THE HIGH COURT

IN THE MATTER OF ARTICLE 40.4.2° OF THE CONSTITUTION

[2018 No. 109 S.S.]

BETWEEN

M.A. (PAKISTAN)

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

THE HIGH COURT

JUDICAL REVIEW

[2018 No. 73 J.R.]

BETWEEN

M.A. (PAKISTAN)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 30th day of January, 2018

Findings of fact

1. A reasonable place to begin this somewhat tangled tale is the birth of the applicant, on 11th October, 1985. When asked his date of birth, his ostensible wife did not give a clear answer, but gave a long answer in Portuguese with a great deal of hand waving which conveyed a significant impression of uncomfortableness. That was translated to the effect that it is very hard for her to memorise numbers. However she knows her own date of birth. On cross-examination she did not know in what month the applicant celebrated his birthday and said she did not really care about dates.

2. The applicant said that his father contacted the British Embassy in Pakistan and organised a visitor's permission for him to go from Pakistan to the U.K. He went to the U.K. in 2004 and was given a visitor's permission for 90 days in the false name of a Mr. Shakeel Ahmed. He claimed implausibly that this totally different name was a nickname. He says in 2004/2005 he was arrested at home. He made an unsubstantiated application for asylum in the U.K. That application was made only after his arrest, was duly refused and was not appealed. He was imprisoned and ultimately agreed to be deported, which occurred in October, 2005. In addition to using a false name he also used a false date of birth and accepted this in his evidence to the Refugee Applications Commissioner. He said that he applied for asylum in the U.K. under a false name because a friend told him to and he did not realise that was wrong.

3. He arrived in the State from Pakistan in 2009 and then made an unsubstantiated claim for asylum, which was rejected by the Refugee Applications Commissioner on 6th January, 2011 and by the Refugee Appeals Tribunal on 31st March, 2011. Refugee status was formally refused on 21st April, 2011. He then made an unsubstantiated claim for subsidiary protection.

4. He gave contradictory evidence in relation to the date his "wife", Ms. Iolanda Da Silva, entered the State. In affidavit he said it was May or June, 2013, whereas in his EU1 form he said it was 9th September, 2013. Ultimately his oral evidence appeared to favour the latter date. Ms. Da Silva's children are now 15 and 20. Those are children of a previous relationship she had in Portugal, which by definition appears to have lasted for something in the region of six years. Those children would have been 10 and 15 at the time of her entry in 2013. The relatively tender years of Ms. Da Silva's children, and certainly of the youngest child, make it somewhat implausible, all other things being equal, that she would have left them to go to Ireland long-term and then immediately decide to get married here to somebody of precarious status.

5. There is also something of a striking contrast between her relationship with a partner of at least six years with two children in Portugal, where the question of marriage does not seem to have figured on the horizon, and with her immediate marriage to the applicant on arrival in the State. That striking contrast only underlines the peculiar nature of the transaction she entered into with the applicant. Ms. Da Silva made claims regarding the applicant's relationship with the children, which seem to me to be totally unsubstantiated. She claimed in evidence that they had a great relationship but it emerged that the applicant never met the children until he met one of them in the past week.

6. The applicant and Ms. Da Silva do not appear to have any real language in common and Ms. Da Silva's knowledge of English appears to be rudimentary to say the least. In oral evidence the applicant said he did not know when Ms. Da Silva came to Ireland. In oral evidence she said she came to the country to visit some friends. She said this was after leaving her husband, presumably she meant partner, in Portugal but said did not remember the date. When asked she said this could be more or less three months before she got married to the applicant but did not really remember. Ultimately, both of the parties in evidence essentially reinforced the conclusion that she arrived in September, 2013, barely three months before the marriage in December, 2013. She claimed that the children were staying with their paternal grandmother in Portugal and claimed they got on very well with the applicant despite the minimal to non-existent contact that has been established.

7. In his affidavit the applicant says he met Ms. Da Silva and that "*we struck up a conversation and exchanged phone numbers*" although she "*speaks limited English and my own English at the time was less than fluent but we managed to communicate with one another*". She said that "*despite our language problems the applicant and I managed to communicate*", which seems to me somewhat implausible. When the applicant was asked how he communicated with Ms. Da Silva he gave an answer in relation to

written communications and was somewhat evasive in dealing with verbal communication. He said that Ms. Da Silva understands English a bit, "*not very good but she understands*".

8. In oral evidence Ms. Da Silva contradicted her own affidavit both as to the date of arrival and as to whether she was working before she met the applicant. In her affidavit she states she arrived in early 2013 and worked as a cleaner. She met the applicant by chance in Dublin city and "*managed to strike up a conversation*". She said in evidence she stayed in the house of a friend in Dublin city centre and said she started looking for a job when she met the applicant, very much contrary to the sense of the affidavit. She also said that she met the applicant through friends who could speak English, and thus she and the applicant could communicate. That twist was not included in either her affidavit or the applicant's affidavit and it also makes it implausible that the parties could communicate without the benefit of such "*friends*".

9. Ms. Da Silva also had a pronounced lack of knowledge of where her ostensible husband lived. In her affidavit she said she moved into the applicant's house in or about August, 2003. In oral evidence she said she "*cannot pronounce the address*". When asked where in Dublin it is she said "*it's there in the documents. I cannot pronounce it*". "*It was near the city centre, not far*" was the best she could do. Correspondingly, the applicant had a lack of knowledge of where Ms. Da Silva lived. The best he could do was that it was "*around Inchicore*".

10. On 13th December, 2013, as a failed asylum seeker and with a pending subsidiary protection application subsequently rejected due to his failure to pursue it, the applicant went through a ceremony of marriage with Ms. Da Silva. The fact that the applicant was regarded as a good catch at a time when he was a failed protection seeker and had only precarious status is notable. The timing of the marriage is also notable, just marginally over three months after Ms. Da Silva allegedly arrived in the State, given the requirement to give three months' notice of intention to marry. The Minister later stated when in the process of withdrawing the applicant's permission that "*it appears that the EU citizen arrived in the State and immediately decided to marry you*". It seems to me that that view of events has been borne out by the parties' oral evidence. Indeed the applicant expressly said "*we know each other for three or four months and then we got married*". When asked did he give notice of intention to get married as soon as they met he replied "*yes*". There was no one present identifiably associated with the bride's side. When asked who was present she said the minister, her friends who were witnesses and also he had his family. None of her family was there. Ms. Da Silva was unable to identify who the alleged friends were. The marriage certificate identifies what appeared to be witnesses from Pakistan who she said were associated with the applicant. She said her friend was "*Vera*" but did not know the second name. No such Vera appears as a witness. Ms. Da Silva said that "*over the course of the next few months I travelled to Portugal from time to time as I have two children there*". She suggested she was struggling in Ireland due to her limited English and suggested a move to Portugal, to which the applicant was not agreeable. She claimed she lived with the applicant for about six months after they got married. However, confronted in cross-examination with the fact that she left the State immediately after the marriage on the following day, information which she had failed to volunteer, she accepted that she had taken a flight on 14th September, 2013 to Portugal. She gave an extremely vague explanation for the reason she had to go back, and indeed the reason had a somewhat different emphasis from that provided but not volunteered by the applicant. She said "*yes something happened with my daughters so I had to go back*". Importantly, the something that happened was not explained and nor was the immediate leaving of the State volunteered on behalf of Ms. Da Silva. The applicant's version was that the grandmother was sick; again he did not volunteer this somewhat important information either in his affidavit or oral evidence. It is claimed that Ms. Da Silva went back for a small amount of time but on further questioning this was expanded to some weeks. The applicant implausibly claimed that if he knew of his obligation to inform the authorities that his wife had left the country he would have done so. I would totally reject that evidence as contrary to his actual behaviour, which is consistently one of toying with the immigration system, indeed not only of Ireland but of the U.K.

11. In Ms. Da Silva's oral evidence, when asked why not come to visit the applicant herself she said "*I don't like travelling*" and it was more difficult for her with language. It seems to me those are highly evasive answers as to why she did not come to visit. In her affidavit she said she returned to Portugal in 2014 but in oral evidence she was not able to remember when this was. The fact that she averred to a date in the affidavit only a day before giving the oral evidence makes her evidence somewhat questionable. She says the applicant never visited her in Portugal and there is no evidence of physical contact, ongoing emails, holidays together or anything of that nature.

12. On 2nd March, 2014 the applicant applied for a residence card from an address in Parnell Road. He did so personally rather than by solicitors, despite using solicitors for his subsidiary protection application. On 5th September, 2014 the application for a residence card was granted. Both Ms. Da Silva and the applicant claimed that her visit to Ireland in September, 2014 was to see the applicant. Both gave evasive answers when confronted with the fact that this coincided with the residence stamp application. Ms. Da Silva flew to Ireland on 11th September, 2014, and stayed for one week, when she flew back out. She claimed that was to see the applicant and when asked did she complete immigration formalities she said "*no, I don't remember*". When it was then put to her that she attended a meeting at the Irish immigration authorities, during which a stamp was obtained, she said "*yes, if you are talking about his documents, yes*". She said that he had to have everything sorted out so that he could come to Portugal to live with her. That answer does not make sense as the applicant clearly has no intention of coming to Portugal to live with Ms. Da Silva. The applicant also claimed that his "*wife*" came to visit him in September, 2014. He denied that she came for any specific reason, but on further questioning agreed that she came for the purposes of his getting a residence card.

13. Subsequent to this and arising out of a wider investigation of suspected marriages of convenience, the applicant's residency was reviewed. According to the proposed decision intending to revoke the applicant's permission on the 16th May, 2015, officers from the GNIB called to the applicant's address, which turned out to be a small one-bedroom bedsit, and it appeared the applicant was the only individual resident there. There was no evidence of Ms. Da Silva residing. A number of items of post were identified addressed to other individuals and it was said that the applicant claimed to not know who they were. According to this proposed decision, officers became aware that two other individuals for whom post had been received at that address were also EU Treaty rights applicants claiming to be residing at the address with their EU citizen wives. D/ Garda Graham Dillon averred that the applicant's responses to Garda queries about his spouse were "*extremely suspicious*", that the applicant appeared to have "*no significant personal interactions with his spouse*" and that "*the only appreciable amount of time which they spent in each other's company coincided with significant milestones in the legal processes".*

14. On 23rd July, 2015, the Refugee Applications Commissioner deemed the applicant ineligible for subsidiary protection because of his failure to attend. In March, 2016, the applicant received a letter from the department seeking further information in relation to his marriage. He says he went to Stewart & Co. solicitors, instructing them to ask why the documents were required. He averred that he believes that "*Stewart & Co. wrote a letter to that effect on my behalf and also advised the immigration authorities of my new address*". He originally said that this was around May, 2016, which would have put it after his move of house because the applicant claimed that around April, 2016, he moved to an address at Millview Cottages in Kilmainham. A letter from Stewarts was issued. The letter was not actually located but we know that it is dated 20th April, 2016: a strangely coincidental date because that was the very month that the applicant claims to have moved house. The applicant instructed his current solicitors that there was no reply to

this letter (see para. 12 of his solicitor's affidavit) but this is clearly untrue. The letter was forwarded by the Refugee Applications Commissioner to the Minister, and Stewarts were so informed by the Commissioner on 21st April, 2016. The applicant was in possession of that letter, and indeed gave it to his current solicitors who have now exhibited it. The Department of Justice and Equality replied on 29th April, 2016. That reply deals with the question of how to make a s. 17(7) application. There is no reference to acknowledging notice of a change of address. It seems to me, inferring the content of the Stewarts letter from the content of the reply to it and in all the circumstances to be very much more likely than not on the basis of the information we have, and indeed taking into account my view on the applicant's veracity overall, which I will come to later, that the Stewarts letter gave no such notice of change of address and were not instructed to do so.

15. The applicant claimed in oral evidence when he was recalled that he went to Stewarts three times; firstly, in 2016 when he got the letter seeking further information, secondly, to change his address, also in 2016, and thirdly, when he got a phone call from Sinnotts Solicitors in 2017. That somewhat contradicts the affidavit of his solicitor at para. 45 which refers to visiting Stewarts twice. The grounding affidavit of the applicant's solicitor states at para. 12 that the applicant was asked to provide pay slips for his "*wife*" and that he instructed Stewarts to reply to the Department. There is no reference in that affidavit to notice of the change of address as being part of that particular transaction. At para. 20 of the applicant's own affidavit, this is embellished by an averment that he asked Stewarts to notify a change of address, an averment which I reject. The applicant's own affidavit implies that the furnishing of the payslips and the alleged notification of the change of address all arose out of the one meeting with Stewarts. That is somewhat contrary to the applicant's oral evidence that there were two meetings. It is also somewhat different to what is averred to by his solicitor.

16. The documents actually produced refer to the application to be readmitted to the asylum process, which had not featured in the applicant's oral evidence up to that point. When recalled after the production of this material, the applicant modified his oral evidence and made a reference to having discussed a reapplication for protection with Stewarts. The applicant said on re-examination that Mr. Stewart had said he had made a big mistake in withdrawing his protection claim. However, the applicant never withdrew his protection claim. His asylum claim was rejected and his subsidiary protection claim was dismissed due to his failure to attend. The applicant never followed up the advice to make a reapplication for protection. That does not say much for his *bona fides* of having intimated an intention to make such an application. He did not give any satisfactory explanation for the differing accounts of his instructions to Stewarts. In May or June, 2016, the applicant's bicycle was stolen. He gave his address in Inchicore. The respondents state that there is no record that he raised his immigration status at that point or made any formal change of address.

17. On 28th January, 2017, Ms. Stacy Morris of the EU Treaty Rights section of the Department wrote to the applicant notifying him of the intention to revoke his permission. She referred to the Garda visit of May, 2015, and also to the fact that the EU citizen gave notice intending to marry immediately on her arrival in the State, and married just a couple of days after the three month notice period. She also referred to the fact that the marriage took place in Sligo, a place with no relevance to either the applicant or Ms. Da Silva. The Minister was of the opinion that the parties married there because it had the shortest waiting time, a position more or less confirmed by the applicant in his oral evidence. That letter was returned marked "gone away".

18. The applicant's permission was revoked on 23rd March, 2017. He was written to and informed of his right to review the decision. That letter was marked "*not called for*". The applicant said he was in Pakistan between February, 2017, and 3rd June, 2017. He was readmitted to Dublin airport without difficulty. That strange situation suggests some lack of coordination within the INIS in that the revocation of his permission was not picked up at the airport. I would suggest that that situation be investigated and repetition of such a situation be avoided.

19. On 6th May, 2017, a letter containing the proposal to deport was sent to his last notified address in Parnell Road. While a draft version of that letter was exhibited, dated 1st May, 2017. I have seen the original, which is in fact dated 6th May, 2017. A deportation order was made on 25th August, 2017. The analysis supporting that order contains an error, which seems to me to be clearly typographical in the sense that it refers to Ms. Da Silva as coming from Bulgaria. That typographical error is not remotely critical because it is clear that the Minister was well aware that she was Portuguese. Mr. Peart suggests that Central or European nationality could give rise to a suspicion of marriage of convenience but in the case of a Portuguese nationality that would not be so. That submission to my mind is clearly incorrect. Any EU country is capable of giving rise to such a marriage of convenience, and while it is perhaps fair to say that it is mainly a Central and Eastern European phenomenon there certainly have been other Portuguese cases and those from other countries.

20. On 31st August, 2017, a letter notifying the applicant of the deportation order was sent to the Parnell Road address and copied to Sinnotts solicitors, who were the solicitors dealing with the subsidiary protection application. That was returned marked "gone away". The applicant said he was telephoned shortly thereafter by Sinnotts but originally made the totally implausible claim that the telephone call that was received from Sinnotts at this critical time related to the withdrawal of his permission rather than to the making of the deportation order.

21. When the letter from the Department arrived around 1st September, 2017, Ms. Una O'Brien, solicitor, who had been dealing with the matter was on holidays. However, Sinnotts very commendably dealt with the matter immediately rather than waiting for Ms. O'Brien to return, and on 6th September, 2017, Ms. Amanda Lawlor from Sinnotts had a telephone conversation with the applicant, and it is quite clear that the applicant was notified that a deportation order had been made against him on that date.

22. The activity file from Sinnotts solicitors has been produced and it refers to a letter regarding a "*D.O.*" of 1st September, 2017, so it is quite clear that Sinnotts solicitors were focused on the issue of the deportation order from 1st September, 2017 onwards. The applicant's affidavit had said that he was informed that his permission to remain in the State had been revoked, with no reference to the deportation order. His original oral evidence made no reference to the deportation order. When recalled following Ms. O'Brien's evidence, he changed his evidence and claimed that he had been told that both the permission had been revoked and that the deportation order had been made. Such a mutation is characteristic of the applicant's approach.

23. The applicant's general approach is one of bobbing and weaving his evidence to accommodate facts as and when they come to the knowledge of the State authorities, but crucially not until then. He had originally sworn at para. 31 of his affidavit that he received a reply from the immigration authorities informing him that a deportation order had been made, and swore specifically that he knew about the deportation order since "*around October of 2017*" at para. 38 where as in fact he knew at all material times about the deportation order since 6th September, 2017.

24. On 11th September, 2017, Ms. Una O'Brien returned from holidays and emailed the applicant a copy of the deportation order. Indeed, she said that they had "*no instructions or correspondence*" regarding the permission and that her communication was about the deportation order, although it is quite obvious that the deportation order is made inferentially any previous permission is by necessity withdrawn. On 12th September, 2017, the applicant forwarded a copy of the deportation order to his current solicitors, Sky

Solicitors, who he attended in person on 15th September, 2017.

25. The applicant's solicitor averred at para. 16 of the grounding affidavit that the discussion with the applicant at that meeting related to the "*core difficulty*" that the applicant's marriage relationship was deteriorating because the applicant did not wish to move to Portugal, and it also averred that it was not until 19th October, 2017, that the applicant received a reply informing him that he was the subject of a deportation order and "*it came as a great shock to him*" (para. 19). While the applicant's solicitors subsequently corrected this evidence, the reason for the original incorrect averment was unfortunately not explained. The applicant was required to present to GNIB on 4th October, 2017, but failed to do so at a time when he was actually aware of the deportation order. On 19th October, 2017, the Minister wrote to the applicant's current solicitors informing them of the deportation order and requiring the applicant to present. The applicant has been an evader since the making of the deportation order, certainly since the requirement to present at least, up until the time of his arrest.

26. D/ Garda Dillon became aware that the applicant was working in Centra in Ballymun. Given the applicant's lack of permission it would appear that this employment was in breach of the criminal law of the State, and perhaps this matter also warrants investigation. On 15th January, 2018, D/ Garda Dillon attended and identified himself. He said that on being questioned, the applicant did not know where in Portugal his wife was or even what city she was in "*but that he could pay for her to return if needs be*". Ms. Da Silva gave the unconvincing impression in the witness box that she would be paying for her return to Ireland herself. The applicant said to D/ Garda Dillon that he was aware his status had been revoked and that Sky Solicitors in Inchicore had been dealing with it. He said his previous address was Parnell Road and he had friends who were still living there. At 8:00 pm on 15th January, 2018 D/ Garda Dillon arrested the applicant under s. 5 of the Immigration Act 1999. On 19th January, 2018, the applicant's solicitor made an application for leave to remain.

27. On 21st January, 2018, Ms. Da Silva returned to Ireland for the first time since 2014, because she had been contacted by the applicant's brother. She says that "*we have had our difficulties*" but "*continued to speak every day*". She said in her affidavit that "*in the event anything should happen to the applicant it will have a direct effect on myself and my family*". That is a somewhat curious and ambiguous, even troubling, formula. Ms. Da Silva said initially in her oral evidence that she paid for the flights herself "*with a lot of sacrifice*". Then she said she was "*going to pay*" with the help of the applicant's brother. She said the applicant helps her when he can, although she gave the impression of denying that significant sums of money were being advanced to her.

28. The applicant said that a Mr. Latif, who is apparently a friend who is also married to an EU national, booked the flights for Ms. Da Silva. He claimed to have little knowledge of how this came about and said that "*maybe his family asked*". His evidence was clearly evasive.

29. Ms. Da Silva's affidavit states there is an ongoing relationship, whereas the applicant's affidavit says that "*I do not see our relationship as being over and hope that we can overcome our difficulties*". Whether one views that combined with his solicitor's instructions as meaning that the alleged relationship is on life support, or whether it is simply a more gloomy assessment of the situation, the emphasis of the parties does not seem to coincide. His "*wife*" says she is happily conversing with him every day, apparently, whereas he feels the need to deny that the relationship is over. This strange denial of the non-existence of the relationship continued in that on 22nd January, 2018, at 13:41 the applicant's solicitors wrote to the prison service stating that "*their relationship is not permanently broken down*" and threatening Article 40 proceedings. An Article 40 application was then made by the applicant later in the afternoon of 22nd January, 2018.

30. As the applicant's counsel was making closing submissions in the Article 40 application in the afternoon of 25th January, 2018, he suggested to me that time should be extended for a hypothetical judicial review. At that point, in order to facilitate the applicant, I adjourned the matter and entertained an application for leave to seek judicial review on 29th January, 2018, which I granted, *de bene esse*. The respondent's statement of opposition and a replying affidavit were filed more or less immediately and I then heard the substantive judicial review together with the balance of the Article 40 application. I heard helpful submissions from Mr. John Peart S.C. and Mr. Gavin Keogh B.L who also addressed the court, for the applicant and from Ms. Sara Moorhead S.C. and Mr. John Gallagher B.L. who both addressed the court for the Governor and the Minister, and I am grateful to all counsel for their assistance and courtesy in this matter.

Evidence and material before the court

31. It was agreed that evidence in one of the proceedings would also be evidence in the other. In terms of evidence and material from the respondent, who bears the onus of proof in the Article 40 application, I received the following:

> (i). The respondent presented a certificate seeking to justify the detention, dated 23rd January, 2018 to the effect that the Governor holds the applicant on foot of a warrant of detention dated 15th January, 2018.
>
> (ii). I have also received an affidavit of D/ Garda Dillon, who was cross-examined on that affidavit. D/ Garda Dillon is clearly an impressive and intelligent witness, having seen and heard him, and I accept his evidence in full.
>
> (iii). I received an affidavit of Ms. Stacy Morris, together with exhibits. She also swore a supplemental affidavit on 25th January, 2018, and a further affidavit in the judicial review on 30th January, 2018, verifying the statement of opposition and exhibiting further documentation. Ms. Morris was also cross-examined on her affidavit and again having seen and heard her I accept her evidence in full.
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> (iv). I also heard Mr. Gerard Tucker in relation to service of the proposal to deport. He was also cross-examined and having seen and heard him I accept his evidence in full.

32. In terms of evidence from the applicant I received the following:

> (i). I received an affidavit of Imtiaz Ranjha, the applicant's solicitor together with the exhibits. The affidavit was sworn in January, 2018. Although it is undated, it seems that due to human error neither the solicitor swearing the affidavit nor C.B. Robinson Solicitors who took the affidavit appear to have noticed that the date had not been filled in. In terms of substantive content that affidavit is reliant on the applicant's instructions which in certain material respects were totally incorrect. I received a further affidavit of the applicant solicitor on 26th January, 2018, which to some extent corrects the earlier affidavit by acknowledging the fact that the applicant sent an email on 12th September, 2017, and that he was at that stage aware of his immigration difficulties.
>
> (ii). I also received an affidavit of Zanib Khan, a paralegal in the firm of the applicant's solicitors.

(iii). The applicant himself swore an affidavit on 25th January, 2018. He was cross-examined on that affidavit and was also recalled, in fairness to him, to deal with the further material that came in after that cross-examination. Having seen and heard the applicant in the witness box, I reject his evidence generally overall. I am satisfied that his evidence was highly evasive and dishonest.

(iv). I also received an affidavit of Ms. Da Silva. While an incorrect procedure was adopted in that her affidavit was sworn in English, which she clearly does not understand, the respondent was not taking any point on this. She gave oral evidence through an interpreter, Ms. Emili Liz, who also furnished a witness statement. The question of the marriage being one of convenience was, it seems to me, legitimately put by Mr. Gallagher by asking whether she got money from the applicant. I do not accept that there is any validity in Mr. Peart's suggestion that Mr. Gallagher did not challenge the applicant or Ms. Da Silva specifically on their assertions that they loved each other. One cannot be too prescriptive on how cross-examination is conducted as long as there is an opportunity to disagree with the key point and I am fully satisfied that that opportunity was afforded. Overall, Ms. Da Silva's evidence, having seen and heard her in the witness box, was also highly evasive and lacking in honesty. I am satisfied, having seen and heard her, that her demeanour when giving answers, including the clearly uncomfortable lengthy answers to the more difficult questions, and the content of her evidence indicated that, like the applicant, she did her best to mislead the court and stick to what was clearly a pre-prepared story between herself and the applicant. So I also reject her evidence generally.

(v). I also received oral evidence from Ms. Una O'Brien solicitor and accept her very helpful and clear evidence as to her dealings with the applicant.

33. Apart from having seen and heard the applicant and Ms. Da Silva, there are many connected reasons why the credibility of the applicant and his "*wife*" are minimal and why I am satisfied that the Minister's conclusion of a marriage of convenience is amply justified. I can attempt to summarise some of those reasons as follows:

(i). Ms. Da Silva's evasive answer as to why she did not know the applicant's date of birth.

(ii). The fact that she did not know in what month he celebrated his birthday.

(iii). The applicant having deceived the U.K. authorities by seeking a permission on a false name and with a false date of birth.

(iv). The applicant's implausible claim that this was a nickname.

(v). The applicant's making of an unsubstantiated application for asylum in the U.K.

(vi). The fact that this application was made only after his arrest.

(vii). His implausible claim that he applied on a false name because a friend told him to do so.

(viii). His implausible claim that he did not realise this was wrong.

(ix). His unsubstantiated claims for asylum and subsidiary protection in the State.

(x). His contradictory evidence in relation to when Ms. Da Silva entered the State.

(xi). The tender ages of Ms. Da Silva's children making her story of moving to Ireland to immediately decide to marry someone of precarious status implausible.

(xii). The contrast between Ms. Da Silva's non-marriage based relationship with her partner of six years and father of her children in Portugal and her immediate marriage to this applicant.

(xiii). The unsubstantiated claims made about the applicant's relationship with the children.

(xiv). The fact the parties do not speak the same language.

(xv). The applicant's lack of knowledge of when Ms. Da Silva came to Ireland.

(xvi). Ms. Da Silva's contradictory evidence regarding the arrival dates.

(xvii). The implausible story of how the parties communicated.

(xviii). Ms. Da Silva's contradictory evidence as to her date of arrival and when she began working.

(xix). Ms. Da Silva's contradictory explanations about how she communicated with the applicant.

(xx). Her lack of knowledge as to where the applicant lived, and his lack of knowledge of where she lived.

(xxi). The fact that the applicant was regarded as a good catch despite not only being a failed protection seeker but also being unemployed (as stated on the marriage certificate).

(xxii). The timing of the marriage three months after arrival.

(xxiii). Ms. Da Silva's inability to identify who the witnesses were.

(xxiv). The fact that Ms. Da Silva left the State the following day.

(xxv). The fact that she failed to volunteer that information.

(xxvi). The fact that the applicant failed to volunteer that information.

(xxvii). The fact that the applicant implausibly claimed he would have complied with his legal obligations had he only known of them.

(xxviii). The fact that Ms. Da Silva denied visiting Ireland in 2014 for immigration purposes.

(xxix). The fact that the applicant denied that Ms. Da Silva visited Ireland in 2014 for immigration purposes.

(xxx). The timing of the 2014 visit to coincide with the applicant's immigration needs.

(xxxi). The failure of the applicant ever to visit Ms. Da Silva in Portugal.

(xxxii). The failure of Ms. Da Silva to visit the applicant here.

(xxxiii). A lack of evidence of any other forms of ongoing contact.

(xxxiv). The nature of the residence in Parnell Road that the applicant was living in.

(xxxv). The fact that there were other individuals who are known to the applicant, and who were married to EU citizens, operating from that address.

(xxxvi). The extremely suspicious responses of the applicant to enquiries about his wife.

(xxxvii). The applicant's failure to attend to prosecute his subsidiary protection claim.

(xxxviii). The fact that the applicant gave untrue averments as to no reply being received to the Stewarts' correspondence.

(xxxix). The contradictory versions given by the applicant as to his dealings with Stewarts.

(xl). The contradictory information given by the applicant as to the contents of the Stewarts' correspondence.

(xli). The fact that the applicant only introduced the question of a re-application after that was established by documentary material.

(xlii). The lack of any satisfactory explanation for these differing accounts.

(xliii). The fact the marriage took place in Sligo, a place of no relevance to the applicant or Ms. Da Silva.

(xliv). The fact that the applicant sought to mislead the court in relation to the contents of the phone call and communications from Sinnotts.

(xlv). The fact that the applicant altered his evidence in that regard only after the further material had been made available that made the court aware of the factual position.

(xlvi). The fact that the applicant failed to notify the State of his addresses.

(xlvii). The fact that he failed to present to the GNIB as required.

(xlviii). The fact that he failed to challenge any of the decisions appropriately as soon as becoming aware of them.

(xlix). The fact that he worked in breach of the criminal law of the State.

(l). The fact that when arrested he did not know where in Portugal his wife was, or even in what city.

(li). The contradictory evidence given by the applicant and the wife as to who was paying for the flights.

(lii). The contradiction between the emphasis of the applicant and the wife as to the current state of the alleged relationship.

34. Mr. Peart claims this is not a marriage of convenience because the wife has come to Ireland to give evidence. It is clear somebody else bought her ticket in that regard. Her claim that she will pay for it at some unspecified future point falls entirely flat given that I am rejecting her evidence as dishonest and misleading. I am fully satisfied not only that the Minister has a rational basis for the conclusion that this is a marriage of convenience as pleaded in para. 15 of the statement of opposition and also that the Minister's conclusion that a marriage of convenience had taken place is supported by a weight of evidence, including evidence in these proceedings, as pleaded in para. 3 of the statement of opposition.

Adjournment application

35. Mr. Peart commenced the proceedings by seeking an adjournment on two issues. The first was that the matter should possibly be adjourned pending the reference to Luxembourg in *Chenchooliah v. Minister for Justice and Equality* [2016 No. 937 J.R.]. I rejected that application because it seems to me that the issue in *Chenchooliah* does not deal with marriages of convenience and is not therefore determinative for reasons I will discuss later.

36. He also sought an adjournment to reply to the supplemental affidavit of Stacy Morris and makes enquiries with Mr. Stewart and ultimately he did get time to reply and did furnish a further affidavit.

Extension of time

37. The relevant principle is set out in O. 84, r. 21(3) of the Rules of the Superior Courts that time can be extended only if (a) there are good and sufficient reasons for doing so and (b) the circumstances that resulted in the failure to apply in time were outside the control of, or could not reasonably have been anticipated by, the applicant. In the case of an applicant who wrongfully fails to give notice of a change of address, neither of these criteria apply. A fundamental breach by an immigrant of his or her obligations

precludes a finding that there is good and sufficient reason for an extension of time, save perhaps in the most exceptional circumstances, such as hospitalisation. Secondly, such a fundamental breach is neither outside the control of, nor could it not have reasonably been anticipated by, the applicant.

38. This is where we come to a fundamental difficulty with the decision in *Lin Qing v. The Governor of Cloverhill Prison* [2016] IEHC 710 (Unreported, High Court, Mac Eochaidh J., 25th November, 2016). The facts of that case bear some examination. In early 2016, the applicant moved from Monaghan to Kildare. On 12th February, 2016, the Minister sent a deportation order to his Monaghan address, which was the last address notified. On 29th August, 2016, his solicitors informed the Minister for the first time of the new address. On 6th September, 2016, INIS wrote to the applicant in Kildare notifying him of the deportation order made in February. On 12th September, 2016, the solicitor sought revocation of the deportation order, not an extension of time for judicial review. On 24th September, 2016, the applicant was arrested. On 2nd November, 2016, he applied for *habeas corpus* and only after *habeas corpus* was launched was leave sought for a judicial review. The judgment of Mac Eochaidh J. does not set out the date of that application, but I have checked the date in the Central Office system and it was filed on 10th November, 2016.

39. It seems to me that what is unfortunately obscured by the *Lin Qing* judgment is that there was a delay of nine months between the lawful notification of the deportation order and the application for leave to seek judicial review, a delay that was due to the applicant's wrongful breach of the statutory obligation to notify the Minister of his current address. An aggravating element is the delay of over two months between the applicant having actual knowledge and seeking leave - this was in the context where the limitation period was 28 days.

40. In those circumstances I am afraid I must very respectfully take the view that there was simply no sufficient basis to extend the time for judicial review in *Lin Qing* because to do so makes essentially meaningless the time limits in s. 5 of the Illegal Immigrants (Trafficking) Act 2000. In my respectful view, Mac Eochaidh J. goes rather too far at para. 27 of the judgment when he says, referring to the applicant's failure to comply with the statutory responsibilities, that "*none of that has any bearing on whether or not the applicant is entitled to an extension of time*".

41. If one turns to the factors considered by Mac Eochaidh J. at para. 34 in extending time, the first is that the applicant did not have actual notice of the deportation order until 6th September, 2016. That is irrelevant if the reason for that was his own fault. It further raises the question as to the lack of an explanation of the further two-month delay from that date, a matter which did not seem to be considered in the judgment. Secondly, the respondent in that case accepted that the applicant did not, as a matter of fact, receive a copy of the deportation order when it was sent to him. Again, it seems to me that it is irrelevant as it changes neither the date of the deemed notification nor the actual notice of the fact of the deportation order, whether a copy of it was received or not. The third factor was the delay between the making of the deportation order and service of it. I would respectfully take the view that that is irrelevant. The Minister is not obligated to serve a deportation order immediately. The fact that the Minister did not serve the order for some time does not mean that s. 5 of the 2000 Act does not say what it says. The fourth factor was that the applicant had on many occasions informed the authorities of his actual address and informed the respondent of his address on 28th August, nearly seven months after the deportation order was statutorily notified. Unfortunately, I would have to say so what? The fundamental point remains that the reason the applicant in that case did not receive the deportation order was his breach of duty, which was then compounded by his failure to challenge the order for a further two months, nearly double the limitation period. The fifth issue was that Mac Eochaidh J. went on to consider the merits on the point and found it to be arguable. I would accept that the merits are a potential factor among other factors (see also *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 (Hardiman J.)) but it cannot be the law that time must be extended if there is a weighty or arguable point. The whole point of the procedural issues, like limitation periods for example, is that they are capable of defeating claims that could otherwise succeed. Such thresholds do not operate merely to provide a second reason to reject claims that they are going to be rejected on their merits anyway.

42. I am afraid I must respectfully conclude that the first four reasons offered by Mac Eochaidh J. to extend time do not hold water, and the fifth reason, that of merits, was given far too much weight in the circumstances. It also seems to me the learned Judge did not have his attention appropriately drawn to the thresholds in O. 84, r. 21 and if he had focused on those criteria, in my view he would have rejected the application to extend time out of hand.

43. It seems to me the application of those thresholds to the present case is very simple. The applicant wrongfully and unlawfully failed to give proper notice to the Minister of his change of address. I reject his self-serving evidence that he asked Stewarts to notify the Department of the change of the address. He gave false and misleading evidence regarding the extent and date of his actual knowledge. He had actual knowledge of the deportation order and therefore inferentially that his permission had been revoked, when he got a phone call from Amanda Lawlor on 6th September, 2017. He applied for leave on 29th January, 2018. That is four and half months later in the context of the limitation period of 28 days - four and half months after actual as opposed to constructive notice.

44. There is no basis whatsoever to extend time. To do so would make a mockery of s. 5 of the 2000 Act. I also have regard to the fact that this applicant is no stranger to legal proceedings. He has been through the legal process in the UK and has a string of solicitors here in Ireland.

45. It seems to me that that approach is somewhat reinforced by the approach of the Supreme Court to extension of time to appeal to that court; see for example *T.D. v. S.D.* [2017] IESCDET 114 at para. 21, where the Supreme Court refused to extend the time after delay of almost four months outside the prescribed period. The court noted that the applicant "*is well acquainted with court procedures*" and that while he said that "*he has been trying to get Legal Aid Board solicitors to file an appeal on his behalf, such does not excuse the delay in question*". This applicant in this case had solicitors acting for him at all times. It seems to me his position is considerably weaker. The applicant did have access to a solicitor and did not apply until 29th January, 2018, despite being informed by his outgoing solicitors on 6th September, 2017, that the new deportation order had been made.

46. Even if one were to assume that he instructed Stewarts to inform the State of the change of address - and I make clear that I am rejecting that evidence both because I am rejecting his evidence generally as dishonest and evasive, and secondly because I infer from the nature of the reply to that correspondence that the change of address was not part of the letter, and thirdly because of the sheer number of alternative versions of events that the applicant has given on this specific matter, but even if somehow I am wrong on all of that - the proposition that Stewarts actually did give any such notice has not been borne out.

47. Even more fundamentally the applicant had not been damnified by the lack direct notice, at least in terms of the deportation order, because at least in that respect he knew pretty much immediately that the deportation order had been made due to the good offices of Sinnotts Solicitors. He could have sought judicial review at that point but instead sat in his hands. As I say, it would make a mockery of s. 5 to extend time for this applicant to challenge these decisions now. However, I am going to assume I am wrong in

relation to the extension of time and I will go on to deal with the judicial review on the merits.

Merits of the judicial review

The alleged failure to serve the applicant and breach of *audi alteram partem*.
48. The first ground in the judicial review, which is numbered 1, as is the second ground, relates to a breach of *audi alteram partem*, as do grounds 3, 4, 5 and 6. Mr. Peart claims that the notice in relation to the withdrawal of residency and the making of the deportation order was inadequate and in breach of the applicant's constitutional rights.

49. Regulation 24 of the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015) provides in para. (1) for the applicant's obligation to demonstrate proof of notice of change of address to the Minister, which the applicant has failed to do. Paragraph (2) provides for proof of service of documents by the Minister and I am satisfied that such service has been proved, both in relation to the proposal to revoke the residence card and in relation to the decision to revoke the residence card. In relation to the proposal to the make the deportation order, the operative provision is s. 6(1)(b) of the Immigration Act 1999, as amended *inter alia* by the 2000 Act. That provides for different modes of service but the operative one being by sending the correspondence by post in a prepaid registered letter or in any other form of recorded delivery to the address most recently furnished by the applicant. The last address furnished to the Refugee Applications Commissioner was the Parnell Road address and it is clear that the papers in relation to the proposed deportation order and the order itself were properly served. I also heard Mr. Gerard Tucker in relation to service of the proposal to deport and I am satisfied that that was also appropriately served.

50. Section 9 of the Immigration Act 2004 requires a non-national to register, which the applicant failed to do, and to notify the Minister of any change of address under s. 9(2)(c), which was also not complied with. Regulation 11(2)(a)(1) of the 2015 Regulation also imposes an obligation to inform the registration officer within seven days of any change of a place of residence and that was not done.

51. The position is that the applicant, having failed to notify the State of these matters, was bound by the last notification of his address and bound by any decisions or proposed decisions sent to that address. In *D.P. v. Governor of the Training Unit* [2001] 1 I.R. 492 [2000] IEHC 104, Finnegan J., as he then was, said at p. 502 that "*the applicant by his own conduct in failing to notify his change of address effectively prevented the operation of the Immigration Act, 1999, s. 3(3) in his favour and in such circumstances it cannot be open to him to allege that the respondents here infringed his constitutional rights. Accordingly, I refuse leave on this ground*". That was a case where the applicant failed to even get over the hurdle of leave to seek judicial review, having been in breach of his obligation to notify his address. In the Supreme Court in *D.P. v. The Governor of the Training Unit* [2001] IESC 113 (Unreported, Supreme Court, 28th November, 2001) Keane C.J. said "*In relation to the deportation order the obligation on the State is to notify the applicant of the making of the deportation order. That was done, and it is not in dispute that the notice was sent. It was sent to an address at which the applicant, as is admitted, was no longer residing when it was sent. It is not in dispute that under the relevant regulations, a person in the position of the applicant must notify the authorities of any change of address on his part and if he fails to do so, then in legal terms a failure to give him notice of the intention of the making of a deportation order is not a matter which is the legal responsibility of the Minister. It is entirely the applicant's responsibility because he has failed to comply with the relevant regulations.*"

52. In *Q.W. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 375 (Unreported, High Court, 17th July, 2012) Hogan J. applied the judgment of Finnegan J. in *D.P.* to this effect. I respectfully must take the view that the law in this regard is clear. Having failed in his statutory duty to give notice of change of address, the applicant's claim in relation to the breach of *audi alteram partem* or lack of notice falls flat. The manner of service is specified in the Act and that was complied with.

53. Mr. Peart's submission was that when a letter comes back as not called for, the Minister is therefore on notice that the letter had not reached the person and it was therefore harsh and inappropriate to proceed further unless actual notice was furnished. That untenable interpretation would make a nonsense of the legislation regarding service procedures. The onus is on an applicant to supply a current address and an applicant will simply have to live with any consequences of failing to do so.

54. Even if there was some infirmity with the service, the applicant was on notice since 6th September, 2017, from the phone call from Amanda Lawlor, that he was in significant legal jeopardy by virtue of the deportation order. Even assuming everything in favour of the applicant, he was on notice to look into and deal with the situation from that point and failed to do so. He did nothing legally effective until after he was arrested.

55. It was submitted that the Gardaí should have contacted Ms. Da Silva, but one cannot get into a situation where the court in a judicial review is dictating the procedural methodology of a Garda investigation. And even if that was somehow appropriate, it is clear that while the applicant told the Gardaí that Ms. Da Silva was in Portugal, he did not know where she lived, even to the nearest city, so it is not clear how the Gardaí could have effectively made any further enquiries even if there was an obligation to do so, which I am holding there was not. There was also a claim that the Department has the applicant's email address and phone number arising from his EU residence application. The Department may well have had that information, but so what? The legislation provides for a method of service and that does not involve emailing or phoning. The Minister was entirely correct to send the notice by post to the applicant's last known address.

56. There was a further claim that there was something irregular in the Minister having sent the deportation order to Sinnotts rather than Stewarts, given the reference in the letter from the Department dated 29th April, 2016, that the applicant was previously represented by Sinnotts. Whether the Minister was correct or not to send the letter to Sinnotts, there was no obligation to do so because service on the solicitors was done as a courtesy. Having a solicitor on the Department's record is not the same thing as furnishing an address for service for the purposes of s. 6. In any event, serving the matter on Sinnotts worked entirely to the advantage of the applicant, because due to the professionalism of Sinnotts in acting immediately to inform the applicant he was not only not disadvantaged but was significantly benefited by this having been done because it enabled him to give fully informed instructions to his new solicitors. Thus I entirely reject the claim that there was no proper attempt to notify the applicant. On the contrary, the Minister fully complied with the Act on these facts.

57. There was a claim that the applicant could have been served in person had he been chased down. That as a hypothesis may well be so, but the State is not obliged to pick any one form of service rather than another, and there is certainly no obligation to locate a runaway applicant as opposed to serving by post if that is the Minister's chosen methodology. The primary onus is on the non-Irish national to notify the Minister of his or her current address.

58. To this extent Mr. Peart's reliance on law in relation to *audi alteram partem*, particularly *Foley v. The Irish Land Commission* [1952] I.R. 118 is generally uncontroversial, but does not impact on the facts of the situation which we have here, where there is a

fundamental failure to comply with the statutory obligation to notify one's address.

59. I also note that the applicant had actual knowledge of the intention to revoke the residence card as opposed to merely constructive knowledge as pleaded in para. 2 of the statement of opposition. Thus he was on actual notice that his status was in question. That is all the more reason why it was essential for him to give notice of the change of address, and indeed perhaps all the more reason as to why the applicant's moving address without so notifying is questionable. Fundamentally, I uphold the plea at para. 7 of the statement of opposition that the Minister is not obliged to achieve actual notice of correspondence having regard to the procedures set out in the relevant statutes. I also entirely endorse the plea at para. 8 of the statement of opposition that a duty to achieve actual contact with an applicant "*would disrupt and impede an efficient and orderly deportation function which is premised on the principle that the onus is on non-nationals to maintain contact with immigration authorities*".

60. It follows if there was any lack of participation in the process, it was the fault of the applicant, as pleaded in para. 14 of the statement of opposition. I reject the applicant's evidence generally, so in particular I reject his evidence that he instructed Stewarts to notify the state of his change of address. But even if he did, I would uphold para. 9 of the statement of opposition that "*no instructions passing between those parties could have the effect of notifying a change of address unless concluded in a legally effective manner*". To add to the mix, it appears to be the case that the applicant has even now, as of the date of the hearing of this matter, failed to comply with his legal obligation to formally change the address or give formal notice to the change of address as pleaded in para. 10 in the statement of opposition, but whether that is correct as it appears to be or not, it makes no difference to the result.

The claim that the State failed to consider the deportation order and the decision to revoke permission appropriately
61. Ground 7 of the statement of grounds pleads that there are flaws and inaccuracies in the decision to make the deportation order and similar points appear to be made in relation to the decision to revoke.

62. There is a particular complaint made in submissions that there is a mistake in the analysis where the country of origin of Ms. Da Silva is referred to as being Bulgaria, where clearly it should have been Portugal. That as I stated is clearly immaterial and merely a typographical error.

63. Therefore, I uphold the plea in the statement of opposition that in revoking the residence card, the Minister utilised lawful considerations, as pleaded in para. 11, and that the Minister lawfully exercised her discretion as pleaded in para. 12.

The correct method of dealing with the applicant is by way of a removal order rather than a deportation order
64. Ground 1 of the statement of grounds, that is the second ground so numbered, and Ground 2, plead that it is unlawful for the Minister to make a deportation order given the allegation that the applicant is a person to whom the European Union (Free Movement of Persons) Regulations 2015 applies.

65. Mr. Peart relied on the decision of Hogan J. in *Igunma v. The Governor of Wheatfield Prison* [2014] IEHC 218 (Unreported, High Court, 29th April, 2014) to advance this submission. The problem for his submission is that this is clearly a marriage of convenience. The Minister's finding in that regard was unchallenged at the time and is totally consistent with all of the evidence before me. The Minister's conclusion that the "*marriage*" was a fraud seems to me to be totally justified and reinforced by the evidence I have heard. Here there is an express finding of a marriage of convenience, and I would apply *K.P v. Minister for Justice and Equality* [2017] IEHC 95 [2017] 2 JIC 2006 (Unreported, High Court, 20th February, 2017) in refusing to regard the deportation order as defective on that basis (see also *M.A.K. v. Minister for Justice* [2017] IEHC 465 (Unreported, O'Regan J., 17th July, 2017), which follows this approach).

66. It seems to me the *Igunma* doctrine does not apply. Here we have an absolute abuse of law and legal rights. An applicant is not entitled to a removal order where the EU law "*rights*" are procured by abuse and fraud and have been withdrawn. In such a case it is lawful for the Minister to make a deportation order. I therefore would uphold the plea at para. 13 of the statement of opposition that it is open to the Minister to terminate or withdraw the right under art. 35 of 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, at least in such circumstances and where the Minister has so terminated or withdrawn the right, it is open to the Minister to make a deportation order.

Futility
67. It seems to me, given the weight of evidence in support of the conclusion that the marriage here was one of convenience and the dishonest evidence given by or on behalf of the applicant and Ms. Da Silva, any remittal to the Minister for reconsideration of that ultimate issue would be futile and any relief should be refused, as pleaded at para. 17 of the statement of opposition.

Discretion
68. Even if I am wrong in any of the foregoing, I would dismiss the proceedings in the discretion of the court given the abuse of the system and dishonesty shown by the applicant, as pleaded at para. 16 of the statement of opposition; see my decision in *Li v. Minister for Justice and Equality* [2015] IEHC 638 [2015] 10 JIC 2102 (Unreported, High Court, 21st October, 2015) and the judgment of Lord Carnwath in *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

Merits of the Article 40 application – intention to deport
69. Having seen and heard D/ Garda Dillon, I am satisfied there is a settled and valid intention to deport the applicant within the statutory timeframe.

Extent to which the applicant can challenge past processes in an Article 40 application
70. By making an Article 40 application, an applicant does not restart the clock and set at nought all previous decisions. The Supreme Court decision in In *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19 [2000] 2 I.R. 360 establishes that s. 5 is an exclusive procedure to challenge a deportation order or any other decision subject to section 5. Likewise, any administrative decision subject to O. 84 should be challenged in that way. It is not open to an applicant to challenge a deportation order in an Article 40 inquiry. He or she must apply for judicial review. Where, as here, a deportation order is unsuccessfully challenged because I am rejecting the judicial review, the Article 40 application is going nowhere.

71. If likewise, a deportation order is not challenged either in time or at all, or is unsuccessfully challenged, it cannot be challenged in an Article 40 proceeding. It is not open to an applicant to simply wheel into court to impugn a deportation order or any immigration decision, simply because he or she gets arrested and then gets the idea of revisiting past decisions.

72. The Supreme Court decision in *Rachki v. The Governor of Cloverhill Prison* (Unreported, Supreme Court, 5th December, 2011) (Fennelly J.) clearly implies this, as I noted in *K.P.*, and such a conclusion followed from the decision of the Supreme Court in the

Trafficking Bill Reference and also followed from the jurisdiction on failure to challenge orders in time, such as the Supreme Court decision in *L.C. v. Minister for Justice, Equality and Law Reform* [2006] IESC 44 [2007] 2 I.R. 133.

73. For that reason, I must respectfully say that it is clear that the decision of Hogan J. in *Igunma* was incorrect, in that it ignored the time limits in s. 5, failed to apply those time limits and essentially regarded them as not relevant, and failed to apply the binding Supreme Court decision in *Rachki*. I spell out more detailed reasons for that in *K.P.* Those reasons can be incorporated by reference here.

Order

74. Despite the fact that Mr. Peart and Mr. Keogh have done everything possible to advance the case on behalf of the applicant, it is very clear that their client and Ms. Da Silva attempted intentionally to deceive and mislead the court and the immigration authorities. They are parties to what has been found to be a marriage of convenience, a position that I find to be totally consistent with all the evidence before me. The Minister's conclusion that the "*marriage*" was a fraud seems to me to be totally justified and reinforced by the evidence I had heard. The proceedings, therefore, are an abuse of process and an attempt to assert legal rights based on an illegal position obtained by fraud. The doctrine of *ex turpi causa* therefore applies, as discussed in *K.P. v. Minister for Justice and Equality.*

75. The order, therefore will be:

(i) that the judicial review will be dismissed on the merits; and

(ii) that the Article 40 application will be dismissed.

Postscript – leave to appeal and injunction

76. Having heard the parties on the question of leave to appeal, Mr. Peart formulated a proposed question which was essentially whether it is right to avoid the rule *audi alteram partem* by continuing with the process when one knows service has failed and where the statute enables *audi alteram partem* to take place in normal course. It seems to me there are a number of difficulties certifying that as a question for leave to appeal. The two that I want to mention are that that point seems to me to be already covered by the Supreme Court decision in *D.P. v. The Governor of the Training Unit* and secondly, that question is not decisive given that even if it is answered favourably to the applicant, I would refuse relief anyway having regard to the findings of fact I made in this particular case. It seems to me, therefore, that leave to appeal should be refused.

77. As regards the injunction, it was not made entirely clear to me whether this was being pursued if leave to appeal was to be refused but insofar as it is, Ms. Moorhead relies on *Okunade v. Minister for Justice and Equality* [2012] IESC 49 [2012] 3 I.R. 152, and applying that decision, it seems to me that this is a case where the balance of justice is massively against granting injunctive relief to this particular applicant. Thus an injunction will be refused.