THE HIGH COURT

[2023] IEHC 499

[Record No. 2022/784JR]

BETWEEN:-

MISTU MISTU

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered electronically on the 10th August, 2023.

Introduction.

1. The applicant is a citizen of Bangladesh. He has been resident in the State under various permissions since 14 July 2004. In these proceedings, the applicant seeks an order of *certiorari* quashing the respondent's decision of 4 July 2022, to uphold on review the respondent's earlier decision of 2 August 2019, to revoke the applicant's residence card as a family member of an EU national and to declare the applicant's marriage to the EU citizen as being a marriage of convenience.

2. While it will be necessary to set out the background facts in more detail later in the judgment, the key elements in the applicant's case can be stated as follows: He originally entered the State in July 2004 under a student visa. This was renewed on a number of occasions. His case is that he met and married a Hungarian national, Ms. GR, when she was resident in the State and exercising her right as an EU citizen to work here. Following his marriage GR, the applicant received a residence card based on his wife exercising her EU Treaty Rights to work in the State.

3. Approximately 13 months after their marriage, the applicant, through his solicitor, wrote to the Minister seeking a variation of his permission to remain in the State, based on the fact that his marriage to GR had broken down. In response thereto, the Minister issued a letter indicating that she intended to revoke his permission to remain in the State, on the basis that the EU citizen was not residing in the State and was no longer exercising her EU Treaty Rights to work in the State since 2013. The applicant was invited to make representations in this regard. He did not do so.

4. On 2 November 2017, the respondent issued a decision revoking the applicant's residence card, on the basis that his wife was no longer resident and working in the State.

Prior to that decision, the applicant had applied to the respondent for a variation in his permission to reside in the State, based on the length of time that he had been resident in the State and his integration into the local community.

5. By letter dated 16 April 2019, the respondent wrote to the applicant setting out her concerns that the applicant's marriage to GR had been a marriage of convenience. The applicant was invited to make representations.

6. By a decision issued on 2 August 2019, the Minister decided to revoke the residence card based on findings that the applicant had submitted false and misleading documentation and had entered into a marriage of convenience with GR On 4 July 2022, the respondent issued a review decision, in which she overturned the finding that the applicant had submitted false and misleading documentation, but confirmed the finding that had been made that he had entered into a marriage of convenience.

7. The applicant argues that the respondent's review decision of 4 July 2022 must be set aside on the following grounds:-

(a) That as the Minister had already revoked the applicant's residence card by virtue of the decision made in 2017, the Minister was *functus officio*, in the matter and, therefore, she could not purport to revoke the residence card a second time;

(b) That even if it is held that the Minister had jurisdiction to revoke the residence card by virtue of the decision in 2022, that decision must be set aside as having been reached in breach of the applicant's rights to fair procedures; in particular, due to failure on the part of the Minister to conduct an oral hearing or interview with the applicant, before finding that he had participated in a marriage of convenience.

8. The respondent denies that she was precluded at law from considering whether the applicant's residence permission should be revoked, due to the fact that he had entered into a marriage of convenience. It was denied that she had acted in breach of fair procedures, in reaching her conclusion that he had in fact entered into a marriage of convenience, without affording the applicant either an oral hearing or an interview.

Background.

9. While the key events in the background have been described above, it is necessary to set out in more detail the correspondence and steps that were taken by the parties, leading to the various decisions that were taken by the respondent concerning the applicant's immigration status within the State.

10. The applicant is 40 years of age. He originally entered the State on 14 July 2004 under a student visa. He held a number of such visas in subsequent years. The applicant maintains that Ms. GR, a Hungarian national, entered the State on 3 July 2011. She acquired her PPSN within the State on 28 February 2012. The applicant maintains that, in or about late 2011/early 2012, he met GR in the State. Shortly after they met, the applicant and GR commenced a romantic relationship.

11. On 21 June 2012, the applicant and GR married at the registry office in Galway. On 29 June 2012, the applicant submitted his initial application for a residence card based on his marriage to GR On 18 December 2012, the applicant received a residence card based on GR exercising her EU Treaty Rights to work in the State.

12. By letter dated 12 July 2017, the applicant's solicitor wrote to the respondent seeking a variation of his permission to remain in the State, on the basis that the applicant's marriage to GR had broken down. The letter stated that their client was, therefore, unable to renew his permission under EU Treaty Rights provisions.

13. In response thereto, by letter dated 21 July 2017, the respondent wrote to the applicant noting that there was a record of employment for the EU citizen in the State for 2012 and a record of just four weeks employment for her in 2013. There was no record of any employment or welfare claims in the State in respect of GR since 2013. The letter noted that the applicant had failed to inform the Minister of the changes in his circumstances. The letter went on to advise the applicant that the respondent intended to revoke his permission to remain in the State, on the basis that the EU citizen had not been residing and exercising her rights in the State in conformity with reg. 6 of the 2015 Regulations, since 2013. He was invited to make written representations if he wished to do so, within 15 working days. The applicant did not make any representations in this regard.

14. In response to that letter, the applicant's solicitors responded by letter on 11 August 2017, indicating that they had made an application to vary the basis of residency on behalf of the applicant; which application was with the respondent. On 11 September 2017, the applicant's solicitor wrote to the respondent in relation to the applicant's extant

Stamp 4 permission, which was due to expire on 15 October 2017. It noted that he had been in employment with Dunnes Stores since November 2004. His employer was happy to keep him employed in that position, should he hold a residency permission which allowed him to work. A reference letter from Dunnes Stores was enclosed. The respondent was asked to take into consideration the fact that he had resided in Ireland since 2004.

15. By letter dated 2 November 2017, the respondent wrote to the applicant informing him that, as it appeared that the EU citizen had not exercised her rights through employment in the State in accordance with reg. 6(3) of the Regulations since 2013, the Minister had reached the decision that the permission to remain which had been granted to the applicant, under the provisions of the European Communities (Free Movement of Persons) Regulations 2015, should be revoked for the reasons stated. The letter informed the applicant that he could seek a review of the decision if he wished. The applicant did not seek a review of that decision.

16. By letter dated 24 April 2018, the applicant's solicitor wrote to the respondent in relation to the application to vary the basis of his residency permission pursuant to s. 4(7) of the Immigration Act 2004. In connection with that application, a number of references, which evidenced the applicant's good character and integration into the local community, were submitted for consideration by the respondent.

17. By letter dated 23 November 2018, the respondent informed the applicant that she had decided to grant him a temporary permission to remain in the State on Stamp 1 conditions for one year, without the requirement of an employment permit.

18. By letter dated 16 April 2019, the respondent informed the applicant that she had concerns in relation to the previous application that had been lodged by the applicant, which had been based on his marriage to GR In the letter, the respondent outlined the nature of her concerns. She noted that, in the EU Fam residence application, he had indicated that his spouse entered the State on 3 July 2011. She had obtained her PPSN on 28 February 2012. The applicant had married GR on 21 June 2012. The Minister noted that, given that a notification of intention to marry must be submitted 3 months prior to the proposed marriage date, this meant that the applicant had submitted the notification no later than March 2012, which was just 1 month after GR obtained her PPSN. This raised concerns for the respondent, regarding the applicant's relationship with GR, given the

short time between her entry into the State, his marrying GR, and submitting a residence application based on the marriage.

19. The Minister noted that the applicant had submitted his initial residence application on 29 June 2012. He had registered a temporary Stamp 4 permission with GNIB on 23 July 2012, while his residence application was under consideration. When the EUTR unit approved his residence application, he registered the Stamp 4 EU Fam permission as approved on 18 December 2012, with the GNIB on 19 December 2012, which was valid until 15 October 2017.

20. The letter pointed out that he had not provided an explanation as to how GR had supported herself in the State for an extended period from the date that he alleged she had entered the State in July 2011, to the time that she obtained her PPSN in February 2012, without having access to employment, or benefits.

21. The letter went on to make certain observations in relation to the level of his employment while he was on student permissions, which appeared to be in contravention of the terms of those permissions. The letter went on to state that the Minister had concerns that the applicant had entered into a marriage with an EU national in order to obtain a residence permission in the State, due to the fact that he had been present in the State as a student from 2004. The rules regarding the continued registration of student permissions had changed in 2011. Thus, his future residence in the State, as a student, had, therefore, become unpredictable.

22. The letter went on to notify the applicant that information available to the respondent from An Garda Síochána, indicated that GR's status in Hungary, was recorded as single; she was recorded as being resident in Hungary since 2012, where she had children and was recorded as being employed and in receipt of welfare benefits in that country. The applicant was informed that, based on that information, the Minister was of the opinion that the documentation that he had provided was false and misleading. He was also informed that the Minister was of the view that the marriage that he had contracted with GR, was one of convenience.

23. The applicant was informed that, if that was found to be a fact, then, in accordance with reg. 28(1) of the regulations, the Minister would disregard the marriage for the purpose of the determination of the matter. He was further informed that any previous residence permission held from 2012 on the basis of this marriage, would be deemed not

to have been valid and would be revoked in accordance with reg. 27(1) of the regulations. The applicant was informed that he was required to provide representations to the Minister within 21 days, stating why his expired permission to remain, should not be revoked. He was told what information should be included in any representations that he should choose to submit.

24. By letter dated 5 June 2019, the applicant's solicitors made representations, by enclosing an email from the applicant dated 31 May 2019, together with a number of photographs. In the email, the applicant had stated that GR had been living with her sister after to moving to Ireland in July 2011. He stated that *"Perhaps her sister assisted her to live here before she got employment in 2012, or she might have own funds for herself"*. He went on to deal with his work in Dunnes Stores, indicating that he had only worked for 20 hours per week during the college terms. He stated that in relation to his wife's immigration history, she had often travelled to Hungary to visit her family while she was living in Ireland. When their relationship was not working very well, on occasions she would not tell him that she was travelling to Hungary, or when she was coming back to Ireland.

25. In respect of the marriage ceremony, he stated that they had had to get married as quickly as possible, due to religious obligations, whereby, according to his religion, he was not allowed to have a sexual relationship outside marriage. In relation to the concerns that the Minister had in relation to his marriage to GR, the applicant stated that, in their marriage ceremony, her family members, and his friends, and his family members, were present. He stated that the photographs that had been supplied, would prove their presence at the marriage ceremony. He stated that his wife's sister was one of the witnesses of the marriage. The applicant stated that, while the Minister was concerned that he had got married because of the student visa position, he pointed out that when he got the EU Fam visa, he was eligible to get a student visa, because he had come to Ireland in July 2004 and the Government issued visas for students who had come to Ireland prior to 2005.

26. By letter dated 2 August 2019, the applicant was informed that the Minister had made a decision to revoke his EU family residence card, based on the submission by the applicant of false and misleading documentation and a finding that he had entered into a marriage of convenience with GR. He was informed that, as it had been determined that

the permission to remain (stamp 4 EU Fam) which had been granted to him on 18 December 2012, had been obtained through his engagement in a marriage of convenience, that immigration permission was deemed never to have been valid. Equally, any temporary stamp 4 permission associated with his application for permission to remain, was deemed never to have been valid. In that letter, the applicant was informed of his right to seek a review of that decision.

27. By letter dated 5 September 2019, the applicant's solicitor sought a review of the Minister's decision of 2 August 2019. It was submitted that, as the applicant's EU Fam permission had previously been revoked on 2 November 2017, the Minister did not have jurisdiction to revoke that permission for a second time. The letter went on to state that the finding made by the Minister that the applicant had entered into a marriage of convenience, was flawed, as a personal interview had never been conducted with the applicant. It was stated that that finding had been made in breach of fair procedures and EU guidance and was founded on reasons which were based on conjecture and speculation. The letter also took issue with the finding in the decision that the applicant had submitted false and misleading documentation.

28. By letter dated 20 November 2019, the respondent informed the applicant that the Minister was proposing to revoke the stamp 1 permission granted to the applicant on 23 November 2018, as she was satisfied that he had not been of good character in the State and that his conduct in the State was unacceptable, as he had knowingly entered into a marriage of convenience and had provided misleading information to the Minister in order to obtain his permission pursuant to the Directive and the Regulations, as he had sought to obtain the permission on the basis of a marriage of convenience. The applicant was informed that he was required to provide representations to the Minister within twenty-one days, stating why the stamp 1 permission granted to him on 23 November 2018 should not be revoked and rendered *void ab initio*.

29. On 20 September 2020, on application being made to the County Registrar in the Circuit Court in County Clare, the applicant was given liberty to issue and serve a civil bill out of the jurisdiction on GR, seeking a decree of divorce. On 31 May 2022, the applicant obtained a decree of divorce from GR, in the Circuit Court, sitting in Ennis.

30. On 4 July 2022, the respondent issued her decision on review, to uphold the decision made on 16 April 2019, to deem the immigration permission that had been

provided to the applicant on 18 December 2012, as never having been valid and to revoke same. The letter went on to outline the information that had been furnished to the Minister from the Department of Employment Affairs and Social Protection in relation to the employment history of GR in the State in 2012 and 2013. It noted that the Union citizen's employment in the State appeared to have ceased very soon after his application for a residence card had been approved.

31. It was noted that the applicant had not informed the Minister of the significant change in his circumstances, as was required of him under reg. 11(2). It was stated that it appeared that the applicant had endeavoured to withhold information that may have had a negative effect on his continued entitlement to a derived right of residence in the State. It was stated that that was indicative of contrived activity.

32. The letter went on to note that information that had been provided to the Minister by the Hungarian authorities, which indicated that GR was recorded as being single and as having been resident in Hungary since 2012, where she had children and had been employed and had been in receipt of Social Welfare benefits.

33. The decision went on to note that the Minister did not concur with the finding of the deciding officer that the applicant had submitted false and misleading documentation. That element of the deciding officer's determination was set aside.

34. The letter went on to deal with the marriage of convenience issue. It noted that the applicant had advised that the Union citizen had arrived in the State on 3 July 2011, yet she had not obtained a PPS number until 28 February 2012. The Minister noted that she would not have been able to obtain employment, or Social Welfare assistance, without such an identification number, and in the absence of any information or documentation placing her in the State prior to that time, the Minister held that it was reasonable to assume that GR, had entered the State in or around 28 February 2012.

35. It was noted that the applicant and the Union citizen had married in the State on 21 June 2012. The Minister noted that given that those intending to marry in the State were required to provide three months' notice to the registrar of marriages, this meant that the applicant and the Union citizen must have submitted notification of their intention to marry by 21 March 2012, at the latest. It was noted that that was just one month after the Union citizen was assessed to have entered the State. It was noted that the accelerated nature of their relationship and decision to marry, was of some concern as it

appeared that the applicant had met and decided to marry GR within a period of just one month. The Minister noted that the applicant's immigration position in Ireland was precarious at the time that he had decided to marry, as his student permission to remain in the State had come to an end.

36. The decision went on to note the submissions that had been made by the applicant in his email of 31 May 2019. It noted that he had failed to provide any evidence to back up the assertion that GR may have lived with her sister in the State prior to meeting the applicant. It was noted that he had failed to provide any evidence of his relationship with GR prior to their marriage. It was considered that he had provided little cogent documentation, or information, in respect of his relationship with GR. The decision noted that there was nothing to suggest that the applicant and GR had made any financial commitments to each other; or had any joint assets or liabilities; or had travelled or lived together for any significant length of time outside the State; or had lived together for any significant period of time within the State; or had dealt to any great extent with other organs of the State as a married couple; or had displayed a continuing commitment to mutual emotional and financial support. It was noted that there was no useful information or documentation on file in respect of his relationship with GR prior to his marriage, or indeed after the marriage.

37. The decision stated that the evidence available to the Minister, strongly indicated that the applicant's marriage to GR was one of convenience, within the provisions of reg. 28 of the 2015 Regulations and that it was contracted in an attempt to obtain an immigration permission to which he would not otherwise have been entitled. It was found that the marriage was never genuine and the Minister had decided that it should be disregarded for the purposes of immigration.

38. The applicant was informed that having considered all of the information, documentation and submissions on the file, the Minister found that the decision of 2 August 2019, should be set aside insofar as it found that the applicant had submitted false and misleading documentation; but the Minister was satisfied that the applicant's marriage to GR was one of convenience in accordance with reg. 28 of the regulations, that it was contracted in an attempt to obtain an immigration permission to which the applicant would not otherwise have been entitled. The applicant was informed that it had been found that the marriage was never genuine and that it would be disregarded for the purposes of

immigration. Any permissions that were provided to the applicant on the basis of the marriage, were not valid permissions. The letter went on to state:

> *"Against this background, the Minister has determined that the Stamp 4 EU Fam permission that you held between 18 December 2012 and 2 November 2017, was not a valid permission and it has been revoked."*

39. On 20 September 2022, the applicant opened his application seeking leave to proceed by way of judicial review. On 24 October 2022, the applicant was given leave to proceed by way of judicial review with the application herein.

Legal Issues for determination on this Application.

40. The court is satisfied having regard to the papers lodged in this case and the submissions lodged, and the oral submissions made by counsel, that the following are the issues that fall to be resolved by the court:

(a) Did the respondent retain a statutory power to determine in the review decision made in 2022, that the applicant's EU Fam permission issued on 18 December 2012, had been obtained by means of fraud or abuse of rights, subsequent to a decision made in 2017 revoking that permission on the basis that the applicant's Union citizen's spouse, GR, had ceased to exercise her EU Treaty rights in the State?

(b) If the answer to (a) is "yes", should the impugned decision made in 2022, be quashed by reason of the respondent not having held an oral hearing or interview with the applicant prior to making that decision?

Relevant Statutory Provisions.

41. Before coming to the legal submissions made on behalf of the parties, it will be helpful to set out the main statutory and other provisions that are of relevance to this application. The first relevant provision is reg. 27 of the European Communities (Free Movement of Persons) Regulations 2015 (SI 548/2015), which is in the following terms:

> *27. (1) The Minister may revoke, refuse to make or refuse to grant, as the case may be, any of the following where he or 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:*

[…]

(b) a residence card, a permanent residence certificate or permanent residence card;

[…]

(2) Where the Minister suspects, on reasonable grounds, that a right, entitlement or status of being treated as a permitted family member conferred by these 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.

(3) 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).

(4) In this Regulation, 'abuse of rights' shall include a marriage of convenience or civil partnership of convenience.

42. Directive 2004/38/EC of the European Parliament and of the Council, of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States, provides as follows at Art. 35:

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.

Submissions on behalf of the Applicant.

43. On behalf of the applicant, Mr. Conlon SC, submitted that the review decision ought to be set aside on two grounds: that the respondent did not have jurisdiction to revoke the residence card, it already having been revoked by virtue of the 2017 decision; thereby rendering the Minister *functus officio* in that regard; and secondly, that even if the Minister did have power to make the decision to revoke the residence card, the decision

should be set aside for failure to apply fair procedures, and in particular, for failure to afford the applicant either an oral hearing, or an interview.

44. In relation to the first submission, counsel submitted that the decision that the respondent had reached in November 2017, to revoke the applicant's EU Fam Permission, due to the fact that GR was no longer exercising her right to travel to the State and work therein; was final and irrevocable and was not, under the terms of the statutory scheme, capable of being revisited.

45. In support of that submission, counsel referred to a number of cases, where it had been held that statutory bodies could become *functus officio* once they had made a final decision in a matter. He referred to *Noel Recruitment (Ireland) Limited v. Personal Injuries Assessment Board* [2016] IECA 129, where the court held that PIAB was not entitled to issue a second authorisation to a plaintiff in respect of an accident, against the same defendants, which had been the subject of a prior authorisation.

46. Counsel accepted that in *Manor Castle Limited v. Commission for Aviation Regulation* [2008] IEHC 386, Charleton J. had held that, as the respondent was not a court, it was therefore not *functus officio* once it had made its initial decision. Rather, as an administrative body, it could reconsider a decision in appropriate cases where the licence had just expired, or when it was about to expire. Similarly, in *Barry v. Flood* [2013] IEHC 171, O'Malley J. had held that while a court generally becomes *functus officio* when it finalised all necessary decisions in relation to a case, she noted that she had not been directed to any authority which suggested that the same was necessarily true of a body such as a tribunal, when making an administrative decision in relation to the costs of persons appearing before it.

47. Counsel pointed out that there were contrary dicta in *Eviston v. DPP* [2002] 3 IR 260, where Keane C.J. had stated that it was undoubtedly the law that the DPP was entitled to review an earlier decision by him not to prosecute and to substitute for the earlier decision a decision to prosecute, at least in a case where he had not already communicated his earlier decision to the putative accused. He stated that that position had to be contrasted with that of a court or quasi-judicial tribunal, which was normally *functus officio* once the decision in a particular case had been pronounced.

48. Counsel pointed out that the 2015 Regulations did not expressly provide the Minister with any statutory power to alter a decision once one had been made. He stated

that that contrasted with the position under the Social Welfare Consolidation Act 2005, which provided that a deciding officer may at any time, revise a decision, if it appeared that the earlier decision appeared erroneous in the light of new evidence, or new facts that had been brought to the attention of the Minister. Counsel pointed to a similar provision in s. 122 of the Residential Tenancies Acts 2004. Counsel stated that fundamentally, it was the applicant's case that the original revocation was the final one and that if a jurisdiction to revisit the matter were to exist (which was denied), same did not inure simply where the respondent unilaterally decided to buttress an earlier refusal at a later date. Thus, it was submitted that the respondent did not have jurisdiction to revoke the earlier permission for a second time.

49. By way of alternative submission, counsel submitted that if the court was against the applicant on the *functus officio* ground, the court should still set aside the decision due to the failure on the part of the Minister to conduct an oral hearing, or to carry out an interview with the applicant prior to reaching the review decision.

50. It was submitted that in this case, the applicant had criticised the lack of an oral hearing or interview prior to the decision to revoke the EU Fam permission on the grounds of submission of false and misleading documentation and on the ground that the applicant had entered into a marriage of convenience, which decision issued on 2 August 2019. It was submitted that in criticising the lack of such a hearing, the applicant had effectively requested that one would be carried out prior to the review decision. It was submitted that in failing to carry out an oral hearing, or interview, particularly where the credibility of the applicant in relation to his assertion that his marriage had not been one of convenience was an issue; this resulted in the review decision being flawed for failure to adopt fair procedures, by failing to carry out such an oral hearing or interview.

51. Counsel accepted that the dictates of fair procedures varied from case to case: see *Ezeani v. Minister for Justice* [2011] IESC 23; and that there were no hard and fast rules as to when the dictates of fairness would require the holding of an oral hearing: see *Galvin v. Chief Appeals Officer* [1997] 3 IR 240.

52. It was submitted that where the consequences of an adverse finding for an applicant were serious and would have life changing consequences, this dictated that fair procedures required the holding of an oral hearing or an interview. In support of that

proposition counsel relied on the decision in *Damache v. Minister for Justice* [2020] IESC 63.

53. Counsel also relied on the decision in *ZK v. Minister for Justice* [2022] IEHC 278, where Phelan J. had held that in the circumstances of that case, the holding of an oral hearing was required to ensure fair procedures for the applicant. Counsel accepted that in three subsequent judgments of the High Court, in *H v. Minister for Justice* [2022] IEHC 721; *SSA v. Minister for Justice* [2023] IEHC 32; and *SK and JK v. Minister for Justice* [2022] IEHC 591, the decision in the *ZK* case had not been followed. Counsel noted that each of these cases had been appealed to the Court of Appeal and judgment was awaited in respect of the appeals that had been heard in March and June 2023. Counsel further submitted that each case must turn on its own facts. It was submitted that where there was a serious credibility issue as to the truthfulness of an applicant's application, the requirements of justice required that he be given an opportunity to answer those concerns in a face-to-face interview.

54. As no such oral hearing or interview had taken place prior to the delivery of the review decision, counsel submitted that the procedure leading to the review decision was fatally flawed in that regard and had to be set aside.

Submissions on behalf of the Respondent.

55. On behalf of the respondent, Mr. Murphy BL submitted that Art. 35 of the Directive and reg. 27 of the 2015 Regulations, clearly authorised the Minister to revoke an earlier permission in cases of fraud. It was submitted that in this case the Minister was not conducting the same exercise in relation to the EU Fam permission that had been held by the applicant. In the 2017 decision, the Minister had been considering whether that permission ought to be terminated due to the fact that GR was no longer residing in the State and exercising her right to work here. The issue of the validity of the applicant's marriage to GR had not been in issue in that decision.

56. It was submitted that the second decision to revoke made on 2nd August, 2019, which was confirmed on review in the impugned decision on 4th July, 2022, was a different decision, which had considered whether the applicant had submitted false and misleading

documentation and whether his marriage had been one of convenience. It was submitted that in these circumstances, the Minister was not looking at the same question as had been considered by her in 2017.

57. It was submitted that the Directive and the regulations gave the Minister wide powers to take corrective action in cases of fraud. There was no prohibition contained therein, on the Minister reviewing earlier decisions. It was submitted that that was entirely logical, having regard to the fact that fraud was the basis of the reconsideration of the matter. It was submitted that neither the *Noel Recruitment* case or the *Eviston v. DPP* case were relevant, as the Minister was not investigating the same issue; because, in this case the Minister had not investigated, let alone made any decision on the genuineness of the applicant's marriage at the time of the 2017 decision. The decisions in 2019 and 2022, were on a completely different matter.

58. It was submitted that the impugned decision in 2022, did not correct any error in the 2017 decision, nor did it revisit that decision; the 2022 decision was an entirely different decision dealing with the issue as to whether the applicant's marriage was one of convenience.

59. It was submitted that the doctrine of *res judicata* did not apply to the Minister's decision, or preclude a reassessment of the eligibility for a particular permission, simply because the fraud might have been uncovered at an earlier date. In this regard counsel relied on the decision of Bolger J. in *A. v. Minister for Justice* [2022] IEHC 408. Nor could there be any argument that the Minister was estopped from revisiting the issue, because there was no evidence before the court that the applicant had altered his position, or otherwise acted to his detriment, as a result of the earlier decision in 2017. Accordingly, it was submitted that the Minister was entitled to revisit the matter once a suspicion of fraud came to light: see *SSA v. Minister for Justice* [2023] IEHC 32.

60. Counsel pointed to the fact that in the affidavit sworn by Mr. Carleton on 24th January, 2023, it had been averred that the new information concerning GR's residence Hungary since 2012, only came to the attention of the respondent in April 2019, when it had been furnished to her by the GNIB. It was submitted that in all the circumstances, there was nothing at law, or on the facts, which prevented the Minister from considering the original issue of the EU Fam permission, in the manner that she had done in this case.

61. In relation to the fair procedures point, it was submitted that while it had been held in the *Z.K.* case that the applicant had a right to an interview, as part of the appropriate fair procedures in that case; in the subsequent three cases, it being held that the applicant in those cases did not have such a right. The key consideration was what was required by the individual circumstances of the case.

62. It was submitted that in this case, the applicant had not pointed to any evidence which he wished to lead, or to any issue on which he maintained that an oral hearing or an interview was essential, in order for him to properly put his case before the Minister. It was submitted that in these circumstances, it was not sufficient for the applicant simply to state that because his credibility had been challenged in relation to the true character of his marriage, that that of itself imposed an obligation on the Minister to carry out an oral hearing or an interview.

63. It was submitted that in this case, the Minister's concerns had been very clearly articulated to the applicant in advance of the decision in 2019 and in advance of the review decision; he had been given every opportunity to engage with those concerns; he had elected to do so by putting in a vague and unspecific statement via his email; it was submitted that in these circumstances, he had not demonstrated that it was a requirement of fair procedures that he be given an interview.

64. It was submitted that in the circumstances of this case, the applicant had not discharged the onus of proving that it was necessary for him to be given an oral hearing or an interview, in order for fair procedures to have been observed by the Minister.

Conclusions.

65. The first issue for determination, is whether the Minister was *functus officio* as a result of the first decision to revoke the applicant's EU Fam permission in 2017, such that she was not able to issue the decision that she did in 2019, which was confirmed on review in 2022 (hereinafter referred to cumulatively as "the review decision"), in relation to the question of whether the applicant's marriage to GR was one of convenience, and on that basis whether his entitlement to an EU Fam permission should be revoked *ab initio*.

66. I am satisfied that the Minister was entitled to make the review decision for the following reasons: first, the review decision was in effect a separate decision on a different matter, to that given in the decision of 2017. The 2017 decision did not relate to the

genuineness of the applicant's marriage to GR It was a decision to revoke his extant EU Fam permission, on the basis that GR was no longer exercising her right to travel to and work in the State. The applicant had not objected to the making of that decision.

67. The review decision in 2022 concerned two issues, namely: whether the applicant had submitted false and misleading documentation in support of his application for an EU Fam permission: and whether his marriage to GR had been a marriage of convenience. In the circumstances, the court is satisfied that the 2017 decision and the review decision in 2022, were separate decisions on entirely different issues.

68. In argument at the bar, Mr. Conlan SC relied heavily on the decision in *Noel Recruitment (Ireland) Ltd v. PIAB*, where the Court of Appeal held that the respondent, having issued a first authorisation for proceedings to be issued at the suit of the plaintiff against Noel Recruitment, they could not issue a second authorisation in identical terms. The facts in that case were most unusual. The plaintiff had applied to PIAB for an authorisation to issue proceedings against Noel Recruitment, in respect of an accident on a particular date. An authorisation duly issued to him. For some unknown reason, he did not issue his summons on foot of that authorisation. Instead, he submitted a second application under a slightly different name, but in respect of the same accident and as against the same defendant, except that he added a further defendant in that application. PIAB proceeded to issue a fresh authorisation. The Court of Appeal held that that was not possible, as they had already issued an authorisation to the plaintiff against Noel Recruitment arising out of the same accident.

69. The court is satisfied that the decision in the Noel Recruitment case is not of relevance to the within proceeding, due to the fact that in this case, the court is satisfied that the Minister was not deciding the same issue when she issued the 2022 decision, as she had done when she issued the 2017 decision.

70. The second reason why the court is satisfied that the Minister was not *functus officio* and therefore denied the opportunity to consider the issue whether she should revoke the original EU Fam permission on grounds of fraud, is due to the fact that the wording of Art 35 of the Directive and reg. 27 of the Rregulations, give the Minister wide powers to revoke a permission in cases where there has been a finding of fraud. There is no time limitation on the revoking of a permission, where a finding of fraud has been made.

71. In *A. v. Minister for Justice*, Bolger J. held that the doctrine of *res judicata* did not apply to a similar administrative decision, where the Minister had given a previous permission on the basis that the applicant had been validly married. She stated as follows at para. 38:

> "*The Minister advised the applicant on 30 October 2020 that she intended not to renew his permission because he had been found to have entered into a marriage of convenience. The Minister was entitled to rely on her finding of September 2019 vis-a-vis the applicant's involvement in a marriage of convenience and his attempts to wrongly and unlawfully seek to reside in the State on that basis. The doctrine of res judicata does not apply to that administrative decision. The Minister had, in good faith, exercised her executive discretionary power to allow the applicant to reside in the State after the breakdown of what the Minister believed and was led by the applicant to believe was a valid marriage. The Minister subsequently became aware of the applicant having misled the State into treating him as someone who had acquired legal rights by his marriage. The Minister could not be precluded from taking the applicant's fraudulent conduct into account in the exercise of her discretionary executive power simply because the Minister only appreciated the fraudulent nature of his conduct some time after he had been given a right of residence on the basis of that fraudulent conduct.*"

72. Bolger J. went on to hold that the Minister was not prevented from looking at the issue due to the passage of time. She stated as follows at para. 40:

> "*Marriage is an institution that is afforded the highest of legal, constitutional and societal recognition in the State, including advantages and entitlements in the immigration process. McKechnie J. in MKFS (Pakistan) v. Minister for Justice and Equality [2022] IESC 48 determined (at para. 66) that "the whole point of having a marriage of convenience provision under Regulation 28 is to prevent one obtaining an advantage or entitlement, in the general immigration process, by reason of that fact". The fact that this applicant sought to abuse the immigration advantages afforded to a party to a bona fide marriage and in doing so engaged in fraudulent and deceptive activity, is a matter the Minister was entitled to take account of regardless of the passage of time since the marriage and the absence of any*

change in circumstances, other than the Minister having become aware of the fact that the applicant's marriage was a marriage of convenience."

73. In *SSA v. Minister for Justice*, Bolger J. held that there was no estoppel on the Minister due to any earlier decision to grant a permission to reside in the State. She noted that the Irish regulations, in accordance with Art. 35, allowed for the revocation of a residence card which was not dependent on a change in circumstances, or evidence of an error in the original decision. In that case, the applicant had argued that the Minister could not find the documentation that he had furnished in July 2013, was false and misleading and therefore could affect the earlier decision of January 2013. Bolger J. did not agree. She stated as follows at para. 40:

"*The applicant contends that the Minister erred in determining that he had submitted false and misleading documentation to obtain a derived right of free movement and residence. He says that he obtained that right in January 2013 and, therefore, the Minister could not find that documentation he furnished in July 2013, which she found to have been false and misleading, could ground that conclusion. I do not agree. The Minister sought further information in July 2013 at which time the applicant had been granted a residence card. That residence card could have been revoked at any time in accordance with the Regulations. Therefore, the documents he furnished in July 2013 and information confirmed in correspondence from his solicitor viz-a-viz his spouse's then work activities, were part of his attempts to retain the rights of residence he had secured the previous January which were always dependent on the existence of a genuine and subsisting marriage with his EU spouse. The Minister was entitled to conclude, in the light of the applicant's spouse's tax information available to her, that the documents the applicant submitted in July 2013 were false and misleading. The applicant is not entitled to separate his conduct of July 2013 or since then from what had occurred in January 2013 so as to render the validity of his residence card forever immune from any further examination or assessment in spite of the Minister's clear statutory powers to revoke that permission in appropriate circumstances*."

74. The court is satisfied that there can be no question of an estoppel arising in this case, which prevented the Minister from reaching a decision that may have conflicted with an implied acceptance in the decision of 2017, that his marriage to GR had been a valid

marriage. In order for an estoppel to arise, the applicant would have to establish that he had acted upon the 2017 decision to his detriment, such that it would be unjust and improper to allow the Minister to impugn that decision, or its underlying basis. The court is not satisfied that the applicant has established that he acted to his detriment on foot of the 2017 decision, such as to enable him to make an argument that the Minister was estopped from making the decision that she did in July 2022.

75. The court accepts the evidence contained in Mr. Carleton's affidavit, that the new evidence which came to light, was the evidence which came to the Minister via the GNIB, from the Hungarian authorities, to the effect that GR was recorded as single in Hungary; had been resident in Hungary on a continuous basis since 2012; had been employed in that country; had received social welfare benefits therein; and had two children living there. The court is satisfied that that new information, allied with the other concerns, as outlined by the Minister in her correspondence, entitled her to examine the question of whether the applicant's marriage to GR had been one of convenience. When she came to the conclusion that it had been a marriage of convenience, she was entitled to revoke the EU Fam permission issued to the applicant, *ab initio*.

76. Turning to a consideration of the fair procedures point, the court accepts the submission made by Mr. Conlan SC that the review decision was a very important decision from the applicant's point of view. The consideration of whether he had entered into a marriage of convenience, could result in a finding that would have serious adverse consequences for him. In these circumstances, the court is satisfied that a right to fair procedures was engaged.

77. The court accepts that while neither the Directive, nor the 2015 Regulations, provide for the holding of an oral hearing or interview, that does not mean that such a hearing or interview would not be mandated to ensure a fair hearing in appropriate circumstances.

78. It has been stated on many occasions, that the dictates of what constitutes a fair hearing, vary depending on the nature of the investigation being undertaken, and the issues that fall for determination. As to whether an oral hearing must always be held, Costello P. stated as follows in *Galvin v. Chief Appeals Officer* at p. 251:

> "*There are no hard and fast rules to guide the appeals officer or, on an application for judicial review, this Court, as to when the dictates of fairness require the*

holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested."

79. In *Ezeani v. Minister for Justice, Equality and Law Reform* [2011] IESC 23, Fennelly J. summarised the issue in a broad sense as follows:

"*The requirements of fair procedures are not set in stone. What is required is that the procedures be reasonably fair in the context of the nature of the decision and the facts which are relevant to it. The overriding requirement is that the person affected be given reasonable notice of matters which are of concern to the decision maker.*"

80. In the *Z.K*. case, it was held that in the circumstances of that case, an oral hearing, or interview was required. However, in the subsequent cases of *H v. Minister for Justice* [2022] IEHC 721*; SK and JK v. Minister for Justice* [2022] IEHC 591; *and SSA v. Minister for Justice* [2023] IEHC 32; it was held that in the circumstances of those cases, an oral hearing, or interview was not required.

81. The court does not see that there is any inherent tension between the decision in *Z.K.* and the decisions in the subsequent three cases, where it was held that fair procedures did not require the holding of an oral hearing, or an interview. As I understand these decisions, they do not differ on a conceptual or theoretical basis as to the possibility of holding an oral hearing or interview in appropriate cases; they departed, in that in the factual scenarios presented in each of the cases, it was held that in three of the cases, an oral hearing or interview was not necessary, in order for the process involved in each case, to adhere to the requirements of fair procedures.

82. What is clear, is that in order for an applicant to be in a position to argue that an oral hearing, or interview, was necessary; he must have engaged with the concerns of the Minister on the facts as they appeared at that time and the applicant must set out a basis for arguing that it was necessary to have an oral hearing or interview, in order to properly decide the issues being determined in the decision.

83. In this case, the Minister had outlined her concerns in considerable detail. She had indicated the implausibility of the applicant's assertion that GR had entered the State in

2011, yet had only obtained her PPSN in February 2012, when she was entitled to such a number, and as possession of such a number was necessary to enable her to take up employment, or to receive social welfare benefits in the State. The Minister had outlined her concerns about the short period between the applicant meeting GR and their decision to marry. She was concerned about the coincidence that those events occurred at a time when the applicant's permission to remain in the State on foot of his student visa, had become precarious.

84. The most important area of concern was the fact that GR only had employment records in the State in 2012 and for a very short period in 2013. There was also the new evidence which the Minister had received in April 2019 from the Hungarian authorities, as outlined above. It was outlined to the applicant that all of these circumstances combined, caused the Minister significant concern and she was of the opinion that his marriage to GR had been one of convenience, contrived with the object of enabling him to obtain a permission to remain in the State, to which he was not otherwise entitled.

85. The applicant was given a full opportunity to address these concerns. The applicant only engaged with them in a vague manner in his email to his solicitor dated 31 May 2019, in which he had stated that *"Perhaps her sister assisted her to live here before she got employment in 2012, or she might have own funds for herself"*. He had gone on in that email to simply state that GR had often travelled to Hungary to visit her family and that, when their relationship became strained, she would sometimes go to Hungary without notice to him. He offered as an explanation for the speed of their marriage after their first meeting, the fact that his religious beliefs prevented him having sexual relations with GR prior to marriage. In relation to providing evidence of the genuineness of his marriage, he stated that members of his family and his friends, had been present at the wedding ceremony and his wife's sister had been one of the witnesses of the marriage. He denied that his actions had been activated due to any precarious nature of his permission to remain based on a student visa, due the fact that students who had been in the country prior to 2005, had been allowed to stay in the State. The applicant had submitted some photographs of his marriage ceremony. That was the extent of his submission in relation to the issue of the genuineness of his marriage to G.R.

86. While it could be argued that the applicant had not specifically requested the holding of an interview in advance of the review decision, the court is satisfied that in his

application for a review of the initial decision, which was made by letter from his solicitor dated 5 September 2019, it had been submitted that the decision of 2019 had been flawed, as a personal interview had not been conducted with the applicant. It stated that the findings in that decision, therefore, had been made in breach of fair procedures. The court is satisfied that this constitutes an implicit request for the holding of an oral hearing, or interview.

87. While accepting that that letter constituted a request for the holding of an interview, it is significant that the applicant did not outline what evidence he could only advance by means of an oral hearing, or interview, that could not have been adduced by making representations and submitting documents in advance of the review decision. Even at the hearing of this application, the applicant did not outline what evidence he could only have tendered by means of an oral hearing, or interview.

88. It is not correct to say that, because the applicant's credibility was called into question, that that of itself, imposed an obligation on the Minister to hold an oral hearing, or interview. In this case, the main issue that the applicant had to address, was whether his marriage was a genuine marriage, or was a marriage of convenience. That could have been addressed by submitting evidence of their lives as a married couple, both socially and financially; which could have been proved by statements from people who knew them as a married couple and by submitting documentation that showed their joint financial interests and documentation showing their joint activities as a married couple, such as social occasions spent together, holidays spent together and text and other messages, that usually pass between a husband and wife in the ordinary course of their married life together. None of that required the holding of an oral hearing, or interview.

89. The main obstacle which the applicant had to cross was the evidence of the Hungarian authorities that GR had resided in Hungary since 2012; had worked there and had received social welfare benefits there; and had two children living in that country. The applicant did not address that aspect at all, save for the vague assertion that his wife used to visit her family regularly and, on occasions, did so without notice to him. He did not make out any case that an oral hearing was required, in order for him to adequately address the information that had been supplied by the Hungarian authorities.

90. The court finds that the applicant has failed to establish that, in the circumstances of this case, there was some evidence that he, or others, only could have given by means of an oral hearing, or interview.

91. Accordingly, the court finds that the requirement to provide a fair hearing in the circumstances of this case, did not oblige the Minister to conduct an oral hearing or interview with the applicant in advance of reaching the review decision in 2022.

92. The court is satisfied that the Minister's concerns had been clearly articulated to the applicant in advance of the making of the decision. The applicant had been given a fair opportunity to address these concerns in whatever way he thought fit. The Minister had considered all the evidence that was placed before her. Her review decision of July 2022 was reasoned, fair and balanced. The court is satisfied that there is no basis on which it can be set aside.

93. For the reasons set out herein, the court refuses the reliefs sought by the applicant in his notice of motion dated 25 October 2022. As this judgment is being delivered electronically, the parties shall have 4 weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

94. The matter will be listed for mention at 10.30am on 10th October 2023 for the purpose of making final orders.