judicial review can proceed.

59. In *AP v Director of Public Prosecutions* [2011] IESC 2; [2011] 1 I.R. 729, the Supreme Court (Denham J., as she then was) observed at paragraphs 7-9 of that judgment, as follows:

> "*(7) When an applicant seeks leave to apply for judicial review he does so on specific grounds stated in the statement required. On the ex parte application for leave the learned High Court judge may grant leave on all, or some, of the grounds sought or may refuse to grant leave. The order of the High Court determines the parameters of the grounds upon which the application proceeds. The process requires the applicant to set out precisely the grounds upon which the application is to be advanced. On any such application the High Court has jurisdiction to allow an amendment of the statement of grounds, if it thinks fit. Once an application for leave to appeal has been granted the basis for the review by the Court is established.*
>
> *(8) In this case the ground upon which the relief was sought is as set out previously. This then is the scope of the review to be made by the Court.*

(9) The High Court, in a wide ranging judgment, refused the application. In the analysis by the learned High Court judge he addressed issues outside the grounds granted for the judicial review, in the absence of any order, or consent, to amend the statement of grounds. In this he fell into error. A court, including this Court, is limited in a judicial review to the grounds ordered for the review on the initial application, unless the grounds have been amended. In this case the grounds for review are limited, essentially that a fourth trial would be an abuse and unfair, and were not amended."

60. In his judgment in *AP v Director of Public Prosecutions* [2011] IESC 2; [2011] 1 I.R. 729, Murray C.J. expressed a similar view at 732, as follows:

"***[4]*** *Judicial review constitutes a significant proportion of the cases that come before the High Court and before this Court on appeal. A party seeking relief by way of judicial review is required to apply to the High Court for leave to bring those proceedings and can only be granted such leave on specified grounds when certain criteria, required by law, are met. In most cases the applicant must demonstrate that he or she has an arguable case in respect of any particular ground for relief and there are also statutory provisions setting a somewhat higher threshold for certain specified classes of cases.*

[5] *In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out*

clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought.

[6] *It is not uncommon in many such applications that some grounds, and in particular the ultimate ground upon which leave is sought are expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea, and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted particularly when such a ground is invariably accompanied by a list of more specific grounds.*

[7] *Moreover, if, in the course of the hearing of an application for leave it emerges that a ground or relief sought can or ought to be stated with greater clarity and precision then it is desirable that the order of the High Court granting leave, if leave is granted, specify the ground or relief in such terms.*

[8] *There has also been a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge in those of the applicant that in reality either go well beyond the scope of a particular ground or grounds upon which the leave was granted or simply raise new grounds.*

[9] *The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant should seek an order permitting any extended or new ground to be argued.*

This would avoid ambiguity if not confusion in an appeal as to the grounds that were before the High Court. The respondents, if they object to any matter being argued at such a hearing because it goes beyond the scope of the grounds on which leave was granted, should raise the matter and make their objection clear. Although it did not arise in this particular case, it is also unsatisfactory for objections of this nature to be raised by the respondents at the appeal stage when no objection had been expressly raised at the trial or there is controversy as to whether this was the case.

[10] *In short it is incumbent on the parties to judicial review to assist the High Court, and consequentially this Court on appeal, by ensuring that grounds for judicial review are stated clearly and precisely and that any additional grounds, subsequent to leave being granted, are raised only after an appropriate order has been applied for and obtained.*"

61. The Court of Appeal[8] applied the decision in *AP v Director of Public Prosecutions* [2011] IESC 2; [2011] 1 I.R. 729 in its decision in *F.B. v the Minister for Justice & Equality* [2020] IECA 89 beginning at paragraph 52 in the judgment of Collins J. (with whom Costello J. and Ní Raifeartaigh J. agreed).

62. Generally, in relation to all applications for judicial review, the position in relation to (i) new grounds being argued for (sometimes through the prism of legal submissions) for which leave has not been granted and (ii) insufficient particularisation of grounds,

[8] The Court of Appeal comprised Costello, Ní Raifeartaigh and Collins JJ.

is the subject of well-settled jurisprudence from the Superior Courts is also reflected in Order 84 of the Rules of the Superior Courts 1986 as amended ("RSC 1986"). For example, O. 84, r. 20(1) RSC 1986 provides that "[n]*o application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule*." O. 84, r. 20(3) RSC 1986 provides that "[i]*t shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a)*[9] *an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground*."

63. In his judgment in *Reid v An Bord Pleanála (No.7)* [2024] IEHC 27 at paragraphs 48 to 58, Humphreys J. referred to many of the seminal decisions of the Superior Courts in Ireland[10] dealing with this issue before observing (at paragraph 58) "[w]*hile exact*

[9] O. 84, r. 20(2)(a)(ii) RSC 1986 refers to "*a statement of each relief sought and of the particular grounds upon which each such relief is sought*"; O. 84, r. 20(2)(a)(iii) RSC 1986 refers to "*where any interim relief is sought, a statement of the orders sought by way of interim relief and a statement of the particular grounds upon which each such order is sought*."

[10] *Mahon v Celbridge Spinning Company Limited* [1967] I.R. 1 at page 3 per Fitzgerald J., cited by Clarke J. in *Mooreview Developments Ltd. & Ors v First Active Plc & Anor* [2005] IEHC 329; [2005] 10 JIC 2004 at paragraph 7.2); *AP v Director of Public Prosecutions* [2011] IESC 2; [2011] 1 I.R. 729; *Keegan v Garda Síochána Ombudsman Commission* [2015] IESC 68 per O'Donnell J. (as he then was) at paragraph 42; *Alen-Buckley v An Bord Pleanála* [2017] IEHC 311 per Costello J.; *Alen-Buckley v An Bord Pleanála* [2017] IEHC 541 per Haughton J.; *Sweetman v An Bord Pleanála* [2020] IEHC 39 per McDonald J. at paragraph 103. (In *Reid*, Humphreys J. refers to this as *Sweetman XV* by reference to the numbering system in cases involving Mr. Peter Sweetman, the well-known environmental campaigner, in *Sweetman v An Bord Pleanála* (*Sweetman XVII*) [2021] IEHC 662); *Rushe v An Bord Pleanála* [2020] IEHC 122 per Barniville J. (as he then was) at paragraph

specification of every jot and tittle of a case is an impossible standard, an applicant can only be permitted to advance at a hearing a point that is acceptably clear from the express terms of the statement of grounds, subject to the grant of any order allowing an amendment."

64. Accordingly, in this application for judicial review, the Applicants are confined to the grounds as set out in the Statement of Grounds as informed by the provisions of O.84 RSC 1986 and the applicable jurisprudence, as summarised above.

65. Earlier in this judgment, I briefly summarised the two main aspects of the case made on behalf of the Applicants as (i) there had been no prior finding that 'the documents' relied on by the First Named Applicant were in themselves false or constituted forgeries and (ii) in the previous decisions of 15th July 2019 and 29th August 2019, a similar contention was made which had included the alleged marriage of convenience which had been subsequently set aside and there had been no distinction made as to what 'documents' are now being referred to. For the following reasons, I am refusing the First Named Applicant's application for judicial review.

66. Regulation 27(1)(b) of the 2015 Regulations *inter alia* provides that the Minister may refuse to grant a residence card where she decides, in accordance with this Regulation, that the right, entitlement or status, as the case may be, concerned is being claimed *on the basis of fraud or abuse of rights*.

111; *Casey v Minister for Housing, Planning and Local Government & Ors.* [2021] IESC 42 at paragraphs 29 and 31 per Baker J., beginning at paragraph 29.

67. In the completed Form EU4 which is the Request for the Review of Decision dated 2nd September 2019, under section 4 – *Current activity of the EU citizen in the State* – the following two boxes are ticked: *Involuntary Unemployment* and *Residing with sufficient resources*.

68. In section 6 of this form – *Details of Review* – section 6.1 refers to *Statement of the grounds on which the requester seeks the review of the decision made (indicating where, in the view of the requester the deciding officer erred in fact or in law)* and this is completed as follows: "[a]*s attached/stated in cover letter*." That appears to be a reference to the covering letter from Travers & Company Solicitors dated 16th September 2019 which states that they are instructed to submit an application for review for the First Named Applicant and the following documents are enclosed for the Minister's consideration:

> "*1 EU Form 4*[11]*, completed and signed*
>
> *2 Letter from Tallaght University Hospital, dated the 9th August, 2019, confirming* [the Second Named Applicant's] *place on waiting list*
>
> *3 Medical Certificate from* [name of doctor given] *which certifies that* [the Second Named Applicant] *is suffering from abdominal pain and nausea, related to a hernia. The letter confirms that the symptoms are debilitating and impact on* [the Second Named Applicant's] *ability to work*

[11] Form EU4.

4 Copy British passport for [the Second Named Applicant] *with Nigerian visa, issued from Kuala Lumpur. It confirms her date of entry as the 23rd December, 2015 and exit as the 28th January, 2016*

5 Residence Permit for [the Second Named Applicant] *for Nigeria*

6 Employment permit for [the Second Named Applicant] *for Malaysia*

7 Email correspondence from [the Applicants] *wherein they seek to explain the issues raised by the Minister*

8 Photos of the [Second Named Applicant] *in Nigeria*".

69. Throughout the process – including the correspondence dated 15th July 2019, 29th August 2019 and 22nd December 2022 – there was a ministerial request for the First Named Applicant to explain why the Second Named Applicant's purported employment with the hair salon was not reflected in the State's records. The Minister formed the view that the First Named Applicant had not provided any further information or documentation in respect of the Second Named Applicant's recent economic activities in the State, and that there was no record of her employment on DEASP records since 2019 and concluded, therefore, that as there was nothing to suggest that the Second Named Applicant was exercising her Treaty Rights in the State, the First Named Applicant did not have an entitlement to a derived right of residence and, therefore, his residence card application was refused.

70. The Minister, therefore, determined that this amounted to *an abuse of rights* (as provided for in Regulation 27(1)(b) of the 2015 Regulations) in the following two extracts from the decision dated 5th December 2022:

> "*It is considered that you submitted and sought to rely upon information and/or documentation that you knew to be false and/or misleading in order to obtain a derived right of free movement and residence under EU law to which you would not otherwise be entitled. This is an abuse of rights in accordance with Regulation 27 of the Regulations*"[12]

and

> "*However, the Minister is satisfied that you submitted and sought to rely upon documentation and/or information that you knew to be false and/or misleading in order to obtain a derived right of free movement and residence under EU law to which you would not otherwise be entitled. This is an abuse of rights in accordance with Regulation 27 of the Regulations.*"[13]

71. This is a challenge to a reviewed decision. Insofar as the Applicant has claimed a failure to provide reasons at paragraph (e)(ii) of his Statement of Grounds dated 7th February 2023, the Minister has stated that because there was no record of the Second Named Applicant's employment on DEASP records since 2019 and as a consequence there was nothing to suggest that the Second Named Applicant was exercising her Treaty Rights in the State, consequently the First Named Applicant did not have an

[12] Emphasis added.

[13] Emphasis added.

entitlement to a derived right of residence and therefore his residence card application was refused. The reasons for refusal were, therefore, furnished.

72. Further, the Minister has held that the documentary failure (as set out above) to establish the exercise of a Treaty Right by the Second Named Applicant in order to subtend a derived right to reside and move freely on behalf of the First Named Applicant had not been satisfied and the documents and information furnished amounted to *an abuse of rights* under Regulation 27 of the 2015 Regulations.

73. This is a very different factual scenario to that which applied in *Saneechur & Anor v The Minister for Justice & Equality* [2021] IEHC 356 where at paragraph 5 of his judgment, Barrett J. observed that "[a]*n error on a payslip could not, by itself, reasonably ground the serious finding that the applicant's application was fraudulent. That would be wholly unreasonable. The court considers that it can take judicial notice of the fact that, in life, payslip errors happen from time to time. A couple of months ago this Court was advised of a months-long error in its own payslips. These things happen. So one cannot point to an error in a payslip and say, 'A-ha, that means there's fraud in your EUTR application.' More would be required; and that 'more' does not present.*"

74. Further, and by analogy, in *AR & NK v The Minister for Justice & Ors* [2019] IECA 328, the Court of Appeal[14] addressed circumstances which involved the refusal of a residence card which had been sought on the basis of the applicant, in that case, stating that he was a permitted family member of an EU citizen. On review as per

[14] The Court of Appeal comprised Baker, Whelan and McGovern JJ.

Regulation 25 of the 2015 Regulations, the Minister had formed the view that the relationship was one of convenience adding that she "*was of the opinion that the documentation provided*", and the statements made were "*false and misleading as to a material fact*". In her judgment, Baker J. observed at paragraph 60 as follows:

> "*I consider that the failure to fully engage with the opportunity to clarify the matters of fact which had given rise to concern on the part of the Minister makes it untenable for the appellants to now argue that the Minister's decision lacked reasons, was given in breach of the obligations of fairness, and that the Minister's decision was irrational. I do not consider that the remedy of judicial review on these bases should be granted, although I leave to another case the broader question of whether there may be circumstances where failure to engage with the opportunity to further comment might preclude an application for judicial review on jurisdictional grounds.*"

75. At paragraph (e)(iii) of the Applicants' Statement of Grounds dated 7th February 2023, it is argued *inter alia* that there was a failure of the Minister to recognise and consider the question of sufficiency of resources. As set out earlier in this judgment, in the completed Form EU4 (the Request for the Review of Decision) dated 2nd September 2019, under section 4 – Current activity of the EU citizen in the State – the following two boxes were ticked: *Involuntary Unemployment* and *Residing with sufficient resources*. In the letter from the EU Treaty Rights Review Unit (Immigration Service Delivery) dated 3rd February 2021, a number of documents were sought in different scenarios, including:

"*If the EU/UK citizen is involuntary unemployed, (Including the COVID payment) the following documents should be provided:*

- *Current letter from Department of Social Protection with details of current benefit claims*
- *Current letter from Employment Services Office acknowledging registration as a jobseeker*
- *Letter from previous employer outlining circumstances of redundancy*
- *P60s for last 2 years of employment (P60s not issued after 2018).*
- *P45 for last employment (if employment ceased on or before 31/12/2018)*
- *Copy of Employment Detail Summary from the Revenue Commissioners (Income Tax) from the EU/UK Citizen (from 2019 onwards)*"

and

"*If the EU/UK citizen is residing in the State with sufficient resources, the following documents should be provided:*

- *Evidence of financial resources*
-*Bank statements*
-*Letter from private medical insurance provider for EU/UK citizen and any dependants*".

76. In response by e-mail dated 7th September 2022, the Applicants' solicitors submitted a number a documents including, *inter alia*, a letter from Permanent TSB showing the Applicants' address, a personal letter from the Second Named Applicant dated 6th September 2022, payslip and tax documents for the First Named Applicant, a doctor's letter for the Second Named Applicant in respect of her inability to work and a letter from Laya healthcare in relation to the Second Named Applicant's private health insurance.

77. The personal letter from the Second Named Applicant dated 6th September 2022 refers to her name and that she is the wife of the First Named Applicant and adds:

> "*I lost my job before Covid 19. Then Covid 19 set in and I was unable to work. My husband was working and is still working now. I have had to rely on my husband to work as he financially looks after me. He has been doing this as I cannot work at the moment as I am seeing my doctor for a medical problem I am having*".

78. The letter dated 5th December 2022 also confirms that these matters were considered by the Minister, as evidenced from the following extracts:

> "*More recently, the UK citizen has advised that she lost her job before the COVID 19 lockdown and has since been unable to work for medical reasons. She advises that you are now supporting her. She has not, however, provided any explanation for why her purported employment with the named hair salon was not reflected in the State's records …*

You have not provided any further information or documentation in respect of the UK citizen's recent economic activities in the State, and there is no record of her employment on DEASP records since 2019

…

Moreover, the Minister is satisfied that you have failed to establish that [the Second Named Applicant's name] *is exercising her Treaty Rights in the State through employment, self-employment, the pursuit of a course of study, involuntary unemployment, or the possession of sufficient resources in conformity with Regulation 6(3) of the Regulations*".

79. Whilst it is suggested that the last extract quoted above is '*boiler plate*' and '*pro forma*' in its format in that the reference to '*self-employment*' and '*the pursuit of a course of study*' has no application to the Applicants' circumstances, it is clear that the reference to involuntary unemployment or the possession of sufficient resources was applicable to the First Named Applicant's application. Accordingly, I do not consider that there was an error in the Minister's decision dated 5th December 2022 in her recognition and consideration of the question of sufficiency of resources.

80. At paragraph (e)(iv) of the Applicants' Statement of Grounds dated 7th February 2023, it is *inter alia* contended that the Minister erred by failing to reach any determination on the issue of the Second Named Applicant's involuntary employment in accordance with Article 7(3)(a) of Directive 2004/38EC and/or her ability to take up employment

due to her health. However, as quoted above, the letter dated 5th December 2022 records that "[m]*ore recently, the UK citizen has advised that she lost her job before the COVID 19 lockdown and has since been unable to work for medical reasons. She advises that you* [the First Named Applicant] *are now supporting her. She has not, however, provided any explanation for why her purported employment with the named hair salon was not reflected in the State's records*" and "*the Minister is satisfied that you have failed to establish that* [the Second Named Applicant's name] *is exercising her Treaty Rights in the State through employment, self-employment, the pursuit of a course of study, involuntary unemployment, or the possession of sufficient resources in conformity with Regulation 6(3) of the Regulations*".

81. Regulation 6(3)(a)(i) of the 2015 Regulations addresses 'residence in the State' and *inter alia* provides that a Union citizen to whom Regulation 3(1)(a) applies may reside in the State for a period that is longer than 3 months if he or she is in employment or in self-employment in the State.

82. Regulation 6(3)(c) provides that "[w]*here a person to whom Regulation 6(3)(a)(i) applies ceases to be in the employment or self-employment concerned, that subparagraph shall be deemed to continue to apply to him or her, where—(i) he or she is temporarily unable to work as the result of an illness or accident, (ii) <u>he or she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with a relevant office of the Department of Social Protection</u>,*[15] *(iii) subject to subparagraph (d), he or she is in duly recorded involuntary unemployment after completing a fixed-term employment*

[15] Emphasis (underlining) added.

contract of less than a year, or after having become involuntarily unemployed during the first year, and has registered as a job-seeker with a relevant office of the Department of Social Protection, or (iv) he or she takes up vocational training and, unless he or she is involuntarily unemployed, the training relates to his or previous employment."

83. The question of involuntary unemployment is, therefore, predicated on the question of employment and it is clear that the Minister addressed this issue and the information which was furnished by the First Named Applicant.

84. In the circumstances, I do not consider that the grounds upon which the First Named Applicant was granted leave to apply for judicial review and legal arguments put forward on the Applicants' behalf, during this hearing, are such as to warrant the reliefs claimed in this application for judicial review and, therefore, I refuse this application.

PROPOSED ORDER

85. I shall make an Order refusing the First Named Applicant's application for reliefs claimed by way of judicial review. I shall put the matter in for mention before me on Wednesday 5th June 2024 at 10:45 to address the question of costs and any ancillary or consequential matters which arise.