THE COURT OF APPEAL

Record Number: 244/2023

Ní Raifeartaigh J. **Neutral Citation Number [2024] IECA 83**

Meenan J.

Burns J.

BETWEEN/

MINISTER FOR JUSTICE

APPELLANT

- AND -

MOHAMMAD IMRAN

RESPONDENT

JUDGMENT of Ms. Justice Tara Burns delivered on the 19th day of April, 2024.

1. This is an appeal against the judgment of the High Court (Barr J.) [2023] IEHC 338, granting an Order of *Certiorari* of a review decision ("the Decision") of the appellant which revoked the permanent residence card granted by her to the respondent on the basis that false and/or misleading information/documentation to a material fact had been provided by the respondent in support of his application for a permanent residence card, and that the permanent residence card had been obtained by false pretences.

Background

2. The respondent is a Pakistani national who averred in his grounding affidavit that he arrived in the State on foot of a student visa on 24 April 2004, although he gave 25 November 2003 as the date of his arrival in the State in an application which he made in January 2011 seeking a derived right of residence.

3. He married an EU citizen, Evelin Lango, on 10 January 2011 whom, he averred in his affidavit, arrived in the State in March 2010. He further averred that he met Ms. Lango in January 2010, when she was on holiday in Ireland, and that they commenced a relationship in November 2010. This sworn evidence is in contradiction to information provided to the appellant by the respondent on 12 January 2011 when he sought a derived right of residence in the State pursuant to the European Communities (Free Movement of Persons) Regulations 2006 and 2008 on foot of his marriage to Ms. Lango. In that application form, he indicated that Ms. Lango arrived in the State in August 2010. It is also contrary to the information his solicitor provided to the appellant in a letter dated 1 October 2018 wherein it was stated "*that the couple knew each other from internet-based contact prior to [her arrival in the State in August 2010]. They had known each other since January 2010 through such electronic contact*".

4. The respondent's application for a derived right of residence card was granted on 6 July 2011.

5. On 20 May 2016, the respondent and Ms. Lango made an application for a permanent residence card, pursuant to the European Communities (Free Movement of Persons) Regulations 2006 and 2008 . The application was based on the respondent's marriage to an EU citizen (Ms. Lango), who was exercising her EU Treaty rights by

working within the State, and that they had both been living in Ireland for a continuous period of 5 years. It was asserted that Ms. Lango was working as a self-employed childminder up until the date of the application. 92 invoices were submitted from Ms. Lango's childminding business in support of the respondent's permanent residence application. Those invoices were dated from 7 December 2015 to 21 May 2016, and showed earnings in the region of €3,000.

6. On 14 July 2016, the respondent was granted a permanent residence card.

7. By letter dated 14 May 2018, the appellant notified the respondent of her opinion that the documentation which the respondent provided evidencing the residence of the respondent and Ms. Lango and the exercise of rights by Ms. Lango, was false and misleading to a material fact, and that the marriage between the respondent and Ms. Lango was one of convenience. The respondent was given an opportunity to make comprehensive submissions to the appellant concerning these issues. The respondent's solicitor responded on his behalf by making detailed submissions which asserted that the documentation submitted in support of his application was genuine and that the marriage was not one of convenience.

8. On 19 November 2018, the appellant issued a decision revoking the respondent's permission to reside in Ireland on the basis that he had entered into a marriage of convenience and had submitted false and misleading documentation which asserted that his wife had been working as a self-employed childminder between December 2015 and May 2016.

9. On 7 December 2018, the respondent sought a review of the revocation decision under Regulation 25 of the European

Communities (Free Movement of Persons) Regulations 2015 ("the 2015 Regulations").

10. By letter dated 29 March 2019, the respondent's solicitor informed the appellant that the respondent's wife had obtained a consent divorce in her EU nation State on the 13 February 2019.

11. On 11 February 2021, the respondent's solicitor sent submissions to the appellant in relation to the review decision. The submissions stated *"[the respondent's wife] left Ireland in January 2016. Thereafter she didn't return."* This in in contradistinction to the childminding receipts which had been submitted by the respondent and Ms. Lango which evidenced work up to and including 21 May 2016 and the signing by Ms Lango and the respondent of the application form on the 20 May 2016.

12. On 13 December 2021, the appellant determined that the respondent's review had not been successful and upheld the revocation of the permanent residence card, although on a different basis to the original decision. The Decision found that the marriage was not one of convenience, however the appellant was not satisfied that the respondent's wife was engaged in self-employed childminding in 2016. The Decision found that the invoices submitted by the respondent in support of his permanent residence application were false and misleading to a material fact in circumstances where the respondent's solicitor's letter stated that the respondent's wife had left the State in January 2016 and had not returned.

13. On 12 January 2022, the respondent's solicitor sent the appellant a pre-action warning letter in contemplation of these judicial review proceedings, noting that the previous assertion made by the respondent to the effect that his wife had left Ireland in 2016 and had

not returned was a mistake and a case of *"human error"*. The letter stated:-

> *"..... he had recalled incorrectly at that remove that Ms. Lango had left in January 2016. He has now clarified for us that she left in mid-2016, but cannot recollect the exact date. One thing he is sure of is that the documentation submitted was genuine and truthful. Therefore, he must have been mistaken in the date of departure as she had worked in accordance with the invoices before she left the State. He regrets this human error and that he did not make your office aware that he was unsure of the exact month at the time. To be fair to our client, it is often difficult to recall with certainty exact dates at such a remove."*

14. The error asserted in his solicitor's letter has not been addressed by the respondent in sworn evidence. Nowhere in the affidavit evidence of the respondent before the Court has there been any averment as to when his former wife left this jurisdiction or how the mix up with dates as to when it was asserted she left occurred. Instead, with absolutely no explanation whatsoever, the Statement of Grounds states that Ms. Lango left this jurisdiction in August 2016. This is a very unsatisfactory position for the respondent to have adopted.

15. On 9 May 2022, leave to apply by way of judicial review was granted by Meenan J. in the High Court seeking:-

> *"1. An Order of Certiorari of the letter of the respondent dated the 13th December 2021 communicating the decision after statutory administrative review pursuant to Regulations 25 and 27 of the European Communities (Free Movement of Persons)*

Regulations 2015, that the applicant's permanent residence card ought to be revoked.

2. An Order of Certiorari of the letter of the respondent dated the 13th December 2021 communicating the decision after statutory administrative review pursuant to Regulations 25 and 27 of the European Communities (Free Movement of Persons) Regulations 2015, that the applicant's permanent residence card ought to be revoked.

3. A Declaration that regulation 27 of the European Communities (Free Movement of Persons) Regulations 2015 is to be interpreted as requiring that a proportionality assessment applies to the question of whether a permanent residence card ought to be revoked by the respondent.

4. If necessary, and in the alternative … a Declaration that insofar as Regulation 27 of the European Communities (Free Movement of Persons) Regulations 2015 failed to provide that a proportionality assessment applies to the question of whether a permanent residence card ought to be revoked by the respondent therefore the regulations fail to properly transpose article 35 of Directive 2004/38/EC."

16. Other relevant applications which the respondent made to the appellant are a second application for permanent residence dated 11 January 2022 (mistakenly stated as 2021) and a citizenship application on 9 February 2016. Neither of these applications were referred to in the papers, lodged by the respondent, seeking leave to apply by way of judicial review.

17. The second permanent residence card application was based upon the assertion that the respondent had been married to an EU citizen (Ms. Lango) who was exercising her free movement rights within the State and had been legally resident in Ireland for a continuous period of 5 years between 2011 and 2016. On this occasion, the application form did not give a defined time period in respect of when Ms. Lango was engaged in childcare services, nor was the form signed by Ms. Lango.

18. The citizenship application was refused on 14 April 2022. This was after the Statement of Grounds was lodged but before the leave application was moved before the High Court. The decision refusing a grant of citizenship referred to the fact that the respondent had fathered two children to the same mother in Pakistan, one born in 2009 and the other in 2014, and further was based upon the same facts as the Decision, namely that the information provided by the respondent to suggest that Ms. Lango was working in Ireland in 2016 was false. The failure to disclose a motoring offence from 2012 was also a further reason for the refusal.

19. On 23 November 2022, the respondent withdrew his second application for permanent residence.

The Decision

20. The operative part of the Decision revoking the respondent's residence card provides as follows:-

> *"In your application for a permanent residence card on 20/05/2016, you advised that Evelin Lango was self-employed with a company that she had established on 29/02/2012 called Evelin Childcare. A receipt book was submitted as evidence of her activity in the State, with receipts dating between*

07/12/2015 and 21/05/2016. This invoice book contains approximately 90 invoices for work undertaken by the Union citizen, mostly in 2016, and the approximate earnings set out for the dates between 04/01/2016 and 21/05/2016 was €3,000.

However, your legal representatives now advise that Ms. Lango left the State in January 2016 and has not returned. If this is the case, then it would not have been possible for her to undertake child minding work in the State between January 2016 and May 2016. Therefore, the invoices submitted in respect of the EU citizen's child minding activities in 2016 must be either false or misleading.

Information available to the Minister via the Department of Employment Affairs and Social Protection (DEASP) shows that Evelin Lango worked for just one week in 2016, earning €455. DEASP information does not reflect the work that you allege Ms. Lango undertook as a child minder in 2016. In this regard, your legal representatives note that the Union citizen was employed with Smyth's Toys over the Christmas 2015 period and was paid in January 2016 for this work.

You were provided with an opportunity to address the Minister's concerns in respect of the Union citizen's activities in the State in 2016 in the 'intention to revoke' letter that issued to you on 14/05/2018 and in the revocation decision letter that issued to you on 19/11/2018.

Against the background of the foregoing, the Minister is not satisfied that the Union citizen in this case was engaged in genuine self-employment as a child minder in 2016. You have

provided scant probative documentation or information in respect of this self-employment during that year - just one hand-written invoice book. Ms. Lango's self-employment is not reflected in DEASP records, and your legal representatives have confirmed that she left the State in January 2016.

The Minister is of the view that the documentation and information that you submitted as putative evidence of the EU citizen's self-employment in the State in 2016 was submitted with the intention of misleading the Minister into thinking that the EU citizen was exercising her EU Treaty Rights as a child minder during that time when this was not the case.

Your legal representatives assert that Evelin Lango departed the State in January 2016, and, as set out above, you have not provided any convincing documentation to establish that she was present in the State during that year. In your application for a permanent residence card on 20/05/2016, you stated that you and Ms. Lango were still living together in Cork City and that she was exercising her EU Treaty Rights in the State through self-employment with a company that she had established called Evelin Child Care. It appears that none of this was true and that Ms. Lango was not living in Ireland on the date that you made an application for a permanent residence card. It follows that your permanent residence card was provided under false pretences.

The Minister is satisfied that you submitted and sought to rely upon information and/or documentation 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.

Having considered all of the information, documentation, and submissions on all of your files, the Minister finds that the decision of 16/11/2018 should be set aside and substituted with the following determination.

The Minister is satisfied that your marriage to Evelin Lango was genuine and was not one of convenience in accordance with the Regulations. However, in support of your application for a permanent residence card, 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. The Regulations provide that the Minister may refuse, terminate, or withdraw any rights conferred under the Directive in the case of fraud or abuse of rights.

Therefore, the Minister finds that the permanent residence card that was provided to you on 14/07/2016 should be revoked. The permission that you held between 14/07/2016 and 19/11/2018 was not a valid permission because the documentation and information that you provided as evidence of your entitlement to a permanent residence card under the Regulations has been found to be false and/or misleading as to material fact."

The High Court Judgment

21. At the hearing before the High Court, the appellant asserted that by failing to reference the second application for a permanent residence card and the citizenship application, the respondent had failed to comply with the duty of candour which he was required to observe when moving the *ex parte* application seeking leave to apply by way of judicial review. It was also asserted that he failed to comply with the High Court Practice Direction referable to asylum, immigration and citizenship applications, namely High Court Practice Direction 81 ("PD 81"). The appellant raised this issue as a preliminary objection.

22. On 22 June 2023, Barr J. gave judgment in favour of the respondent by granting an order of *Certiorari* of the Decision and remitting the matter to the appellant for further consideration.

23. With respect to the claim of a lack of candour, the trial judge accepted the explanation of the respondent's solicitor that an administrative error had occurred, which she was responsible for, in failing to aver to the second application for a permanent residence card. With respect to the failure to aver to the citizenship application and his two children born in Pakistan to another woman, the trial judge was of the opinion that whilst it may have been preferable for the respondent to refer to these matters in his *ex parte* application, they were not relevant to the issues which arose for determination in these proceedings. Accordingly, he was of the opinion that a culpable lack of candour did not arise on the part of the respondent.

24. With respect to the requirement to carry out a proportionality assessment, the trial judge was of the view, having regard to *Saneechur v. Minister for Justice and Equality* [2021] IEHC 356 and *AKS (a Minor) v. Minister for Justice & Ors* [2023] IEHC 1, that the appellant was obliged to carry out a proportionality assessment when

considering the revocation of a permanent residence card. He stated at paragraphs 54 and 55 of his judgment:-

> *"54. The court is of the view that where an applicant has been found to have been in a valid marriage with an EU citizen, who was exercising her EU Treaty rights by living and working in Ireland; and when the non-EU citizen has been living and working in Ireland for approximately twenty years; and had been tax compliant; and has not come to the adverse attention of the gardaí; the decision maker must carry out a proportionality assessment when considering whether to take the drastic step of revoking a permanent residence card, when a finding has been made that the applicant had submitted false and misleading information.*
>
> *55. The court is satisfied that from the wording of Art. 35 of the Citizen's Rights Directive and Reg. 27 of the 2015 Regulations, that it is necessary to carry out such an assessment."*

25. In relation to the respondent's assertion that the Decision did not comply with the duty on a decision maker to provide reasons for her decision, the trial judge was satisfied that when the Decision was read as a whole, the reasons for the decision were apparent.

26. The trial judge concluded that his determination to set aside the Decision was in accordance with the general justice of the case. He noted that the appellant's finding that the invoices were fraudulent was based entirely on a submission made by the respondent to the effect that Ms. Lango had left the State in January 2016 and had not returned. The trial judge was of the view that the signatures on all the invoices at issue seemed to match those on other documentation

exhibited, to include a contract for employment, a tenancy agreement and a signed passport and ID card in respect of Ms. Lango. The trial judge opined that affidavits could have been obtained from the customers identified from these receipts, to ascertain if the respondent's wife had been in the State on the dates asserted. The trial judge also had regard to a self-assessment tax return submitted by the respondent which if shown to be for the relevant period, would support the veracity of the invoices submitted. Ultimately, the trial judge was of the view that to base such a serious allegation of fraud on a single sentence in a set of submissions without giving the respondent an opportunity to correct the statement made on his behalf, when the consequences of such a finding were so great, was somewhat harsh.

The Appeal

27. A Notice of Appeal was lodged on the 25 August 2023. The appellant appealed against the trial judge's findings on each question of law with the exception of the finding that adequate reasons were given in the impugned decision.

28. The respondent's notice was filed on the 16 October 2023. The respondent opposed the appellant's grounds of appeal in full, but lodged a cross-appeal in respect of the trial judge's finding that adequate reasons were given in the impugned decision.

Issues to be Decided in this Appeal

29. The issues submitted by the parties to be determined by this appeal are:-

> *"(i) Does a "culpable" lack of candour have to be established before a court can mark its disapproval of alleged non-disclosure at the ex parte stage in judicial review proceedings?*

(ii) Does a proportionality assessment have to be carried out prior to revoking a residence card under the terms of Article 35 of Directive 2004/38/EC and the implementing Regulations?

(iii) If the answer to (ii) is yes, did the High Court correctly identify the factors set out at paragraph 54 of the judgment for the purposes of such a proportionality assessment?

(iv) Was the High Court entitled to make adverse findings on the grounds of fair procedures when no such argument was raised by the Respondent?

(v) Was the High Court entitled to evaluate the evidence if its own motion in the case?

(vi) Was the High Court entitled to grant relief on the basis that it was in accordance with "the general justice of the case"?

(vii) Does the failure of the impugned decision to address the question of whether revocation was a proportionate sanction for the abuse of rights found mean that the impugned decision failed to provide adequate reasons?"

Submissions of the Appellant

30. In relation to the failure on the part of the respondent to refer to his second application for a permanent residence card and his citizenship application, the appellant submitted that the trial judge erred in finding that there was not a breach of the duty of candour having regard to the duty of *uberrimae fides* in *ex parte* applications and the requirements of PD 81.

31. Further, the appellant submitted that the trial judge erred in finding that it was necessary for the decision maker to conduct a proportionality assessment prior to revoking a residence card under the terms of Article 35 of Directive 2004/38/EC ("the Citizens Directive") and Regulation 27 of the 2015 Regulations. The appellant submitted that while the decision itself must be proportionate and based on an individual assessment, an explicit requirement to carry out a proportionality assessment does not arise.

32. Further it was submitted that the trial judge erred in identifying a set of factors to be considered in a proportionality assessment at paragraph 54 of his judgment determining that the respondent was not placed on notice regarding the appellant's concerns about Ms. Lango's residency and employment status in 2016; substituting his assessment of the evidence for that of the decision maker regarding the 92 invoices; and considering the general justice of the case.

Submissions of the Respondent

33. The respondent accepted that there is a duty of *uberrimae fides* when making an *ex parte* application for leave to seek judicial review but contended that the respondent's citizenship application and the fact of his two children born in Pakistan were not relevant to the matters that arose for determination in these proceedings. Further, the respondent submitted that the omission of a reference to the second permanent residence application was an administrative error on the part of the respondent's solicitor which should not be laid at the respondent's door. In the alternative, the respondent submitted that if the Court does find there was a breach of the duty of candour, it was not of the level of seriousness to deprive the respondent of the relief he might otherwise be entitled to.

34. The respondent submitted the trial judge was correct to find that the impugned decision was in breach of EU law for failing to conduct a proportionality assessment in accordance with Article 35 of the Citizens Directive. The respondent accepted that the 2015 Regulations do not expressly provide for any proportionality assessment but contended that this is due to a failure to properly transpose the Citizens Directive which specifically refers to the requirement to act proportionally in circumstances where an abuse of rights or fraud arises.

35. Further, the respondent submitted that the trial judge did not err in the factors which he suggested should be considered by a decision maker in conducting a proportionality assessment.

36. It was also submitted that comments by the trial judge referring to a lack of fair procedures; possible evidence which could be explored to establish Ms. Lango's working status; and the general fairness of the case, were *obiter*.

37. Finally, and in the alternative, the respondent submitted that if it is found that a proportionality assessment was conducted in reaching the impugned decision, the Decision failed to provide sufficient reasons.

Discussion and Determination

Lack of Candour

38. PD 81 for the asylum, immigration and citizenship list governed the *ex parte* leave application in this matter. It sets out very detailed and specific requirements in relation to applications of this nature requiring that all relevant matters be brought to the attention of the judge hearing the *ex parte* application.

39. PD 81 requires a written submission in support of an *ex parte* application and sets down specific requirements in relation to its contents, as follows:-

> ***"B. Statement of relevant facts***
> *This shall set out in chronological order the facts relevant to the legal issues and all facts necessary for the court to understand the full background, particularly in relation to the applicant's immigration history… This section shall include:*
>
> *(a). Full details of all protection or immigration applications made by each applicant, whether in the State or elsewhere, and outcomes and the dates of each.*
>
> *(b). Full details of the applicant's complete immigration history since leaving his or her country of origin (if applicable) and in particular identifying the total period of presence in the State and breaking down that period by reference to the precise dates during which such presence was lawful (identifying the legal basis and whether it was precarious, short-term or long term), or unlawful as the case may be, and identifying any periods during which the applicant(s) failed to comply with reporting requirements.*
>
> *(c). Details of the current immigration status of the applicant(s) and the factual basis for that status (e.g., left State voluntarily, deported, illegally present, present with permission and the basis of same)."*

40. An Explanatory Note relating to PD 81 outlines the importance of the principle of *uberrimae fides* in *ex parte* applications stating at paragraph 2:-

"2. In view of the principle of uberrima fides applying to ex parte applications…applicants have a general duty to put all relevant material before the court when making any form of ex parte application. The purpose of Practice Direction HC81 is inter alia to give practical effect to this requirement."

41. The Explanatory Note under the heading of *"Relevance"* sets out the disclosure obligations on an applicant and the potential consequences for failing to comply with the obligations, from paragraph 7 - 10:-

"7. As regards relevance, material regarding previous applications or proceedings may be relevant to questions of candour, conduct or discretion even if such material was not before the decision-maker in respect of the particular decision being impugned in the proceedings.

8. Any previous application by an applicant himself or herself will be regarded as presumptively relevant. There may be circumstances where this is not the case, but if so this must be explained on affidavit.

10. If an applicant fails to make full disclosure at the ex parte stage in accordance with the Practice Direction (including a failure that arises by averring incorrectly as to the non-relevance of matters that are subsequently held to be relevant), any failure in that regard may be taken into account if the question of discretionary relief including injunctive relief arises at a later stage of the proceedings, independently of whether such non-disclosure is a ground for setting aside the order granting leave."

42. In the matter of *PNS v Minister for Justice and Equality* [2020] IESC 11, McKenchie J. stated at paragraphs 96 and 98 of his judgment:-

> *"96. There can be no doubt but that a judge's capacity to condemn abusive conduct by the exercise of discretion, is fundamental to the functioning of any legal system. It is certainly part of our national law and where EU rights or entitlements are asserted, it is almost certainly also to have a foundation there…. In any event such power is particularly important in the context of refugee and asylum cases, as where an applicant engages in serious abusive practices, they put the integrity of the entire system in jeopardy. That system, to successfully reflect genuine cases depends on fairness, good faith and transparency; all are seriously at risk with such abuse Therefore, there is and must be the jurisdiction for such behaviour to be recognised and controlled at a judicial level.*
>
> *..*
>
> *98. In my view, this jurisdiction must be used sparingly and in a cautious manner; it should only be resorted to, where the abuse in question is serious and flagrant; where it has been deliberately engaged in, such that self-evidently the applicant, by his or her actions, has shown a clear disregard for the asylum system. This may take a variety of forms, such to be determined by the trial judge. In this respect, I would tend to agree with the views expressed by Birmingham J., as he then was, in D.W.G v. Minister for Justice and Equality [2007] IEHC 231 (Unreported, High Court, Birmingham J., 26 June, 2007). The applicant in question in that case wished to benefit from subsidiary protection which, at the time, came from European Communities (Eligibility for Protection Regulations, 2006) S.I. 518/2006: however the learned judge felt that his conduct was such that it had disentitled him to any relief in judicial review,*

he described the backdrop of the applicant's situation as being one of quite serious delay and ongoing illegality. He was careful to point out however that he reached this decision while also holding the view that only in certain rare cases would the conduct of an applicant disentitle them to relief (pg. 15 of his judgment)"

43. Counsel for the respondent submitted that PD 81 did not require the respondent to bring his citizenship application and its refusal to the attention of the High Court at the leave application stage as it was not relevant to these proceedings. An affidavit sworn by the respondent's solicitor goes further stating:-

"[T]he fact that the Applicant who has children who live outside the State is complete(ly) irrelevant to both these proceedings and indeed the question of revocation before the Respondent. Moreover, given that the Respondent was also the decision-maker in respect of the Applicant's citizenship application, the Respondent would have already been fixed with knowledge of the existence of the Applicant's children, and therefore it is difficult to see any issue here of relevance to these proceedings – I say that, certainly, no issue of candour arises."

44. The respondent's solicitor is quite incorrect is this assertion. The respondent's citizenship application was a relevant matter and was required to be referred to in his grounding affidavit and brought to the attention of the judge before whom the leave application was moved. Further, I am surprised that the respondent's solicitor is of the view that the fact that the respondent fathered a child in Pakistan, during the currency of his marriage to Ms. Lango, with the same mother with whom he had fathered an earlier child, was not of relevance to the question of revocation before the appellant, when

the question of a marriage of convenience remained a live issue before the review decision maker.

45. Further, the argument made on behalf of the respondent at hearing, and partially reflected in the affidavit of the respondent's solicitor, to the effect that the appellant is fixed with knowledge of all applications made by an applicant because of the presence of an applicant's personal identity number on the paperwork, is incorrect. The volume of applications which the appellant deals with on a yearly basis is immense. The duty is placed firmly on the shoulders of an applicant in judicial review proceedings to bring all relevant applications to the attention of the appellant. The fact that a common personal identity number is attached to applications does not absolve an applicant of that duty.

46. With respect to the second application for a permanent residence card, the respondent accepts that this should have been brought to the judge's attention at the *ex parte* stage.

47. The question thereupon arises as to the consequences of the failure on the part of the respondent to bring both of these applications to the attention of the judge before whom the *ex parte* leave application was moved. The reason why a lack of candour occurred can be manifold, to include an applicant failing to disclose relevant matters to his legal team, or his legal team misunderstanding the relevance of a particular fact; holding an incorrect view of the relevant law; or making a genuine mistake resulting in a relevant fact inadvertently not being adverted to. Accordingly, the cause of the lack of candour is a relevant consideration when determining the consequence of it.

48. In the instant case, the reason for the failure to disclose the second permanent residence application was accepted by the trial judge as

being the fault of the respondent's solicitor. This is a finding of fact in respect of which there is no basis for this Court to interfere.

49. With respect to the failure to refer to the citizenship application, I am of the opinion that the trial judge erred in relation to his view of the relevancy of this matter. However, the failure to disclose this application arose as a result of the respondent's solicitor's view that the application was not relevant. While that is an incorrect view of its relevance, which is particularly clear having regard to PD 81, the question arises as to whether the seriousness of the omission required the proceedings be stuck out *in limine*. This is a matter which falls within the discretion of a trial judge. Each case will depend on its own factual circumstances which will require an assessment of the importance of the fact omitted and the reason that the omission occurred. It cannot be the case that once a duty of candour is established that the resulting consequence is that the proceedings be automatically struck out as is reflected in *PNS v Minister for Justice and Equality* [2020] IESC 11.

50. In the instant case, as there is affidavit evidence to the effect that the respondent's solicitor was of the opinion that the matter was not relevant (although this is incorrect), and as I am dealing with this on appeal, it seems appropriate to me, that an Order should not be made at this stage striking out the respondent's proceedings *in limine*.

Proportionality Assessment

51. It is important to be clear about what the respondent sought to challenge in these proceedings. The sole focus of the reliefs sought by the respondent was that there was a requirement to conduct a proportionality assessment in circumstances where the appellant was considering revoking the respondent's permanent residence card on the basis of him acquiring the card by false pretences. Accordingly,

the determination of the appellant that the documentation submitted by the respondent seeking to establish his spouse's employment status was false and/or misleading to a material fact, was not challenged in these proceedings.

52. The respondent's argument in this regard was based on an interpretation of the Citizens Directive in conjunction with two recent cases of the High Court, namely *AKS (a Minor) v. Minister for Justice & Ors* [2023] IEHC 1 and *Saneechur v. Minister for Justice and Equality* [2021] IEHC 356.

53. Regulation 27 of the 2015 Regulations states:-

> *"Cessation of entitlements*
> *27. (1) The Minister may revoke, refuse to make or refuse to grant, as the case may be, any of the following where he or she decides, in accordance with this Regulation, that the right, entitlement or status, as the case may be, concerned is being claimed on the basis of fraud or abuse of rights:*
>
> *…*
>
> *(b) a residence card, a permanent residence certificate or permanent residence card;*

54. Regulation 27 of the 2015 Regulations derives from Article 35 of the Citizens Directive, which under a heading of *"Abuse of rights",* states:-

> *"Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and*

subject to the procedural safeguards provided for in Articles 30 and 31."

55. In *McCarthy v. Secretary of State for Home Department* (Case C-202/13), ECLI:EU:C:2014:2450, the CJEU considered Article 35 of the Citizens Directive stating at paragraphs 47 – 51 of its decision:-

"47. Furthermore, in accordance with Article 35 of Directive 2004/38, Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by that directive in the case of abuse of rights or fraud, such as marriages of convenience; however, any such measure must be proportionate and subject to the procedural safeguards provided for in the directive (judgment in Metock and Others, EU:C:2008:449, paragraph 75).

48. As regards the question whether Article 35 of Directive 2004/38 allows the Member States to adopt measures such as the measure at issue in the main proceedings, it is to be noted that the right of entry and the right of residence are conferred on Union citizens and their family members in the light of their individual position.

49. Indeed, decisions or measures adopted by the competent national authorities relating to a possible right of entry or residence, on the basis of Directive 2004/38, are intended to establish the individual position of a national of a Member State or of his family members with regard to that directive (see, to this effect, with regard to issue of a residence permit on the basis of secondary legislation, judgments in Collins, C-138/02, EU:C:2004:172, paragraph 40; Commission v Belgium, C-

408/03, EU:C:2006:192, paragraphs 62 and 63; and Dias, C-325/09, EU:C:2011:498, paragraph 48).

50. Furthermore, as Article 35 of Directive 2004/38 expressly states, measures adopted on the basis of that article are subject to the procedural safeguards provided for in Articles 30 and 31 of the directive. As is clear from recital 25 in the preamble to the directive, those procedural safeguards are intended, in particular, to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State.

51. In light of the fact that Directive 2004/38 confers rights on an individual basis, the redress procedures are designed to enable the person concerned to put forward circumstances and considerations relating to his individual position, so as to be able to obtain from the competent national authorities and/or courts recognition of the individual right to which he may lay claim.

52. It follows from the foregoing considerations that measures adopted by the national authorities, on the basis of Article 35 of Directive 2004/38, in order to refuse, terminate or withdraw a right conferred by that directive must be based on an individual examination of the particular case."

56. In *AKS (a Minor) v. Minister for Justice & Ors* [2023] IEHC 1, Phelan J. considered Article 35 of the Citizens Directive and Regulation 27 of the 2015 Regulations in the context of a minor applicant who had acquired Irish citizenship at birth, on foot of her father's permanent residence permission, which was subsequently revoked by the

Minister. The Minister's position, in that case, was that the minor citizen applicant's rights were not engaged and did not have to be considered in the context of a decision to revoke her father's permission to reside, despite the Minister's position that the effect of revocation of the father's permanent residence permission was that it was void *ab initio* which thereby had a consequence on the original entitlement of the minor applicant to citizenship. Phelan J. stated at paragraphs 104 – 105; 118 – 119; and 122 - 123 of her judgment:-

> *"104. In contrast to the mandatory language of the previous Regulation 24 of the 2006 Regulations, Regulation 27 of the 2015 Regulations provides instead in discretionary terms that the Minister "may revoke" where it is found in accordance with the Regulation that a right, entitlement or status concerned is being claimed on the basis of fraud or abuse of rights. Nothing in the language used requires that such revocation would necessarily follow on a finding of fraud or a marriage of convenience (contrary to what was suggested in the First Respondent's correspondence in this case).*
>
> *105. Considering then Article 35 of the Directive, it is noted that it also uses permissive language in that it provides "Member States may adopt the necessary measures to refuse, terminate or withdraw any rights conferred by this Directive in the case of abuse of rights or fraud.". From the language used what appears to be envisaged is a power to terminate rights acquired under the Directive. On my reading the Directive does not require or even permit automatic revocation. I based this view on the fact that Article 35 requires that "any such measure shall be proportionate and subject to the procedural safeguards provided."*
>
> *…*

118. It seems to me that there is a disconnection between the correspondence which issued in this case and the requirements of the Directive as transposed through the 2015 Regulations. I am satisfied that the First Respondent has erred in approaching the exercise of her power (whether retrospective or prospective) under the 2015 Regulations by proceeding as if the Regulations mandate revocation it is clear from the language of the regulations (and indeed its parent Directive) that the first respondent has a discretion to revoke but is not required to exercise that discretion. It was plainly said not once but in repeated correspondence that a finding of fraud and marriage of convenience "will" result in his permission being revoked and previous permissions being "deemed" to have been invalid. I am satisfied that this correspondence is not aligned with the language of the Regulations and misstates the nature and effect of powers vested under the 2015 Regulations which, whatever about the separate question of retrospection, do not mandate revocation in the case of every incident of fraud or marriage of convenience. Rather the Directive and the 2015 Regulations both enable revocation in circumstances where this is a proportionate exercise of discretion. This is an important distinction.

119. The requirement to exercise a discretion in a proportionate manner is rooted in clear terms in the Directive, if not in the Regulations, but in any event flows as a matter of constitutional justice and arising from the requirement to respect and vindicate fundamental rights affected by the decision and may be considered necessarily implied in a decision-making process under the 2015 Regulations which purports to interfere with rights (see Luximon v. Minister for Justice & Equality). Accordingly, a proportionate exercise of a power to revoke

would require consideration of the impact of revocation on any acquired rights prior to the exercise of such a power.

…

122. Where it is proposed to make a revocation order, be it retrospective or prospective, I am satisfied that consideration should be given in the exercise of a discretionary power to the potential impact of the decision on acquired or vested rights. An assessment of the potential impact of the decision on acquired or vested rights is necessary as a first step to ensuring that the decision ultimately taken does not give rise to a disproportionate interference with such rights.

123. It is clear from the terms of the correspondence that at the time the decision making process under the 2015 Regulations was invoked, the first Respondent did not understand the nature of her power as discretionary rather than mandatory. In consequence she did not appreciate that she was required to exercise her discretionary powers in a proportionate manner having due regard to all affected rights and interests. The process was fundamentally flawed for this reason"

57. In *Saneechur v. Minister for Justice and Equality* [2021] IEHC 356, Barrett J., concluded that the determination by the Minister that the applicant had engaged in fraud to acquire a residence card was not made on a sufficiently solid basis, nor were the reasons given rationally justified to take into account the personal circumstances of the applicants. He stated at paragraphs 21 and 22 of his judgment, in relation to the requirement to hold a proportionality assessment when exercising the power conferred pursuant to Article 35 of the Citizens Directive:-

"21. [O]ne arrives next at the Minister's remarkable conclusion that " Because you have asserted a right based on documentation intentionally misleading as to a material fact about a central aspect of your application you cease to be entitled to any right of residence…". The court admits to some surprise that the Department of Justice would come to court and seek to stand over a conclusion that is so patently infirm in substance and thrust. When one looks to Article 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 within the territory of the Member States …, it provides, inter alia, that " Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud….Any such measure shall be proportionate…". Yet there is simply no proportionality assessment undertaken in the impugned decision. There is just a blanket cessation of any EU treaty rights presenting. That is so flawed an approach that on this ground alone, the impugned decision would have to fall (though, as can be seen, there are multiple grounds on which it falls).

22. Fourth, conversely, not only has the Minister failed to undertake a proportionality assessment, but the conclusion/decision arrived at in this regard – a blanket cessation of any EU treaty rights presenting – is utterly dis-proportionate."

58. *AKS (a Minor) v. Minister for Justice & Ors* [2023] IEHC 1, and *Saneechur v. Minister for Justice and Equality* [2021] IEHC 356 were not appealed by the Minister.

59. However, neither *AKS (a Minor) v. Minister for Justice & Ors* [2023] IEHC 1, nor *Saneechur v. Minister for Justice and Equality* [2021] IEHC 356 specifically deal with the issue which has arisen in the instant case.

60. The underlying basis of Barrett J.'s decision in *Saneechur v. Minister for Justice and Equality* [2021] IEHC 356 was that the evidence submitted in support of the residence card application could have been sufficient for the Minister to be satisfied that the right was acquired pursuant to the 2015 Regulations; that the finding of fraud by the Minister was made in the absence of a rigorous examination of the application; and that proper and sufficient reasons were not given for the finding of fraud made. In *Saneechur v. Minister for Justice and Equality*, the applicants' position was that the documentation supporting the application was genuine. That is not the position in the instant case where the finding by the appellant that the respondent had submitted fraudulent documentation in support of his application is not challenged by the respondent. This is a significant differentiation from the instant case such that *Saneechur* can be distinguished.

61. With respect to *AKS (a Minor) v. Minister for Justice & Ors* [2023] IEHC 1, vested rights of citizenship were at risk of being interfered with arising from the decision of the Minister that fraud had been perpetrated to obtain a permanent residence card, without the vested citizenship rights being considered in that determination. Furthermore, the Minister misunderstood her power pursuant to Article 27 of the 2015 Regulations, assuming a mandatory requirement to revoke a residence card on foot of a fraud being perpetrated rather than a discretionary power, as specified in the 2015 Regulations. The existence of a discretion on the Minister's part

to revoke a residence card obtained by false pretence does not imply a procedural requirement to conduct a proportionality assessment, it simply means that she has a discretion in the matter. Of more significance however, are the very particular facts of *AKS (a Minor) v. Minister for Justice & Ors* and the fact that vested rights, most particularly citizenship rights, were engaged by the decision to revoke the permanent residence card which had not been considered by the Minister. In that scenario, Phelan J correctly identified that an onus arose on the Minister to consider those rights and to determine the outcome of the fraudulent activity in a proportionate manner to the vested rights affected. Again, this is a significantly different scenario to the instant case where no other vested right arose for consideration on foot of the revocation of the respondent's permanent residence card. Accordingly, again, AKS *(a Minor) v. Minister for Justice & Ors* can be distinguished from the instant matter.

62. The appellant submits that the import of Article 35 of the Citizens Directive is that a decision taken by the Minister in response to fraudulent activity perpetrated by an applicant to deceptively acquire a right pursuant to the Citizens Directive, does not require that a standalone proportionality assessment be conducted in each and every case, but rather requires that such a decision be proportionate to the individual case.

63. I agree with this analysis of the Citizens Directive. It cannot be the case that where residence rights are sought to be acquired as a result of fraudulent activity or abuse of the system, to include marriage of conveniences being entered into, that a proportionality assessment must, of necessity, be conducted. A right cannot inure if it was fraudulently obtained. Hence, in a situation where the right sought to be relied upon is vitiated and void *ab initio* as a result of it being

obtained by false pretences, an absolute standalone requirement to conduct a proportionality assessment cannot arise.

64. I am supported in this view by the the judgment of the CJEU in *Cussen & Ors v. T.G Brosnan* (Case C-251/16), ECLI:EU:C:2017:881C-251/16, where the Court stated at paragraph 32 of its judgment:-

> *"It should also be added that, according to the Court's case-law, refusal of a right or an advantage on account of abusive or fraudulent acts is simply the consequence of the finding that, in the event of fraud or abuse of rights, the objective conditions required in order to obtain the advantage sought are not, in fact, met, and accordingly such a refusal does not require a specific legal basis."*

65. This does not mean that the decision does not have to be individualised and proportionate to the circumstances of the case, which accords with the decision of the CJEU in *McCarthy v. Secretary of State for Home Department* (Case C-202/13), ECLI:EU:C:2014:2450. However, a standalone proportionality assessment is not required to be carried out where fraudulent activity arises.

Criminal Liability

66. In relation to the respondent's argument that other penalties are available to address such fraudulent activity, this fails to engage with the central issue in the matter which is that the right to permanent residence has not accrued in the first place. Creating criminal liability in respect of providing false information or documents in an application pursuant to the Citizens Directive does not render this an alternative remedy for such activity. Rather, it establishes the

seriousness of such conduct and creates criminal liability separate and distinct to the entitlement of the Minister to revoke the residence benefit deriving from fraud.

An already acquired right?

67. In the course of the hearing before us, Counsel for the respondent sought to raise an argument that the respondent had acquired rights to the permanent residence card by the 5th anniversary of his marriage to Ms. Lango as the requirements to acquire such a right were met by him in that it was asserted he was living with Ms. Lango for 5 years who was exercising her employment rights within the State. That argument was not before the trial court (as was acknowledged in the respondent's legal submissions, despite returning to this proposition at paragraph 88 of the submissions), and that basis for claiming Citizen Directive rights was not the basis of the application before the appellant. To reiterate, the respondent was found to have submitted false and/or misleading information and documentation to the appellant. The proceedings were premised on this determination and raised the issue whether in those circumstances, the Minister was required to conduct a proportionality assessment before making a determination. The question as to whether the respondent had already acquired rights does not arise in this appeal.

Opportunity to "further comment"

68. The appellant sent the required procedural letter to the respondent in May 2018 notifying him of her opinion that the documentation which the respondent provided to evidence the exercise of rights by Ms. Lango was false and misleading to a material fact. It was stated that the reason for this concern related to the records held by the Department of Employment Affairs and Social Protection which did not support the proposition that Ms. Lango had worked in childcare

in 2016. While additional matters came to be relied upon by the appellant, namely the information from the respondent's solicitor that Ms. Lango had left the jurisdiction in January 2016 and did not return, the respondent was fully aware from the start of the process that the genuineness of the assertion that Ms. Lango worked as a childcare assistant from December 2015 to May 2016 was at issue. Furthermore, the additional information which the appellant relied upon to determine that the information and/or material provided by the respondent was false or misleading, emanated from the respondent himself. There was no requirement for the appellant to bring that very information to the respondent's attention or to permit him an opportunity to further comment on the information which he himself provided. The trial judge erred in his determination that an obligation arose for the respondent to be given an opportunity to address an inconsistency in the information which he himself provided.

"Justice of the Case"

69. The trial judge proceeded to engage in an analysis of the evidence in the case. He commented in relation to the signatures on the impugned receipts and suggested avenues which the respondent could pursue to attempt to establish that Ms. Lango had provided the childminding services at issues. It seems to me that the trial judge engaged in this commentary arising from his view that the respondent should have the opportunity to confront the proposition that Ms. Lango left the jurisdiction in January 2016, which assertion, it must be remembered, emanated from the respondent. As I have already determined, an opportunity to comment on the material which he himself had submitted did not arise for the respondent for the reasons I have already set out. I am of the view that the trial judge did not decide that the justice of the case was a matter for his

determination but rather made these comments in a manner intended to be helpful.

Adequate Reasons

70. The respondent has cross appealed the determination of the trial judge that adequate reasons were given by the appellant in the Decision. I am in agreement with the trial judge in this regard. The Decision of the appellant, taken as whole, makes it abundantly clear that the reason for the revocation of the permanent residence card was because the documentation and information provided to the appellant by the respondent was false and misleading to a material fact which was established by the information provided by the respondent to the effect that his wife had left the jurisdiction in 2016. The upshot of that information was that the invoices had to be false. Ms. Lango's non-working status was corroborated by the Department of Employment Affairs and Social Protection records. There is no ambiguity in this regard. Having regard to these findings, the Decision clearly reflects a personalised assessment of the respondent's application; the issues arising; the fraudulent claim of an entitlement to rights; and the consequences of the fraudulent claim. In light of the determination that the basis of the right claimed was fraudulent, the decision to revoke the permanent residence card was proportionate to the abuse of rights which is established to have occurred.

Conclusion

71. Accordingly, I am of the opinion that the trial judge was correct in relation to his determination that adequate reasons were given for the appellant's decision but was incorrect in determining that a standalone proportionality assessment was required to be conducted by the appellant the absence of which rendered the Decision invalid.

72. I will therefore make an Order allowing the appellant's appeal and setting aside the Order of the High Court made on 11 July 2023. I also will make an Order refusing the respondent's cross appeal with respect to paragraph 54 of the High Court judgment.

73. The usual rule that costs follow the event should apply which would result in a cost order of the High Court proceedings and the appeal before this Court being made against the respondent.

74. If the respondent wishes to contend otherwise in relation to the cost order, I will give him leave to file and serve a short written submission – not exceeding 1,000 words - within fourteen days of the delivery of this judgment in the event of which I would allow the appellant fourteen days to file and serve a response, similarly so limited.

75. I will make no order for costs with respect to the respondent's cross appeal.

76. As this judgment is being delivered electronically, Ní Raifeartaigh and Meenan JJ. have authorised me to say that they agree with it.