

THE HIGH COURT

[2022] IEHC 278

[Record No. 2021/409 JR]

BETWEEN

Z.K.

APPLICANT

AND

THE MINISTER FOR JUSTICE & EQUALITY

AND

IRELAND

AND

THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 16th day of May, 2022
INTRODUCTION

1. In these proceedings the Applicant challenges a decision to revoke EU residency granted on foot of his marriage to an EU citizen exercising free movement rights in the State on the basis that it had been fraudulently obtained in reliance on a marriage of convenience. The Applicant maintains that the decision was based on a personal credibility assessment in which his account and that of his wife were disbelieved and the constitutional justice and fairness required that an oral hearing should have been convened as part of the decision-making process in those circumstances. Notably, no request for an oral hearing was made prior to the decision being made.
2. In its opposition papers, the First Named Respondent confirms that while the First Named Respondent is not precluded from convening an oral hearing, no provision of the

Citizens Rights Directive 2004/38/EC [hereinafter “Directive 2004/38/EC”] or the transposing EC (Free Movement of Persons) Regulations, 2015 [hereinafter “the Regulations”] provides an entitlement to an oral hearing. It is accepted that the practice of the First Named Respondent is such that applications for residence cards and any subsequent review process under Directive 2004/38/EC the transposing Regulations is conducted in writing for all Applicants.

3. The First Named Respondent maintains that the requirements of natural and constitutional justice are met in the context of the relevant legislation which provides in express terms for the Applicant’s right to know the information upon which the decision is being made, a right to reply prior to any adverse decision being taken and a right to know the reasons for any such decision. The First Named Respondent further maintains that the decision was based on evidence available to her and not on the basis of a personal credibility assessment as claimed.

4. Accordingly, the net issue in this case is whether the requirements of constitutional and natural justice required some form of oral hearing before a decision to revoke residency was made.

5. In the light of the First Named Respondent’s acceptance that it remains open to the First Named Respondent to convene an oral hearing, the Applicant did not pursue a constitutional challenge to the Regulations which had been pleaded in the proceedings as instituted.

BACKGROUND

6. The Applicant is a Georgian national who travelled to Ireland without lawful permission on the 19th of September, 2016. The Applicant’s wife is a Lithuanian national who has resided in the State since 2006. The couple claim to have met on a dating app (Badoo.com) in or about May, 2016 while the Applicant was still living in Georgia and his future wife was living in Dublin with her mother at an address in Citywest. It is claimed that the couple courted through video, phone and messages for several months before the Applicant travelled to Ireland.

7. It is claimed that following the Applicant's arrival in the State the relationship intensified and that while the Applicant's future wife continued to live with her mother, she overnights frequently with the Applicant. It is claimed that as the relationship accelerated the couple discussed marriage.

8. Although present in the Irish State from September, 2016, the Applicant did not notify the authorities of his presence until he applied for international protection on the 22nd of February, 2017. He admits that his application for international protection was made in order to obtain a temporary permission for the purpose of submitting an application to marry. It is claimed, however, that the couple decided to marry because they were in love and wanted to spend the rest of their lives together. It is denied that there was any ill-intention or ulterior motive.

9. The couple married on the 1st of March, 2017 in Dublin. The marriage certificate records an address in Dublin 6 [hereinafter "the Dublin 6 address"] as their common address. The couple went on honeymoon to Georgia in August, 2017 where it is claimed that the Applicant introduced his wife to his family and friends. Supportive photographic evidence and travel documentation has subsequently been relied upon to confirm this.

10. On the 12th of April, 2017, the Applicant submitted an application to the First Named Respondent for a residence card as the spouse of an EU national exercising her EU Treaty Rights in the State.

11. On the 21st of December, 2017, the First Named Respondent approved the Applicant's application for a residence card. The Applicant was informed that the onus was on him to advise the Minister for any change of circumstances which may affect his right to reside in the State under S.I. 548/2015 European Communities (Free Movement of Persons) Regulations 2015 (e.g. change of residence, the activities of EU citizen or the relationship to the EU citizen).

12. The Applicant and his wife (who swore an affidavit in the proceedings) maintain that the relationship became strained in or about December, 2017. It is claimed that the Applicant's wife moved home to her mother for a short while before agreeing to attempt to work through their differences in early 2018. It is claimed that she left the couple's rented accommodation permanently in October, 2018. Since then the Applicant's wife has lived in a series of rented

accommodations. She continues to use her mother's address in Citywest for some correspondence including bank statements and payslips.

13. The Applicant did not advise the First Named Respondent that the relationship had broken down and the couple were no longer residing together. On the 28th of February, 2019 the Applicant wrote to the First Named Respondent to inform her that he had lost his passport and had ordered a new one.

14. On the 8th of March, 2019 the First Named Respondent wrote to the Applicant at the address he had given for the family home of the Applicant and his wife seeking evidence relating to the identity, the relationship with the EU citizen, current activities of the Applicant and the EU citizen since 2017 and, evidence of residence for both the Applicant and the EU national.

15. On the 1st of April, 2019, the Applicant and the EU national sent the First Named Respondent a hand written note (penned by the EU national but signed by both the Applicant and the EU national) informing the First Named Respondent that they had ceased residing together since October 2017. It was stated that:

“Me and ZK.. met in person in September, 2016 and started dating. We soon fell in love and started living together. Not long after Z.K. proposed to me and I said yes. We decided to get married in March 2017. Only recently I moved out in October 2017 because we were having lots of the fights and after trying to save the relationship we decided to move on and live as separated couple ...we decided to divorce. However, we have been very busy with work lately, but we will start seeking further advice about divorce in the near future. I am currently renting with a friend of mine....”

16. The Applicant furnished up to date documentation confirming his employment and correspondence from the Revenue Commissioners in relation to his tax credits addressed to his home address. A copy of the lease agreement entered into with both the Applicant and his wife in March, 2017 was provided as well as a utility bills (Vodafone) in her name sent to the said address between May, 2017 and October, 2018. The Applicant's wife's bank statements and payslips continued to be addressed to her mother's address throughout 2017 and indeed her

payslips give her mother's current address right up to 2019 when the query arose. A copy of the Applicant's wife lease agreement in respect of her new home was also provided. This lease agreement cited its commencement date as being October, 2018. Correspondence with Virgin Media and the ESB Networks appear to confirm the Applicant's wife taking up occupation at her new rental address in October, 2018. Her new tenancy was registered with the Residential Tenancies Board [RTB] as having been commenced on the 16th of October, 2018.

17. On foot of the information furnished by the Applicant and the EU national, the First Named Respondent issued the Applicant with a letter on the 30th of April, 2019 setting out her concerns regarding his marriage and the permissions given to him. This letter set out a summary of an examination of the Applicant's immigration permission in the State as follows:

"It is noted that you entered this State on 18/09/2017 without any legal permission to do so. You did not attempt to legitimise your status or engage with immigration authorities in this State until you submitted an application for International Protection on 22/02/2017. You then married the EU citizen on 01/03/2017 and submitted an application for EU Treaty Rights on 12/04/2017. Following which your international protection application was withdrawn on 20/07/2017. Your EU Treaty Rights application was approved on 21/12/2017, granting you permission to remain for a period of 5 years."

18. The First Named Respondent informed the Applicant of an intention to revoke his permission on the basis that he had submitted documentation that was false and misleading as to a material fact in respect of his marriage. It was stated:

"It is noted that in your most recent correspondence dated 01/04/2019 you state that you are now separated from the EU citizen and that you both have been living apart from one another since October 2017. It is of concern that your original application was not approved until 21/12/2017, some two months after you and the EU citizen separated. However at no point during your original application did you make this office aware of this fact despite your obligation to do so in accordance with Regulation 11.2 of the Regulations. All documentation and information submitted with your original application suggested that you and the EU citizen were in a subsisting

relationship. It is of concern that you did not disclose this fact at such time as it may have had an adverse effect on the outcome of your application. You knowingly concealed this information in order to further your application “

19. In this letter the First Named Respondent referred to the short timeframe between the Applicant’s arrival in the State in September, 2016 and the notification of an intention to marry in November, 2016. The letter highlighted the fact that a different address appeared on the EU citizen’s payslip and bank account to that of the Applicant during the period when they said they had resided together. Reference was also made to the fact that while the couple claimed to have lived together prior to marriage, there was no evidence of this and the lease details submitted dated to March, 2017 when the couple married. It was stated:

“the above inconsistencies would raise concerns as to the authenticity of the documents submitted to evidence your residence with the EU citizen. It is unsighted as to how you provided documentation which specifies the EU citizen residing at two separate addresses during the said timeframe. It is also unsighted as to how you produced utility bills in the EU citizen’s name for the couple’s joint residence after October, 2017 when the EU citizen specified she moved out. Based on the above there are concerns as to the veracity of the documentation submitted to evidence your residence with the EU citizen.”

20. On the 16th of July, 2019 an unsigned letter was submitted by the Applicant from the EU national. In this letter the Applicant stated that he had met the EU national online and then in person when he came to Ireland in September, 2016. It was stated that they started dating and that they decided to live together unofficially. The letter stated that they decided to get married and following their marriage they entered into a lease in both their names with their landlord in March, 2017. It was claimed that the reference to breaking up in October, 2017 was a mistake and should have read October, 2018. The Applicant’s letter dated the 16th of July, 2019 also stated that:

“Reason we never let you know about our break up until I receive this letter was that we were working on our relationship and we had hopes to fix our problems. From October 2018, we decided to separate and spend some time off and see if we can save

the marriage or not. However, we came to a conclusion that it would be best to stay separated.”

21. On the 8th of August, 2019 the First Named Respondent issued a first instance decision to the Applicant revoking his residence card on the basis of Regulations 27(1) and 28(1) of the 2015 Regulations. The letter communicated that the information provided in response to the concerns had not allayed those concerns and was not indicative of a genuine relationship and the marriage was deemed to be one of convenience. The letter stated that the Minister was of the opinion that the documentation that the Applicant had provided in support of his application was false and misleading as to a material fact, particularly with respect to his own and the EU citizen’s residence in the State. This was said to constitute a fraudulent act within the meaning of the Regulations and the Directive and the Minister decided to revoke his residence card in accordance with the provisions of Regulation 27(1) of the Regulations and Article 35 of the Directive. Furthermore, it was stated that the Minister was of the opinion that the Applicant’s marriage was one of convenience contracted for the purpose of obtaining a derived right of free movement and residence under EU law as a spouse who would not otherwise have such a right. It is noteworthy that the Minister relied on the date of notification of intention to marry in November, 2016 to find that the couple “...*could have only been in a relationship for a mere 9 weeks prior to submitting your notice of intention to marry*” but did not refer to the claim made that they had been courting online and by telephone and messages for several months before the Applicant came to Ireland.

22. In finding that the documentation submitted to establish residency together was unsatisfactory, the letter proceeds on the basis that the Vodafone bills submitted were for the period from April, 2017 to January, 2018. A closer review of the said bills establishes that bills issued to the EU citizen at the address she claimed to share with the Applicant up until October, 2018 (this fact has not featured in the correspondence or in the proceedings but is apparent from an inspection of the exhibited documentation). The letter further stated “*it is unsighted as to how you provided documentation which specifies the EU citizen residing at two separate addresses during the same timeframe*” with reference to the fact that the EU citizen continued to also receive post (bank statements and payslips) at her mother’s address in Citywest. The decision letter does not refer to the Applicant’s claim that the reference to living separately from October, 2017 in the previous letter was a mistake.

23. On the 20th of September, 2019, the Applicant's solicitor submitted a request for a review on the Form EU 4 and the cover letter from MS Solicitors made representations on behalf of the Applicant. It was submitted by the Applicant's legal representatives that the couple nurtured their relationship online and through regular phone calls and video chats and enjoyed what was referred to as a "*long distance relationship*". They submitted a transcript of messages dating from May, 2016 to August, 2016. The letter further submitted that there was nothing unusual in an adult child failing to update or change their address when they leave home pointing out that the EU citizen had lived at two further rental properties since splitting from the Applicant also without changing the address on her payslip or bank account. Reliance was placed on third party testimonials in the form of letters from friends and acquaintances as to the genuineness of the relationship.

24. A recommendation submission was prepared on the 24th of January, 2021 by an official in the Department of Justice and Equality. In the recommendation submission it was observed that it could not be validated that the transcript of messages were between the Applicant and the EU citizen as there are no names or numbers identified in these messages. It was stated that there was nothing to suggest that the couple made any financial commitments to each other, had any joints assets or liabilities or lived together for any significant time outside the State. It was said that there was no useful information or documentation on file in respect of their relationship prior to their marriage or after their marriage. Reference was also made to the "*accelerated nature of the couple's relationship and decision to marry*" and the Applicant's precarious immigration position in Ireland when he decided to marry. It was concluded "*the marriage was never genuine, and I am of the view that it should be disregarded for the purposes of immigration*".

25. On the basis of the documents and without meeting the Applicant or his EU citizen spouse, the officer reading the file for the purpose of recommendation submissions concluded that the marriage was contracted in an attempt to obtain an immigration permission to which the Applicant would not otherwise be entitled and was never genuine.

26. As to the couple's residence together, the Recommendation submission observed:

“it is not accepted that the EU citizen would not have any other documentation to evidence her residence with the Applicant other than a utility bill from one company. According to the Applicant they lived together for over 2 years from September, 2016 until October, 2018. It is difficult to understand how she would not have other documentary evidence of her residence in her possession.”

27. On the 1st of February, 2021 the review decision letter issued. In this letter the decision of the 8th of August, 2019 to revoke the residence card on the basis of Regulations 27 and 28 of the 2015 Regulations was affirmed. The letter stated:

“you were advised on 08/08/2019 that the Minister had decided to revoke your residence card. This was because the Minister was of the opinion that the documentation that you had provided in support of your application was false and misleading as to a material fact, particularly with respect to the EU citizen’s residence in the State.”

28. The Applicant contends that this statement suggests a serious error of fact in that it appears to assert that the EU citizen was not resident in the State. The First Named Respondent contends, however, that this is not what is meant by the words used. It is submitted that what is meant to be conveyed is that the First Named Respondent had found that information was false and misleading as to the couple’s residence together in the State. It is said that this is clear from the original decision letter (which was sought to be summarised in this part of the First Named Respondent’s letter) and from the balance of the review decision letter. The review decision letter recites the Applicant’s submissions and explanations, albeit without referring to the third party testimonials submitted in support of the genuineness of the relationship before stating:

“the above explanations notwithstanding, it is considered that there is little information or documentation on file in respect of your relationship with the Union citizen. That is to say, there is nothing to suggest that you made any financial commitments to each other, had any joint assets or liabilities, travelled or lived together outside the State, or lived together for any significant length of time in this State. Nor is there any useful

information or documentation on file in respect of our relationship prior to your marriage, or, indeed, after your marriage.”

29. The findings were set out in the decision which included the following:

"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 regard to K.B.'s residence in order to obtain a derived right of free movement and residence under EU law to which you would not otherwise be entitled. You did so with the intention of misleading the Minister into thinking that the EU citizen was residing with you, when this was not the case. This is an abuse of rights in accordance with Regulation 27 of the Regulations.."

30. On the 2nd of February, 2021, the Applicant was sent a letter from the First Named Respondent (described colloquially as a “*current activity*” letter) seeking updated information and documentation from the Applicants. As the review decision had issued the previous day, this letter caused confusion. The First Named Respondent maintains that it issued in error as part of an administrative exercise due to the disruptions and delays caused by the COVID-19 pandemic.

31. By letter dated the 9th of March 2021, the Applicant was informed that the review decision remained unchanged as regards the findings made in accordance with Regulation 27 and 28 of the 2015 Regulations.

32. In Opposition papers filed, the Respondents point to the fact that an oral hearing had only been sought after the review had been completed. By letter dated the 1st of October, 2021, the Applicant’s solicitor asked the First Named Respondent to confirm (it was said to obviate the necessity for discovery) whether, had an oral hearing been sought, it would have been granted prior to the completion of the review. Further information was sought regarding the number of persons who have been granted oral hearings and the respondent’s policy on the granting of oral hearings.

33. In response, by letter dated the 15th day of October, 2021, it was confirmed that there is no requirement to convene an oral hearing and the process is conducted, in accordance with the requirements of natural and constitutional justice, on the papers. This letter therefore confirmed that the First Named Respondent considers the revocation of EU residency through a paper based process.

STATUTORY FRAMEWORK

34. Directive 2004/38/EC concerns the right of free movement for EU citizens with the European Economic Area. It also secures the right of EU citizens to be joined by family members, including those who are third country nationals. Article 35 of the Directive states:

“Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.”

35. Whereas Article 30 of Directive 2004/38/EC sets out the requirements *vis-à-vis* notification of decisions. The necessary procedural safeguards are contained within Article 31 which reads in relevant part as follows:

“The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.”

36. Article 37 of the Directive clarifies that Member States retain the power to bestow more favourable conditions to persons who come within its remit.

37. The Regulations give effect to Directive 2004/38/EC in Irish law. Regulation 27 empowers the Minister to revoke, refuse or refuse to grant a right, entitlement or status on the basis of fraud or abuse of rights such as a marriage of convenience. Regulation 28 provides that a Minister may deem a marriage to be one of convenience. Regulation 28(2) states that the

Minister may send a notice requiring persons concerned to provide such information as is reasonably necessary either in writing or in person to satisfy the Minister that the marriage is not one of convenience. Regulation 25(5) provides that: “*The officer carrying out the review shall have regard to the information contained in the application and may make or cause to be made such enquiries as he or she considers appropriate and may— (a) confirm the decision the subject of the review on the same or other grounds having regard to the information contained in the application for the review, or (b) set aside the decision and substitute his or her determination for the decision.*”

38. As with the Directive, there is no specified right to an oral hearing in the decision making process under the 2015 Regulations.

39. Under the Regulations, the First Named Respondent in deciding whether a marriage is a marriage of convenience in accordance with Regulation 28 may send a notice to the parties to the marriage requiring the persons concerned to provide, within the time limit specified in that notice, such information as is reasonably necessary, “*either in writing or in person*”, to satisfy the Minister that the marriage is not a marriage of convenience (Regulation 28(2)). Accordingly, the Regulations clearly envisage the possibility of an “*in person*” meeting as part of the decision-making process.

40. Regulation 28(5) further provides that the Minister, in making his or her determination that a marriage is a marriage of convenience shall consider certain prescribed matters. Included in the list of prescribed matters are whether the parties have been residing together as husband and wife, and, if so, the length of time during which they have so resided; the extent to which the parties have been sharing income and outgoings; the nature of the relationship between the parties prior to the marriage; whether the parties are familiar with the other’s personal details and the immigration status of the parties in the State or in any other state.

41. The language of Regulation 27 is different. It provides in similar terms to Regulation 28(2) for a power of enquiry where the Minister suspects, on reasonable grounds, that a right, entitlement or status of being treated as a permitted family member conferred by the Regulations is being claimed, or has been obtained, on the basis of fraud or abuse of rights, he or she shall be entitled to make such enquiries and to obtain such information as is reasonably necessary to investigate the matter. Regulation 27(3) provides that where the Minister proposes

to exercise his or her power under paragraph (1), he or she shall—(a) give notice in writing to the person concerned, which shall set out the reasons for his proposal and shall give the person concerned a period of 21 days within which to give reasons as to why the right, entitlement or status concerned should not be revoked, and (b) consider any submissions made in accordance with subparagraph (a). In distinction with Regulation 28(3), however, no express reference is made to an “*in person*” meeting. Regulation 27(4) provides that ‘*abuse of rights*’ shall include a marriage of convenience or civil partnership of convenience.

42. Regulation 25 provides for a review as occurred in this case. It provides that the officer carrying out the review shall have regard to the information contained in the application and may make or cause to be made “*such enquiries as he or she considers appropriate*”. It is noted, however, that under Regulation 23(12) it is provided that the Minister may allow a person who is the subject of an exclusion order to re-enter the State for the purposes of attending a hearing connected with a review of a decision under these Regulations. Accordingly, the Regulations expressly allow of the possibility that a hearing may be required as part of the review process.

43. While the Regulations may allow for it, it is clear from the First Named Respondent’s correspondence which has been placed on affidavit in these proceedings, that the practice is for applications to be determined on the papers and in the letter of the 15th of October, 2021 no reference or allowance is made to any exception to this practice.

SUBMISSIONS

44. A number of submissions were advanced on behalf of the Applicant including:
- A. There had been a failure to have regard to all relevant factors and materials as evidenced by the fact that a request for further information was received on the 2nd of February, 2021, the day after the decision had in fact been made;
 - B. There was a material error of fact evidenced by the terms of the review determination communicated by letter dated the 1st of February, 2021 where it is suggested that the application was misleading as to the EU citizen’s residence within the State when there was no basis for questioning the EU citizen’s residence in the State and the only question which had been raised was as to whether the couple were resident together within the State;

C. The decision-making process failed to safeguard the Applicant's procedural rights by reason of the failure to provide an oral hearing prior to making a determination that the marriage was one of convenience, particularly because the Applicant's credibility was in issue.

45. As noted above an issue raised as to the constitutionality of the Regulations was not pursued in view of the Respondents' acceptance that the Regulations did not preclude an oral hearing. Similarly, a pleaded irrationality claim whilst not abandoned, was not central to the claim advanced on behalf of the Applicant and the only relief sought on the case as pleaded in this regard was declaratory relief, not *certiorari*. The claim for damages which had been pleaded was not pursued during the hearing.

46. In opposing the proceedings, the Respondents' position is that the letter which issued on the 2nd of February, 2021 seeking up to date information was issued as a part of a clerical exercise and there has been no failure on the part of the decision maker to have regard to all relevant factors and materials. They contend that the reference to the EU citizen's residence in the State in the review decision letter should be understood as a concern as to where the EU citizen was residing in the State (as in together with the Applicant or elsewhere), not whether she was resident in the State and accordingly, the decision-making process is not vitiated by a material error of fact.

47. On the question of the right to an oral hearing, the Respondents' submission was that the requirements of constitutional justice are met in this case on a paper-based process where concerns are identified to the Applicant and he is afforded an opportunity to make submissions and submit evidence in advance of the decision and thereafter is afforded a review by a different decision maker. Emphasis was placed on the fact that the Applicant did not seek an oral hearing at any time in advance of the review decision.

DISCUSSION AND DECISION

48. It was clear from the presentation of the case that the focus of the Applicant's challenge is on the failure to provide an oral hearing. This notwithstanding, it is also necessary to consider the other arguments advanced during the hearing.

A. Failure to have regard to all relevant factors and materials

49. On the 1st of February, 2021 the First Named Respondent issued the review decision indicating that the First Named Respondent had affirmed the decision of the 8th of August, 2019 to revoke the residence card on the basis of Regulations 27 and 28 of the 2015 Regulations. The following day, on the 2nd of February, 2021, a different official within the EUTR section had sought up to date information said to be “*necessary*” to the determination of the review application. It was explained by Ms. G, deponent on behalf of the First Named Respondent, that this letter issued as part of an administrative mailshot exercise due to the disruptions and delays caused by the COVID-19 pandemic and issued in error to the Applicant. Nonetheless, the fact that the review was concluded without the up-to-date information sought in the letter of the 2nd of February, 2021 is relied upon by the Applicant to demonstrate that the decision made on the 1st of February, 2021 was made without material information.

50. The First Named Respondent points out that no issue was taken with the issue of the letter of the 2nd of February, 2021 prior to the institution of the proceedings, albeit that the Applicant’s solicitors wrote seeking a further appeal and oral hearing following receipt of the review decision. The First Named Respondent contends that the letter represents a simple error and that such a mistake is not in itself sufficient evidence of legally ineffective decision making or such want of care in the decision making process as would warrant *certiorari*. Importantly, it is pointed out that the letter of the 2nd of February, 2021 did not originate with the decision maker who had determined the Applicant’s review. The actual decision maker wrote by letter dated the 9th of March, 2021 in response to the Applicant’s solicitors’ correspondence confirming that the application “*is now closed*”. Reference is also made to the fact that the Applicant had been pressing for a decision under threat of proceedings for several months.

51. While clearly I must be satisfied that the decision is not based on irrelevant considerations or an error of fact (*A.M.T v. RAT* [2004] 2 I.R. 607), I am satisfied on the evidence that the letter of the 2nd of February, 2021 issued as part of an administrative mailshot exercise undertaken as a clerical exercise in view of delays in the decision-making process and without the officer advertent to the fact that the decision maker assigned to deal with the Applicant’s case had already proceeded to make a decision. There is no basis to conclude that

the decision maker was other than satisfied that he had sufficient information to complete the review and did not require further up to date information.

52. Whereas receiving such a letter would certainly undermine the Applicant's confidence in the decision-making process and properly prompt inquiry, the explanation provided demonstrates that the letter of the 2nd of February, 2021 did not issue as a result of an individual deliberative process which identified that up-to-date information was necessary in the Applicant's specific case. Accordingly, the existence of a letter in the terms of the letter of the 2nd of February, 2021 alone and in view of the explanation provided does not evidence that the decision maker had determined the application without waiting for relevant and up to date information which had been identified as necessary or material to a fair decision. The fact that a decision was made without awaiting receipt of information sought (and indeed had already been made before the request for further information was made) does not of itself render the decision unfair or unsafe (*R.A. (Pakistan) v. Minister for Justice and Equality* [2019] IEHC 319 applies) on the facts and circumstances of this case. I would not be prepared to quash the review decision on this basis alone.

B. Material Error of Fact

53. As set out above, the terms of the review determination communicated by letter dated 1st of February, 2021 suggested that an error of fact undermined the decision insofar as it appeared to state that the application was misleading as to the EU citizen's residence within the State when there was no basis for questioning the EU citizen's residence in the State and the only question which had been raised was as to whether the couple were resident together within the State.

54. I agree that where the decision maker exercising a review jurisdiction has not correctly understood what occurred in the earlier stages of the process and proceeds on the basis of a material error, this may vitiate the decision where it goes to the soundness of the basis upon which the review jurisdiction is based (*H. R v. RAT & Ors* [2011] IEHC 151).

55. If I were satisfied that there was a concern that the decision maker on review approached the decision under review on the basis that the original decision maker did not

accept that the EU citizen was residing in the State, then this could provide the basis for intervening by way of judicial review particularly where there was a concern that it rendered the review decision in some-way flawed based on the review of the decision maker's determination on the facts. Considering that the sentence in the review letter which gives rise to concern is contained in the part of the letter which summarizes the basis for the concerns previously communicated and where it had never been a part of the concerns previously communicated that the EU citizen was not residing in the State and considering that in the decision part of the letter of the 1st of February, 2021 it is not suggested that there is any query as to the EU citizen's residence in the State but rather her residence with the Applicant, it seems to me that the proper interpretation of the reference to the EU citizen's residence in the State is a reference to her residence as part of the couple.

56. To interpret one line in the letter in isolation and out of context of the balance of the letter as the Applicant urges me to do would be to interpret parts of the letter as if they were statutory provisions. This is not the proper basis upon which to approach the interpretation of the correspondence in the decision-making process. I adopt the dicta of the Court of Appeal (Peart J.) in *Balc v. Minister for Justice and Equality* [2019] IECA 76 where it was held:

“The appellants have sought to parse and analyse these documents and to find an occasional infelicity of language to support the argument that the incorrect test was applied. The construction of a document containing the reasons for the decision is not to be approached in the same strict and literal manner by which a statute will be construed. It is a matter of reading the whole document to get its sense, without separating out one or two phrases here and there and considering them in isolation to the remainder of the document.”

57. In this case, it seems to me to be very clear from all of the papers that all parties were aware that the issue in this case was with the genuineness of the marriage and whether the couple had an enduring relationship in which they resided together. There was no question as to the EU citizen's actual residence in the State which has been established since 2006 and neither the original decision maker nor the review decision maker laboured under any misapprehension in this regard. It would be wrong in the context of the documents as a whole to separate out one phrase to read it in a manner which runs contrary to the clear intention of

the author especially where it is possible to construe the same phrase as meaning that the concern as to EU citizen's residence related to her residence with the Applicant, as opposed to her presence in the State (in respect of which no concern was ever identified).

58. It is clear from all of the documents generated in the decision-making process and recording the decision in this case that the First Named Respondent accepted that the Applicant and the EU citizen were both residing in the State. However, at first instance, and on review, the point in issue was that in his initial application the Applicant had represented to the First Named Respondent that he and the EU citizen were residing together in the Dublin 6 address. The issue identified by the First Named Respondent was in relation to where the EU citizen was residing in the State, not whether she was resident in the State and this is the true meaning of the sentence as it appears in the review decision letter. Accordingly I must conclude that there was no material error of fact as to the residence of the EU national in the State and the decision has not been shown to have been based on a mistaken conclusion that the EU national was no longer resident in the State.

C. Right to an Oral Hearing in context of Credibility Findings

59. The right to a fair decision-making process mandates that the parties concerned should receive a statement of the claims and/or objections raised and be given the opportunity to respond and make views known on the truth and relevance of the facts and documents used. As the Supreme Court found in *Ezeani v. Minister for Justice, Equality and Law Reform & Ors* [2011] IESC 23, (at para. 45):

“The rules of natural justice require the decision maker to give reasonable notice to the affected person of the substance of any matters being raised which are adverse to his interest. It is not necessary that the entire of every detail of the case against him be notified. The test is whether he has a fair opportunity to prepare himself and to respond”.

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.

61. The Applicant makes the case that while the Directive does not expressly provide for the right to an oral hearing, it is clear that the redress procedure must adhere to the principles of *audi alteram partem* and fair procedures, which in these circumstances they submit would include the obligation to conduct an oral hearing or interview. Their primary contention is that depending on the nature of a given case, fairness may only be achieved by affording an Applicant with an oral process. It is contended that the absence of an express provision specifically guaranteeing an oral hearing is not fatal, as it is established that an oral hearing can be an element of natural justice and fair procedures depending on the specific circumstances and/or the severity of the consequence (*Mooney v. An Post* [1998] 4 I.R. 288) and therefore a duty to conduct same may arise in particular circumstances even where express provision has not been made. It is noteworthy also that in the *Ezeani* case, referred to above, concerning the revocation of citizenship (pursuant to s. 8 of the Irish Nationality and Citizenship Act, 1956) which was acquired on the basis of marriage to an Irish citizen, no express statutory provision was made for an oral process. Despite the absence of a specific statutory requirement to convene an oral process, the Minister wrote to the Applicant notifying him of concerns in relation to whether the Applicant and his spouse were living together and in a subsisting marriage at the date of the declaration grounding his application for citizenship and offered the opportunity of interviews to deal with the concerns identified. The offer of interviews was declined but was material to the Supreme Court's conclusion that the Minister has not departed from his obligation to respect fair procedures (para. 56).

62. In the instant case, the Applicant rejects the Minister's contention that his marriage is one of convenience and it is his position that he has not been afforded a proper or meaningful opportunity to defend this position. It is contended that an oral hearing is crucial to the vindication of the right to constitutional justice where credibility is in issue. The Applicant relies on *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240 a case involving a conflict of fact as to whether the Applicant had made the requisite payments to qualify for an Old Age Contributory Pension. The relevant statute gave discretion to the Appeals Officer as to whether or not to hold an oral hearing. The Appeals Officer opted to conduct a wholly paper-based review. The High Court (Costello J.) held that there was no doubt but that the case involved an

“important right” and concluded that without an oral hearing, it would have been extremely difficult -if not impossible- to arrive at a true judgment on the issues (p. 252 to 253):

“[T]he conflict between the parties cannot be properly resolved in absence of oral testimony. I conclude that the Appeals Officer should have conducted an oral hearing, that he should have heard evidence under oath of the Applicant and, if available, Mr Higgins and that he should have heard evidence from the Officer in the Department responsible for searching the departmental records who should have been available to cross examinations.”

63. Resolving conflicting factual accounts, as in *Galvin*, 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. As the Supreme Court (O’Donnell J.) stated in *MM* (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 considered 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.”

64. This case is different in that it does not involve a conflict of fact as between two versions of events where one person maintains as fact, something which is disputed by another and the decision maker must adjudicate between the two. In this case, we are concerned with conclusions as to credibility which are drawn by the decision maker based on his assessment of the likely veracity of an account given having regard to the existence of corroborative evidence. In my view, however, this is nonetheless an issue closely related to the personal

credibility of the Applicant and his EU citizen wife where the account given could be true and is not manifestly implausible having regard to objective material evidence.

65. The case of *N (S U) (South Africa) v. Refugee Applications Commissioner* [2013] 2 I.R. 555 concerned whether an oral hearing is a necessary ingredient to an appeal in the asylum process in circumstances where the refusal is based upon an issue of personal credibility and where the Applicant has been found not to be telling the truth. The High Court (Cooke J.) was of the view at p. 574 that:

“Where, as in the present case, a claim for asylum has been rejected in a s. 13 report upon the basis that the Applicant has been found not to be telling the truth, the issue of personal credibility is clearly fundamental to the appeal and, accordingly, to the character of the appeal procedure as providing a remedy which is effective to rectify the basis upon which the claim has been rejected. 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.”

66. The importance of an oral stage to a process involving adverse findings as to the credibility of an Applicant is clear. In the case of *U.P. v. Minister for Justice* [2014] IEHC 567 the ORAC refused refugee status to the Applicant owing to a lack of credibility. The Commissioner exercised his discretion under s. 13(5) of the Refugee Act, 1996 and the Applicant had no oral hearing on appeal. The High Court (Barr J.) found at para. 41 that:

“Where there [are] negative credibility findings made against the Applicant, the loss of the right to an oral hearing is a serious matter and would put the Applicant in a very disadvantageous position in relation to his appeal.”

67. The right to an oral hearing under the Directive 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.

68. It is noted that in the separate context of subsidiary protection, Directive 2004/83/EC does not require an oral hearing *per se* either but it has been found that an oral hearing may be necessary to ensure fairness where credibility issues arise. As noted by O'Donnell J (as he then was) in *M.M v. Minister for Justice and Equality* [2018] IESC 10 (paras. 26 to 27):

“It is an ingrained part of the law of fair procedures that Irish courts considered 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. [...] If a decision requires credibility in this classic sense, that is, whether an account of disputed facts is to be believed or not, that, in Irish law can lead rapidly to the necessity for an oral hearing if fair procedures are to be applied.”

69. It bears note that in the subsidiary protection process which is secondary to an asylum application such as that under consideration in *MM*, an oral meeting will have occurred at an interview stage of the protection claim.

70. Given that in *MM* procedural fairness was preserved by the availability of an oral hearing at a different stage of the process, it follows that the Supreme Court's findings as regards the importance of an oral process, arguably resonates even more forcefully in this case where there has been no oral process at all. Indeed, the fact that there was an oral process at an earlier stage in *MM* was material to the decision of the ECJ on reference from the Irish court

as its ruling in relation to there being no requirement for a subsidiary protection interview in all cases was clearly predicated on there having already been a written procedure and interview with the Applicant in the asylum process which could be considered in the subsidiary protection process. There has been no similar oral process in this case in relation to the decision to revoke residency. Notwithstanding the fact that there was an oral process at an earlier stage in *MM*, the ECJ still ruled that in certain circumstances, such as when a competent authority was not objectively in a position - on the basis of the elements available to it following the written procedure and the interview with the Applicant conducted when his asylum application was examined – to determine with full knowledge of the facts whether the claim for protection had been made out on a correct application of the legal test, there was a requirement to arrange a further interview (see para. 23 of the Supreme Court judgment). The fact that there is an oral process in the form of an interview during the process was relevant to the Supreme Court's decision in *IX v. Chief International Protection Office* [2020] IESC 44 that there is no necessity for the decision maker to have an oral hearing where an interview had taken place during the process.

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.

72. Considering the serious accusations and suggestions made by the First Named Respondent against the Applicant, I accept that there is some analogy to be drawn with the position of a person the subject of a decision to revoke citizenship as considered in *Damache v. The Minister for Justice* [2020] IESC 63 and the position of a person the subject of a decision to revoke a derived right to EU residency under consideration here. In *Damache*, the Supreme Court (Dunne J.) found (paras. 125 to 126) that given the importance and significant effect on an individual of the revocation of citizenship, standards of procedural safeguards ought to be available for the process to be fair such as: (1) an oral hearing before a Court, or before an independent administrative tribunal, where there is a serious issue of credibility; (2) a fair opportunity to state the case and know the case to be met; and (3) the right to an impartial and

independent decision-maker. I accept that while the impact of the decision is not the same, both decision making processes entail the curtailment and revocation of important rights with significant consequences.

73. In my view the import of the First Named Respondent's decision for the Applicant is such that he is entitled to a wide panoply of procedural protections because he has been accused of serious misconduct. The need for such protection arises given the life-changing nature of the First Named Respondent's findings which will in all likelihood lead to the removal of the Applicant from the State (see *S v. Minister for Justice* [2020] IESC 48 at para. 111) notwithstanding his marriage to an EU citizen who is living and working in the State and both his derived right and her rights, albeit not unconditional, as a matter of EU and Irish law to reside in the State with her spouse.

74. The First Named Respondent calls into question the Applicant's standing to maintain a challenge on grounds of a failure to provide an oral hearing in circumstances where one was not sought prior to the review decision in reliance on the dicta of the Court of Appeal in *Balc v. Minister for Justice* [2018] IECA 76, para. 77 where Peart J. held:

"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...."

75. It is further submitted that the Applicant has not identified any factual matter which he would seek to address orally which could not adequately have been addressed in his written submissions.

76. I do not consider the fact that the Applicant did not seek an oral hearing in advance of the decision on review to be determinative. In this regard the First Named Respondent's admitted practice of determining reviews on the papers, seemingly in all cases is relevant. There being no established pathway to an oral hearing, it is not surprising that one was not sought. Furthermore, the Applicant's written submissions in reply were substantive and these

might have been sufficient to alleviate the First Named Respondent's concerns. I am satisfied that it is only in circumstances where the First Named Respondent communicated that he was proceeding to act on concerns on the basis that they had not been addressed that the need for an oral hearing crystallised for the Applicant and that on the facts and circumstances in this case, the Applicant has not been deprived of *locus standi* to bring these proceedings by reason of not having specifically sought an oral hearing prior to the decision being taken. The responsibility to ensure a fair process rests in the first instance on the decision maker.

77. The question of what the Applicant might seek to address on an oral hearing which could not have been addressed in writing is material. A failure to identify matters which cannot be properly assessed on the basis of submissions in writing could be fatal depending on the circumstances. However, in circumstances where personal credibility is at stake, as here, it appears to me that this is less important. This is because the oral hearing or interview allows for the decision maker's concerns to be probed and explored and permits a fuller credibility assessment based on the nature and manner of the replies received. This type of assessment cannot be so readily facilitated in writing, particularly when there are language issues and the intervention of third party advisers in compiling submissions.

78. I am satisfied that fair procedures in this case required an opportunity for the Applicant and his EU national spouse to be assessed as to the plausibility of their account and the genuineness of their marriage through the process of a face-to-face meeting or hearing. It is noted in this regard that Regulation 28(5) requires the First Named Respondent to consider whether the parties are familiar with the other's personal details in making a decision as to whether or not a marriage is one of convenience. There has been no assessment, at least as far as I can see, of the familiarity of the parties with each other's personal details in this case. It is unclear to me how this is achieved by the First Named Respondent without an opportunity to raise questions with the Applicant and the EU national spouse either together or separately and perhaps both and assess the responses received. This is an exercise which might be conducted without an interview with the decision maker and even without a face to face meeting of any kind but it is an exercise which is clearly conducive to conduct through a face to face meeting with the Applicant and/or his EU national spouse both separately and together. In the absence of a process which allows for familiarity to be considered when deciding

whether a marriage is genuine or one of convenience, as required by Regulation 28(5) of the Regulations, the case for an oral interview of some kind is more compelling.

79. In this case, the opportunity to produce in person the message exchange on the couples' devices (which appears to include some photographic material) suggests itself as potentially important in deciding to attach significance or discount the relationship of the couple before the Applicant arrived in the State. Similarly, the significance of the fact that the EU national spouse's Vodafone bills continued to be addressed to the shared Dublin 6 address until October, 2018 is less likely to have been overlooked as a relevant consideration in assessing the veracity of the couple's account of having resided together until October, 2018 where an oral process was conducted.

80. I am satisfied that given the nature of the credibility issues which arise in this case and having regard to the fact that the account given could be true but has been discredited as false and misleading based on an assessment of the veracity of the Applicant and his EU national spouse, an oral process is required in this case to ensure fairness.

CONCLUSION

81. I have concluded that the issue of the letter of the 2nd of February, 2021 was the result of human error as part of a clerical rather than a deliberative exercise and does not invalidate the decision to revoke residency.

82. I have also concluded that the decision to revoke was not vitiated by a material error as regards the fact that the EU national was resident and working in the State.

83. It is my view, however, that the decision-making process which led to the decision to revoke was unfair and does not vindicate the Applicant's rights to constitutional justice in that process in view of the nature of the personal credibility findings made and by reason of the absence of an oral stage to the process, be it in the form of an interview or a hearing.

84. Accordingly, I propose to make an order of certiorari quashing the decision revoking residency.