APPROVED

THE COURT OF APPEAL
CIVIL

Neutral Citation: [2023] IECA 254
Record Number: 2022/165
High Court Record No.: 2021/409 JR

Donnelly J.
Ní Raifeartaigh J.
Power J.

BETWEEN:

Z.K.

APPLICANT/RESPONDENT

– AND –

THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS/APPELLANTS

JUDGMENT of Ms. Justice Power delivered on the 20th day of October 2023

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Introduction

1. This case raises a question concerning the procedural requirements to be observed when an administrative decision-maker revokes a residence card previously issued to a person who had obtained a derived right of free movement and residence on the basis of marriage to a European Union ('EU') citizen under the provisions of Directive 2004/38/EC (hereafter, 'the Directive' or 'the Free Movement Directive').[1] That Directive provides that the right of all EU citizens to move and reside freely within the territory of the Member States extends to their family members, irrespective of nationality.[2] Initially, the Directive was transposed into Irish Law by the European Communities (Free Movement of Persons) Regulations of 2006 (SI No. 226/2006) and the European Communities (Free Movement of Persons) (Amendment)

[1] 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 the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
[2] Recital (5) of the Directive.

Regulations of 2008 (SI No. 310/2008) ('the 2006 and 2008 Regulations'), and, subsequently, by the European Communities (Free Movement of Persons) Regulations of 2015 (SI No. 548/2015) ('the 2015 Regulations'). This case is concerned with the 2015 Regulations.

2. The principal issue to be determined by this Court is whether fair procedures and natural and constitutional justice required the first named appellant (hereinafter 'the Minister')[3] to afford to the respondent an 'oral hearing' or an 'in-person interview' prior to determining an application to review a decision to revoke the respondent's residence card. The respondent never asked for an oral interview prior to the Minister's decision, and the question arises, whether that prevents him, now, from relying upon the absence of such an interview as the basis for challenging the decision made. In making her determination in respect of the respondent's residence, the Minister disregarded his marriage to an EU citizen as a factor bearing on that determination as she deemed that marriage to be a marriage of convenience.

3. On foot of an application brought by the respondent (hereinafter and for ease of reference 'the applicant' or 'ZK'), the High Court granted an Order of Certiorari quashing the Minister's decision of 1 February 2021 (hereinafter 'the impugned decision' or 'the review decision') in which she affirmed an earlier decision of 8 August 2019 to revoke the applicant's residence card.

4. The judgment which gave rise to that Order of Certiorari was delivered by the High Court (Phelan J.) on 16 May 2022 ([2022] IEHC 278).

5. The appellants filed a Notice of Appeal seeking to appeal the entire decision of the High Court on the grounds set out in the said Notice of 30 June 2022. No cross appeal has been taken in respect of any aspect of the High Court's findings.

[3] References to the Minister include references to officials working within the Minister's Department.

Background Facts

6. In May 2016, the applicant, using an online dating application, connected with a Lithuanian woman (hereinafter 'KB'), who was resident in Ireland. She was an EU citizen, exercising her rights under Article 3(2) of the Treaty on European Union ('the EU Treaty'). During the course of their online communications, the applicant was living in his home country of Georgia.

7. On or about 19 September 2016, the applicant came to Ireland, '*for the purposes of meeting [KB]*' in person. Despite that being the stated purpose of his visit, it would appear that he had already organised, in advance, a one-year lease agreement, because, on the same day that he entered the State, unlawfully, he signed that lease agreement in respect of a property in Dublin 6 ('the Dublin 6 address').[4] ZK remained, unlawfully, present in the State for almost six months, and he did not notify the authorities of his presence therein.

8. On 22 February 2017, ZK wrote to the authorities and claimed that he needed international protection, when he did not.

9. On 1 March 2017, the applicant married KB. On the marriage certificate, the Dublin 6 address was given as the couple's then current and future address.

10. On 3 April 2017 the applicant applied to the Minister for a residence card under the 2015 Regulations based on his marriage to an EU citizen. On submitting the application form, the applicant declared: '*I consent to the EU Treaty Rights Unit making inquiries to confirm any of the details or documents provided by me in this application, including my participation in an interview process*'. The form also informed the applicant that the onus was on him to advise the Minister of any change in his circumstances**.**

11. By letter of 21 December 2017, ZK's application for residence was approved. Permission, valid for a period of five years, was to be endorsed on his passport. The letter

[4] See paras. 6, 7 and 44 and Exhibit ZK29 of ZK's affidavit dated 29 April 2021.

confirmed that ZK was entitled to enter employment in the State subject to his continued conformity with the 2015 Regulations. The penultimate paragraph of the letter reiterated that the onus was on him to advise the Minister of '*any change in circumstances*' which may affect his right to reside in the State. A specific example of such changed circumstances included a change in his relationship to the EU citizen. The letter ended with an express warning that any person seeking to assert rights or entitlements under the 2015 Regulations was obliged to ensure compliance with all the appropriate provisions of the said Regulations.

12. On affidavit, KB averred that, on or about December 2017, her marriage with the applicant began to be strained. Difficulties were said to have arisen and, following an argument, she left the marital address in December 2017 (the same month that permission to reside had been granted) and stayed, temporarily, with her mother. Following subsequent unsuccessful attempts to reconcile, they decided to separate. During the course of inquiries, ZK had submitted a letter from KB informing the Minister that the marriage ended in October 2017. However, subsequently, he claimed that this was a mistake on her part, and that the marriage had ended in October 2018. KB agreed that she had '*incorrectly identified*' the date of separation. By October 2018, KB and a Mr A. had entered a new tenancy agreement elsewhere.

13. The applicant took no steps to inform the Minister that his relationship with KB had changed.

14. On 28 February 2019, ZK wrote to the Minister to say that he had lost his passport and had ordered a new one. No mention was made of the fact that his circumstances had changed in that his marriage had ended and that he was no longer living in a marital relationship with KB.

15. On 8 March 2019, the Minister wrote to the applicant at the Dublin 6 address stating that it was necessary for him to clarify the status of his relationship with KB. Documentary

evidence was requested regarding his identity and his relationship with the EU citizen, and details were sought in respect of the couple's activities and residence within the State since 2017.

16. In response, the applicant submitted utility bills, bank statements, pay slips, a marriage certificate, photographs, and documents relating to his employment status and tax liabilities. A copy of a lease agreement dated 8 March 2017 between a named landlord[5] (who signed it) and ZK and KB (who did not)[6] was also submitted. More specifically, the bills for electricity were in the applicant's sole name. The bills for a mobile telephone number were in KB's sole name. These Vodafone bills included bills for the period from March 2017 to January 2018 and were addressed to KB at the Dublin 6 address. However, her 2017-2019 bank statements (in her sole name) and her pay slips that were submitted were addressed to her at a different address in Dublin 24. This was the address at which she had been residing (with her mother) prior to ZK's arrival in the State. The new tenancy agreement which KB and Mr. A. had entered in respect of a new residence was also provided.

17. In addition, ZK also submitted a handwritten letter from KB dated 1 April 2019, wherein it was stated that she and ZK '*started dating*' in September 2016, got married in March 2017 and that she had recently moved out in October 2017 because they were having fights. The letter stated that they were living separately and had decided to divorce. KB's name and a mobile telephone number, plus the applicant's name and a mobile number, were set out at the end of the handwritten note.

[5] This was the same landlord who had granted ZK a one-year lease on the date he arrived in the State.
[6] As *per* the papers available to the Court.

The 'Proposal to Revoke' Letter

18. On the basis of the information provided by the applicant, the Minister wrote to ZK on 30 April 2019 concerning his immigration status in the State. She set out her concerns in respect of the marriage and the permissions that had been given to him on foot thereof. The letter outlined ZK's immigration history, noting his unlawful entry into the State, his subsequent marriage to the EU citizen in March 2017 and his separation from her in October 2017—a date which preceded the grant of his residence card. It also noted that he had submitted the application for EU Treaty rights shortly after the marriage, and that an application for international protection was then withdrawn in July 2017.

19. The letter of 30 April 2019 noted the short duration of the relationship ('*a mere 9 weeks*') prior to the submission of a notice of intention to marry. It also raised concerns in relation to the documentation submitted. The documentation was dated in '*extreme close proximity*' to the marriage. The difference between KB's address as *per* her pay slips and bank account, and ZK's address during a period when he claimed they were residing together, was also noted. The applicant had not explained why he had provided documentation which specified the EU citizen residing at two separate addresses during the same timeframe. The letter further noted that utility bills issued only in KB's name were given as '*evidence*' of the couple's joint residence after October 2017, even though KB had said that she had moved out by then. Based on these '*inconsistencies*', the applicant was told that there were concerns about the veracity of the documentation submitted as '*evidence*' of his residence with the EU citizen.

20. The letter stated that the accelerated nature of the applicant's marriage coupled with his precarious immigration status was, in the Minister's view, '*not indicative of the formation of a genuine relationship*' and indicated that the marriage may have been one of convenience, contracted to enable the applicant to pursue a right of residence in the State which he would not otherwise have been entitled to do. ZK was advised that Member States may withdraw

rights conferred under the Directive in the case of an abuse of rights, such as, marriages of convenience. He was warned that, if such were found to be the case, the Minister would proceed to revoke the permission granted. Based on the concerns set out in the letter, ZK was invited to provide representations on why his permission to remain should not be invalidated.

21. ZK replied by way of a typed unsigned letter, dated 16 July 2019, which was said to be from him and KB.[7] Whilst KB's name is typed at the end of the letter, she is referred to, throughout the letter, in the third person. The letter set out the history of the relationship. It stated that the couple had started living together '*not officially*' after he had arrived in Ireland and that after residing together, they developed strong feelings for each other and sent a 'Notice of Intention to Marry' in November 2016. The landlord had given them the official residential tenancy as a married couple on 8 March 2017. The reference in an earlier letter to the couple breaking up in October 2017 was a mistake. They had broken up in October 2018. KB had paid the '*internet Vodafone bills*' and ZK paid the electricity bills. ZK had returned to Georgia from 27 July until 16 August 2017, and KB joined him there for a week. The letter ended with an expression of hope that the mistake '*we made*' on a previous letter would not be a problem '*for us*'.

The First Instance Decision

22. On 8 August 2019, the Minister, having considered the representations made, revoked the applicant's residence card on the basis of Regulations 27(1) and 28(1) of the 2015 Regulations. The letter confirmed that the information provided had not allayed the concerns raised nor was it indicative of a genuine relationship, and that the marriage was deemed to be '*one of convenience*'. The specific difficulties identified included: the applicant's illegal immigration history, the absence of documentation to substantiate ZK's claim of residence with

[7] Emphasis here and throughout the judgment is mine unless otherwise indicated.

KB prior to the marriage, the submission of a notice of intention to marry after '*a mere 9 weeks*' of a relationship, the fact that all documentation submitted was dated in close proximity to the date of the marriage, and the inconsistencies regarding KB's residence, including, Vodafone bills in her sole name only, indicating one address (Dublin 6) and her bank statements and pay slips for the same period indicating a different (Dublin 24) address. The explanation which ZK had offered for this, namely, that the KB's mother was sick and needed constant attention and that KB had easy access to her bank statements at all times, was not considered sufficient to allay the concerns raised by the Minister.

23. Based on the above, the Minister's letter stated that she was satisfied that the documentation provided in support of ZK's application was false and misleading as to a material fact. It confirmed that the Minister had decided to revoke the applicant's permission to remain in the State. The Minister was satisfied that the permission held by ZK was invalid as the documentation provided, evidencing such entitlement to reside, was found to be false. It said that the Minister was further satisfied that the marriage contracted between the applicant and the EU citizen was one of convenience. ZK was directed to report to the local Immigration Office in order to have the Stamp 4 endorsement on his passport cancelled.

24. ZK was advised of his right to request a review of the decision made.[8]

The Request for Review

25. On 20 September 2019, ZK, through his solicitors, submitted a request for a review of the Minister's decision. A completed Form EU4, dated 11 September 2019, together with representations by his solicitors were submitted. Printouts of text messages dating back to September 2016 were enclosed as evidence of a '*long distance relationship*'. The Minister's reference to a relationship of '*a mere 9 weeks*' was said to be factually incorrect, and it was

[8] Regulation 25 of the 2015 Regulations.

claimed that the Minister had failed to address ZK's earlier account of the online relationship. Case law was cited in support of the proposition that the onus rests with the Minister to prove that a marriage is one based solely on convenience. It was submitted that the explanation given for KB's maintenance of her Dublin 24 address was reasonable. Letters from the couple's friends were also submitted in support of the contention that the relationship was genuine. Also included were a letter from their landlord to say that he was aware ZK and KB were living together prior to the marriage and a letter of 19 September 2019 from 'Hidden Hearing', which stated that ZK and his wife had attended its clinic twice *'in Septembe*r' and that, due to a problem with the computer system, the dates of such visits were not available. Of note, the applicant's solicitors stated in their letter of 20 September 2019:

> "*All relevant document and proofs at [the applicant's] disposal have been submitted and a satisfactory explanation regarding the lack of other relevant proofs has been given. [The applicant's] statements are coherent and plausible and do not run counter to available specific and general information relevant to his case.*"

26. On three occasions thereafter (23 July 2020, 3 November 2020 and 14 January 2021), the applicant's solicitors sent letters to the Minister, initially, seeking an update on the review application and, later, calling upon the Minister to '*issue a decision'* within 14 days, threatening judicial reviewing proceedings in default thereof.

The Review Decision

27. An official in the Department of Justice prepared a 'Recommendation Submission' on 24 January 2021. The recommendation observed that the transcript of text messages claimed to have been exchanged from May to August 2016 could not be validated as messages passing between the applicant and KB, as there were no names or telephone numbers identified on those messages. It was further observed that there was no suggestion of any financial commitments having been made to each other nor had they any joint assets or liabilities. There

was no '*useful information*' in respect of the relationship before or after the marriage. Reference was also made to the '*accelerated nature of the couple's relationship and decision to marry*'. The recommendation concluded that the marriage was never genuine and that it should be '*disregarded*' for the purposes of immigration.

28. On 1 February 2021, the first instance decision to revoke the applicant's residence card was upheld. The letter confirming this set out the relevant background to the application and the conclusions which had underpinned the initial decision. It then addressed the representations made by the applicant in support of a review. In respect of the transcript of messages furnished as documentary evidence of a relationship '*nurtured*' via text messages, phone calls and video chats, the Minister considered that this evidence could not be '*verified*' as messages exchanged between ZK and KB. There were neither names nor numbers identified in the transcript. The Minister also considered that there was '*little information or documentation on file*' in respect of the couple's relationship. There was nothing to suggest that the parties had made '*any financial commitments to each other*', nor had they '*any joint assets or liabilities'*. They had not '*travelled or lived together outside the State*', nor had they '*lived together for any significant length of time in this State*'. In the Minister's view, there was not much by way of useful information or documentation on file in respect of the parties' relationship prior to or after the marriage. The '*accelerated nature*' of the relationship – having met in-person for the first time, moved in together and married '*within a period of just seven months*' – was noted, as was the applicant's '*precarious*' immigration position when the decision to marry was made.

29. The Minister also found it '*very difficult to believe that the EU citizen . . . would misremember the date upon which she left [the] marriage by an entire year*'. Dissatisfaction was also expressed with the material tendered as proof of cohabitation. It was not accepted that the EU citizen would have no documentation to evidence her residence with the applicant

other than utility bills in her sole name, from one company. The letter to ZK continued: '*You contend that you lived with [KB] for two years, and it is difficult to understand how she would not have other documentary evidence of her residence in her possession*'. On foot of those difficulties, the Minister indicated her belief that ZK intended to mislead her '*into thinking that the EU citizen was residing with you, when this was not the case*'.

30. Having regard to all of the above, the Minister concluded as follows:

"*Having considered all of the information, documentation, and submissions on all of your files, the Minister is not persuaded that the decision of 08/08/2019 should be overturned. You have failed to establish that the Deciding Officer erred in fact or law when revoking your residence card. The Minster* [*sic*] *finds that the appropriate procedures were used and that the correct interpretation of the Regulations and the Directive was applied. In making her determination, the Deciding Officer in this case considered all of the information and documentation available to her.*

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

Moreover, the Minister is satisfied that your marriage to [*KB*] *was one of convenience in accordance with Regulation 28 of the Regulations that was contracted in an attempt to obtain an immigration permission to which you would not otherwise be entitled. This marriage was never genuine, and it will be disregarded for the purposes of immigration. As such, any immigration permissions that were provided to you on the basis of this marriage were not valid permissions.*

Against this background, the Minister has decided to affirm the decision of 08/08/2019 to revoke your residence card as a family member of an EU citizen.

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

Your EU Treaty Rights application is now closed. It is noted that you now have no immigration status in the State. The Minister will be in contact with you in due course in respect of your position in the State."

31. A mailshot letter seeking up-to-date information in respect of the '*current activities*' of ZK and KB which was dated the following day (2 February 2021), was sent, in error, during the Covid-19 pandemic. (The High Court accepted that this was erroneous and not material to the decision made in respect of the applicant and there is no appeal of the High Court's finding on this point.)

32. On 24 February 2021, the applicant's solicitor acknowledged receipt of the review decision. He asked the Minister to refer the matter for '*a full Garda investigation and/or an independent, merits-based, appeal to an independent person or body*'. No such request had been made by the applicant or his solicitor prior to the issuing of the impugned decision.

33. On 9 March 2021, the Minister wrote to the applicant's solicitor indicating that she remained satisfied with the findings made in the review decision and that the application was closed.

34. On 20 April 2021, the applicant's solicitor deemed the review decision to be '*unlawful*' and sought a '*full oral hearing*' of ZK's application for review, threatening judicial review proceedings in default thereof. This was the first time that the applicant had raised the issue of an oral hearing or interview or had claimed that the absence of such amounted to a breach of fair procedures. This request was made some eleven weeks after the review decision had issued.

The High Court Application

35. In his application for judicial review, ZK challenged the lawfulness of the Minister's finding that his marriage was one of convenience. He also challenged the lawfulness of the Minister's determination to revoke his residence card in the absence of any oral and/or

independent, merits-based hearing. He asked the High Court to determine whether the Minister's determination breached his right to fair procedures and natural and constitutional justice by making a credibility finding against him that was based solely upon a paper-based review. He submitted that there a clear failure to afford him an adequate opportunity to deal with the issue of personal credibility.

36. In their Statement of Opposition, the respondents (now appellants) submitted that the Minister's decision of 1 February 2021 to uphold, on review, the revocation of the applicant's residence card was valid '*as a matter of fact and law*' and that, at all material times, the Minister had complied with the provisions of the 2015 Regulations and the Directive. The Minister, in determining the application that was before her, adhered to fair procedures and constitutional justice in finding that the applicant had engaged in an abuse of rights and fraud in order to contrive an advantage under EU law, to which he would not otherwise have been entitled.

The High Court Judgment

37. The trial judge identified the net issue in the case as being whether the requirements of constitutional and natural justice required some form of oral hearing before a decision to revoke residence permission was made.[9] She noted the Minister's view that the requirements of natural and constitutional justice were met in the context of the relevant legislation, which provided, in express terms, for the applicant's right to know the information upon which the decision concerning him was made, together with a right to reply prior to any adverse decision being taken and a right to know the reasons for such a decision. The Minister contended that the decision in question was based on the evidence available to her and not on the basis of any

[9] Throughout the High Court judgment, the term 'oral hearing' is used interchangeably with other terms, such as, 'oral process' or 'interview'.

credibility assessment, as claimed. The trial judge then set out the background facts, which have been summarised above.

38. Having reviewed the facts and the case law opened to the High Court, Phelan J. granted an Order of Certiorari in respect of the Minister's decision of 1 February 2021, on the basis of the absence of an oral hearing. Whilst noting that no request for an oral hearing had been made prior to the decision being issued, she considered that the specific issue was '*whether or not an oral hearing was required in this case where the decision of [the Minister] turned on the credibility of the Applicant*' (at para. 60).

39. In support of her finding that the decision should be quashed, the trial court relied upon a number of decisions of the superior courts. Citing *Ezeani and Another v. Minister for Justice, Equality and Law Reform & Ors* [2011] IESC 23 ('*Ezeani*'), she observed that fair procedures require the parties concerned to be aware of the substance of matters which are adverse to their interests, and to have an opportunity to respond thereto, but that it is not always necessary to have an oral stage to the decision-maker's process. In her view, the fact that the applicants in *Ezeani* had been offered an opportunity to be interviewed, albeit separately, was material to the Supreme Court's conclusion, that the Minister, in that case, had not breached fair procedures.

40. The trial judge also considered *Galvin v. Chief Appeals Officer* [1997] 3 IR 240 ('*Galvin*') in which Costello P. had found that it would have been extremely difficult, if not impossible, to arrive at a true judgment of the issues, where a conflict of fact existed, without an oral hearing. She was satisfied that the importance of an oral stage to a process involving adverse findings as to credibility, was also clear. She had regard to *SUN (South Africa) v. Refugee Applications Commissioner* [2013] 2 IR 555 ('*SUN*')[10] and to *UP v. Minister for Justice* [2014] IEHC 567 ('*UP*') in coming to her conclusion in this regard. Both cases

[10] In her judgment, Phelan J. refers to this case by the title *N (SU) (South Africa) v. Refugee Applications Commissioner* [2013] 2 IR 555, notwithstanding the Irish Reports citation she uses refers to it as *SUN*.

concerned the absence of a right for an oral hearing when a decision maker was exercising a discretion to make a specific finding under s. 13(5) of the Refugee Act 1996.

41. Referring to the judgment of this Court in *Balc v. Minister for Justice & Equality* [2018] IECA 76 ('*Balc*'), the trial judge noted that Peart J. (at para. 77) had held that the right to an effective remedy specified in Article 47 of the Charter of Fundamental Rights of the European Union did *not* require an oral hearing in every administrative decision and that, if the Directive required an oral hearing, then it would have made that intention clear. Phelan J. was satisfied that '*Balc is not authority for the wider proposition, however, that an oral hearing is never required but rather that it is not always or even usually required*'.

42. Particular reliance was also placed by the trial judge on the Supreme Court's decision in *MM v. Minister for Justice* [2018] 1 ILRM 361 ('*MM*'). In *MM*, O'Donnell J. (as he then was) held that in most cases it is inevitable that an oral hearing, and cross-examination, would be required where two witnesses as to facts give contradictory accounts which cannot be reconciled. Phelan J. considered that the judgment of O'Donnell in *MM* resonated more forcefully in the present case, in circumstances where there had been no oral process prior to the decision in issue (at para. 70). *MM* concerned an application for subsidiary protection under Council Directive 2004/83/EC ('the Qualification Directive')[11] and the Supreme Court had noted that an oral interview had already taken place at an earlier stage in the context of the applicant's claim for asylum.

43. The trial judge also had regard to the Supreme Court's decision in *IX v. Chief International Protection Office* [2020] IESC 44 ('*IX*') in coming to her decision. She observed that, as there was nothing '*demonstrably false*' in the applicant's application, the Minister could only have come to her conclusion based on an assessment of his credibility and a position taken

[11] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

as to the likely truthfulness of the account that he had given (at para. 71). Given the '*serious accusations and suggestions*' made against the applicant, Phelan J. accepted (at para. 72) that there was '*some*' analogy to be drawn between ZK's situation and the revocation of citizenship which was in issue in *Damache v. Minister for Justice* [2020] IESC 63 ('*Damache*'). She found that, while the impact of the decision in ZK's case was *'not quite the same'* as in *Damache,* both entailed '*the curtailment of important rights with significant consequences*'.

44. The question of what an applicant might seek to present to the Minister in an oral interview which could not or cannot be addressed in writing was, in the trial judge's view, a '*material*' consideration. She noted that a failure to identify such matters '*could be fatal*' depending on the circumstances. However, she considered that question to be '*less important*' in the instant case because the applicant's personal credibility was in issue (at para. 77). Phelan J. held (at para. 78) that:

> "*...fair procedures in this case required an opportunity for the Applicant and his EU national spouse to be assessed as to the plausibility of their account and the genuineness of their marriage through the process of a face-to-face meeting or hearing.*"

45. With reference to Regulation 28(5) of the 2015 Regulations, the trial judge considered it unclear how the Minister could obtain information as to whether the parties were familiar with each other other's personal details in the absence of an opportunity to raise questions with them – either together or separately – and to assess the responses received. She found (at para. 78) that, in the absence of a process which allowed for the familiarity of the parties to be considered when deciding if a marriage of convenience exists or not, '*the case for an oral interview of some kind is more compelling*'.

46. Finally, the trial court rejected the two specific complaints which the applicant advanced as grounds in respect of the relief of *certiorari*. These concerned (i) an alleged failure to have regard to have all relevant factors and materials, and (ii) an alleged '*material error of fact*'. Nevertheless, she proceeded to make an Order for Certiorari on the basis that there had been a

breach of fair procedures in the decision-making process, by reason of the absence of an oral interview or hearing.

The Appeal

47. The appellants contend that the trial judge erred, in fact and in law, on a number of fronts. They say that an oral hearing was not required because ZK had been put on notice of the matters of concern and had been given ample opportunity to furnish representations in relation thereto. His failure to seek such a hearing before the review decision issued, was material, as was his failure to identify the matters which he would address at an oral hearing. Moreover, the 2015 Regulations do not *oblige* the Minister to have regard to the parties' familiarity with each other's personal details. The assessment in which the Minister was engaged did not turn on ZK's credibility, and the circumstances were not as directly analogous to international protection applications or the potential loss of citizenship as Phelan J. had understood them to be. They say that this Court's decision in *Balc* is authority for the proposition that an oral hearing is not mandated by the Free Movement Directive, nor even required to be available, if sought. Finally, ZK lacked the standing to challenge the lack of an oral hearing, because, as well as failing to request such a hearing, he stated that '*all relevant documentation and proofs…have been submitted*' when calling for a decision to be issued.

48. Opposing the appeal, the applicant denies that the trial judge erred on the grounds set out by the appellants. Given the seriousness of the matter and the potentially life-changing consequences of the decision, he was entitled to a wide panoply of procedural protections. His failure to request an oral hearing was not, in and of itself, determinative but was one of many factors to consider when deciding if a hearing was necessary ('*Galvin*'). His failure to identify any issues which required an oral hearing was not held to be 'immaterial', by Phelan J. She merely determined that it was a '*less important*' consideration in circumstances where the

Minister's decision turned on personal credibility. An oral hearing would have provided the Minister with an opportunity to inquire as to the nature of the relationship between the parties prior to the marriage and their familiarity with the other's personal details, to which she is required to have regard pursuant to Regulation 28(5)(b) of the 2015 Regulations. The Minister's decision turned on credibility, and an oral hearing would have provided ZK with the opportunity of persuading the Minister that he was personally credible (*SUN*). It is not open to the appellants to now '*disavow*' the body of asylum jurisprudence in relation to credibility assessments. Phelan J. did not hold *Damache* to be directly analogous, in terms of the requirements of natural and constitutional justice. She simply observed that both cases entailed the curtailment and revocation of important rights. The decision in *Balc* was not misapplied by the trial judge. The appellants' acceptance that an oral hearing is not precluded is difficult to square with their reliance on *Balc*. ZK's failure to request an oral hearing before the review decision issued does not amount to a waiver of his right, as the need only '*crystallised*' for him when it became apparent that his '*extensive representations*' were insufficient to alleviate the Minister's concerns. Finally, the Minister has professed to abide by a fixed policy in processing applications for residence cards.

THE LAW

European Union Law

49. The Directive makes provision for Member States to give effect to EU citizens' freedom of movement and residence. This includes directing the Members States on the provision of residence cards to '*family members*' of EU citizens. Article 27(1) provides that, subject to certain provisions, '*Member States may restrict the freedom of movement <u>and residence</u> of Union citizens and their family members…on grounds of public policy, public security or public health.*'

50. Article 35 provides that any measure taken by Member States in cases of abuse of rights shall be proportionate and subject to the procedural safeguards specified in Articles 30 and 31. Article 30 of the Directive - '*Notification of decisions*' - provides that a person shall be notified in writing of any decision in such a way that the person is able to comprehend its content and implications. It requires the person to be informed precisely and in full of the reasons on which the decision was taken unless that would be contrary to the interests of state security. The notification should also give details on how to appeal.

51. Article 31 provides that any person concerned should have access to judicial and administrative redress procedures to appeal or seek a review of a decision taken against them. It also provides for a procedural entitlement to seek an interim order staying removal from the host Member State, pending appeal or judicial review. It does not provide for an oral hearing or interview.

52. The Directive has been transposed into Irish law by the 2015 Regulations. Regulation 25(1) provides that a person who has an entitlement to enter or to reside in the State pursuant to the Regulations '*may seek a review of any decision concerning such entitlement*'. Such a review shall be carried out by an officer of the Minister '*other than the person who made the decision*' and '*of a grade senior to the grade of the person who made the decision*'.[12] The officer carrying out the review shall '*have regard to the information contained in the application and may make or cause to be made such enquiries as he or she considers appropriate*'.[13] That officer may confirm the decision that is subject to review or set it aside and substitute his or her determination for the decision.

53. Regulation 27(1) provides that the Minister '*may revoke, refuse to make or refuse to grant*' a right, entitlement or status where she is concerned that it is being claimed '*on the basis*

[12] Regulation 25(4).
[13] Regulation 25(5).

of fraud or abuse of rights'. An '*abuse of rights*' shall include a marriage of convenience.[14] Where the Minister suspects '*on reasonable grounds*' that a right is being claimed, or has been obtained, on the basis of fraud or an abuse of rights, then she is entitled to '*make such enquiries and to obtain such information as is reasonably necessary to investigate the matter*'.[15] When the Minister exercises her power under Regulation 27(1), 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).*"[16]

54. In making her determination of any matter relevant to the 2015 Regulations, the Minister may, pursuant to Regulation 28(1), *'disregard a particular marriage as a factor bearing on that determination where [she] deems or determines that marriage to be a marriage of convenience*'. Where the Minister, in taking into account a marriage for the purpose of making a determination of any matter relevant to the 2015 Regulations, has '*reasonable grounds*' for considering that the marriage is a marriage of convenience, 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*."[17]

55. The Minister shall determine whether a marriage is one of convenience having regard to '*any information furnished under these Regulations*' and to such of the following matters as appear to the Minister to be relevant in the circumstances:

> "...

[14] Regulation 27(4).
[15] Regulation 27(2).
[16] Regulation 27(3).
[17] Regulation 28(2).

(ii) whether the parties have been residing together as husband and wife, and, if so, the length of time during which they have so resided;

(iii) the extent to which the parties have been sharing income and outgoings;

…

(v) the nature of the relationship between the parties prior to the marriage;

(vi) whether the parties are familiar with the other's personal details;

(vii) whether the parties speak a language that is understood by both of them;

…

(ix) whether the parties have a continuing commitment to mutual emotional and financial support;

(x) the history of each of the parties [. . .]'

(xi) whether any previous conduct of either of the parties indicates that either of them has previously arranged a marriage of convenience or otherwise attempted to circumvent the immigration laws of the State or any other state';

(xii) the immigration status of the parties in the State or in any other state;

(xiv) any other matters which appear to the Minister to raise reasonable grounds for considering the marriage to be a marriage of convenience."[18]

The term '*marriage of convenience*' refers to a marriage contracted '*for the sole purpose of obtaining an entitlement*' under the Directive or the 2015 Regulations or under any measure adopted by a Member State to transpose the Directive, or under any national law concerning the entry and residence of foreign nationals.[19]

The Commission's Handbook on Marriages of Convenience

56. The European Commission has published a '*Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens*' ('the Handbook).[20] It provides '*guidance*' to Member States on approaching the implementation of the Directive with regard to the revocation of a residence

[18] Regulation 28(5).
[19] Regulation 28(6).
[20] SWD (2014) 284.

card on the basis of a marriage of convenience. In terms of proving that a marriage is one of convenience, the Handbook, reflecting the general principle that he who alleges must prove, provides that the burden rests on the national authorities who suspect that a non-EU national has entered into a marriage of convenience for the sole purpose of obtaining a derived right of free movement and residence.[21] However, it states that a national authority may formally adopt a decision restricting EU rights to residence on the grounds of a marriage being a marriage of convenience where the authority has '*sufficient evidence*' to conclude that the marriage is one of convenience. [22] The decision must be proportionate, requiring '*an individual assessment*' that complies with all the '*material safeguards*' provided for in national, EU and international law.[23]

57. The Handbook recalls that Art. 30 of the Directive obliges Member States to ensure that the parties concerned understand '*the situation they have found themselves in*' so that they may '*take effective steps to ensure their defence*', and to ensure access to judicial review.[24] It notes that parties subject to a decision to revoke a residence card must have access to administrative and judicial redress procedures, and the available redress procedures '*must allow for an examination not only of the legality of the decision but also of the facts and circumstances on which the proposed measure is based*'.[25]

58. In terms of investigating marriages of convenience, the Handbook identifies '*simultaneous interviews or questionnaires*' as one of a number of main '*investigative techniques*' used by national authorities to investigate marriages of convenience. Other techniques listed in the Handbook include document and background checks and inspections and community-based checks to ascertain whether the couple is living together and jointly

[21] Section 3.2, p. 28
[22] Section 3.3, p. 29.
[23] Section 3.1.1, p. 18 and section 3.3, p. 29.
[24] Section 3.3.1, p. 30.
[25] Section 3.3.2, pp. 31-32.

administering their household.[26] The Handbook does not state that an interview or oral hearing is mandatory or always required in reaching a determination that a marriage is one of convenience.

Irish Law

59. A considerable body of jurisprudence was opened to the Court during the course of this appeal. In particular, the Court was invited to consider cases across several areas, including, case law on the consequences of a failure to request an oral hearing, on the lawfulness of adopting a fixed policy in administrative decision-making, on the reluctance of courts, generally, to interfere with a process once finalised, on the possibility of a waiver of important natural and constitutional rights, on whether judicial review constitutes an effective remedy, and, on the circumstances under which natural and constitutional justice would require that an oral hearing be held. I do not propose to consider each case cited, nor discuss at length the issues which were not central to this appeal. I propose only to highlight the key principles emanating from the relevant jurisprudence on the matters that were to the forefront of the parties' respective arguments.

On a failure to request an oral hearing

60. On the applicant's failure to request an oral hearing, both parties invited the Court to consider the case of *Galvin*, in which Costello P. held that in determining the requirements of fair procedures, account should be taken, as one factor among others, of whether a request for a hearing had been made. This Court's judgment in *Balc* was also discussed by the parties with the appellants contending that it supports the proposition that a failure to request an oral

[26] Section 4.5, p. 42.

interview could '*affect standing to challenge on that ground*'. In arguing that such failure *must* negatively affect an applicant's standing to challenge a decision, the appellants also relied upon *TO (Nigeria) v. Minister for Justice & Equality and Others* [2018] IEHC 256 ('*TO*') (itself based, in part, on *ISOF v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457 ('*ISOF*')).[27] Humphreys J.'s decision in *TO*, as one of nine appeals, was upheld by this Court in *FM and Others v. Minister for Justice* [2020] IECA 184 ('*FM*') in which Faherty J. found (at para. 32), *inter alia*, that the appellants had not identified the type of '*exceptional situation*' referred to by O'Donnell J. (at para. 25 of his judgment in *MM*), '*such that it might have rendered it imperative for the Minister to permit an oral interview*'.

61. The applicant, ZK, invited the Court to consider a series of cases involving the Financial Services Ombudsman ('the Ombudsman' or 'the FSO'), which indicate that, in certain circumstances, an oral hearing may be required irrespective of whether one was requested. The courts have found that, where a body has the power to hold an oral hearing, it should consider doing so where a '*conflict of material fact*' arises (*J & E Davy v. Financial Services Ombudsman and Others* [2010] 3 IR 324 ('*Davy*')). The Ombudsman's '*broad discretion*' to decide whether an oral hearing is required is subject to the dictates of fairness (*Hyde v. Financial Services Ombudsman* [2011] IEHC 422 ('*Hyde*')). Where a decision not to hold an oral hearing would preclude applicants from adequately stating their case, '*the very substance of [their] constitutional right to fair procedures*' could be negated (*Lyons and Another v. Financial Services Ombudsman* [2011] IEHC 454 ('*Lyons*')). In some circumstances, the necessity of an oral hearing will be such that a request for same will not be necessary (*O'Brien v. Financial Services Ombudsman* [2014] IEHC 111 ('*O'Brien v. Ombudsman*'). In *O'Brien v. Ombudsman*, O'Malley J. did not consider the Ombudsman's failure to inform a legally

[27] They also relied on *JMN (A Minor) v. Minister for Justice* [2017] IEHC 115 ('*JMN*'), *Voivod v. Minister for Justice* [2018] IEHC 647 ('*Voivod*'), and *SO (Nigeria) v. Minister for Justice* [2019] IEHC 573 ('*SO*').

represented party that an oral hearing should be sought if such were thought to be necessary, to amount to an error of such significance as to vitiate the impugned decision (at para. 62).

The principle of non-interference with a finalised process

62. In principle, courts, generally, are reluctant to allow retroactive interference with settled proceedings. The appellants referred to *Marckx v Belgium* [1979] 2 EHRR 330 ('*Marckx*'), in which the European Court of Human Rights endorsed the proposition that '*the principle of legal certainty*', which is '*inherent in the law of the Convention as in Community Law*', dispensed Belgium from reopening legal acts or situations that antedated the delivery of the Strasbourg Court's judgment. It noted that a similar solution is common to a number of Contracting States that have a constitutional court, in that their public law limits the retroactive effect of court decisions that annul legislation.

63. The Irish courts are reluctant, in principle, to indulge those who have '*slept on their rights*'. In *Murphy v Attorney General* [1982] IR 241 ('*Murphy*'), the Supreme Court held, *inter alia*, that the plaintiffs were entitled to be repaid the monies collected under the invalidly imposed tax legislation from the first day of the financial year following the year in which they brought their challenge. It found that up to that point, the State had been entitled to proceed on the assumption that the taxes were validly imposed. Henchy J.'s observed (at p. 313-314):

> "*For a variety of reasons, the law recognises that in certain circumstances, no matter how unfounded in law certain conduct may have been, no matter how unwarranted its operation in a particular case, what has happened has happened, and cannot, or should not, be undone. The irreversible progressions and bye-products of time, the compulsion of public order and of the common good, the aversion of the law from giving a hearing to those who have slept on their rights, the quality of legality – even irreversibility – that tends to attach to what has become inveterate or has been widely accepted or acted upon, the recognition that even in the short term the accomplished fact may sometimes acquire*

an inviolable sacredness, these and other facts may concert what has been done under an unconstitutional, or otherwise void, law into an acceptable part of corpus juris."

64. The principle of non-interference with a finalised process has been applied by the Supreme Court in *A v. Governor of Arbour Hill Prison* [2006] 4 IR 88 ('*A*'), a case in which applicant was convicted under s. 1(1) of the Criminal Law (Amendment) Act 1935 of unlawful carnal knowledge of a girl under the age of fifteen. Following the Supreme Court's finding that that Act was unconstitutional (*CC v. Ireland* [2006] IESC 33), he sought release from custody pursuant to Article 40.4.1˚. In rejecting his arguments, the Supreme Court held (at p. 116) that '*the retrospective effect of a judicial decision is excluded from cases already finally determined*'.

65. Exceptions to this principle may arise. In *A*, Murray C.J. (at p. 142) did not exclude, by way of such exception '*that the grounds upon which a court declares a statute to be unconstitutional, or some extreme feature of an individual case, might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that verdicts in particular cases or a particular class of cases be not allowed to stand.*"

In this regard reference was also made to the judgment of Hardiman J. in *DPP v. O'Brien* [2012] IECCA 68 ('*DPP v. O'Brien*'), in which Hardiman J. set out a number of grounds for exception. Building on those grounds, Kearns J. in *DPP v. Cronin (No. 2)* [2006] 4 IR 329 ('*Cronin*') took the view (at p. 346) that:

"*some error or oversight of substance, sufficient to ground an apprehension that a real injustice has occurred, must be demonstrated before the court should allow a point not taken at trial to be argued on appeal. There must in addition be some sort of explanation tendered to explain why the particular point was not taken.*"

66. The Supreme Court has held that, where an administrative decision is appealed to the High Court, a new point, that had not been raised before the maker of that decision, should not be entertained by the Court. Such was the case in *Rotunda Hospital v. Information*

Commissioner [2013] 1 IR 1 ('*Rotunda*') and *ENET v. Information Commissioner* [2021] 2 ILRM 81 ('*ENET*'). In particular, at p. 29 of *Rotunda*, Fennelly J. opined:

> "*I think it is an integral part of any appeal process, other than possibly an appeal by complete re-hearing, that any point of law advanced on appeal shall have been advanced, argued and determined at first instance.*"

Macken J. in *Rotunda* (at p. 79) considered that the general law requires that '*a party will bring forward, at least in the context of legal proceedings, his entire case, so that there is no incremental decision making process'.*

On the application of a fixed policy

67. There was no serious dispute that in exercising her discretion pursuant to the 2015 Regulations, the Minister may adopt a usual practice. However, such a practice must not unduly fetter ministerial discretion. *Mishra v. Minister for Justice and Another* [1996] 1 IR 189 ('*Mishra*') concerned a rejected application for naturalisation in which the applicant was told that it was the policy of successive Ministers not to provide reasons for their decisions and that there was no set form of appeal against such a decision. Kelly J. described the Minister's discretion as '*absolute*', subject only to compliance with the requirements of constitutional and natural justice. Whilst the applicant had been determined to fall short of the criteria for citizenship, he thought it would have been appropriate for the Minister to at least consider exercising his discretion rather than adhering exclusively to his general policy. The exercise of a true discretion '*was to be distinguished from one which has become somewhat atrophied by reliance upon a policy or rules, which although useful and permissible, may, if care is not taken, have a stultifying effect*.' Kelly J. was not suggesting any impropriety in the Minister's adoption of a policy or a set of rules, but such a policy must guide and not govern the exercise of ministerial discretion.

The Directive and the 2015 Regulations

68. It was not disputed that neither the Directive nor the 2015 Regulations oblige the Minister to conduct an oral hearing as part of the decision-making process. The Court of Justice of the European Union ('the CJEU') outlined the requirements of Articles 30 and 31 of the Directive in *Case C-300/11, ZZ v Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:363 ('*ZZ*')). Essentially, the crux of the obligations on Member States lies in informing applicants about matters that are relevant to proceedings in which they are involved and affording them an opportunity to address any issues arising.

69. The question of whether an oral hearing was required, specifically, under the Directive, has been raised previously before this Court in *Balc*. That case concerned the removal (and exclusion) of a foreign national, who, unlike the applicant here, was an EU citizen. In *Balc*, the appellant's removal was directed pursuant to the 2006 and 2008 Regulations and was based on his conviction for sexual assault and his being deemed to pose a threat to public policy or security. He contended, *inter alia*, that the process of administrative review, as provided for in the 2006 and 2008 Regulations, was not compliant with the requirements of Art. 31 of the Directive, because he had not been afforded an oral hearing.

70. Peart J. did not agree. He found that the requirements of Article 31 had been fulfilled, and that an effective remedy was provided, by the redress procedures that had been afforded to the applicant and by the availability of judicial review. At para. 77 of his judgment he stated:

> "*Quite apart from the fact that the appellants never sought an oral hearing when seeking a review (which might affect standing to challenge on that ground but is neither here nor there as far as the proper interpretation of the Directive is concerned), I am satisfied that an oral hearing is not mandated or even required to be available if sought. The Minister is correct to refer to the difference between the wording of the Procedures Directive and the present Directive in this respect. If it was intended that an oral hearing was required, the Directive would have made that intention clear. The fact that Article 47 of the Charter refers to an effective remedy before a tribunal must not be taken as mandating in the case*

of every administrative decision that an aggrieved party must have a review with an oral hearing before an independent judicial tribunal. If it was that prescriptive the Directive itself would have so specified. The availability of judicial review…fulfils any requirement for judicial oversight of the decision that is made on the merits."

71. In *Balc* Peart J. was satisfied that the ground for removal and exclusion which the appellant said had not been taken into consideration during the internal review, could have been raised by the appellant in writing during that process. In such circumstances, he had not been disadvantaged by the lack of an oral hearing (at para. 79).

72. A number of recent High Court cases have considered the question of whether an oral hearing is required where decisions on the revocation of a residence permission are made (see *SK and JK v. Minister for Justice* [2022] IEHC 591, *H v. Minister for Justice* [2022] IEHC 271 and *Waila and Another v. Minister for Justice & Equality* [2022] IEHC 339). As these decisions are under appeal to this Court, I do not propose to consider them at this juncture.

On judicial review as an effective remedy

73. As the net issue in the case was whether the requirements of natural and constitutional justice required some form or oral stage in the decision-making process, the parties did not focus their arguments, to any great extent, on the effectiveness or otherwise of judicial review as a remedy. That said, the appellants submitted that the applicant had exercised his right to an effective remedy, including, by judicial review and they relied on *Balc* to say that judicial review fulfils any requirement for judicial oversight of the impugned decision that was made on the merits. They also referred to *Pervaiz v. Minister for Justice & Equality* [2020] IESC 27 ('*Pervaiz*'), where the Supreme Court was satisfied that Regulation 25 provided appropriate safeguards to ensure that a fair review is conducted. The applicant, on the other hand, citing *Stefan v Minister for Justice* [2001] 4 IR 203 ('*Stefan*') submitted that a '*fair appeal does not cure an unfair hearing*'.

On the requirements of natural and constitutional justice

74. In several immigration and asylum cases, the Irish courts have considered the dictates of fairness but have not deemed that, invariably, an oral hearing is required. Fennelly J. in *Ezeani* noted (at para, 39) the '*requirements of fair procedures are not set in stone*' and that the '*overriding requirement is that the person affected be given reasonable notice of matters which are of concern to the decision maker*'. He found that the type of fair procedures identified in *Re Haughey* [1971] IR 217 ('*Haughey*'), which approached those required in criminal proceedings, do not arise in an administrative context. The test is whether affected parties have had a fair opportunity to prepare and to respond to any matters raised which are adverse to their interests (at para. 45).

75. The thrust of the case law suggest that the requirements of fair procedures depend on the individual circumstances of a given case (see *State (Williams) v Army Pension Board* [1981] ILRM 379 ('*Williams*'), *Galvin* and *Atlantean v Minister for Communications and Natural Resources* [2007] IEHC 233). In *Atlantean*, Clarke J. (as he then was) considered that any party who is entitled to the benefit of procedures complying with the rules of constitutional justice is entitled to know the case against him cannot be doubted but that it was also well settled '*that the precise application of the rules of constitutional justice depends on all the circumstances of the case under consideration*'.

76. As a general principle, the more serious the circumstances, or the more severe the consequences of a decision, the more stringent the requirements of fairness will be (see *Damache*). However, even where the consequences could be described as '*disastrous*' for an applicant, an oral hearing will not automatically be required (see *Mooney v. An Post* [1998] 4 IR 288 ('*Mooney*')).

77. What does appear to be clear is that insofar as administrative decision-making processes are concerned, '*an endless slide into the application of criminal-trial-type rights as in In re*

Haughey [1971] IR 217' is to be avoided (see *Shatter v Guerin* [2021] 2 IR 415 ('*Shatter*'), at p. 537, and *Ezeani*). The bare minimum that is required in such a process is that an applicant be put on notice of any issues that arise, which may affect his or her application, and be afforded the opportunity to address those issues (see *Glover v. BLN* [1973] IR 388 ('*Glover*') and *Ezeani*). However, that requirement may be discharged with the provision of one opportunity to address such an issue. There is no right to multiple opportunities to relitigate the same issue (see *Nicolai v. Minister for Justice* [2005] IEHC 345 ('*Nicolai*')).[28] Moreover, that right to address matters of concern may, more often than not, be adequately realised through written submissions (see, for example, *Williams*, at p. 382, and *Z v. Minister for Justice* [2002] 2 ILRM 215 ('*Z*'), at p. 239).

78. The courts have recognised that credibility assessments are central to the determination of international protection applications (see *MARA (Nigeria) (An Infant) v Minister for Justice* [2015] 1 IR 561 ('*MARA*')). Thus, it has been acknowledged that, where negative findings as to the personal credibility of an applicant are made, the absence of an oral hearing on appeal can be disadvantageous to the point of breaching fair procedures (see *SUN* and *UP*). Nevertheless, an oral hearing will not be necessitated in every international protection application in which the credibility of an applicant is doubted. Rather, it is where contested issues of fact could only be reconciled through cross-examination of the parties, that issues of credibility will give rise to a requirement for an oral hearing (see *XLC v. Minister for Justice* [2010] IEHC 148, *MM* and *VJ v. Minister for Justice* [2019] IESC 75 ('*VJ*')).

[28] See also *PA (Albania) v. Refugee Appeals Tribunal* [2014] IEHC 493, *MA v. Refugee Appeals Tribunal* [2015] IEHC 528, *CNK v. Minister for Justice* [2016] IEHC 424, *AMA v. Minister for Justice* [2016] IEHC 466 and *Straczek v. Minister for Justice* [2019] IEHC 155.

On the waiver of natural and constitutional rights

79. Natural and constitutional rights may be waived by the conduct of a party (see *Corrigan v. Irish Land Commission* [1977] IR 317 ('*Corrigan*'), *CC v. Early* [2006] IEHC 147 ('*CC*'), and *WM v. DPP* [2007] IESC 24 ('*WM*')). In *The State (Nicolaou) v. An Bord Uchtála* [1966] IR 567 ('*Nicolaou*'), the Supreme Court demonstrated that this may apply even to parental rights, in holding that a father seeking an order of *certiorari* quashing the adoption of his child had, through his conduct, '*disentitled*' himself to the relief he sought.

80. *WM* offers an example of waiver arising through conduct. The appellant asserted that his right to a fair trial would be breached if he were tried for historical sexual assault and rape some thirty years after the alleged event. In earlier correspondence, however, he had, in fact, invited his sisters to prosecute the complaints against him, with his solicitor stating to their solicitor that:

> "*This will enable your clients to substantiate their allegations and our client will in turn be in a position to defend them. Our client has nothing to hide and will vigorously defend any criminal prosecution (if brought).*"

By this statement, WM was deemed by Kearns J. to have made it '*abundantly clear*' that he had suffered no prejudice by reason of the passage of time (at p. 12), and that he had thus waived his entitlement to the relief sought. The facts of this case were acknowledged (at p. 13) to be '*particular and unusual*'.

81. A succinct description of the principle of acquiescence was referenced by MacMenamin J. in *CC* (at para. 26) as follows:

> "*Once an individual without other disability has full knowledge of the relevant circumstances and once that can be established or inferred from his conduct, then he will be taken to have unambiguously surrendered such rights. The same applies to natural justice*."

Discussion

82. There are two issues that fall to be determined in this appeal. The first is whether the trial judge erred in finding that the applicant's failure to request an oral hearing prior to the determination of the review, did not deprive him of standing. The second is whether the requirements of natural and constitutional justice obliged the Minister to include an oral stage or hearing in the decision-making process before confirming the decision to revoke the applicant's residence card.

The First Issue: The Failure to Request an Oral Hearing

83. The parties disagree on whether the applicant's failure to request an oral hearing was fatal to the extent that it was, essentially, determinative of the entire matter.

The Appellants' Submissions

84. The appellants say that Minister's practice in processing administrative decisions of this nature is to conduct all reviews '*on the papers*'. At no point in that process did the applicant complain about the lack of an oral hearing prior to the final determination. On the contrary, his letter of 20 September 2019 confirmed that all relevant documentation and information had been submitted and that a satisfactory explanation had been given for the absence of other proofs. ZK complained only of the delay and threatened judicial review in default of a decision being issued. In his later letter of 24 February 2021, he requested a '*full Garda investigation and/or an independent, merits-based, appeal to an independent person or body, within 14 days*', but it was not until 20 April 2023, some eleven weeks after the impugned decision had issued, that he first complained about the lack of an oral hearing.

85. The Minister was, therefore, given no opportunity to consider whether a departure from her usual practice was required, nor was any argument put to her that she should do so. ZK,

essentially, acquiesced in the process of conducting the review on the papers. If he had a right to an oral hearing then, through his conduct, he waived any entitlement thereto. In the circumstances the Minister was entitled to rely on her usual, paper-based practice, and on this Court's findings in *Balc* in which Peart J. had stated that '*an oral hearing is not mandated or even required to be available if sought*'. This position, the appellants say, is reinforced by the fact that neither the Directive nor the 2015 Regulations require that an oral hearing be held. It is '*incumbent*' upon a person who believes that fair procedures require an oral hearing, to make that case to the Minister.

86. The failure to request an oral hearing was deemed to be fatal in *TO*, in which Humphreys J. (relying upon Cooke J. in *ISOF*) found that '*[p]arties more generally have to make their point to the decision-maker before running to a court*.' Support for this proposition is also to be found in *JMN*, *Voivod* and *SO*.

87. The appellants say that the High Court's finding in *Galvin* can be distinguished on two fronts. First, the applicant therein had requested an oral hearing prior to the decision being made and, second, the legislation in issue in *Galvin* had provided, expressly, for the possibility of such a hearing.[29] Moreover, the cases involving the FSO were also concerned with an express statutory provision with respect to a discretion to hold an oral hearing.[30]

88. Citing *Murphy, A* and *DPP v. Bolger* [2013] IECCA 6 ('*Bolger*'), the appellants argued that there is a consistent principle in Irish jurisprudence that a person cannot, retrospectively, seek to invalidate a decision, judgment or liability by raising an issue for the first time after the process in question had concluded. Whereas recognised exceptions to this principle may arise where a fundamental unfairness amounting to a denial of justice exists, the applicant's claim does not fall within such exception.

[29] S. 258, Social Welfare (Consolidation) Act, 1993.
[30] S. 57CE(1), Central Bank Act, 1942.

89. The appellants submit that the applicant failed in his challenge to the impugned decision made by the Minister on the grounds actually pleaded and that he succeeded only on this '*purely procedural ground*'. He has not pointed to any additional information or evidence which he was prevented from bringing to the Minister's attention, nor has he demonstrated any prejudice caused by the absence of an oral hearing (*Z*). The issues identified by Phelan J. (at para. 79 of her judgment) were capable of being addressed in writing. The trial judge erred in finding that the applicant's failure to request an oral hearing prior to the impugned decision being made, was not determinative of the matter. While the Minister is obliged to ensure that the process is fair, she is not required to alter her usual practice, which has been endorsed by this Court in *Balc*, without any application or submission being made in respect of an oral hearing.

90. The appellants say that, even if an entitlement to an oral hearing existed, the applicant, through his conduct in demanding a decision, has waived it and/or acquiesced in the process undertaken by the Minister, and that *Nicolaou*, *Corrigan*, *CC*, and *WM* demonstrate that waiver and acquiescence may arise in respect of rights, including, '*constitutional rights of such significance as fair procedures and parental rights*'. The applicant's three letters, written to the Minister demanding a decision, place him in a position akin to the applicant in *WM*, in which Kearns J. had found that the applicant, as an inexorable result of his correspondence, was fixed with his stated position.

91. The applicant has exercised his right to an effective remedy by challenging the decision made, including, by way of judicial review. *Balc* confirms that judicial review fulfils any requirement for judicial oversight of the administrative decision that was made on the merits and *Pervaiz* confirms that Regulation 25 of the 2015 Regulations provides appropriate safeguards to ensure that a fair review is conducted.[31]

[31] Regulation 25(5) provides: '*The officer carrying out the review shall have regard to the information contained in the application and may make or cause to be made such enquiries as he or she considers appropriate and may* –

The Respondent's Submissions

92. In opposing the appeal, ZK, for his part, accepts that a failure to request an oral hearing may be relevant, but says that it is only one of many factors that should be considered when deciding on the requirements of natural and constitutional justice. He contends that the requirements of fair procedures and natural justice may vary from case to case. There are no hard and fast rules to guide the decision-maker or the courts as to when the dictates of fairness require the holding of an oral hearing (*Galvin*, at p. 251-253).

93. ZK submits that *Galvin* was relied upon in *Davy* where the Court held that the Central Bank Act, 1942 did not contemplate a full oral hearing but, rather, allowed for the possibility of examining a witness in certain circumstances, and that it may be appropriate for a decision-maker to consider holding an oral hearing in the interests of fairness, where there is a conflict of material fact. He also relies upon several cases involving the FSO to argue that the superior courts have rejected the idea that a failure to request an oral hearing is determinative in itself (*Hyde, O'Brien v. Ombudsman, Caffrey v. Financial Services Ombudsman* [2011] IEHC 285 ('*Caffrey*'). In *O'Brien v Ombudsman*, the appellant, like ZK, had not requested an oral hearing and challenged the Ombudsman's decision on the basis of his failure to hold one where there was a '*fundamental conflict of fact*'. O'Malley J. observed that '*there will be cases where the necessity to have oral evidence will render unnecessary a request in that regard*' whilst finding that the case before her was not such a case. The applicant says that *Caffrey* also supports the proposition that a failure to request an oral hearing is only ever <u>one</u> of many factors to be '*weighed in the balance*'.

94. According to ZK, the trial judge was correct in identifying that the overall scheme of the 2015 Regulations expressly allows for the possibility of an oral hearing. Regulation 25(5)

(a) Confirm the decision the subject of the review on the same or other grounds having regard to the information contained in the application for review, or
(b) Set aside the decision and substitute his or her determination for the decision.

permits an officer carrying out a review of a decision to conduct '*such enquiries as he or she considers appropriate*', and Regulation 28(2) confers on the Minister the power to request that information be provided '*either in writing or in person*.' Additionally, the Commission clearly envisages in its Handbook on alleged marriages of convenience that Member States may undertake interview-based investigations where serious doubts arise about the genuineness of marriage.

95. Contending that Regulation 23(12)(a)[32] does not apply to the applicant, because he is not subject to an exclusion order, is to miss the point. This provision contemplates the possibility of an oral element to a review and that the person to whom the review decision applies cannot be prevented from attending such a hearing.

96. Express reference to oral hearings in the relevant legislation is not an absolute necessity for the possibility of an oral hearing to arise, and in this regard, the applicant relies on the observations of Clarke J. (as he then was) in *Fitzgibbon v Law Society* [2014] IESC 48.

97. According to the applicant, the Minister's position appears to be inconsistent with her acceptance of the fact that neither the Directive nor the 2015 Regulations precludes her from holding an oral hearing. Neither requires an oral hearing be convened, *per se*. However, the Minister is obliged to ensure that the process is fair. *Mooney* and *Davy* support the contention that the absence of an express provision, guaranteeing an oral hearing, is not fatal. This is because an oral hearing constitutes an element of natural and constitutional justice and fair procedures, depending on the specific circumstances that arise and/or the severity of the consequences for an applicant. *Lyons* supports the view that, while the courts have accepted that an adjudicatory system statutorily designed to be informal and expeditious should not have

[32] '*Subject to subparagraph (b), the Minister may allow a person who is the subject of an exclusion order to re-enter the State for the purposes of attending a hearing connected with a review of a decision under these Regulations.*'

an adversarial court-style model imposed upon it, the right to fair procedures may necessitate an oral hearing no matter how inconvenient the result on the decision-making process.

98. The applicant submits that it is difficult to see how Humphreys J.'s conclusion in *TO* follows on from O'Donnell J.'s finding in *MM*. According to *MM*, one of the exceptional instances in which an oral hearing may be necessitated in a subsidiary protection application, may be where some substantial grounds for doubting a conclusion reached in the asylum application process has been raised. Moreover, *ISOF* does not support Humphreys J.'s conclusion that an applicant is required, expressly, to request an oral hearing before the decision-maker, in order to challenge a decision, on the basis that fair procedures and natural justice required an oral hearing. In any event, this aspect of *TO* has never been relied upon or referenced in any other judgment. The applicant argues that the appeal in *FM* focused on the extent to which applicants for subsidiary protection were entitled to be notified in respect of certain country of origin information reports relied upon by the Minister, rather than expressly approving Humphreys J.'s conclusion that a failure to request an oral hearing must always be fatal.

99. The applicant argues that the Minister is not entitled to defer, automatically, to her standard, paper-based practice without ever engaging in a '*propio motu*' consideration of its appropriateness in an individual case. Relying on *Mishra*, he says that every application must be considered in its own right, and the Minister's adherence to her admitted practice is only permissible insofar as the procedures satisfy the requirements of fairness (*Ezeani*). To contend that the Minister is not required to depart from her admitted practice in the absence of a request to so do, amounts to a tacit admission of a fixed policy which fetters her discretion.

100. The applicant argues that it is a misreading of *Balc* to say that the Minister's default adherence to her usual practice was endorsed in that case. The High Court, correctly, distinguished between an argument that the failure of the 2006 and 2008 Regulations to provide

for an oral hearing as of right was a systemic flaw which rendered them incompatible with EU law (as argued, unsuccessfully, in *Balc*) and an argument that the requirements of a particular case may necessitate the holding of an oral hearing to ensure the fairness of the process (as argued herein). Whilst the remedy of a paper-based administrative review may be effective in a general sense, this does not mean that fair procedures will have been complied with in an individual case. *Balc* cannot be seen as a '*wholesale approval*' of the Minister's adherence to her usual practice. Peart J.'s observation that a failure to seek an oral hearing may have an impact upon standing should be read as *obiter*, because of his acknowledgement that it was '*neither here nor there as far as the proper interpretation of the Directive [was] concerned*'.

101. It was argued that the failure to request an oral hearing is merely one factor to be considered when assessing the question of the applicant's standing. Extensive evidence pertaining to the genuineness of his marriage had been provided, and the Minister did not seek any further material. ZK could not have anticipated that his evidence would be summarily rejected as unverifiable or that the material provided would not alleviate the Minister's concerns. Phelan J. was, therefore, correct to conclude that the need for an oral hearing only '*crystallised*' when the Minister communicated that she intended to proceed on the basis that her concerns had not been addressed.

102. As to his alleged acquiescence in the Minister's practice, ZK contends that *WM* can be readily distinguished on its '*particular and unusual facts*'. The correspondence he sent to the Minister was concerned with the prolonged delay and requested updates on the process. His letter of 14 January 2021, in particular, stated that he was suffering ongoing prejudice, in that he was facing severe financial difficulties, as well as stress and anxiety, and he therefore demanded a decision and/or an explanation for the delay. The letters were not the end of a conversation, but the beginning of one, and cannot be construed as an invitation to issue a decision absent fair procedures.

103. The complaint and request for an oral hearing are not retrospective in nature, but rather should be considered as flowing from the review decision. *Z* can also be distinguished in that the applicant therein had been given an oral interview earlier in the process, which is not the case here.

104. The contention that ZK has exercised his right to an effective remedy, by way of judicial review, is refuted. The limitations of judicial review are well-established (*Keegan*). Absent a claim of unreasonableness or irrationality, the court is not concerned with the merits of a decision. This means that in cases concerning marriages of convenience, the court is not concerned with the genuineness of the marriage as a question of fact, but, rather, with whether the Minister was entitled to reach a conclusion on the information before her (*FAY*).

105. Too much emphasis is placed on the availability of judicial review as '*fulfilling any requirement for judicial oversight of the decision that is made on the merits*' (*Balc*, at para. 77). Irrespective of how '*robust*' the remedy judicial review may be, the applicant is entitled to a decision in the first instance that is compliant with fair procedures and to an appeal from that decision (*Stefan*). A fair appeal does not cure an unfair hearing. Access to judicial review does not negate the necessity to afford an applicant the protection of fair procedures at first instance.

The Court's Assessment

106. The starting point in considering whether the applicant's failure to request an oral hearing should be determinative of the entire issue, is to note that neither the Directive nor the 2015 Regulations require that such a hearing be held. Peart J. in *Balc* observed that a failure to request a hearing *could* affect standing to challenge a decision made in the absence of an oral hearing on that ground but he put it no further than that. It is true that in *TO*, the High Court (Humphreys J.) took a somewhat stronger line and found that the starting point for any

consideration of what fair procedures require is the submission made by an applicant to the decision-maker.

107. The cases involving the Financial Services Ombudsman, which are relied upon by the applicant, are of limited assistance. The legislative scheme under which the FSO carries out its functions provides, expressly, for the provision of information '*orally or in writing*' Regulation 28(2) of the 2015 Regulations also provides that the Minister may require that the information requested be provided '*either in writing or in person*'. However, the thrust of the FSO cases appears to support the view that a failure to request an oral hearing where the FSO has '*a broad discretion*' to grant one, is not, in itself, determinative (see *Hyde*, *Lyons*). There will be some cases in which the necessity to take oral evidence will be so obvious as to render a formal request so to do unnecessary (*O'Brien v. Ombudsman*). That said, the Ombudsman's failure to tell the legally represented complainant in *O'Brien v. Ombudsman* that he should ask for a hearing if he considered one necessary, did not amount to an error of such significance as to vitiate the impugned decision.

108. Where the courts did find that an oral hearing should have been held notwithstanding a failure to request one, it was in circumstances where it was '*impossible*' for the applicants, realistically, to establish the merits of their cases without an oral hearing. This was because their claims turned on a dispute as to whether verbal agreements had, in fact, been made such that there was no physical evidence available to the applicants for them to adduce (*Hyde* and *Lyons*). That case law cannot, in my view, be applied directly to situations such as the one in the instant appeal. The 'impossibility' of an applicant seeking a review of the type sought here and having nothing but oral evidence to offer, simply does not arise.

109. In determining whether a failure to request an oral hearing is fatal to an applicant's standing to challenge, later, a decision taken without such a hearing, I am mindful of the importance of finality and non-interference with a settled process. Both *Murphy* and *A*

underscore the legal principle that one cannot seek to invalidate a decision by raising an issue not raised before the decision-maker, and, in principle, the law discourages individuals from '*sleeping on their rights*'. Where such an aversion is evident even in a criminal context, it would be unwise, in my view, to adopt a lower standard and to encourage or tolerate sluggishness in the context of administrative law. An applicant may, of course, come within the recognised exceptions to the general principle, but the threshold for such exceptions is a high one, requiring, as it does, that '*wholly exceptional circumstances related to some fundamental unfairness amounting to a denial of justice*' be established before a decision is to be set aside (*A*).

110. It is common case that the Minister's standard practice was to process reviews of decisions on the revocation of residence cards '*on the papers*' and that ZK did not present any submission to the Minister which suggested or even hinted that fair procedures might be breached if the review, in *his* case, were conducted in accordance with her usual practice. Not only did he fail to request an interview, but he sent several letters confirming that '*all relevant*' information had been presented and demanding that a decision be made. This may be significant factor in a consideration of *locus standi*.

111. Nevertheless, I consider that it would be imprudent for this Court to conclude, by way of a definitive and general principle, that the applicant's failure to request an oral hearing was, in and of itself, so entirely detrimental as to be determinative of the entire appeal. Whilst there may be cases where such a failure could be fatal to any subsequent challenge on the basis of such an omission, it would unwise, in my view, to approach this appeal in that way. The more appropriate course would be to adopt the approach set out by Costello P. in *Galvin*. Whilst the court in *Galvin* did not indicate the extent to which, if at all, the absence of a request should be determinative in terms of an appeal, it, nevertheless, considered that, when a decision-maker

or court is deciding whether an oral hearing is necessitated, '*account should…be taken*' as to whether one was requested.

112. Consequently, the applicant's failure to request a hearing in advance of the impugned decision will be considered as one of several factors to be weighed in the balance when determining the requirements of natural and constitutional justice in this case. For that reason, I propose to join the appellants' claim regarding the impact of ZK's failure to request an oral hearing, to the overall merits of the substantive appeal.

The Second Issue: The Requirements of Natural and Constitutional Justice

113. In determining whether an oral hearing ought to have been held in this case, it is important to recall that the issue before the Court is not whether the Minister was correct in concluding that ZK's marriage was one of convenience, but, rather, whether the process which led to the Minister's decision was vitiated by an error of such significance that the decision ought to be set aside. That is the important principle that governs the appeal.

114. The trial judge considered that, in view of the '*personal credibility findings*' made by the Minister, the decision-making process was unfair because of the absence of an oral stage. Such a failure, she concluded, did not vindicate the applicant's natural and constitutional rights.

The Appellants' Submissions

115. The appellants say that, on the facts of this case, an oral hearing was not required. Some of their submissions on the substantive issue overlap with their arguments that ZK's failure to request a hearing, deprives him of standing to challenge the review decision on the basis that he was not afforded an oral interview. On the requirements of natural and constitutional justice, their submissions may be summarised as follows. The requirements vary depending on the nature of the decision being made. Whilst the legislation does not preclude an oral hearing, it

is significant that there is no provision in the Directive or the 2015 Regulations that mandates the provision of an oral hearing. Article 35 of the Directive requires that any measure taken by Member States in cases of abuse of rights shall be '*proportionate*' and subject to the procedural safeguards laid down in Articles 30 and 31. These safeguards require (i) that a person shall be notified of a decision under in writing, in such a way that the person is able to comprehend its content and implications (Art. 30) and (ii) that any person concerned should have access to judicial and administrative redress procedures to appeal or seek review of a decision (Art. 31). The CJEU in *ZZ* stated (at para. 47) that '*the redress procedures must include an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based.*' In the instant case, the Minister complied fully with the requirements of the Directive, including, its safeguarding provisions.

116. Regulation 27(3) suggests a written or paper-based review. It provides that, where the Minister proposes to revoke or refuse to grant a residence card, he or she shall '*give notice in writing to the person concerned*', setting out the reasons for that proposal and granting the person a period of 21 days within which to give reasons why the residence card should not be revoked. Whilst Regulation 28(2) allows the Minister to require of parties the provision of information '*in writing or in person*', neither Regulation 27(3) nor Regulation 28(2) obliges the Minister to provide an oral hearing.

117. Whilst Regulation 23(12)(a) provides that the Minister may allow a person who is subject to an exclusion order to re-enter the State for the purpose for attending a hearing, that provision is not in issue in this case as the applicant is not the subject of an exclusion order. Thus, whilst Phelan J. correctly found that there is no statutory right to an oral hearing in the Directive or the 2015 Regulations, the appellants submit that she erred in finding, on the basis of 23(12) and 28(2), that the Regulations '*expressly allow for the possibility that a hearing may be*

required as part of the review process' (emphasis added in submissions). The correct position is that an oral hearing is not precluded.

118. Moreover, *Balc* is supportive of the Minister's position. The applicant in *Balc* was the subject of a removal order and had complained that the available redress procedure did not constitute an effective remedy, because an oral hearing was not permitted. Peart J. was satisfied that it did provide an effective remedy and it fulfilled the requirements of Article 31 of the Directive, stating that '*[i]f it was intended that an oral hearing was required, the Directive would have made that intention clear.*' The Minister's distinction, between the Free Movement Directive and the Recast Procedures Directive[33] on the minimum standards required in procedures for processing international protection applications, was endorsed. What is required is that the process undertaken by the Minister is capable of producing a fair decision. *Balc* confirms the material distinction between Art. 31 of the Free Movement Directive and Art. 39 of the Recast Procedures Directive, and Phelan J. should have placed greater weight on the arguments and case law in *Balc*.

119. In *Ezeani*, the Supreme Court overturned the finding of the High Court wherein Hanna J. had found that fair procedures entitled the applicant to challenge the evidence offered against him, in particular by way of cross examination of member of An Garda Siochána. Fennelly J. held that what was required was that the applicant be given notice of the substance of the evidence against him and not every detail, the test being whether an applicant has had '*a fair opportunity to prepare himself and to respond*'. In finding that the offer of interviews in *Ezeani* was material to the Supreme Court's finding of no breach of fair procedures, the trial judge erred in law. Fennelly J. had noted the reasonableness of the offer, not its necessity as a requirement of natural and constitutional justice. The material finding in *Ezeani* was that '*the*

[33] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

most important general point to note' was the Minister's clear conveyance of his concern and lack of satisfaction, by letter, to the applicant. The applicant had been put on notice and given an opportunity to respond.

120. The appellants emphasise that, in *Ezeani*, Fennelly J. rejected the contention that the Minister's decision regarding the applicants' marriage was an assessment of their truthfulness. He found that the Minister did not set out to question the applicants' truthfulness. Rather, '*[h]e was entitled to test the evidence and question it, if he had doubts. It is only indirectly that the truthfulness becomes an issue.*' The question before the Minister was whether ZK's marriage was one of convenience and whether he and KB had resided together, as claimed. It was not whether he was personally credible. As in *Ezeani*, the Minister was engaged in considering whether statutory criteria were satisfied or whether sufficient evidence was provided to entitle the person concerned to the benefit in issue.

121. The appellants rely on numerous other general administrative decisions within the immigration sphere to argue that both a paper-based process and the availability of judicial review are capable of administering fair procedures. They say that the decisions of the Irish courts in respect of other administrative decision-making processes also support the Minister's position. The principle articulated in *Williams*, that the Minister is only required to hold an oral hearing if she would not be capable of making a decision fairly in the absence of such a hearing, remains valid in law.[34]

122. *Galvin* and *Mooney* are also relied upon by the appellants to argue that an oral hearing in this case was not required. The applicant had a right to be told what might be wrong and to have his reply taken into account, but this does not mandate an '*endless slide into the application of criminal-trial-type rights as in In re Haughey*' (*Shatter*, at p. 537).

[34] Whilst *Williams* was subsequently overturned, it was not on this point (see *State (Williams) v Army Pensions Board* [1983] IR 308).

123. Fairness does not always require an oral hearing; it depends on the circumstances of each case. In *Z*, McGuinness J. rejected the claim that the applicant was entitled to an oral hearing, on the basis that the evidence he may have wished to provide, could have been provided in writing and in *SUN*, Cooke J. considered that the exclusion of an oral hearing does not preclude an applicant giving evidence. A decision-maker must consider such testimony as an applicant wishes to have taken into account. The absence of an oral hearing is only a disadvantage where '*the contested issues of fact*' depend upon an appreciation of an applicant's truthfulness.

124. The appellants argue that even in international protection claims, appeals or reviews can lawfully be conducted on the papers alone where credibility may be in issue. *MM* is relevant in this regard. In *MM*, O'Donnell J. (as he then was) stated (at para. 25) that:

> "*[I]t was permissible to make* [*the*] *decision on the basis of a written procedure, so long as the procedures adopted were sufficiently flexible to allow the applicant to make his case. That was plainly the case here. Exceptionally, it may be necessary to permit an oral interview…*

At paragraph 26 he continued:

> *If a decision requires credibility in this classic sense, that is, whether an account of disputed facts is to be believed or not, that, in Irish law, can lead rapidly to the necessity for an oral hearing if fair procedures are to be applied. Thus, in the present context and applying the decision of the ECJ, one of the exceptional cases in which a hearing or interview may be necessary, might be, where although an adverse decision on certain facts had been made by ORAC/RAT, an application for subsidiary protection raised some substantial grounds for doubting that conclusion.*"

In considering the *MM* case in *VJ*, the appellants refer the Court to the fact that O'Donnell J. stated that '*[T]here was no basis for contending for an oral hearing, still less for an adversarial hearing*'. He held that '*what is required is that an applicant must have an opportunity of making his or her case.*'

125. The appellants claim that the exercise engaged in by the decision-maker in this case is more comparable to that which was considered by Fennelly J. in *Ezeani* than to an application

for international protection. Unlike the International Protection Act, 2015 and the Recast Procedures Directive, the 2015 Regulations do not impose any express duty to carry out a personal credibility assessment. *Damache*, they say, can be distinguished because it concerned the loss of citizenship, and, therefore, was of a different order to whether a person is entitled to benefit from the EU Treaty rights of their spouse.

126. Pointing to para. 4(d) of their Statement of Opposition, the appellants say that ZK is misconceived in contending that they did not argue that a credibility assessment in international protection is fundamentally different to the present context. It was expressly pleaded that the findings that flowed from the Minister's investigation were not based on a personal credibility assessment. The Minister's written submission before the High Court made it clear that the right to an oral hearing was not automatic *even* in an asylum context.

127. Finally, the appellants say that it is not necessary to grant an applicant more than one opportunity to address a given issue (*Nicolai*). The Minister's obligation was discharged when written submissions were invited from the applicant.

The Respondent's Submissions

128. On the substantive issue in this appeal, the respondent's submissions may be summarised as follows. The Directive and the 2015 Regulations do not expressly provide for a right to an oral hearing. However, the review procedure must adhere to the principles of *audi alteram partem* and fairness of procedures and, in this case, these included the obligation to hold an oral hearing. The need for an oral process in a paper-based process is clear where credibility is in issue and important rights are engaged (*Galvin*). The Minister was obliged to ensure uphold fair procedures irrespective of whether the applicant's marriage was genuine (*Glover*).

129. The trial judge was correct to find that *Balc* does not support the proposition that an oral hearing is never required as a matter of fair procedures, but, rather, that it is not always, or even

usually, required. *Balc* merely confirms that the Directive itself is silent on the question of whether an oral hearing may be a necessary part of a fair hearing.

130. In any event, the decision in *Balc* pre-dated the 2015 Regulations. The earlier regime had no specific guidance on approaching alleged marriages of convenience. The Commission's 2008 Report on the application of the Directive[35] is instructive. In that Report, the Commission opined that most Member States (including Ireland) had failed to properly transpose the relevant procedural safeguards and the provisions authorising measures to tackle abuse of rights, such as, marriages of convenience. Guidance on rectifying this was subsequently provided in the Commission's 2009 Communication on guidance for better transposition and application of the Free Movement Directive.[36] This is the first occasion on which this Court is required to examine the 2015 Regulations, specifically, *vis-à-vis* oral hearings and it is free to arrive at a conclusion different to the one reached in *Balc*. The Supreme Court in *Damache* overturned the High Court's decision which had relied heavily on *Balc*.

131. Whereas *Damache* was about the loss of citizenship, the Supreme Court's statement about the individual concerned becoming '*subject to the risk of deportation*' applies to ZK. Citizenship does entail broader rights than marriage to an EU citizen occasions, but both involve a loss of residence. This is of such significance that fair procedures require an oral hearing before a court or an independent administrative tribunal where issues of personal credibility arise (*Damache*, paras. 126-127). Phelan J. was correct to find that both decision-making processes involved the curtailment and revocation of important rights with significant consequences, and that ZK was entitled to a wide panoply of procedural protections, given that he was accused of serious misconduct (*per Lawlor v. Flood* [1999] 3 IR 97). The need for such

[35] 'Report from the Commission to the Parliament and Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely in the territory of the Members States' COM (2008) 840.

[36] 'Communication from the Commission to the Parliament and Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States' COM (2009) 313.

protections is even more pronounced where the likely consequence is removal from the State (*S v. Minister for Justice* [2020] IESC 48).

132. Particular regard should be had to the observations of Cooke J. in *SUN* and Barr J. in *UP*, to the effect that where there are negative credibility findings made against the applicant, the loss of the right to an oral hearing is a serious matter and puts the applicant in a disadvantageous position in relation to his appeal. It is incorrect to suggest that oral hearings in immigration decisions are required only in '*exceptional circumstances*'. In *MM*, the applicant for subsidiary protection had already had the benefit of an oral interview as part of the asylum application process. *MM* is not authority for a blanket policy that oral hearings are not required where the Qualification Directive is concerned. In *MM*, O'Donnell J. held that, where credibility is concerned, oral hearings are the rule rather than the exception, referring to an oral hearing with cross-examination as '*standard procedure*'. He observed (at para. 26) that:

> "*It is an ingrained part of the law of fair procedures that Irish courts considered it is only very rarely that such a conclusion could be arrived at on paper alone: normally the choice between disputed accounts can be tested against each other, and, their own inherent internal consistence, and be tested in turn by the opposing party. In most cases, it is inevitable that this will lead to an oral hearing with cross-examination.*"

133. Nothing in the decision of the Supreme Court in *VJ* displaces the '*standard procedure*' that an oral hearing should be conducted where credibility is in issue. Moreover, both *VJ* and *MM* are distinguishable from the instant proceedings in that both concern the pre-2015, bifurcated process in international protection.

134. In the absence of an oral hearing, ZK was not given a meaningful opportunity to respond to the Minister's findings and to persuade her that he is personally credible. Both *SUN* and the Commission's Handbook support this position. *Ezeani* is distinguishable, as interviews were offered and refused in that case.

135. The contention that the Minister's determination does not turn on personal credibility is based on a misunderstanding of *Ezeani* and of the 2015 Regulations. While *Ezeani* is instructive, it is not '*on all fours*' with the instant proceedings. First, it did not concern a marriage of convenience *per se*. It was focused more on the discrete issue of whether the couple in question had been living together for the requisite statutory period for the purposes of obtaining post-nuptial citizenship. It was on this particular basis that Fennelly J. held that truthfulness was indirectly at issue. Second, there was no finding that the applicant in *Ezeani* had knowingly engaged in fraud. It was determined here that ZK had provided false and/or misleading documentation, which could subject him to criminal liability under Regulation 30(1)(m). To suggest that the determination does not turn on the applicant's personal credibility is inconsistent with the language of the 2015 Regulations, which makes it an offence to knowingly provide false or misleading information for the purposes of seeking an entitlement under those Regulations. Third, where there is a finding that false and/or misleading information has been provided, personal credibility findings will invariably arise in cases of alleged marriage of convenience. The Minister's decision did turn on personal credibility and an oral hearing should have taken place. In view of the provisions of Regulation 28(5)(v) and (vi), the Minister should have had regard to the nature of the couple's relationship prior to their marriage and to whether they were familiar with each other's personal details.

The Court's Assessment

136. In considering the substance of this appeal, certain principles evident in the case law and the 2015 Regulations are clear. The first is that there is no hard and fast rule of constitutional justice which dictates, invariably, that an oral hearing is always required before natural and constitutional justice can be respected (*Galvin*). It seems to me that the thrust of the case law indicates that the need for an oral hearing will be higher where issues of conflict arise on the

evidence placed before the decision-maker and where his or her decision involves a preference for one version of the evidence over another. Second, it is also clear that neither the 2015 Regulations nor the Free Movement Directive mandates that an oral hearing is to be conducted in every case. The Regulations do not exclude the possibility that a hearing may be held in specific cases,[37] but it would be a step too far, in my view, to say that they provide, expressly, for the possibility that a hearing may be *required* as part of the review process. Third, it is, undoubtedly, the responsibility of the Minister to ensure that fair procedures are observed in the decision-making process. Whilst an established practice may be followed, the Minister is not entitled to adopt a blanket policy that fetters the *authentic* exercise of her discretion (*Mishra*). Fourth, those who are the subject of decisions under the Directive and the 2015 Regulations have responsibilities, too. They are obliged to be truthful and to keep the Minister apprised of changes in their circumstances which may impact on the rights acquired on foot of their relationship to an EU citizen.[38]

137. In assessing whether an oral hearing was required in this case or whether the absence thereof constituted a breach of the requirements of natural and constitutional justice, the appropriate starting point, in my view, is to consider the various factors set out by Costello P. in *Galvin* which are relevant to such a determination. These factors include the specific legislation and rules under which the Minister was discharging her functions, whether an oral hearing was requested, the subject matter with which the Minister was dealing, the overall circumstances that pertained in the case, and the nature of the inquiry in issue. Thereafter, an analysis of the distinction between an assessment of evidence and an assessment of credibility considers when fairness of procedures may require some form of oral hearing. Finally, I propose to examine the extent to which, if at all, the absence of an opportunity to have the

[37] Regulation 23(12).
[38] Regulation 11(2).

applicant's demeanour assessed in the decision-making process impacted upon the overall fairness of procedures.

The 'Galvin' Factors

The Legislation Governing the Impugned Decision

138. There is no dispute between the parties that neither the Directive nor the 2015 Regulations confer upon the applicant the right to an oral hearing. What is required is that the person concerned be told of a decision to restrict his or her freedom of movement and/or residence, and the grounds thereof, in writing, in such a way that the person is able to understand the decision and its implications (Art. 30). The person's submissions as to why his or her right should not be revoked must also be considered by the Minister (Regulations 27(3)). The parties also accept that the Minister's general practice is to conduct reviews, like that one at issue here, on the papers. However, such reviews involve important procedural protections as an intrinsic part of the process. I accept that the 2015 Regulations do not prohibit the Minister from inviting an individual for interview if, in her discretion, she considered that fair procedures so require. In passing, I note that the letter sent to the applicant when he applied, initially, for a residence card envisaged that an interview was not to be excluded.[39]

139. None of this is sufficient to say that an oral hearing is 'envisaged' by the 2015 Regulations or the Directive and the trial judge, in my view, overstated, somewhat, the position when she referred (at para. 42) to the Regulations as '*expressly allow[ing] of the possibility that a hearing may be required as part of the review process*'. This, it would seem, was based, in part, on her recognition that Regulation 23(12) prohibits the subject of an exclusion order from being prevented from attending a hearing in-person. Given that ZK was not the subject

[39] See para. 10 above.

of an exclusion order, the provisions of Regulation 23(12) are not relevant in determining whether an oral hearing was required in this case.

140. That said, whilst the law in question did not require an oral hearing, there can be no doubt that the Minister was, at all times, under an obligation to provide fair procedures which ensured that the applicant had an opportunity to address any concerns that arose and to respond, fully, thereto. In this regard, I note that the process under consideration in this case involved a number of procedural steps which included the issuing of a proposal letter to the applicant, an invitation to address the concerns raised by the Minister therein, a first instance decision in the light of his response, and the right to request a review of that decision. ZK availed of that right and the review decision issued only after the applicant was invited to, and did, provide further input and information.

141. I am satisfied that the process in issue did not fail to comply with any of the statutory safeguards as set out in Articles 30 and 31 of the Directive. Whether it complied with the obligation on the Minister to ensure that fair procedures are observed as a matter of *constitutional* law is a distinct issue that calls for consideration.

Whether an Oral Hearing was Requested

142. The absence of any request for an oral hearing or interview is a notable factor in this appeal. Whilst, as indicated earlier, a failure to request a hearing may not always be determinative, it may and, in this case does, at least in my view, carry significant weight. In this regard, I am mindful that courts are reluctant, generally, to reopen a process on procedural grounds where no complaint was raised in respect of that process before the decision maker.[40] Peart J. in *Balc* opined that a failure to seek an oral hearing as part of the review *may* affect an applicant's standing to challenge the outcome on that ground whilst noting, at the same time,

[40] See, generally, *Murphy*, *A*, *JMN*, *Voivod*, and *SO*.

that the Directive does not mandate one. Without ruling out the possibility that exceptional situations may exist, there is some force, in my view, to the opinion of Humphreys J. that parties, generally, should make their point to the decision-maker before '*running to a court*'. I acknowledge that some of the case law opened to the Court, concerning the FSO's failure to hold oral hearings indicates that a failure to have an oral component *may* breach the right to fair procedures irrespective of whether a hearing was requested. I am, however, satisfied that the facts in those cases distinguish them from this one. There may be instances, as in *Lyons* and *Hyde*, where it may not be feasible for an applicant to establish the merits of his case without an oral hearing. However, the applicant, in this case, struggles to establish that the merits of his application could not have been presented, reasonably and viably, in writing, by way of corroborative documentation and written submissions to the Minister. That distinct issue is a matter to which I shall return.

143. In failing to ask for an oral interview, the applicant's situation, in my view, falls to be considered in the light of *Murphy*, in that he appears to have '*slept on* [his] *rights*'. If the process in which he was involved was so fundamentally unfair then, in my view, it was incumbent upon him to have said so. The notion that an applicant, advised by lawyers, may remain silent and wait for a process to conclude before raising any complaint about it is, in my view, untenable. Indeed, it is notable that, even after he received the impugned decision, he still made no complaint about the unfairness of the process until almost three months had passed. In such circumstances, one might be forgiven for suspecting that the central claim in his proceedings before the High Court was something of an afterthought, a thought that occurred to him (or his solicitor) long after the process had ended.

144. It is significant, in my view, that the applicant was represented by a solicitor with experience in immigration law. At no point prior to the impugned decision, did he or his solicitor alert the Minister to any deficiency in the procedure such that an oral hearing would

be necessary for her decision to be lawful. His letters insisting on the issuing of a decision are, at least in my view, patently inconsistent with his later contention that the absence of an oral hearing rendered that decision unlawful. He confirmed, expressly, that the Minister had all the information required in order to make a decision, and, indeed, judicial review proceedings were threatened in default of the issuing of a decision.

145. I accept, of course, that there may be circumstances where, as O'Malley J. observed in *O'Brien v. Ombudsman*, the need for an oral hearing is so obvious that a failure to formally request one could not be considered fatal to a challenge. However, this, in my view, is not such a case. There is no doubt that the applicant was aware that the scheme under which the Minister processed review decisions was one which involved a review on the papers alone. Indeed, he relies on this to argue that, had he asked for a hearing, this request would have resulted in a refusal. Whilst there may some merit in that submission, that alone is insufficient to have obviated the necessity for the applicant to have raised a concern about fairness of the procedures before the impugned decision was made.

146. To my mind, the applicant cannot but have been aware that well-founded suspicions existed on the part of the Minister concerning the genuineness of the marriage to the EU citizen and the appropriateness of having granted him a residence card on foot of that marriage. He not only received a letter stating that it was necessary for him to clarify the status of his relationship with an EU citizen (8 March 2019), but a further letter was sent to him stating, expressly, that the Minister had concerns in relation to the marriage and the permissions that had been given to him on foot of that marriage (30 April 2019). He must, therefore, be deemed to have been fully on notice of the Minister's serious concerns in respect of the authenticity of the marriage. At this point, he was '*at large*' with regard to the evidence he chose to present (see *mutatis mutandis Rehman v. Minister for Justice and Equality* [2018] IEHC 779 ('*Rehman*'). In response to the serious concerns identified, the applicant submitted

documentation which, on any measure, must be regarded as having been of limited probative value.

147. It seems to me that, if, as the applicant now contends, the Minister could not make a decision, fairly, in the absence of an oral hearing, then the onus was on him, at that point, to request an opportunity to put his case before the Minister by way of an oral hearing or an in-person interview. If a process is unfair, then an issue should be raised about that unfairness while an application is pending, and I cannot accept the proposition that the need for an oral hearing '*crystallised*' only after the decision in this case was made. It cannot be said that unfairness in processing applications for review only comes to light on the basis of the outcome, such that all positive outcomes deem the process a fair one, and all negative ones, an unfair one. If this were so, then, conceivably, the unfairness of every negative decision would only be discernible, or '*crystallise*', after a decision issues. This would not only elongate the entire process in every failed application, but would, in effect, allow for the possibility that relevant evidence could be withheld by an applicant on the basis that it could be tendered, later, at an oral hearing. Just as a decision-making authority is obliged to place all cards 'face up' on the table, so, too, parties who engage with such decision-makers must put their entire case, including, any complaints in respect of procedural unfairness, to the decision-maker at the appropriate time.[41]

148. The applicant was not entitled to presume that the documentation he provided, being of such limited probative value, would be sufficient to dispel the Minister's well-founded concerns as to the genuineness of the marriage. It should have clear to him and to his solicitor that the state of the evidence submitted was problematic, to say the least. That being so, if he considered that written documentation alone was insufficient to convince the Minister about

[41] See *mutatis mutanda MNN v. Minister for Justice and Equality* [2020] IECA 187 and *R v. Lancashire County Council ex p. Huddleston* [1986] All ER 941.

the authenticity of his marriage and that a fair decision in his case could not be made without an in-person interview, then he was obliged to have indicated such and to have requested an oral hearing.

149. I accept that such a request may have been denied in view of the Minister's usual practice of dealing with such applications on the papers. However, at the very least, by asking for an oral hearing, the applicant would have alerted the Minister to a potential unfairness in his case and would have allowed her to reflect, at the relevant time, on whether there was, as claimed, a procedural flaw in the process. The applicant's failure to make the said request, at the very least, deprived the Minister of an opportunity to consider whether fair procedures in this case required her to invite this particular applicant for interview before issuing the final decision.

150. The applicant was not entitled to '*sleep on* [his] *rights'* and to expect the reopening of a finalised process, only after the decision was made. I do not deny that a failure to request an interview may not always, in and of itself, be fatal to a claim in respect of fair procedures and that exceptional situations may arise. However, such an applicant must show that a fundamental unfairness amounting to a denial of justice would ensue. The applicant, in my view, struggles even to identify the nature of the unfairness visited upon him by reason of the absence of an oral interview.

151. There is some force to the appellants' contention that ZK, through his conduct, acquiesced in the conducting of the review without an oral hearing which thereby prohibits him from raising his complaint after the decision was made. That important constitutional rights may be waived by the conduct of a party is clear from several cases, and *CC* confirms that the same principle applies to natural justice. It is worth noting, in passing, that the principles of the Strasbourg court's case law on waiver are not dissimilar to those emanating from the Irish

courts. In several cases,[42] the ECtHR has held that the obligation under Article 6 § 1 to hold a hearing is not an absolute one. It recognises that '*a hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest making a hearing necessary*'.[43] A waiver can be done explicitly or tacitly. A tacit waiver may occur where a party refrains from submitting a request for a hearing.[44] In *Döry* (which concerned an adverse decision on the applicant's request for social benefits), the Strasbourg court noted that the applicant did not request a hearing before the County Administrative Court, the proceedings before which were normally conducted in writing. In such circumstances, the court considered that the applicant could have been expected to request a hearing if she attached importance thereto. She did not do so, and the court, therefore, found that she could reasonably be considered to have waived her right to a hearing before the administrative court.

152. Having regard to the jurisprudence indicating that a waiver may occur even in a criminal context and notwithstanding the applicant's submission that *WM* may be distinguished on its '*particular and unusual facts*', it is difficult to see how the applicant's conduct does not constitute a waiver of the right he now asserts in administrative proceedings. Moreover, if a person, through his or her conduct, may waive such important constitutional rights as those inherent in a natural parent (*Nicolaou*), I am not convinced that the same may not be said in respect of other rights which the Constitution also protects. In circumstances where ZK laboured under no disability, was legally represented by experienced immigration lawyers, and where he had full knowledge of the Minister's concerns as to the authenticity of the marriage and the possibility of a negative decision being delivered in his case, his conduct might well be

[42] See *Döry v. Sweden* CE:ECHR:2002:1112JUD002839495 ('*Döry*'); *Eriksson v. Sweden* CE:ECHR:2012:0412JUD006043708.
[43] *Döry,* at para. 37.
[44] See *Håkansson and Sturesson v. Sweden* (1991) 13 EHRR 1, para 66; *Schuler-Zgraggen v. Switzerland* (1993) 16 EHRR 405, at para. 58.

deemed to have constituted a waiver of the right he now seeks to assert. However, I am not persuaded that the appeal should be decided on that point alone.

The Subject Matter of the Decision

153. The subject matter of the decision before the Minister was, clearly, important for the applicant. The findings made would have implications for his life. The control of immigration and the curtailment of potential abuses were also important aspects of the subject matter in issue. Whether the applicant was entitled to the benefit of residence depended, critically, on the Minister's determination of his application for review and, in particular, on whether the considered that the marriage should be '*disregarded'* as a factor bearing upon that determination. Once again, it is important to reiterate that it is not this Court's task to determine whether the Minister was correct in her decision about the applicant's marriage. What the Court is concerned with is whether the process by which she reached that decision was a fair one.

154. In view of the subject matter of the decision, the trial judge placed significant weight on the implications, for the applicant, of the Minister's findings. Having considered the Supreme Court judgment in *Damache*, she drew certain comparisons between a decision to revoke citizenship and a decision to revoke a right of residence. Clearly, both decisions entail the curtailment and revocation of important rights. Phelan J. noted that the impact of the decision in this case was '*not the same*' (as in *Damache*) but the implications of the finding, clearly, weighed heavily in her assessment and led her to conclude that the applicant was entitled to *'a wide panoply of procedural protections because he has been accused of serious misconduct*'.

155. In this regard, it seems to me that trial judge's conclusion suffers from the same legal frailty as did the High Court's finding in *Ezeani*. Hanna J. in *Ezeani* had been particularly concerned that the Minister's decision amounted to a finding that the appellants had been

'*untruthful*' (Mr Ezeani was a solicitor). He considered that it was open to the deciding officer to hold that not only was the application '*unmeritorious*' but that *'it was founded on lies'* that it was, in effect*, '*a *fraudulent application for Irish Citizenship*', and that the applicants must have been '*guilty of perjury*'. In the Supreme Court, Fennelly J. considered (at para. 55) that the High Court's overwhelming concern that the Minister had questioned the applicants' truthfulness was '*a mistaken interpretation of the Minister's decision*'. Overturning the finding of Hanna J., the Supreme Court found that the decision concerned the question of whether the couple were living together, that it was for them to place evidence of that before the Minister, and that the Minister had not departed from his obligation to respect fair procedures. A purely administrative procedure is not adapted '*for the intervention of the intrinsically adversarial procedure of cross-examination*'. In Fennelly J.'s view, requiring the administrative decision-maker to devise procedures approximating to a courtroom would be '*a drastic step*', and '*cumbersome, potentially lengthy and inconvenient and would open up further avenues for judicial review'* (*Ezeani* at para. 44). I consider those observations to be apposite in this case, too. To the extent that the applicant seeks to distinguish this case from *Ezeani* by pointing to the Minister's findings that he had provided false and misleading information which could, potentially, subject him to criminal liability, I am not persuaded that this is a basis for rejecting the authoritative value of *Ezeani*. The Supreme Court allowed the appeal in *Ezeani* notwithstanding the High Court's concern that the Minister had not attached sufficient weight '*to the potential criminality*' implied in the impugned decision. Whilst the Minister's decision, in this case, undoubtedly, has significant consequences for the applicant, the import of that decision is not such as to entitle ZK to *so* wide a panoply of rights as the trial judge considered necessary.

156. That aside, I do not consider that the revocation of a right of residence, significant as it may be, can necessarily or automatically be compared to the loss of citizenship – particularly

where, as in this case, the concerned person retains the option of residing lawfully, and safely, within his country of birth. The decision to revoke a person's citizenship is of an altogether different nature and has a far greater impact upon an individual than the decision to revoke a permission to reside. As Dunne J. observed in *Damache,* the loss of citizenship, entailing as it does the loss of protection of the full range of constitutional rights conferred upon a citizen, '*is a matter of grave significance to the individual concerned*'. The loss of Irish citizenship, she noted, will also result in the loss of citizenship of the European Union, unless that citizenship is held by virtue of rights in another Member State.

157. Moreover, the revocation of citizenship may result in a person being declared stateless, a status that has significantly more serious ramifications for an individual than the loss of a right to reside. Loss of citizenship not only deprives a person of the right to consular assistance when abroad, but it touches upon the very core of a person's identity. The right of citizenship, in my view, falls within that category of rights which McKechnie J. in *OR and Others v. An t-Ard Chláraitheoir and Others* [2014] IESC 60 referred to as being at '*the highest level of our legal order*' (see also the judgment of this Court in *Habte v. Minister for Justice and Equality* [2020] IECA 22). Whilst acknowledging that important benefits are, undoubtedly, lost where a derived right of residence is revoked, I find that the guidance drawn by the trial judge from *Damache,* albeit by way of analogy, to have been somewhat misapplied.

The Overall Circumstances of the Case

158. Another of the *Galvin* factors to be considered in determining whether the decision-making process undertaken by the Minister was in breach of fair procedures, concerns the overall circumstances of the case. The Commission's Handbook confirms that evidence collected must be considered '*in its entirety*' and assessments must be based '*on a combination*

of all information collected during the course of investigation'.[45] Certain circumstances of this case are particularly notable. These included ZK's unlawful entry into the State, the filing of an accelerated notification of an intention to marry some nine weeks thereafter, his history of abuse of its immigration procedures, the relatively short duration of the marriage and the scarcity of objectively verifiable evidence of the couple having lived together. These were all matters that went into the mix when the relevant assessment was conducted. It was against that factual background, that the additional evidence and explanations furnished by ZK were considered, including, KB's retraction of her initial assertion as to date when the marriage ended, the unverifiable text messages of an online relationship and the brief third party testimonials.

159. Moreover, ZK's failure to abide by the declaration he made to the effect that he would keep the Minister apprised of changes in his circumstances which may affect his right to reside in the State also formed part of the factual matrix. The dearth of substantive and persuasive evidence coupled with the low probative value of the documentation actually provided, were matters to which the Minister had regard in her overall assessment. The Minister's decision must be seen in the light of all the background information in this case, including, ZK's established willingness to mislead the immigration authorities by claiming that he needed international protection when he did not. The trial judge, to my mind, appears to have attributed little, if any, weight thereto when concluding that the failure to offer the applicant an interview constituted a breach of fair procedures.

The Nature of the Inquiry

160. As to the nature of the inquiry conducted by the Minister, I accept that it was one of significance, in that important derived rights and benefits accrue to spouses of EU citizens who

[45] s. 3.2, p. 28.

exercise their EU Treaty rights. That said, the inquiry was not a criminal investigation and ZK was not in the position of an accused person facing a prosecution such that a '*whole panoply of rights*' under the Constitution or Article 6 of the European Convention on Human Rights would apply. There were, of course, significant consequences for the applicant if his challenge to the proposed revocation of his residence card failed. Similar consequences may arise for anyone whose permission to reside is revoked on the basis of an abuse of rights. The fact that serious consequences flow from the revocation of residence is not, in itself, a basis for contending that a person in the position of ZK is entitled, automatically, to have an oral hearing as part of the decision-making process. What is required is that the decision-making process be fair.

161. The nature of the inquiry in this case was such that the Minister, based on well-founded suspicions that the marriage was one of convenience, was investigating whether the further information she had required from ZK was sufficient to dispel her concerns about the marriage. The onus of proving that a suspected marriage is one of convenience, rests on the national authorities. A validly married couple with the requisite evidence that an EU citizen is exercising his or her EU Treaty rights enjoys '*the benefit of assumption*' and does not have to prove that theirs is a genuine marriage. However, where the authorities have '*well-founded suspicions*' concerning the genuineness of a particular marriage, they are entitled to invite the couple concerned to produce further evidence or relevant documentation. At this point, the spouses have an obligation to comply with the authorities. If the evidence provided '*dispels the concern*s' identified, then the matter can be closed. As the Handbook indicates, it can reasonably be expected that genuine couples would have such evidence available to them. If the couple fails to '*produce <u>evidence that would dispel the suspicions</u>'* of the authorities, that failure can be taken into account together with *all other relevant circumstances* when the

assessment as to the genuineness or otherwise of the marriage is being made. As noted above, all of the evidence collected must be reviewed and considered in its entirety.

162. Whereas the Handbook recalls that the burden of proof is on the State to prove that a marriage is one of convenience, the Commission's '*guidance*' therein is silent as to the precise standard of proof that is to be applied, referring only to a marriage of convenience being '*duly established*' by the national authorities in compliance with '*the relevant evidential standard*'. (Section 3.2, p.28) It seems to me that common sense would dictate that determinations made in the context of administrative proceedings, including a finding that a marriage is one of convenience, cannot be required to meet the criminal standard of proof beyond reasonable doubt. Indeed, the Handbook itself recognizes that different evidential standards may apply depending on the legal nature of the objective being pursued (with footnote 35 referencing abusive conduct of a particular couple being pursued in different contexts—such as in criminal proceedings or in immigration and administrative law). The Commission's Handbook stipulates that a national authority can formally adopt a decision restricting the right to free movement and residence where, *inter alia*, it has '*sufficient evidence*' to conclude that the investigated relationship is a marriage of convenience.

163. In considering the respective burdens in this regard, Richards L.J. in *Rosa v. Home Secretary* [2016] 1 WLR 1206 ('*Rosa*') summarised (at para. 25) the Commission's guidance by noting that the '*burden of proving*' that a marriage is one of convenience lies on the national authority that is seeking to rely on the existence of a marriage of convenience as a reason for refusing a residence card to which an applicant is otherwise entitled. It is not the case, he held, that every applicant for a residence card is obliged to produce proof that his or her marriage is not one of convenience. Rather, such proof need only be produced where the national authority has raised '*a reasonable suspicion*'. In other words, if the national authorities adduce evidence

'capable of pointing to the conclusion that the marriage is one of convenience', then, in the view of Richards L.J. *'the evidential burden shifts to the applicant*" (at para. 27).

164. In this case, the Minister's suspicion was founded upon several factors, including, *inter alia*, the applicant's immigration history, the short duration of the relationship, the claim of having first dated KB before living with her and then having lived with her before proposing to her coupled with the submission of a notice of intention to marry within '*a mere 9 weeks*' of relationship, the '*inconsistencies*' regarding KB's address during the tenure of the marriage, the fact that the documentation submitted was all dated in extremely close proximity to the marriage, and KB's assertion (subsequently retracted) that the marriage had broken down in October 2017. These factors together with ZK's precarious immigration status at the relevant time constituted evidence that was capable of pointing to the conclusion that ZK's marriage was one of convenience and, in this regard, I am satisfied that the Minister's suspicions were well-founded.

165. Once notified of the Minister's concerns as to the genuineness of the marriage, the applicant was under an obligation to comply with the Minister's request for further information. At that point, the '*evidential burden*' shifted to ZK (*Rosa*) to provide additional evidence that would dispel the Minister's suspicions.[46] What he produced consisted of a typed and unsigned letter which was said to be from the couple but in which KB is referred to throughout in the third person. The letter explained that he asked for international protection to '*get a status*' and that he was '*asked to do so*' by the Civil Registration Service. The letter set out the history of the relationship. It began on the internet and then, after ZK's arrival in Ireland, they had started dating '*after a while'*. The letter claimed that the couple had been living together before the marriage ('*not officially*') and that KB had sometimes stayed with her mother. After the marriage, they started sharing bills. KB's mother's sickness and need for constant attention

[46] The Commission's Handbook, s. 3.2, p. 28.

were offered as reasons for not changing KB's address on her payslips and bank statements, these being easily accessible to KB whenever she wanted them. The couple had gone on honeymoon to Georgia (ZK for three weeks and KB for one) so that KB could meet his family and friends. Photographs were included. The loss of his passport meant that he did not have any information or stamps showing travel to and from Georgia. The earlier assertion about breaking up in October 2017 was said to have been a '*mistake*'.

166. Having considered the additional information provided by the applicant and the further representations that he made, the Minister's suspicions that the marriage was one of convenience were not dispelled. She then took ZK's failure in this regard into account together with all other relevant circumstances and disregarded the marriage for the purposes of her determination that his residence card was to be revoked on the basis of Regulation 27(1) and 28(1) of the 2015 Regulations.

167. On review, ZK was afforded another opportunity to provide further information to dispel the Minister's concerns, and, once again, he failed so to do. The additional evidence he provided, through his solicitor, consisted, *inter alia*, of unverifiable '*printouts*' of text messages of '*a long-distance*' online relationship, some typed letters from the couple's friends confirming that the relationship was genuine, a letter from their landlord to say he was aware they were living together prior to the marriage and a letter from 'Hidden Hearing' noting two visits from ZK and his wife but the dates of such visits were not available. His solicitor's letter set out case law on the burden of proof and submitted that the explanations furnished in respect of KB's different addresses were reasonable and consistent.

168. In upholding the first instance decision, the Minister's letter of 1 February 2021, set out the conclusions which had underpinned that decision and then addressed the further representations made by ZK in support of a review. The Minister was not persuaded that the

decision to revoke should be overturned and detailed reasons were provided in respect of the conclusion reached. These have all been set out in full earlier in this judgment.

169. It is in the context of the foregoing process that the question of fairness falls to be considered and, in particular, whether the failure to provide an oral hearing or an in-personal interview rendered the decision-making process, in this case, unfair. In considering that question, it is important to point out that, in this case, the decision-maker was not confronted with any contradictory testimony or spousal dispute which she was called upon to resolve in the light of the applicant's response to cross-examination or questioning by an opposing party. The decision-maker was obliged to make a determination, fairly, on the basis of the evidence submitted to her and on all the information collected but she was not, herself, an opponent whose suspicions or views were subject to cross-examination by the applicant.

170. Moreover, the Commission's Handbook does not say that interviews are required or that they are the most effective method for investigating marriages of convenience. Rather, it reports that '*experts*' say that interviews are the most effective way '*to verify whether the spouses give non-conflicting, consistent and correct information'* (Section 4.5, p. 43). In this case, there was no question of the decision-maker being confronted with conflicting or inconsistent information from the spouses. It follows that the applicant's reliance on the Handbook in support of his claim that the absence of an interview deprived him of a meaningful opportunity to respond to the Minister's findings, is misplaced. In this case, the decision-maker was dealing with the applicant's account which was contradicted by no one nor was it inconsistent with any other account. The difficulty was that it was not substantiated by evidence sufficient to '*dispel*' the serious doubts that had arisen in respect of the genuineness of the marriage (see para. 190 as to the deficiencies in his evidence).

171. I have come to the view that in approaching the nature of the inquiry undertaken by the Minister in the way that she did, the trial judge fell into error. The process by which she reached

her decision in this case calls for close scrutiny. The trial judge accepted that it is not always necessary to have an oral stage to the decision-making process in order to secure the right to fairness and she observed that neither the Directive nor the 2015 Regulations required an oral hearing in every case. In her view, the matter in issue was whether an oral hearing was required in *this* case where, as she put it, the Minister's decision '*turned on the credibility of the Applicant*'. Phelan J. accepted that *Balc* is authority for the proposition that an oral hearing is not always '*or even usually*' required (at para.67). The question, therefore, arises as to what she considered were the '*unusual*' circumstances of this case which led her to conclude that an oral hearing was necessary.

172. The trial judge concluded that fair procedures were breached, in this case, by referring to a number of citations from the case law and by applying those citations to the facts of this case. She began her analysis with *Galvin*, where Costello P. had found that the conflict between the parties could not be properly resolved without oral testimony. In *Galvin*, the Appeals Officer had to decide between the account offered by the applicant (who claimed that he had made the requisite payments to qualify for a contributory pension) and that of the Department's officer (who disputed Mr Galvin's contention). In view of this conflict, Costello P. held that evidence should have been taken from the officer who had searched the Department's records and that he should have been available for cross-examination. In that context, the absence of an oral hearing was deemed to have breached Mr Galvin's rights to natural and constitutional justice.

173. The trial judge then considered the observations of the High Court in *SUN*, in which Cooke J. had found that the effectiveness of an appeal remedy was dependent upon '*the availability to the applicant of an opportunity of persuading the deciding authority on appeal that he or she is personally credible in the matter*'. Phelan J. also had regard to the judgment of O'Donnell J. in *MM*. Because procedural fairness was preserved in *MM* by reason of the availability of an oral hearing during the asylum phase, Phelan J. opined that '*it follows that*

the Supreme Court's findings as regards the importance of an oral process, arguably resonates even more forcefully in this case where there has been no oral process at all'.

174. Noting that the instant case did '*not involve a conflict of fact as between two versions of events*', the trial judge, nevertheless, considered that it was concerned with '*conclusions as to credibility*' based on the decision-maker's assessment of the likely truthfulness of the couple's account having regard to '*corroborative evidence*'. This was, she considered, an issue '*closely related to the personal credibility*' of the applicant and the EU citizen. Having made '*personal credibility*' the essential thread linking this case with *Galvin, SUN* and *MM* and based on a series of *dicta* that began with *Galvin* and concluded with *Damache,* Phelan J. found that the applicant was entitled to '*a wide panoply of procedural protections*'. The need for such protections arose, in her view, because of '*the life-changing nature*' of the Minister's findings.

175. I find the apparent ease with which the trial judge made '*personal credibility*' the bridge between *Galvin* and this case to be troubling because the facts were altogether different. Whether Mr Galvin had made the requisite contributions towards a pension was capable of confirmation by reference to objective documentary evidence. Mr Galvin had maintained that there was uncontradicted evidence that he had paid insurance contributions during a particular period and that this was supported by the evidence of his former employer's accountant, a Mr Higgins. The Appeals Officer, in his view, had erred in concluding that the absence of Departmental records to confirm such payments meant that they had not been made. Moreover, he had declined Mr Galvin's request for an oral hearing. Costello P. found that the question before him was whether the dispute as to the reliability of the applicant's evidence, on the one hand, and the accuracy of the Department's records, on the other, made it imperative that the witnesses be examined and cross-examined under oath. It was in that very concrete context of a clear conflict in the evidence of the respective parties that Mr Galvin's 'credibility' was disputed.

176. Based on the cumulative effect of several considerations, Costello P. concluded that it would have been '*extremely difficult if not impossible*' to arrive at a true judgment of the dispute without an oral hearing. The period in question was so long passed that the possibility of records being mislaid, misfiled or destroyed was much greater than if the relevant period was more recent. The fallibility of the Department's records was evidenced by the fact that two different officers had made different errors in respect of payment dates based on those records. The proper resolution of the dispute required an assessment of the strength of the applicant's case, and the Department's lack of records should have been weighed in that assessment. A cross-examination of the person who conducted the Departmental search would have assisted the Appeals Officer in reaching a view on the strength of Mr Galvin's case. It was in that sense that Mr Galvin's 'credibility' was in issue.

177. In this case, the applicant's credibility did not fall, in any way, to be tested against other contradictory evidence. It was the quality of his own evidence that was in issue here. Given the low probative value of that evidence, coupled with the overall circumstances of the case, the Minister had well-founded suspicions about the genuineness of he marriage and was entitled to require further information from the applicant to dispel her concerns. There is a world of a difference, in my view, between the 'credibility' of Mr Galvin, which was capable of being fortified or diminished arising from the cross-examination of others, and the 'credibility' of the applicant whose evidence was not contested or disputed by any other party and whose own account gave rise to well-founded suspicions on the part of the decision-maker.

178. The trial judge noted there is and was no conflict arising between two versions of events that called for a resolution by the decision-maker in this case. However, she moved somewhat swiftly, from that critical acknowledgement to finding that this case was, '*nonetheless*', concerned with credibility. In doing so, she failed, in my view, to consider the pivotal role which the irreconcilable conflict of facts had played in *Galvin*, and which required resolution

by way of an oral hearing. It was only by Mr Galvin testing his opponent's evidence and cross-examining the witness who had searched Departmental files, that the decision-maker in that case could determine where the weight of the truthful evidence lay. Costello P. found that an oral hearing was required, because, without an oral hearing, the Appeals Officer in *Galvin* was not in a position to resolve, fairly, the irreconcilable conflict between the contradictory evidence tendered by both parties.

179. The trial judge appears to have attributed little weight to that central aspect of *Galvin* when moving from that case to her conclusion that this case, too, involved conclusions as to credibility. Where, as in this case, there was no conflict of fact, the decision-maker did not have to choose between different accounts to assess which was the more reliable but was, rather, looking at the applicant's uncontested account and the information he provided, in the round. It was the overall facts of the case as presented and the quality of evidence provided that was the subject of the assessment undertaken by the Minister when deciding whether the marriage should be '*disregarded*' as a factor bearing upon her determination. The absence of any conflict of facts in this case distinguishes it, markedly, from *Galvin*. There was no 'other' or 'contradictory' evidence that ZK was deprived of testing whether by way of cross-examination or otherwise, in order to persuade the Minister that her well-founded suspicions could be dispelled. It follows that, unlike in *Galvin*, the personal credibility conclusions, or, more correctly, the indirect implications as to ZK's credibility, were reached in circumstances where there was but one version of events which was assessed in the light of all the prevailing circumstances, including, the relative strength of the additional information that the applicant was invited to provide.

180. Nor was the observation of Cooke J. in *SUN* entirely supportive of the trial judge's conclusion in this case, notwithstanding her reliance thereon. The context of *SUN* was obviously graver in that an unfairly processed asylum appeal may result in a real risk to life

and limb. Additionally, corroborative documentation may be more difficult to obtain where an individual has fled a situation of persecution than where one has asserted an authentic marriage to an EU national. Cooke J. did not indicate that an oral hearing would be required in all administrative decision-making processes, where the events and facts described by an applicant are of a kind that could have taken place but had been rejected purely because the applicant has been disbelieved for his or her account of them. What Cooke J. did say was that in such a case the effectiveness of the appeal remedy would be dependent upon the availability to an applicant of *'an opportunity of persuading the deciding authority that he or she is personally credible in the matter'*. In the context of an asylum application under the Refugee Act, 1996 and the specific circumstances before him in *SUN*, he found that an oral hearing was necessary to provide such an opportunity.

181. In my view, an opportunity to persuade a decision maker that one is '*personally credible*' is not to be equated, automatically, with an opportunity to meet the decision-maker, in person, so that one's personality, general appearance or demeanour might be assessed. The requisite '*opportunity*' does not exclude, but nor does it, necessarily, imply, an invitation to attend for an oral interview. As a general principle and based on the observations of Fennelly J. in *Ezeani*, it seems to me that the conditions for providing an opportunity to persuade are met where the reasons for a decision-maker's concerns about an applicant's account are put, clearly, before the individual in question and where he or she is then invited to address and dispel those concerns. This, in my view, will best be achieved by reference to objective evidence that corroborates an applicant's account and, thus, reinforces, indirectly, his or her personal credibility.

182. Where, as here, the Minister has written to an applicant setting out her concerns about the genuineness of a marriage and has requested and invited the applicant to submit additional evidence to dispel those concerns and has offered a further opportunity to do so, on review of

the first instance decision, it is difficult to see how that does not fulfil the requirement that an applicant be afforded an opportunity of persuading the decision-maker that he or she is personally credible. It was this which Fennelly J. in *Ezeani* confirmed was '*the most important general point to note'*. In this case, I am satisfied that ZK was afforded such an opportunity. The fact is that it was the nature and the quality of the information and evidence that he provided in response to the Minister's concerns that remained problematic. To the extent that the Minister concluded that she was not satisfied on the basis of the documentation submitted and the overall circumstances of the case that the marriage was not one of convenience, she was impugning the quality of the information and evidence offered by the applicant before both the first instance decision-maker and on review. I am satisfied that the impugned decision reflected '*only indirectly'* upon the credibility of the applicant (*Ezeani* at para. 55). The Handbook indicates that it can reasonably be expected that genuine couples would have available to them evidence that would dispel suspicions as to the authenticity of their marriage. The mere fact that an unpersuasive and poorly corroborated account given by an applicant could, or might, be true is not sufficient, in my view, to give rise to a right on the part of such an applicant to an oral interview before a decision on the merits of his application is made.

183. The trial judge also relied upon *MM* to support her finding that the applicant's right to natural and constitutional justice had been breached because an adverse finding on his 'credibility' had been made in the absence of an oral hearing. I find that her application of certain *dicta* from *MM* to the facts of the instant case is also problematic.[47] Phelan J. cited the same passage from *MM* at both paragraphs 63 and 68 of her judgment, first, to describe what credibility in its '*core meaning*' is about and then to conclude that an oral hearing may be necessary to ensure fairness '*where credibility issues arise*'.

[47] In *MM*, the question which the Supreme Court had posed, in its reference to the CJEU, concerned the scope of the '*right to be heard*' particularly in Member States, like Ireland, that had two separate procedures for examining applications for refugee status and applications for subsidiary protection.

184. The trial judge observed (at para. 63) that resolving conflicting factual accounts '*may come down to a determination of which account is more believable and hearing parties' testimony may be the most appropriate means of determining which account is preferred*'. She then quoted O'Donnell J.'s consideration of the '*core meaning*' of credibility: -

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

At para. 68, the trial judge reiterated the above quotation, lengthening it to include:

> "*If a decision requires credibility in this classic sense, that is, whether an account of disputed facts is to be believed or not, that, in Irish law can lead rapidly to the necessity for an oral hearing if fair procedures are to be applied.*"

185. In considering whether an oral hearing is required so that fair procedures are observed, it is necessary, in my view, to consider what it is that would be achieved by an oral hearing and without which a breach of natural and constitutional justice would occur. It is clear that, in *MM*, O'Donnell J. directed his mind, precisely, to the context in which an oral hearing may be required. Notably, he described that context as one which involves disputed facts, where two witnesses give contradictory accounts and where an adjudicator must reach a conclusion as to which of the two accounts he or she believes. It is *that* type of conclusion that O'Donnell J. considered could only rarely be reached in the absence of an oral hearing. It is telling, in my view, that nowhere in the passage cited by the trial judge does O'Donnell J. suggest that the purpose of an oral hearing could be to allow an adjudicator to assess the general credibility of

a witness whose account is disputed by no one and where the only thing that has not been examined is his or her overall appearance or demeanour. O'Donnell J. was clear. The requirement of an oral hearing is to allow the *disputed* accounts to be tested against each other, to allow each account to be tested for its own internal consistency and to allow each disputed account to be tested by the opposing party.

186. It is difficult to escape the conclusion that, in relying on *MM* to reach her finding in this case, the trial judge overlooked, inadvertently, the very purpose of an oral hearing as articulated by O'Donnell J., and in so doing, misapplied what the Chief Justice said in *MM* to the facts of the instant case. His consideration of credibility '*in the classic sense*' was in the clearly identified context of irreconcilable '*contradictory accounts*' involving witnesses of disputed facts in circumstances where one such witness is not believed by an adjudicator. The conclusion that can only '*very rarely*' be reached on paper alone is that specific conclusion as to which witness is to be believed and why. It is *that* choice that will, in most cases, inevitably lead to the conclusion that an oral hearing is required so that the contradictory accounts can be '*tested against each other*' and by each opponent and to allow for an examination of the internal coherence and consistency of each side's account.

187. It cannot seriously be contended that the Minister's decision in this case involved credibility in the '*classic sense*', as described by O'Donnell J. There were no disputed facts, against which ZK's account was to be believed or not. There was no choice to be made as to which of two contradictory accounts was to be believed and why. There was no one to cross-examine on any contradictory account of events. There was simply a failure on the part of the applicant to provide information or evidence sufficient to dispel the Minister's well-founded suspicions as to the genuineness of the marriage, against a background that involved an online relationship, an accelerated marriage, a history of untruthfulness with immigration authorities, an internally inconsistent accounts of the ending of the marriage and a failure on the part of ZK

to do what he was obliged to do if a change in his relationship to the EU citizen occurred. With due respect to the trial judge, this was not, by any measure, the type of decision, as envisaged by O'Donnell J. in *MM*, that involved a credibility assessment '*in the classic sense*'. It follows that it was not a decision that, in Irish law, could lead rapidly to the necessity for an oral hearing in order for fair procedures to be observed.

188. For the reasons set out above, I am satisfied that neither the observations of O'Donnell J. in *MM* nor the *dicta* of Cooke J. in *SUN* were sufficient, in my view, to form the basis for the trial judge's conclusion that the decision-making process in this case was unfair and failed to vindicate the applicant's right to constitutional justice.

Distinguishing Evidence and Credibility

189. There is an obligation on every applicant to support, by way of evidence, the contentions or claims that are made in applications for administrative review. Each case must be considered on its own distinct facts and nothing in this judgment should be interpreted to mean that a mere discrepancy in evidence, however slight, automatically gives rise to the need for an oral hearing. The process of resolving conflicting facts which may only be resolved, fairly, by way of oral hearing and, probably, cross-examination, is to be distinguished from the process of assessing, fairly, the reliability of an application that stands or falls on its own merits, including, its own evidential basis.

190. In this case, I am satisfied that the applicant must be fixed with awareness of the obvious deficiencies in the evidence he submitted throughout the process in response to the Minister's well-founded suspicions concerning his account of the marriage. These included (i) text messages allegedly passing between himself and KB but with nothing to indicate that such messages came from telephone numbers belonging to either of them; (ii) a revision of a fundamental fact concerning the date of the marriage breakup; (iii) the provision of

correspondence during the currency of the marriage showing different addresses for KB; and (iv) little, if anything, by way of persuasive evidence of their joint residence as a couple during the tenure of the marriage. In fact, apart from an unsigned lease agreement bearing her name, all that was tendered as evidence of the EU citizen's joint residence with ZK was her personal monthly mobile telephone bill, which was issued in her sole name, paid by direct debit, and addressed to the house in Dublin 6. It is implausible, in my view, that nothing else by way of documentary evidence would have been available to the EU citizen as objective verification that she and ZK lived together during the marriage and had, as the Handbook puts it, '*jointly administered their household'*. If the applicant lacked more persuasive and convincing evidence, that speaks for itself. Whilst the failure to provide evidence to dispel well-founded suspicions cannot be the sole or decisive reason for concluding that a marriage was one of convenience, it can, however, be taken into account by the authorities together with all other relevant circumstances in their assessment of the genuineness or otherwise of the marriage. It must be recalled that, in this case, ZK's submission of such tenuous evidence was against the backdrop of his immigration history, including, his unlawful entry into the State, his signing of a one-year tenancy agreement on the same day as his entry therein, an accelerated notice of an intention to marry, the submission of a false application for international protection, and the short duration of the marriage. Having submitted weak and insubstantial evidence and having demanded that a decision be made, it was and is not open to the applicant to insist, long after the impugned decision was taken, that he ought to have been interviewed in-person.

191. The onus was on the Minister to prove that the applicant's marriage was one of convenience and she was obliged to ensure that fair procedures were observed before making a determination of any matter relevant to the 2015 Regulations, including one disregarding his marriage as a factor bearing upon her determination. There was, nevertheless, an obligation on the applicant, where well-founded suspicions arose, to dispel the Minister's concerns that

the marriage was one of convenience. Marriage is a serious business, entailing as it does '*the voluntary entry into mutual personal and legal commitments*' (*HAH v SAA & Ors* [2017] IR 372 ('*HAH*')). In determining whether the applicant's marriage was one of convenience, the Minister was permitted, under Regulation 28(5), to have regard, *inter alia*, to whether the couple has '*a continuing commitment*' to mutual emotional and financial support. The Commission's Handbook points to '*a long-term legal […] commitment*' as '*conduct much more likely to be exhibited by genuine couples*'.[48] Having invited the applicant to provide further evidence to dispel her concerns about the genuineness of the marriage, the Minister was entitled to '*require*' such information as was reasonably necessary to satisfy her that the marriage was not one of convenience.[49] Such information might have included documentary proof of shared responsibility for utility bills, shared financial transactions, text or email messages or other indications of a long-term or continuing commitment (*Pervaiz*). Where there was a failure to provide evidence that dispelled her suspicions where such evidence could reasonably be expected to be available to genuine couples, the Minister was entitled to take that failure into account in combination with the entirety of the information collected during the process.[50] Having failed to provide information or evidence to dispel the Minister's well-founded suspicions, he is not entitled to insist upon a right to assert, orally, what he has already submitted, in writing, nor does he have the right to be cross-examined by the decision maker (*Nicolai*).

192. To my mind, the trial judge's articulation of the nature of the process which led to the Minister's conclusion as being one of '*an assessment of credibility*' was incorrect. At para. 71 of her judgment, the trial judge stated:

> "*As there is nothing demonstrably false in the application, I am satisfied that the First Named Respondent can only have come to this conclusion based upon an assessment of*

[48] The Commission's Handbook, s. 4.2.1.2, p. 35.
[49] Regulation 28(2).
[50] The Commission's Handbook, s. 3.2, p. 28.

the Applicant's credibility and a position taken as to the likely veracity of the account given, albeit that it could be true."

In describing the nature of the inquiry undertaken by the Minister in these terms, the trial judge fell into error as, in accordance with the observation of Fennelly J. in *Ezeani*, it is '*only indirectly*' that an applicant's truthfulness becomes an issue.

193. To some, this distinction between an assessment of the applicant's evidence and an assessment of his credibility may appear to be overly pedantic. The distinction, however, is an important one in my view. The process in question was not a trial with the full panoply of rights associated therewith (*Z*). As Fennelly J. observed in *Ezeani*, the Minister does not set out to question an applicant's truthfulness, but she is entitled to test the evidence that is placed before her and to question it if she has doubts. Where, as in this case, such doubts do exist, then the '*overriding requirement is that the person affected be given reasonable notice of matters which are of concern to the decision maker*' (*Ezeani*).

194. A lack of credibility *vis-à-vis* any applicant may arise by implication or it may be an inference drawn from the Minister's testing of the evidence provided, but the exercise undertaken remains, nevertheless, an assessment of the information adduced in support of a claim. The Minister had a well-founded suspicion that the applicant's marriage was one of convenience. It was for the applicant to provide further information to dispel her concerns. The Minister pointed to the nature and quality of the documentation submitted (or not) by ZK in support of his application. These included noting the absence of any documentation to substantiate a claim of joint residence prior the marriage, the proximity of the date of documentation submitted to the date of the marriage, and the inconsistences in the documentation provided regarding the residence of KB. Based on the information provided and on the evidence in its entirety she was satisfied that the documentation submitted was false and misleading '*as to a material fact'*. In other words, the Minister was satisfied that the

documentation was submitted by ZK to *mislead* her into believing that an authentic marriage existed so that he would obtain a right of residence to which, otherwise, he would not have been entitled. The Minister, from the outset, was not engaged in an assessment of ZK's credibility but in an assessment of the weight or probative value of the evidence provided when further information was required. Having considered and probed all the information and evidence provided and having viewed that evidence in the light of the overall circumstances, she was not satisfied that what he had submitted was sufficient to persuade her that his was not a marriage of convenience. It is the reasonableness or otherwise of *that* decision that must be considered. Whether *that* decision was one which could be reached, fairly, in the absence of an oral component is the critical issue in this appeal. As previously noted, the Court is not tasked with determining whether the applicant's marriage was or was not one of convenience. Its function is to determine whether the Minister's conclusion was one she could lawfully reach on the basis of the process undertaken or whether that conclusion is vitiated by error by reason of procedural unfairness.

195. In terms of the '*position taken*' by the Minister as to '*the likely veracity of the account*', it bears reiteration that that account itself was characterised by a number of remarkable features, including, the applicant's unlawful entry into the State, his untruthful claim to immigration authorities about his need for international protection, his significant change in the version of events pertaining to the date of the marriage separation and his notable failure to inform the Minister of significant changes in his relationship with the EU citizen. At its core, a decision about a marriage of convenience is a decision about an abuse of process. In assessing the evidence of an applicant who has already demonstrated a willingness to abuse immigration procedures and whose account of his marriage breakup changed, it was not unreasonable, in my view, that suspicions arose and that the provision of persuasive evidence sufficient to dispel those suspicions was requested Having been less than honest, and disrespectful of the State's

immigration processes from the outset, the applicant chose to submit documentary evidence that was, by any measure, of low probative value in terms of establishing the authenticity of the marriage. This was a matter entirely within his own control ('*Rehman*'). In these circumstances, the Minister's '*position*' as to the likely veracity of the applicant's account does not, at least in my view, appear arbitrary or unreasonable.

The Question of Demeanour

196. Before setting out my conclusions in this appeal, it might be helpful to address an issue that hovered somewhat elusively but, nevertheless, distinctly in the appeal. It concerns the absence of an opportunity for an assessment of the applicant's demeanour. A notable feature of the hearing of this appeal was the applicant's inability to indicate what it was that he could only have submitted, orally, which could not have been submitted in writing. At para. 77 of the judgment the trial judge stated:

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

197. The trial judge was, undoubtedly, cognisant of the applicant's inability to identify the matters that could not have been assessed in written submissions. She accepted that the question of what the applicant might seek to address at an oral hearing which could not have been addressed in writing was a '*material*' consideration and that the failure to identify such matters could be '*fatal*' (at para. 77). She does not, however, indicate the extent of its materiality or why, in the circumstances of this case, it ought not to be considered '*fatal*', apart

from stating that the question is '*less important*' where credibility is at stake. It was a flaw in her reasoning, in my view, to recognise the materiality of such an omission but to conclude that it was '*less important*' where credibility is at stake. In my view, the inability or omission is linked, intrinsically, to the overall quality of the applicant's evidence and thus, indirectly, to the question of credibility.

198. The trial judge regarded an oral hearing or interview as an opportunity to '*probe*' the decision-maker's concerns. This, in her view, would have permitted '*a fuller credibility assessment based*', *inter alia*, on the nature and *the manner* of the replies received. Had the applicant requested and been invited to an interview, it is not only likely but almost inevitable that he would have pointed to the same documentary evidence and offered the same explanations for the change in his account and the inconsistencies with KB's address as he had offered in writing when addressing to the Minister's concerns. I say this because, during these proceedings, he has not pointed to anything else he might have raised at or brought to an interview. Confronted with the applicant's inability to identify matters incapable of being put in writing, the trial judge appears to have considered, implicitly, that what an oral hearing would have provided was an opportunity to have the applicant's general demeanour assessed (the '*manner*' of his replies) by way of an in-person interview. She considered that this type of assessment could not be facilitated in writing particularly where there are '*language issues*' and '*the intervention*' of advisers in compiling submissions.

199. It seems to me that, whilst not stating so, expressly, the trial judge located the essence of the procedural unfairness or the kernel of the breach of the applicant's right to natural and constitutional justice in the failure to provide him with an opportunity to tell his story, in-person, so that, through exploring and probing the decision-maker's concerns, his credibility might be more fully assessed by reference to his overall demeanour. During the appeal hearing, counsel for the applicant, effectively, conceded that, essentially, this is what an in-person

interview would have afforded. Indeed, he accepted that if, after such an interview, the applicant had still failed to persuade the decision-maker as to his credibility, then there would have been no further cause for complaint about the overall fairness of the process.

200. I have an unease around this proposition and about the trial judge's *implicit* identification of the absence of an opportunity to have the applicant's demeanour assessed as the true source of the 'wrong' in this case. A conclusion in respect of any applicant, including, one that indirectly impugns his or her credibility, ought to be the product, not of instinct or impression, but of analysis and reasoning (see *mutatis mutandis* the observations of Collins J. in *Morgan v. Electricity Supply Board* [2021] IECA 29). Where, as in this case, the applicant had given his account, in writing, and had confirmed that all the information required for a decision had been furnished, it is not clear what, if anything, in terms of a solid rational foundation for a decision, would have been achieved by an assessment of ZK's demeanour or the '*manner*' in which he replied to questions.

201. A considered view is emerging that a focus on demeanour may, in fact, diminish, rather than enhance, the accuracy of a judgment.[51] In *SS (Sri Lanka) v. Secretary of State for the Home Department* [2018] EWCA Civ 1391 ('*SS*') Lord Justice Leggatt (at paras. 36-37), noted that, generally speaking, the inability to assess the demeanour of witnesses is no longer considered as placing an appellate judge in a permanent position of disadvantage as against the trial judge. Referring to publications of both MacKenna J. and Lord Bingham cited above, he considered that: -

> "*Th[is] is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth.*
> *[…]*

[51] See OG Wellborn, 'Demeanour' (1991) 76 *Cornell Law Review* 1075; MacKenna J., 'Discretion' (1973) 9(1) *The Irish Jurist* 1; and Lord Bingham, 'The Judge as Juror: The Judicial Determination of Factual Issues' (1985) 38 *Current Legal Problems* 1.

The reasons for distrusting reliance on demeanour are magnified where the witness is of a different nationality from the judge and is either speaking English as a foreign language or is giving evidence through an interpreter."

202. MacKenna J. in the article on 'Discretion' that was cited in *SS*, had articulated, succinctly, the difficulty that reliance on demeanour creates. He stated:

"*I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is it the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground, perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.*"

203. The trial judge, in my view, fell into error in implicitly attributing a greater weight to the importance of impression and demeanour in the decision-making process that she ought to have done. In her view, the process in this case was unfair because an assessment was made of the applicant's credibility was made and a position was taken on the likely veracity of his account without affording him an opportunity to persuade the Minister, by reference, *inter alia*, to the '*manner*' of his replies, that he was personally credible.

204. Rather than assessing whether ZK's account was truthful from the '*manner*' in which he might have furnished replies, the decision-maker took, what I consider to be, a more objective and reliable approach, one that focussed on the nature of the evidence, which the applicant submitted in support of his case that his was not a marriage of convenience. That evidence was viewed in the light of the history of the courtship, the accelerated nature of the marriage, the provision of dual residential addresses for KB, and with other known facts, including, the applicant's history of untruthfulness when dealing with the State's immigration authorities.

205. The trial judge also considered that a credibility assessment could not be '*facilitated*' in writing, particularly where there are '*language issues*' and the '*intervention*' of advisers in compiling written submissions. This, I find, surprising, as she appears to regard the intervention of legal advisers as a hindrance, more than a help, in compiling submissions. The applicant's legal advisors testified on affidavit that ZK understood the nature of proceedings and the obligation to tell the truth. On his behalf, they confirmed that the Minister had everything necessary ('*all relevant documentation and proofs*') to make a decision on the application. I do not understand the trial judge's view that their '*intervention*' could not 'facilitate' what the judge described as a '*credibility assessment*', but which was, more accurately, an assessment of the evidence which ZK had available to support his claim.

206. The applicant's solicitors also averred that he '*speaks English well*'.[52] Even if there were any '*language issues*' in this case, it is not at all clear how an in-person interview would have enhanced the overall fairness of the process in circumstances where the lawyers who represented ZK were fluent in English and advised and assisted him in preparing submissions. If anything, as Lord Justice Leggatt observed, the reasons for distrusting reliance on demeanour may be magnified where a witness is speaking English as a foreign language.

207. An assessment of the applicant's account, objectively, in the light of the corroborative evidence submitted and the overall circumstances of the case, provided a more reliable basis for a fair decision than one based on an assessment of the manner in which he might have replied or how credible or not he may have appeared at interview. It is entirely conceivable that an applicant who enters a marriage of convenience may, at interview, present as articulate, earnest, honest and persuasive as to the genuineness of his marriage but have little, if any, proof, by way of robust evidence to substantiate his claim. Equally, an applicant who has entered into a genuine marriage may create a poor impression upon interview but may have

[52] See the affidavit of Alice Heron of 29 April 2021.

substantive documentary and other evidence to corroborate the genuineness of a subsisting marriage. The appearance of a witness, his or her or tone, manner or other aspects of personality are not, in themselves, reliable as indicators of credibility.

208. The trial judge erred in finding that the applicant's inability to identify matters which could not be properly assessed in written submissions was '*less important*' in this case. She ought to have considered what it was, evidentially, that the applicant could only have submitted at interview, and which could not be properly assessed by way of a written process. This failure was a significant one, in my view. Her error was compounded by her attribution of weight to the fact the applicant was denied an opportunity to have his demeanour, or the '*manner*' of his replies, assessed in an oral hearing. It is somewhat remarkable to note that, notwithstanding his legal representation by experienced immigration solicitors, the applicant remains unable to say what, by way of additional information or evidence, he could have put to a decision-maker that he could not have furnished in writing.

209. It follows that it has not been shown that the arguments and the evidence on which the applicant sought to rely were incapable of being advanced, fairly, through a paper-based process. Nor has the applicant advanced any argument sufficient to show that he was deprived of an opportunity to do or to say something that he could not have done or said during the paper-based process, such that, by reason of the absence of an oral hearing, his rights to natural and constitutional justice were breached.

Miscellaneous Matters

210. The trial judge found that a case for an oral interview of some kind was '*more compelling*' when one considers what is required by Regulation 28(5). At para. 78 of her judgment, she noted that this Regulation '*requires*' the Minister to consider whether the parties to a marriage are familiar with each other's personal details. As observed by Keane J. in

Rehman (at para. 54), an applicant is '*at large*' as regards the evidence which he chooses to present with an application for residence. The same must apply to decisions concerning revocation. The file disclosed that ZK went on a 'honeymoon' to Georgia, for three weeks, and that KB joined him there for one week. It further contained photos and even letters from the couple's friends, testifying to the relationship (these letters bear a notable similarity, of typeface and tone). The Minister *did* have material before her that was indicative of the parties' familiarity, and it was open to the applicant to adduce more evidence of the parties' familiarity with each other. The evidence was obviously insufficient to persuade the Minister that the marriage was not one of convenience. That aside, the trial judge erred in stating that the Minister was '*required*' to consider the couple's familiarity, because Regulation 28(5) identifies this as but one of a number of matters that may be considered as they '*appear to the Minister to be relevant in the circumstances*'. Regulation 28(5) also makes it clear that nature of the relationship between the parties prior to the marriage is also but one of many matters to which the Minister *may* have regard if she deems it to be relevant.

211. The possibility to produce, in person, the text exchanges on the couple's devices suggested itself to the trial judge as '*potentially important*' when deciding on the weight to be attached to the couple's relationship before ZK arrived in the State. Phelan J. also considered it '*less likely*' that the '*significance*' of KB's Vodafone bills being sent to the Dublin 6 address up to October 2018 would have been overlooked where an oral process was conducted. It was at all times open to the applicant to prove that the messages came from the couple's devices, if such evidence was to hand, and it can hardly be considered that the physical production of devices was the only means of obtaining such proof. Moreover, the applicant never claimed that he was deprived of an opportunity to produce the physical devices from which the texts were sent and received. As to the significance of KB's Vodafone bills being sent to the Dublin 6 address – and the likelihood that this fact may not have been overlooked in an oral process –

it seems to me that such '*significance*', if any, was overestimated in circumstances where KB's Vodafone bills appear from the file to have been paid by Direct Debit.

Summary

212. The essence of the right to be heard in administrative decision-making involves providing a person concerned with a meaningful opportunity to take part in the process. It exists to ensure that decisions taken about an individual are made after having taken into account what that individual has to say and having weighed his or her account in the overall assessment. The natural and constitutional right to be heard does not mandate or require a right to an oral hearing in every case.

213. I am satisfied that the Minister's decision to revoke the applicant's residence card was not vitiated by error for having been made in accordance with her usual practice and without having offered the applicant and/or KB an oral interview or hearing. There was, in my view, no breach of the requirements of natural and constitutional justice for the following reasons:

(i) The legal basis of the decision was clear, and the procedural safeguards required by law were observed. Neither the Directive nor the 2015 Regulations mandate the provision of an oral hearing. Whilst an interview is not precluded, the Directive and Regulations anticipate that decisions of the type in issue in this case are processed in writing.

(ii) The applicant was notified of the proposed decision, in writing, and in such a way as to enable him to comprehend its content and its implications. He was informed of the matters which gave rise to the Minister's well-founded suspicion that the marriage may have been one of convenience, contracted to enable the applicant to pursue a right of residence in the State. He was afforded a meaningful opportunity to provide additional information and evidence to dispel the Minister's concerns and to furnish any explanations or representations he wished to make in relation thereto.

(iii) The applicant cannot but have known of the consequences that an adverse decision would entail. He was advised by experienced practitioners in immigration law. Having been notified of the Minister's well-founded suspicion as to the genuineness of the marriage, he was under an obligation to provide the Minister with information or evidence to dispel her concerns such that those adverse consequences would not materialise. The fact that the evidence he chose to produce was of low probative value in terms of dispelling the Minister's well-founded suspicion and that the explanations he furnished were found to be unconvincing, are not reasons to impugn the Minister's decision.

(iv)The first instance decision, the recommendation submission and the final decision on review were taken after attentive consideration of the evidence and further information provided and of the applicant's submissions, and reasons were given as to why his residence permission was revoked. The applicant availed himself of the administrative redress procedure that was available to him. The impugned decision was made by the Minister having taken into account the applicant's failure to provide information or evidence to dispel her concerns and in combination with all of the other relevant information which had been collected. Additionally, the applicant had access to judicial review.

(v) The Minister was entitled to process the application for review in accordance with the standard paper-based practice for such applications and there is nothing to suggest that her discretion was exercised in an unthinking or uncritical manner. It showed no sign of being '*atrophied*' by reliance upon a fixed policy or set of rules.

(vi)The applicant's failure to identify the evidence or matters which he would have at raised at interview but which he could not address in writing is a material consideration in determining the fairness of the procedures involved. The fact that the applicant did not request to be interviewed prior to the impugned decision but rather had confirmed that all relevant documentation had been submitted and had urged the Minister to reach a decision, whilst not

determinative of the appeal, is also a material consideration in that it suggests that the applicant himself did not regard the process as in any way prohibiting him from participating, meaningfully, in the decision-making procedure.

Decision

214. In view of the foregoing, the applicant has not made out a case of unlawfulness in the Minister's decision or in the decision-making process on which it was based. There was a sufficient basis before the Minister which entitled her to reach the decision that was made and the applicant's right to natural and constitutional justice was not breached by the failure to provide for an oral component in the decision-making process. The Minister's decision to uphold the revocation of the applicant's residence card was not vitiated by an error amounting to a denial of constitutional justice.

215. For the reasons set out above, I am satisfied that the trial judge erred in fact and in law in granting an Order of *Certiorari* quashing the First Named Appellant's decision dated 1 February 2021.

216. I would, therefore, allow the appeal.

217. As the Minister has been entirely successful in this appeal, it would appear that she is entitled to her costs. Should the respondent wish to contend otherwise, he should apply to the Registrar within 21 days for a hearing date to deal with the issue of costs.

218. As this judgment is delivered electronically, Donnelly J. and Ní Raifeartaigh J. have indicated their agreement with the reasoning and the conclusions reached herein.

APPROVED