THE COURT OF APPEAL

Record Number: 2023/142

High Court Record Number: 2022/348

Ní Raifeartaigh J. **Neutral Citation Number [2024] IECA 151**

Power J.

Meenan J.

BETWEEN/

R.S.

APPELLANT

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 21st day of June 2024

Issue to be decided

1. The primary issue in this case is whether the Minister had an entitlement pursuant to the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) to make a determination or finding that the appellant had entered a marriage of convenience and/or had submitted false or misleading information in respect of a residence card which had since expired in circumstances where, at the time of that determination, the appellant was a naturalised Irish citizen. The High Court held that the Minister did have such a power and that conclusion is the subject of this appeal.

2. The Minister also raises a secondary issue of delay, having regard to the passage of time between the dates of two of three allegedly invalid Ministerial decisions and the commencement of the proceedings.

The relevant legal framework

Directive 2004/38/EC (Citizens' Rights Directive)

3. Directive 2004/38/EC, often referred to as the Citizens' Rights Directive (hereinafter "the Directive") provides for the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States. It is not necessary for present purposes to set out the rights which are conferred by the Directive, but it is necessary to note the scope of beneficiaries under the Directive, given that the appellant, who was originally considered to have derived rights from his EU spouse and obtained a residence card on that basis, subsequently acquired Irish citizenship.

4. Article 3 states those to which the Directive applies:

"…Article 3

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State ***other than that of which they are a national****, and to their family members as defined in point 2 of Article 2 who accompany or join them.*

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people." (Emphasis added)

5. Article 35 on 'Abuse of rights' provides that:

"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."*

(Emphasis added)

6. It may also be noted that Recital 28 of the Directive states that one of its objectives is:

"(28) To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures."

European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015)

7. The 2015 Regulations (hereinafter "the Regulations") give effect to the Directive in this jurisdiction. They were amended during the timeline of events leading to these proceedings, but nothing turns on the amendments.

8. Regulation 27, as amended, is entitled '**Cessation of entitlements'** and provides:

"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…

(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.***

…

(4) In this Regulation, 'abuse of rights' shall include a marriage of convenience…" (Emphasis added)

9. Regulation 28, entitled 'Marriages of convenience', provides that:

"…28. (1) The Minister, ***in making his or her determination of any matter relevant to these Regulations****, may disregard a particular marriage as a factor bearing on that determination where the Minister deems or determines that marriage to be a marriage of convenience.*

(2) Where the Minister, in taking into account a marriage for the purpose of making a determination of any matter relevant to these Regulations, has reasonable grounds for considering that the marriage is a marriage of convenience, he or she 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." (Emphasis added)

Background

10. It is not necessary to set out the factual background other than in general terms. The appellant is a non-EU national who married an EU national (not from Ireland) in 2010 and was granted a residence card for five years in October of that year. He successfully applied for citizenship in 2015 and his residence in the State since that date has been on the basis of his citizenship (and not the Directive or Regulations). In 2018, he and his EU wife divorced. In 2019, a third-party non-EEA national made an application for residence on the basis that

she was the mother of an Irish citizen child of whom the appellant was the biological father. This led the Residence Unit to make a notification to the EU Treaty Rights Investigation Unit and in turn to the Minister having concerns that the appellant's 2010 marriage to the EU national, on the basis of which he had previously obtained a residence card, had been a marriage of convenience.

11. On the 18th December 2019 the Minister sent a letter to the appellant proposing to "revoke" his residence card (notwithstanding that the basis for his residence in the State at that time was his Irish citizenship). The appellant was informed of the Minister's concerns that he had submitted false or misleading information and that the appellant's marriage with the EU citizen had been one of convenience. These concerns were said to arise from a number of matters: the accelerated nature of the marital relationship, the lack of documentary evidence of a subsisting relationship prior to the marriage, the nature of his relationship with the third party non-EEA national, the fact that the student permission on foot of which he had been residing in the State had been due to expire some sixteen days after his marriage to the EU national, information from the Department of Employment Affairs and Social protection indicating limited economic activity on the part of the EU national in the State, the appellant's never having informed the Minister of any change of circumstances.

12. The appellant made representations to the Minister by way of response. On 13th February 2020, the Minister "revoked" the appellant's residence card (i.e. the card issued in 2010) on the basis that the documentation he had provided in support of his application for residence was misleading, and the marriage to the EU citizen had been one of convenience.

13. The appellant sought a review and by letter dated 8th September 2020, it was indicated that the reviewer had reached the conclusion that the first instance decision should not be

overturned. A request for a further review was declined. By letter dated 10th March 2021, the appellant's solicitors wrote a letter threatening litigation on the basis that the "revocation" decision was invalid because the appellant was not subject to the Directive or Regulations because he was a naturalised Irish citizen, and therefore the Minister erred in law and acted *ultra vires* the Regulations in purporting to revoke his residence card.

14. There followed correspondence between the appellant's solicitors and the Minister which culminated in a substantive response from the Minister on 1st February 2022. A letter of this date from the Minister indicated that the decision of 8th September 2020 had been rescinded and that, following a re-examination of the case, the initial decision of 13th February 2020 revoking the residence card had been set aside and substituted with a new decision of 1st February 2022.

15. The wording of new decision of 1st February 2022 was different and, significantly, did not purport to "revoke" anything. It said:-

> *"Having considered all of the information, documentation* ***the Minister is satisfied that you submitted and sought to rely upon documentation and/or information that you knew to be false and/or misleading*** *in order to obtain a status or entitlement, to which you would not otherwise be entitled, under Council Directive 2004/38/EC or the measures adopted by individual Member States to transpose the Directive. This is an abuse of rights in accordance with the Directive and Regulations.* ***In making her determination****, the decision maker in this case considered all the information available to her and you had previously been provided with ample opportunity to respond to the issues arising.*
>
> *Moreover,* ***the Minister is satisfied that your marriage to Union citizen, [name of EU national] was one of convenience*** *that was contracted for the sole purposes of*

attempting to obtain an entitlement or status, which you would not other be entitled, under Council Directive 2004/38 EC or any measure adopted by a Member State to transpose the Directive. This marriage was never genuine, and ***any entitlement or status conferred under the Directive from your marriage to the Union citizen concerned are deemed withdrawn from the outset****."*

(emphasis added)

16. I pause here to note the precise character of the Minister's decision. It was not and did not purport to be a revocation or refusal of a right of residence. It was what might (and will, in this judgment) be described as a determination or a finding or a conclusion as to a past state of affairs and/or the past conduct of the appellant. The phrase "deemed withdrawn from the outset" may be noted.

17. The new decision hinted that the determination or finding might be considered in the context of a re-assessment of his citizenship status, while acknowledging that any future re-assessment would take all circumstances (including the appellants right under Article 8 of the European Convention on Human Rights) into account:-

"It is noted that you became a naturalised Irish citizen in 2016.

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

The proceedings

18. On 20th June 2022, the appellant was granted leave to apply by way of judicial review for orders of *certiorari* in respect of all three decisions (of 1st February 2022, of 13th February 2020, and of 8th September 2020) on the ground that the Minister erred in law and the impugned decisions were *ultra vires* the 2015 Regulations in that the appellant, as an Irish citizen residing in the State, was not subject to any provisions of the Regulations or Directive.

19. The High Court (Owens J) delivered an *ex tempore* judgment on the 18th May 2023. He observed that the application had been brought on the ground that by the time the inquiry into the genuineness of his marriage was initiated, he was an Irish citizen and was not subject to those Regulations or to the Directive. He considered that the Minister was entitled to conduct the inquiry which related to a status between 2010 and 2015, and had nothing to do with the fact that he had acquired citizenship since that time. The Minister did not purport to revoke or refuse anything, and so a power to revoke or refuse was not in issue. The later-acquired citizenship did not confer immunity from the Ministerial inquiring into or investigating the grant of permission in the past. He was of the view that the decision of the CJEU in *Lounes v Secretary of State for the Home Department* (C-165/16, 14th November 2016) (hereinafter "*Lounes*"), relied upon by the appellant, was of no relevance to the issue before him.

20. The appellant appeals on a number of grounds which have not been reproduced here in full and are instead summarised for present purposes:

i. The High Court judge erred in finding that the appellant's Irish citizenship was irrelevant to the Minister's *vires* to make the decisions challenged by the appellant.

ii. The High Court erred in holding that there was nothing in the 2015 Regulations or Directive 2004/38/EC to prevent the Minister from making the decisions challenged by the appellant because the provisions of Directive 2004/38/EC cease to apply when a person becomes a naturalised citizen of a Member State.

iii. The High Court judge erred in failing to find that the applicant as an Irish citizen residing in the State was not subject to the 2015 Regulations or Article 35 of Directive 2004/38/EC.

iv. The High Court judge erred in failing to find that if the Minister had concerns that naturalised Irish citizens had procured their certificates of naturalisation by fraud or concealment of material facts, the appropriate procedure was pursuant to s.19 of the Irish Nationality and Citizenship Act 1956 (or whatever version thereof is legislated for by the Oireachtas following the decisions in *Damache v. Minister for Justice and Equality* [2020] IESC 63 and *Damache v Minister for Justice and Equality* [2021] IESC 6 (hereinafter "*Damache*".)

v. The High Court judge erred in failing to find that the Minister erred in law and acted *ultra vires* the 2015 Regulations and without jurisdiction.

Submissions on appeal

The appellant

21. The appellant notes that the respondent is raising an issue of delay in relation to the challenging of the earlier two decision, of 13th February and 8th September 2020 and submits that because the last decision in time (the decision of 1st February 2022) rescinds and revokes these earlier decisions, he needs only to challenge the latest decision in any event. However, the appellant also submits that if the Court finds for the appellant on the central net issue, it follows that the two earlier decisions, of 13th February 2020 and 8th September 2020, were also misconceived and unlawful and that it would be open to the Court to grant *certiorari* of all three decisions. The appellant submits that it was appropriate not to challenge the first two decisions any earlier than he did, given that he was engaging with the Minister and giving the Minister a chance to set aside those decisions.

22. As to the substantive issue, the appellant submits as follows. He says that the High Court did not engage in any analysis of Regulations 27 or 28 of the 2015 Regulations. He submits that Regulation 27(1) allows for the taking of concrete decisions with a real and genuine effect and that where a person is seeking a decision on something not yet granted or recognised, the Minister is empowered to "refuse to make" the decision in the person's favour or to "refuse to grant" the right of residence being claimed. He points out that the wording of Regulation 27(1) allows the Minister to revoke a residence card where it "*is being* claimed on the basis of fraud or abuse of rights", which is written in the present tense. He submits that Regulation 27(1) does not give any power to the Minister to revoke a residence card that is no longer operative. That sort of power would not be necessary, he contends, because once a residence card has expired, it no longer has any effect. He submits that the only part of Regulation 27 that might potentially be read as applying to an Irish

citizen who previously enjoyed a right under the Regulations is Regulation 27(2) (noting the phrase "has been obtained" therein), but he contends that it must be read in the overall context of Regulation 27. He submits that Regulation 27(2) does not give the Minister a freestanding investigative power to be invoked for the purpose of some sort of standalone inquiry that could result in a finding or declaration on some factual matter. Rather, a Regulation 27(2) inquiry can only be for the purpose of making a Regulation 27(1) decision.

23. The appellant also submits that Regulation 28, which sets out how a suspected marriage of convenience can be investigated, cannot provide the basis for a freestanding investigation which is not linked to a determination of any matter relevant to the 2015 Regulations.

24. The appellant also submits that the High Court judge erred in failing to find that Directive 2004/38/EC and the 2015 Regulations do not apply to an Irish citizen living in Ireland and relies on the judgment of the CJEU in *Lounes* in support of the proposition that Directive 2004/38 ceases to govern the residence of a Union citizen who has exercised their right to reside in a Member State from the date they are naturalised as a citizen of the relevant Member State. He submits that once he ceased to be a "beneficiary" under the Directive, it ceased to apply to him in its entirety.

25. The appellant submits that if the Minister has concerns that a naturalised Irish citizen may have procured the certificates of naturalisation by fraud or concealment of material facts, the appropriate route is to take steps to revoke the certificates of naturalisation within the citizenship legal regime. He accepts that there is currently a lacuna in this regime by reason of the Supreme Court decision in *Damache* (which held subsections (2) and (3) of s.19 of the Irish Nationality and Immigration Act 1956 as amended were unconstitutional), but he contends that this does not permit the Minister to fill that lacuna by invoking the

2015 Regulations or Directive 2004/38/EC against a naturalised Irish citizen as a prelude to invoking the applicable revocation power under s. 19. The appellant submits that the real reason the Minister has opted to rely on the 2015 Regulations in this case is because of the outcome of *Damache*, which currently prevents the procedure previously contained in s. 19 from being utilised. He submits that the respondent is in reality seeking to mount a collateral attack on the appellant's Irish citizenship, and that this constitutes an unlawful and improper purpose. He also submits that if the appellant did not take these proceedings, there would be a real risk that in due course the Minister would in the future invoke an amended version of the s.19 of procedures against him and rely on any failure on his part to challenge the impugned decisions as part of that procedure.

26. The appellant contended that if an amended s.19 procedure were in place and the Minister sought to use that procedure, the inquiry as to past events would be carried out in that context and reliance could not be placed on the impugned 'determination' made under the Directive. This, he said, made it manifestly clear that the impugned determination was an exercise in futility as it could not lead to any concrete action being taken on foot of it or any reliance being placed on it in the future. He contended that the Regulation should not be interpreted by the Court as permitting such a futile exercise.

The respondent

27. In the statement of opposition, the Minister raised an issue as to the failure of the appellant to comply with the time limits contained in Order 84, Rule 21 of the Rules of the Superior Courts, as amended, in respect of the first two decisions and suggest that the proceedings should be dismissed on grounds of delay. The Minister refers to relevant caselaw relating to the obligations imposed in law on an applicant seeking an extension of time under Order 84, Rule 21: *O'Donnell v Dun Laoghaire Corporation* [1991] IRLM 301;

de Roiste v Minister for Defence [2001] 1 IR 190; *Dekra Eireann Teoranta v The Minister for the Environment and Local Government* [2003] 2 IR 270; and more recently, *M O'S v The Residential Institutions Redress Board & Ors* [2018] IESC 61. The Minister submits that these cases indicate that sufficient explanations must be offered for delays. The Minister also refers to *G.K v Minister for Justice* [2002] 2 IR 418 and *Alam v Minister for Justice* [2022] IEHC 439 for the proposition that there should be circumstances outside the applicant's control which could not reasonably have been anticipated.

28. On the merits, the Minister submits as follows. She submits that the High Court judge was correct in determining that whether the Minister has the power to *revoke* a residence card that is no longer operative does not fall for decision and that the case concerns the power to investigate only. In respect of that power to investigate, the Minister's position is that the subsequent acquisition of citizenship by a former family member of an EU national does not extinguish the Minister's powers under Regulation 27 and/or 28 of the 2015 Regulations to investigate a reasonable suspicion that the person concerned claimed or obtained a right or entitlement or status conferred by the 2015 Regulations on the basis of fraud and/or abuse of rights, notwithstanding that the appellant no longer benefits from any derived rights of residence under the Regulation/Directive.

29. She submits that the Directive and the 2015 Regulations give the Minister wide powers to take corrective action in cases of fraud, in particular marriages of convenience. The prohibition of fraud and abuse of rights is an important principle enshrined in EU law. In this regard the Minister refers to Recital 28 and Article 35 of the Directive on the right to guard against abuse of rights, fraud, and marriages of convenience. The Minister also notes that the European Commission's Handbook on addressing the issue of alleged marriages of convenience (Comm (2014) 604 final) defines abuse under the directive as "*an artificial*

conduct entered into solely with the purpose of obtaining the right of free movement and residence under EU law which, albeit formally observing the conditions laid down by EU rules, does not comply with the purpose of those rules." The Minister also refers to the "rich vein" of EU caselaw on fraud and abuse of rights: Case C-251/16 *Edward Cussens and Others v. T. G. Brosman,*; Case C-33/*74 Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, para. 13; *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* (Case C-370/90, 7th July 1992, hereinafter "*Singh*"), para. 24; Case C-212/97 *Centros Ltd v. Erhvervs* 240/25; Case C-110/99 *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas).* The Minister notes that in *Ömer Altun & ors v Openbaar Ministerie* (Case C-359/16, 6th February 2018) the CJEU held, in a judgment delivered by the Grand Chamber, that:-

> *"49. The principle of prohibition of fraud and abuse of rights, expressed by that case-law, is a general principle of EU law which individuals must comply with. The application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law…"*

30. The Minister submits that *Lounes*, a central plank of the appellant's case, did not concern any alleged abuse of rights or marriage of convenience. She submits that the fact that the appellant was not a beneficiary under the Directive is not determinative of whether the appellant could be the subject of a finding of fraud or abuse of rights under the Directive. The Minister also relies on *Singh* and *O and B v. Minister for Immigration* (Case C-456/12, 12th March 2014, hereinafter "*O and B*") as authorities for the proposition that one does not

have to be a beneficiary under Article 3 of the Directive or a Union citizen to fall within the scope of the Directive.

31. The Minister refers to authorities concerning statutory construction (including *Montemuino v Minister for Communications* [2013] IESC 40 and *Heather Hill Management Company CLG v An Bord Pleanala & Ors.* [2022] IESC 43) and submits that on a plain reading of Regulation 27(2) of the 2015 Regulations, the Minister is empowered to investigate a reasonable suspicion that any right, entitlement or status conferred by these Regulations that *"has been"* obtained on the basis of fraud or abuse of rights; that is to say, the Minister is entitled to investigate a *past* state of affairs even if the person's current status no longer depends upon it. Further, and contrary to the submission of the appellant, it is not necessary that an investigation under Regulation 27(2) be related to a (refusal or revocation) decision made under Regulation 27(1).

32. The Minister also submits that the determination of the Minister was authorised by Regulation 28 because it involved a determination about a *'matter relevant to these Regulations'*. The determination was, *inter alia*, that the appellant's marriage was one of convenience following the investigation into the *bona fides* of his marriage, the subject of Regulation 28.

33. The Minister invokes *Heather Hill* for necessity to engage in a contextual interpretation and submits that the purpose of Regulation 28 is to empower the Minister to take the necessary measures to deal with marriages of convenience, consistent with and in furtherance of Article 35 of the Directive.

34. The Minister also submits that the caselaw establishes that she is not precluded from investigating the circumstances which led to the grant of the residence card permission to the appellant at a time later than the time of the granting of the residence card. She relies on

Islam & Ors. v Minister for Foreign Affairs and Trade [2019] IEHC 559; *MAM (Somalia) v Minister for Justice & Ors* [2020] 3 IR 50 and *S.S.A v Minister for Justice* [2023] IEHC 32 (upheld by this Court in *SSA v Minister for Justice* [2023] IECA 277; see paragraph 28 in particular). The Minister notes that in *M.K.F.S (Pakistan) v Minister for Justice and Equality* [2020] IESC 48, McKechnie J. noted that the possibility that the marriage in that case was a marriage of convenience only seriously surfaced more than five and a half years later in the course of a second residency card application. She submits that parties to a marriage of convenience often contrive to give the Minister the impression that the marriage is genuine and that compliance with the Regulations have been formally observed, and it often takes years for the true picture to emerge and therefore the ability of the Minister to investigate at a later stage the initial grant of a residence card forms an important part of ensuring the integrity of the immigration system.

35. The Minister submits that the appellant did not obtain leave to argue the point about collateral attack/preparing for future revocation. In the Minister's submission, it falls outside his one ground of complaint as pleaded in the Statement of Grounds and the issue cannot therefore be properly advanced in these proceedings. In the alternative, the Minister submits that there is no question of the Minister attempting to collaterally attack the appellant's citizenship. As set out by Dunne J. in *Damache v Minister for Justice* [2020] IESC 63 at paragraph 70 in the context of possible revocation of citizenship, the process of revocation is an entirely separate exercise. Any process regarding the Appellant's citizenship would need to be initiated under the legislative procedures contained in the Irish Nationality and Citizenship Act 1956, as amended. Further, as the letter of 1st February 2022 expressly states, the decision to revoke the Appellant's residence card does not interfere with his Constitutional and Article 8 ECHR rights which 'will' be considered in any subsequent decision that may interfere with such rights.

36. At the oral hearing, the appellant maintained that it was not necessary for him to argue that the Minister was engaged in a collateral attack on his citizenship and that he was content to rely on the arguments without that dimension being included. It is therefore not necessary in this judgment to address the issue of any alleged collateral attack as a self-standing ground of challenge.

Discussion and conclusions

The delay objection by the Minister

37. As to the issue of the time limit/delay raised by the Minister, this is raised in respect of the first two decisions of the Minister (the first instance decision and the review decision), but not the third decision which contained the determination with which we are concerned. The third decision rescinded the second decision (the review decision), and set aside the first decision. In circumstances where there is no objection to the timeframe within which the appellant challenged the third decision containing the impugned determination, and in a context where he was engaging with the Minister with regard to the earlier decisions (both of which were deprived of effect in any event by the Minister's own third decision), in my view the court should consider all three decisions, not least because it is somewhat difficult to consider the third decision without reference to the first two.

The substantive issues

38. The detailed submissions of the parties on the merits demonstrate that there are two connected issues, one of which is a question as to the scope of the Directive in EU law, the other as to the proper interpretation of the 2015 Regulations. The first of these questions concerns whether or not the appellant was a "beneficiary" under the Directive at the time of

the Minister's determination *and* whether or not the answer to this question necessarily determines the applicability or otherwise of the Directive to him more generally. This question as to the scope of the Directive is a question of EU law. The second question, concerning the interpretation of the Regulations, relates to whether the Minister has, as the appellant put it, a "free-standing" power under the Regulations to make certain factual determinations at a time and in a context where there is no possibility of linking the determination to any decision to "revoke, refuse to make or refuse to grant" any right, entitlement or status in accordance with the Regulation (this being the wording of Article 27(1) of the Regulations). This is a question of statutory interpretation albeit one that is linked with the question of EU law described above. Although the two questions are interrelated, I will address the EU law question in the first instance.

Does the Directive apply to an Irish citizen after he has ceased to be a beneficiary of it by reason of acquiring citizenship?

39. A central plank of the appellant's case concerning the interpretation of the scope of the Directive is the decision in *Lounes.* He contends that this establishes a "bright-line" rule that where a person ceases to be a beneficiary under the Directive, the Directive simply ceases to have any application to him. In *Lounes*, a third country national (male) living in the United Kingdom married a Spanish national (female) who had become a naturalised British citizen, having originally entered and worked in the United Kingdom under the Directive. A question was referred to the CJEU as to whether the wife ceased to be covered by the Directive from the date of her naturalisation and whether or not the husband could rely upon a derived right of residence under the Directive from that date onwards.

40. The court held that the husband did *not* have a derived right of residence *under the Directive*, although it went on to hold that he was eligible for a derived right of residence under Article 21(1) TFEU on conditions which must not be stricter than those provided for by the Directive. What we are concerned with in the present case is the question of the scope of the Directive.

41. Concerning the applicability of the Directive, the key paragraphs of the court's judgment are as follows:-

> "37 The Court has accordingly held that, since, under a principle of international law, a Member State cannot refuse its own nationals the right to enter its territory and remain there and since those nationals thus enjoy an unconditional right of residence there, Directive 2004/38 is not intended to govern the residence of a Union citizen in the Member State of which he is a national. Consequently, in view of the case-law referred to in paragraph 32 of this judgment, nor is the directive intended to confer, in the territory of that Member State, a derived right of residence on family members of that citizen who are third-country nationals (see, to that effect, judgments of 5 May 2011, *McCarthy*, C-434/09, EU:C:2011:277, paragraphs 29, 34 and 42, and of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraphs 42 and 43).
>
> 38 In the present case, it is common ground that Ms Ormazabal, who is a Spanish national, exercised her freedom of movement by moving to and residing in a Member State other than that of which she was a national when she left Spain for the United Kingdom in 1996. It is also common ground that she had the status of a 'beneficiary' of Directive 2004/38 within the meaning of Article 3(1) thereof and that she was

resident in the United Kingdom under Article 7(1) or — as the United Kingdom Government appears to accept — Article 16(1) of the directive, at least until she acquired British citizenship by naturalisation.

39 However, as the Advocate General has noted in points 48 and 63 of his Opinion, Ms Ormazabal's acquisition of British citizenship gave rise to a change in the legal rules applicable to her, under both national law and the directive.

40 Since then, Ms Ormazabal has in fact been living in one of the Member States of which she is a national and consequently enjoys an unconditional right of residence there in accordance with the principle of international law mentioned in paragraph 37 of this judgment.

41 It follows that, *since she acquired British citizenship, first, Ms Ormazabal has ceased to fall within the definition, recalled in paragraph 34 of this judgment, of a 'beneficiary' within the meaning of Article 3(1) of Directive 2004/38*. Secondly, in view of the reasoning set out in paragraphs 36 and 37 of this judgment, the directive no longer governs her residence in the United Kingdom, as that residence is inherently unconditional.

42 That being so, *it must be held that Directive 2004/38 has not applied to Ms Ormazabal's situation since she was naturalised as a British citizen*.

43 That conclusion is not called in question by the fact that Ms Ormazabal has exercised her freedom of movement by going to the United Kingdom and residing there or by the fact that she has continued to hold Spanish nationality in addition to British citizenship. Despite that combination of circumstances, the fact remains that, since she acquired British citizenship, Ms Ormazabal has not been residing in a

> 'Member State other than that of which [she is] a national', as referred to in Article 3(1) of Directive 2004/38, and therefore no longer falls within the definition of a 'beneficiary' of that directive within the meaning of that provision.
>
> 44 In the light of the case-law referred to in paragraphs 32 and 37 of this judgment, her spouse, Mr Lounes, who is a third-country national, likewise does not fall within that definition and thus cannot benefit from a derived right of residence in the United Kingdom on the basis of Directive 2004/38." (Emphasis added)

42. Obviously the factual distinction between the present case and the factual matrix in *Lounes* is that it is the non-EU national (the appellant) who has obtained citizenship of the Member State in which he is living, and not the EU national as in *Lounes*. The appellant maintains that the same principle applies, however, and that from the date upon which he acquired Irish citizenship, the Directive no longer governs his residence in Ireland and that the Minister had no power to do anything in relation to him under the Directive/Regulations quite simply because he was no longer subject to that legal regime.

43. The Minister responds by saying that the decision in *Lounes* should be distinguished because it arose in an entirely different factual and legal context. She says that (i) there was no suggestion of any fraud or abuse of rights in *Lounes;* and (ii) a concrete benefit from the Directive was being sought in *Lounes* (i.e. a right of residence for the husband) whereas the question of obtaining a benefit under the Directive/Regulations does not arise, as the appellant's citizenship is now the source of his right of residence.

44. The factual landscape as between the two cases is indeed different in the two respects identified by the Minister: *Lounes* did not involve any suspicion of fraud or marriage of

convenience, and the applicant therein was seeking to derive a benefit under the Directive. However, neither of these points may necessarily be determinative as to whether the reasoning of *Lounes* can be applied or whether it should be distinguished in the present case. It is true that, as Advocate General Bot pointed out in his opinion, the issue involved a question of the scope of the Directive *ratione personae.* For example, having referred to Article 3(1) of the Directive at paragraph 47, he continued:

> "48. That provision thus makes nationality a determining criterion for the scope *ratione personae* of the directive, so that acquisition by Ms García Ormazábal of the nationality of the host Member State clearly gave rise to a change in the legal rules applicable to her. It is upon those grounds that the United Kingdom relies in order to demonstrate that, by reason of her naturalisation, Ms García Ormazábal can no longer fall within that definition.
>
> 49. While it is clear that Ms García Ormazábal fell within the scope of Directive 2004/38 when she exercised her freedom of movement by leaving Spain, her Member State of origin, to move to the United Kingdom in September 1996 in order to reside there, first as a student and then as an employee at the Turkish Embassy, (14) the fact that on 12 August 2009 she acquired the nationality of the host Member State in which she had resided for a continuous period since 1996 now excludes her from the scope *ratione personae* of the directive.
>
> 50. While it is true that, according to settled case-law, the provisions of the directive must not be interpreted strictly, the fact remains that the wording of Article 3(1) of the directive, as interpreted by the Court, does limit its scope *ratione personae*

to Union citizens who reside in a Member State other than that of which they are nationals.

51. Extending the scope *ratione personae* of the directive to a Union citizen who, like Ms García Ormazábal, has acquired the nationality of the host Member State would therefore lead to departing from the very wording of Article 3(1) of Directive 2004/38 and from the Court's firmly established case-law."

45. Accordingly, it is arguable that the Directive simply does not apply *ratione personae* because an applicant or his/her spouse do not fall within its scope as defined in Article 3(1). On this view, the points of distinction as between the present case and *Lounes* raised by the Minister (as set out at paragraph 43 above) would not necessarily be relevant. However, this point of view arguably fails to take account of Article 35 of the Directive.

46. The Minister referred to the decisions in *Singh* and *O and B*, but it seems to me that these decisions tend to support the appellant rather than the Minister. In neither case was the Directive held to apply; rather the outcome was anchored in more general Treaty provisions, as we shall see.

47. The *Singh* case, decided in 1992, concerned a predecessor measure to the current Directive and involved a British wife and an Indian husband, who married in the UK and moved to Germany to work (in an exercise of the wife's rights under the Directive). They then returned to the UK to open a business, but subsequently separated and divorced. The basis for the wife's re-entry into the UK was the exercise of her citizenship rights, and the question was whether the non-EEC husband was entitled to enter and remain in the UK in those circumstances. While it was held that he *was* so entitled, the conclusion was reached on the basis of Articles 48 and 52 of the Treaty of Rome and *not* on the basis of rights directly

conferred by the Directive, with the court saying that the non-EEC spouse must enjoy at least the same rights as would be granted to him or her under Community law as if his or her spouse entered and resided in the territory of another Member State.

48. Similarly, in *O and B,* two third country spouses of two Dutch nationals, who had been living in Spain and Belgium respectively (on the basis of an exercise of the Dutch nationals' rights under the Directive), sought residence in the Netherlands in order to join their spouses there and were refused. The court held that Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened a family life with a third-country national during genuine residence in a Member State other than that of which he is a national, the provisions of the Directive apply *by analogy* where that Union citizen returns, with the family member in question, to his Member State of origin. In *Lounes,* Attorney General Bot confirmed that in *O and B,* the court *"*found that Directive 2004/38 was not applicable, ruling that a third-country national who is a family member of a Union citizen may not, on the basis of that directive, invoke a derived right of residence in the Member State of which that citizen is a national." He added: "In doing so, the Court relied upon a literal, systematic and teleological interpretation of the directive" (See paras 56 and 57, *Lounes).*

49. In the above decisions, the question of whether or not the Directive *applied* to the individual appears to have been treated as coterminous with whether or not the EU spouse was *receiving a "benefit*" under the Directive. In this regard, the decision in *Chenchooliah v Minister for Justice and Equality* (ECLI:EU:C:2019:693; Case C-94/18, 10th September 2019, hereinafter "*Chenchooliah*") is of interest, insofar as it does *not* appear to have treated the two issues as identical. This in turn raises questions as to whether *Lounes* should be read as applying to all situations involving persons who have ceased to rely upon Treaty rights

(whether direct or derived) because they have become citizens, or whether the conclusion arises from the particular facts which involved a question of potential benefit under the Directive as distinct from a declaration as to a past state of affairs involving fraud or abuse of rights.

50. In *Chenchooliah,* a third country national (a Mauritian woman) married a Portuguese national working in Ireland; he was therefore exercising his rights under the Directive at that time. She initially received a three-month residence permit pursuant to the Directive, but after her husband returned to Portugal, where he was imprisoned for a criminal offence, the Minister refused the wife any further right of residence under Article 7 and proposed to make a deportation order pursuant to the Immigration Act 1999. The wife contended that the appropriate regime to consider her removal from the jurisdiction was the Directive and not the 1999 Act, s.3 of which automatically imposed an indefinite ban on entry into the territory.

51. A question was referred to the CJEU as to whether an expulsion in such circumstances should be carried out in compliance with the provisions of the Directive, or whether it fell within the competence of the national law of the Member State. The court held that the Directive *was* applicable to a decision to expel a third-country national and that in those circumstances the relevant safeguards laid down in Articles 30 and 31 of Directive 2004/38 were applicable. This was despite the fact that the applicant, since her spouse's return to Portugal, no longer enjoyed the status of 'beneficiary' within the meaning of Article 3(1) of the Directive. The concept of 'beneficiary', it said, was "a dynamic concept" in that, even though acquired in the past, the status may subsequently be forfeited if the requirements

laid down by that provision are no longer met. Nonetheless, the expulsion regime in the Directive continued to apply:

> "It should be noted in that regard that Directive 2004/38 does not contain only rules governing the conditions under which one of the various types of residence rights it makes provision for may be obtained and the conditions to be met in order to be able to continue to enjoy the rights concerned. That directive also lays down a set of rules intended to govern the situation arising in which entitlement to one of those rights is lost, inter alia where the Union citizen leaves the host Member State." (para 70)

The continued applicability of the Directive's expulsion provisions could, the court considered, be "reconciled" (para 78) with the fact that the person concerned no longer has the status of 'beneficiary' within the meaning of Article 3(1) of the Directive even though the loss of that status was that the person concerned no longer had the rights of movement and residence they previously held for a certain period of time. Thus, in *Chenchooliah* the scope of the Directive encompassed an individual despite her no longer being a potential or actual 'beneficiary' under the Directive.

52. Counsel for the appellant in his reply suggested that any apparent contradiction or inconsistency between *Lounes* and *Chenchooliah* could be understood by reason of the fact that *Lounes* concerned a person who has acquired the status of citizenship, whereas *Chenchooliah* did not. He submitted that once an individual has acquired the special status of citizenship in the Member State in question, Article 3(1) precludes the Directive from applying to that individual with regard to any matter at all, including an inquiry and conclusion as to whether the individual had in the past obtained a benefit under the Directive through fraud or abuse of rights.

53. Having considered the wording of Article 3(1) of the Directive together with the above authorities concerning the scope and applicability of the Directive, I am inclined to the view that the appellant entirely ceased to be the subject of the regime established by the Directive from the date that he acquired citizenship of Ireland, but the matter is not free from doubt. If the Directive continues to govern the expulsion of a non-EU spouse who has lost entitlement to the benefit of residence under the Directive because the Union citizen spouse has left the host Member State (as was decided in *Chenchooliah),* it is possible to argue by analogy that the Directive continues to govern the question of making a determination of whether a person had originally obtained the benefit of residence under the Directive by fraud *even if* the person has departed from the Directive's regime of benefits by virtue of having obtained citizenship in the host Member State.

54. Accordingly, while I lean to one particular interpretation of *Lounes,* I do not think the matter is free from doubt as a matter of EU law. I will return to this uncertainty and its implications for how the Court should proceed in this case after I have addressed the next major theme in the parties' submissions.

Should the Regulations be interpreted as authorising the Minister to make an adverse finding in respect of the appellant when no issue of refusal or revocation of residence was in question any more by reason of his having acquired Irish citizenship?

55. The net question is whether the Regulations authorise the Minister to make a finding or determination, at a time after the appellant had become an Irish citizen, that in the past he had entered a marriage of convenience and/or submitted false and misleading information in order to obtain residence rights under the Directive.

56. The appellant contends that in circumstances where the Minister was not, in the decision of 1st February 2022, purporting to revoke the previous grant of permission to reside (because he had no power to do so in circumstances where the appellant was an Irish citizen), he had no power to engage in a "free-standing" investigation leading to a determination as to a past state of affairs which was simply incapable as a matter of law of leading to any concrete decision such as revocation of, or refusal to grant, a residence permit.

57. The Minister contends that the Regulations should be read as entitling the Minister to make a determination about a past state of affairs both because of their wording and also having regard to the context to the Regulations, implementing a Directive in which the prevention and detection of fraud and abuse of EU residence rights is an important component. The Minister's position found favour with the High Court. Both parties relied upon the wording of provisions and context of the Directive and the Minister drew attention to certain authorities.

Certain authorities cited do not advance the argument

58. Before turning to the wording of the Regulations, particularly Regulations 27 and 28, I would observe that most of the authorities relied upon by the Minister were not of particular assistance, either because they arose out of factual situations where residence pursuant to the Directive/Regulations was a live issue being considered by the Minister at the time of the investigation and determination, unlike the present case, or because the case arose in the context of a different legal regime.

59. For example, the Minister referred to *MAM (Somalia) v Minister for Justice & Ors* [2020] 3 IR 350, where the Supreme Court held that, as a matter of statutory interpretation, a refugee who subsequently acquired Irish citizenship by naturalisation did not lose the right to apply for family reunification under section 18 of the Refugee Act 1996. (This was

important in circumstances where the conditions for family reunification were less onerous under the 1996 Act than under the Immigration Act 2004 Act and Ministerial policy thereunder). The court held that eligibility depended upon a declaration of refugee status being in force and not on the person actually being a refugee at the time. I do not think the decision can be viewed as creating a general principle or one which transposes to the present context, because the judgment of MacMenamin J (with whom all other members of the court agreed) demonstrates that there was a detailed and close reading of the text of the particular Act in its entirety as well as a consideration of the overall legislative and international context concerning refugees. We are concerned here with a different regime entirely, namely an EU Directive and its transposing domestic Regulations.

60. Also cited by the Minister is *S.S.A v Minister for Justice* [2023] IEHC 32. The Minister contends that this supports the proposition that the Minister is entitled to revisit an earlier decision granting residence if information later emerges which suggests there may have been a marriage of convenience. However, in that case the revisiting by the Minister (in 2017/2018) of the earlier decision to grant permission (in 2013) was carried out in the context of a live application for a further permission to reside. Such a live possibility did not exist in the present case. It is in that context that one has to read what was said at paragraph 17 by the High Court (Bolger J), noting in particular the opening words of the quotation:

> "*When revoking the applicant's permission*, the Minister is permitted to rely on facts and circumstances that existed when the applicant was granted his residence card in 2013. The review decision was not a review of 2012 and 2013 but was a decision based on, inter alia, the absence of evidence of a relationship between 2012 and when the parties separated in December 2017

> or January 2018. The marriage that the Minister accepted in 2012 cannot be forever beyond the Minister's examination given that the Regulations expressly provide for a power to revoke and the legislative scheme envisages the possible revocation of a residence card, a power that is not conditional on evidence of an error in the original decision to grant that residence card."
>
> (Emphasis added)

61. Much the same can be said of *Mistu v Minister for Justice and Equality* [2023] IEHC 499, where the High Court (Barr J) remarked at paragraph 70 that "[t]here is no time limitation on the revoking of a permission, where a finding of fraud has been made". That was in a context where the Minister revoked the permission to reside *ab initio* on the ground of the marriage having been one of convenience. The context was again one where the revocation power was under live consideration. The objection in the present case is not so much to the retrospective nature of the inquiry as to the making of a finding which is untethered to any determination as to residence or status under the Regulations.

The wording of Regulations 27 and 28

62. Let us turn now to a close analysis of the wording of the Regulations, and first to Regulation 27(1). It provides that the Minister may "revoke, refuse to make or refuse to grant" any of the items (to use a neutral word) on a list of items (a)-(h) (which is then set out) where she decides in accordance with the Regulation that the right, entitlement or status "is being claimed on the basis of fraud or abuse of rights". Item (a) in the list is a decision that a person be treated as a "permitted family member". Item (b) is a residence card, permanent residence certificate or permanent residence card. The remaining items are rights of residence under various sub-parts of regulations 9, 10 and 12.

63. The use of the present tense in Regulation 27(1) may be noted; it is clearly talking about a current or live application for a residence card ("is being claimed). The Minister acknowledges this wording, and accepts that there was no live application for residence or live residence card at the time of the impugned determination, but asks us look closely at the wording of Regulation 27(2), which contains an investigative power. This gives the Minister the power "to make such inquiries and to obtain such information as is reasonably necessary to investigate the matter. This is said to apply not only where a right, entitlement or status of being treated as a permitted family member "is being claimed" but also where it "*has been obtained*" (on the basis of fraud or abuse of rights.) Clearly, therefore, this power to investigate applies not only to a situation where the applicant seeks the right, entitlement status prospectively, but also where the applicant *has already* obtained the right, entitlement or status. It is clearly capable of being exercised retrospectively in the sense of conducting an inquiry and making a determination about events in the past. But again, the objection in the present case is not so much to the retrospective aspect of the Minister's determination but to its "free-standing" nature. Is the investigative power in Regulation 27(2) "free-standing" or is it to be exercised in the context of some other power to take some concrete action, such as revoking or refusing a right of residence?

64. Both sub-parts of Regulation 27 are sub-parts of a single provision which is entitled "Cessation of entitlements". They are not separate provisions within the Regulations, which might have supported the view that one provisions concerns a revocation/refusal power, and the other an investigative power. Instead, both are grouped under a common heading which suggests that each is linked to the other, and that the investigative power is linked to the overall issue of "cessation of entitlements" as Regulation 27 is entitled. Further, there is no reference in either sub-part to making a "determination" or "declaration" of any kind. This

could suggest that the investigative power is envisaged as a stepping-stone in a process which may lead to the cessation of an entitlement, rather than something which is intended to lead to a declaration of a state of affairs which stands alone and has no further consequence. Further, the list of items in Regulation 27(1)(a)-(h) inclusive sets out a list of rights or entitlements under the Regulations themselves. On this view, the retrospective power in Regulation 27(2) to investigate whether something "has been obtained" on the basis of fraud or abuse of rights is not at large but is linked to the possibility of making a decision involving the cessation of one of the rights or entitlements in Regulation (1)(a) to (h) inclusive. This presupposes that the cessation of any such rights or entitlements is still a live issue at the time of the investigation and determination (which was not the case when the impugned determination was made in respect of the appellant).

65. We look now at Regulation 28. Regulation 28(1) provides:

> "The Minister, in making his or her determination of any matter relevant to these Regulations, may disregard a particular marriage as a factor bearing on that determination where the Minister deems or determines that marriage to be a marriage of convenience."

This begs the question of what constitutes a "matter relevant to these Regulations". Here *M.K.F.S. (Pakistan)* comes into play.

66. The Supreme Court decision in *M.K.F.S.* is an important decision generally with regard to the consequences of a determination that a marriage is one of convenience under the 2015 Regulations, with the court holding (1) that that such a determination may be relied upon by the Minister in the context of any subsequent deportation process and (2) that such

a determination does not render the marriage a nullity at law but rather was limited to the immigration/deportation context. For present purposes, the Minister argues that it also constitutes authority for the proposition that an investigation into a marriage of convenience may take place retrospectively and after a residence card has issued or even expired. The Minister points out that it was not until 2015 that it was determined that there had been a marriage of convenience in that case, although the first residence card had been obtained in 2010. Again, however, an important factual point of distinction is that the determination in that case was made in the context of, and as a precursor to, a concrete decision to refuse a residence card, unlike the present case. The deportation order under challenge in *M.K.F.S.* was made only after the determination had been made in the context of an application for a residence card (and which led to its refusal).

67. However, of particular interest is the following passage in the judgment of McKechnie J:

> "65. These measures [(the provisions of the Directive)] also apply to family members of the Union citizen, as so defined but regardless of nationality. Without these provisions, but of course subject to any other international obligations so entered into, it would have been the sovereign right of each state to control its borders via its own asylum and immigration system. As we know, the 2015 Regulations gave effect in domestic law to this Directive. Accordingly, it seems to me that at the level of principle there is *an inextricable link and direct relationship between the various legislative measures which deal with the right to enter and remain in this jurisdiction and on what basis, and being refused that right or being removed from the State,* as the case may be. Such of course would have to yield to any express or necessarily implied reservation outlined in any such legislation. It is against that broad backdrop that the

Appellants' submission that the Minister's finding of a marriage of convenience cannot be transposed into or relied on in the immigration process must be considered. This argument is based on an asserted interpretation of Regulation 28, taking subpara. (1) as an example. It reads: "The Minister, in making his or her determination of any matter relevant to these Regulations, may disregard a particular marriage …" (emphasis added) It is suggested therefore that the finding can only apply to the residency card situation, and cannot find its way through any avenue of law into the deportation process.

66. Leaving aside altogether how disjointed and incoherent an interpretation this would give rise to, I am satisfied that *Regulation 28(6) provides a complete answer to this assertion.* That provision defines a marriage of convenience as one entered into for the sole purpose of obtaining an entitlement under the Directive or the 2015 Regulations; or under any other measure adopted to transpose the Directive; or, it then continues, under: "(c) Any law of the State concerning the entry and residence of foreign nationals in the State or the equivalent law of another State." In my view the reference to "entry and residence" must necessarily include removal. *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. Accordingly, it seems to me that on any proper interpretation of the measure last mentioned, the Immigration Act 1999, or more accurately section 3 thereof, must be regarded as coming within its provisions.* That Act clearly covers, inter alia, the entry and residence of persons like the First Appellant, who is not a Union citizen. Having been unsuccessful in his residence card application, he was then a person, as pointed out in the letter of the 20th March, 2017, who had no right to be in the State. That being the situation, the Minister was perfectly entitled to regulate

and determine his status within this jurisdiction. Hence, the operation of section 3 of the 1999 Act. The previous finding was thus directly relevant to the matters which the Minister must consider under subs (6) of that section. *Accordingly, I am satisfied that the Minister was entitled to carry into the immigration process the decision previously made by him under the 2015 Regulations.*" (Emphasis added)

68. Of course, this puts beyond doubt that the power under Rule 28(1) to make a finding that a foreign national entered a marriage of convenience can be carried into a *subsequent* deportation process, but arguably it leaves unanswered two questions: (i) Can the power be exercised when a deportation process *has not yet begun* and there is *no longer any live issue* as to the right of residence under the Regulations because the person has become an Irish citizen?; (ii) Does the reference to "foreign national" in Regulation 28(6)(c) include a person who has become an Irish citizen?

69. The wording of Article 28(1) should also be closely noted. Essentially, that provides that the Minister, in making a 'determination' of any matter relevant to the Regulations, may 'disregard' a marriage of convenience as a factor bearing upon that determination. If, as the Minister submits, the 'determination' in issue here was that the appellant's marriage was one of convenience, then that would lead to the rather senseless proposition that 'The Minister, in making a 'determination' that a marriage is one of convenience may 'disregard' a marriage of convenience as a factor bearing upon that determination.' Logic and syntax militate against this interpretation of Article 28. Therefore, in my view, the entitlement of the Minister to do what she did in the present case, if it is to be found anywhere, is more likely to be found in Regulation 27.

The purpose and context of the Regulations

70. I also wish to turn to the purpose and context of the Regulations as a whole, a matter to which any exercise in interpretation must have regard, particularly having regard to recent caselaw of the Superior Courts including the comprehensive judgment of Murray J in *Heather Hill*. The Minister submits that an important part of the context is that it is a fundamental aspect of the EU citizenship regime that there should be a strong system of preventing, detecting and eradicating fraud and abuse of rights. She points out that this theme is repeatedly emphasised in the legal instruments of the EU and in the authorities of the CJEU.

71. It is beyond question that the prevention, detection and denunciation of fraud and abuse (including marriages of convenience) is of fundamental importance in the EU citizenship regime (and indeed the Irish immigration system as a whole) and I note the emphasis laid on this issue in certain Recitals and Article 35 of the Directive as well as the repeated statements of the CJEU on the topic. I have also considered the helpful information provided by the Minister's deponent, Ms. Katherine Grace, who swore an affidavit in November 2022 in which she gave an indication of the scale of the problem of abuse and fraud in this context. She said that since 2015, the EU Treaty Rights Investigation Unit had commenced over 5,000 investigations and that this had led to revocations in 70% of cases. She also confirmed the unsurprising fact that it often takes some time for the information that a marriage is one of convenience to emerge, which means that inquiries and determinations often need to be retrospective.

72. That said, even accepting that prevention and detection of fraud is highly significant, a slightly different issue is whether this points to any particular interpretation of Regulation 28(1). At the hearing of the appeal, there was some debate as to whether a finding such as

that made by the Minister in this case might assist various other State authorities to whom it was communicated, who might then be in a position to take concrete action, such as by prosecuting a person for a criminal offence, or commencing a deportation process. It is also clear, of course, from *M.K.F.S.* that findings can be used by the same Minister in the deportation context albeit as one among other potentially relevant factors.

73. In this regard, a distinction might usefully be drawn between the Minister making a determination and the Minister simply passing on the information which led to the concerns or suspicions of fraud in the first place to other State authorities as appropriate. It is arguable that a determination as such is not necessary in order to provide assistance to the other State authorities (such as the Garda Síochána), and that it would be sufficient for that purpose for the Minister simply to pass on such information as she has, which would enable that body to carry out investigations prior to any decision as to whether or not to prosecute or take other appropriate action.

74. Less clear, however, is the position of the Minister in the context of any future revocation of citizenship process. It is true of course that as matters currently stand post-*Damache*, no procedures for conducting an inquiry with a view to revoking citizenship have been introduced to replace those which were struck down as unconstitutional by the Supreme Court. However, if and when any such replacement (and constitutionally-compliant) procedures are introduced, there is nothing to stop the Minister from taking into account any *existing* determination by the Minister that the appellant had previously obtained a residence card under the Regulations on the basis of fraud or abuse of rights, specifically on the basis of a marriage of convenience and/or submission of false or misleading information. That much was made clear in *M.F.K.S.* What *M.F.K.S.* does not address is whether, if there is no such determination *already in existence*, the Minister may make such a determination in the

future as part of the revocation process. Suppose the Court in the present case were to decide that the Minister did not have the power contended for by the State when it is not tethered or connected to any concrete power of refusal or revocation. Suppose, further, that in the future the Minister commences a revocation of citizenship process and wishes to investigate whether the appellant's marriage had been one of convenience; might she not be met with the argument that she has no legal basis for such a finding since an investigation into whether the marriage was one of convenience was one that could only have taken place within the context of the Directive/Regulations? If this argument proved to be correct, one might end up with a situation where the Minister is precluded from making a determination under the Regulations that there was a marriage of convenience *either* during a revocation of citizenship process *or* separately (and prior) to it, simply because the person is outside the remit of the Regulations by virtue of becoming a citizen. This would certainly run counter to the broad purpose of preventing and detecting fraud and abuse of rights.

Habte and correcting the record as to questions of status

75. Another interesting dimension to the argument is provided by a relatively recent decision of this Court in *Habte v Minister for Justice* [2020] IECA 22, [2021] 3 IR 627, even though it did it not concern the Regulations. Ms Habte had obtained a certification of naturalisation and sought to correct the record as she had submitted an incorrect date of birth, thereby causing herself several practical difficulties. The Minister declined her request to do so and adopted a fixed policy approach, insisting that she could not amend the certificate of naturalisation, once issued, because the Act conferred no power upon her so to do. Ms. Habte challenged the Minister's refusal to amend the certificate on the basis of a blanket policy. The legislation in question did not expressly confer upon the Minister an entitlement to amend a certificate of naturalisation. This Court (judgments delivered by Murray and Power

JJ) concluded that the Minister did have such a power notwithstanding the fact that it was not expressly articulated in the legislation. The Court found that the appellant's contention that the Minister was empowered to cancel a certificate and to issue a new one so as to correct an error on the record was well founded.

76. Central to the decision was a recognition that there was an implied constitutional obligation on the part of the State to accurately record and represent central aspects of personal identity, in that case the question of the applicant's age. It is, at least, arguable that an individual's marital status is also an aspect of identity which requires accurate recognition. Therefore, if the status of marriage was entered into for the sole purpose of obtaining an entitlement under the Directive or under any law concerning the residence of foreign nationals (including naturalisation), then it is arguable that there is an implied power on the part of the Minister to investigate and make findings regarding the true nature of the marriage, and correct the record if necessary. Similar reasoning might come into play to support an implied power on the part of the Minister under the Regulations with regard to correcting the record as to whether an individual was previously entitled to have a marriage recognised and rights of residence derived from it, even though he has ceased to benefit from any such right of residence by virtue of the acquisition of citizenship.

Provisional conclusion

77. Taking all of the above into account, I would be inclined towards the following conclusions: (i) that Regulation 28(1) does *not* include the power to make a determination of the kind in issue in the present case; (ii) that although there is no express power in Regulation 27 or elsewhere in the Regulations to make a determination of this kind, such a power might be implied into Regulation 27(2).

78. The key question then becomes the following one: Should the Court interpret the Regulations to include such an implicit power? Here it seems appropriate to return to the question of EU law, which was temporarily left to one side earlier in this judgment

79. I said at the outset of the discussion that the scope of the Directive under EU law is linked to the question of interpreting the Regulations. The two questions posed by me were intended to separate out the strands of analysis but they are ultimately interconnected, not least by reason of the doctrine of "indirect effect' as described in decisions of the CJEU in cases such as *Marleasing SA v La Commercial Internacional de Alimentacion* SA (Case C-106/89, 13th November 1990) [1990] 1 ECR 4135, and *Criminal Proceedings against Pupino* (Case C–105/03, 16th June 2005) [2005] ECR I-5285. This is the principle requiring an interpretation of domestic law to comply with EU law insofar as this is possible and without engaging in a "*contra legem"* interpretation. In circumstances where the Court is faced with the interpretation of the Regulations and the possibility of reading an implied power into Regulation 27, it seems to me that it is essential to have clarity on the question of the scope of EU law, and specifically whether the Directive applies to a citizen solely to the extent of authorising the State to investigate a historic marriage of convenience at a time when the now-citizen was obtaining a benefit (derived residence rights) under the Directive by virtue of his marriage to an EU spouse. It seems to me, although I say this provisionally only, that it would not be *contra legem* to interpret the Regulations to encompass the power contended for by the Minister. Thus, the answer to the question as to the scope of EU law is necessary for the determination of the case.

80. Having reached the conclusion that the scope of the Directive is not clear, and bearing in mind the provisions of Article 3(1) and 35 thereof, as where there is a doubt as to the proper interpretation of the Regulations by reason of the wording therein, I am of the view that a question should be referred to the CJEU on the scope of the Directive, the answer to which in turn would be helpful in interpreting the extent of the Ministerial powers under the Regulations which were intended to transpose that Directive.

81. In my view, the appropriate question to refer to the CJEU is as follows:

> Whether Directive 2004/38/EC applies to a person who previously obtained the benefit of derived residence in a Member State by virtue of being a spouse of an EU national exercising Treaty rights in the host State but who has more recently become a citizen in the host State and is no longer the beneficiary of any derived benefit in the host State under the Directive, solely for the purpose of investigating and (if appropriate) making a determination or reaching a conclusion that he engaged in a fraud or abuse of rights and/or a marriage of convenience in the past within the meaning of Article 35 of the Directive in order to obtain a benefit under the Directive?

82. This is the question which the Court proposes to send but if either party wishes to take issue with it, the matter will be listed for a short hearing on Wednesday 26th June 2024 at 2p.m. to address any outstanding issues.

83. As this judgment is being delivered electronically, I wish to record the agreement of my colleagues Power J. and Meenan J. with it.