Neutral Citation [2013] IEHC 176

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012 / 115 J.R.

Between:/

KHALID LAHYANI

APPLICANT

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MS JUSTICE M. CLARK, delivered on the 18th day of April 2013.

1. This judgment concerns the interpretation of *Directive 2004/38/EC 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* and in particular the application of Article 13(2)(a) of the Directive to a non-EU national whose marriage to an EU citizen has ended and whose wife has left the State.

2. The application comes before the Court as a judicial review challenging the lawfulness of the decision of the respondent Minister to revoke the applicant's derivative right of residence in November, 2011. Leave was granted on an *ex parte* basis by order of Cooke J. dated the 20th February, 2012, to seek:-

> *1. A Declaration that for as long as his divorce petition is pending and is being prosecuted expeditiously by him and is not dismissed, the applicant retains his right of residency in the State, which was acknowledged / conferred on him.*
>
> *2. A Declaration that the respondent Minister's purported termination of that right was unlawful.*
>
> *3. An order of certiorari quashing the respondent Minister's purported revocation of the applicant's right of residency.*
>
> *4. An order directing the respondent Minister to grant the applicant a residence card.*
>
> *5. Damages for breach of the applicant's EU Law rights.*

3. The original grounds on which relief was sought were:

> *(i) Breach of fair procedures by purportedly revoking the applicant's right of residence without first notifying him of a contingent intention to do so and affording him some opportunity to make appropriate representations; in substance, comparable to Kadi [2008] E.C.R. I 6351.* This ground was not pursued at the substantive hearing before this Court.
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> *(ii) Breach of Regulation 10 of the European Communities (Free Movement of Person) (No. 2) Regulations 2006 (S.I. No. 656 of 2006) and Article 13 of Directive 2004/38/EC in conjunction with inter alia T.E.U. Articles 2 and 6, T.F.E.U. Article 45 and Article 45(2) (ex 39 TEC) and EU Charter on Fundamental Rights, Article 7, as well as the general interpretive principle against absurdity (i.e. once divorced, plausibly the applicant has a right of residence but, ostensibly and read literally, he has no such right while his divorce proceedings are pending and he is prosecuting them with due expedition).*

4. By way of background, the applicant is the estranged Moroccan husband of a French EU citizen Ms A.S., who worked in this State for a period of time in exercise of her EU Treaty rights. He argues that in his situation, as his marriage has broken down and his wife has left the host State, he should benefit from protection afforded by Article 13 (which allows non-EU family members to retain their right of residence in the event of divorce) as he intends to commence divorce proceedings. In effect, he argues that since he was lawfully resident in the State when his wife left, his stated intention to initiate divorce proceedings should be enough to permit him to remain on in Ireland after her departure and potentially to live permanently in Ireland. His original right to reside in Ireland derived from his marriage to an EU citizen who was exercising her free movement rights in Ireland and his asserted right to continue residing here derives from the fact of his marriage having lasted at least three years and from their residence together in Ireland for a minimum of one year before divorce proceedings are initiated. He says he enjoys the latter right on a personal and individual basis, not on a derivative basis, under Article 13(2)(a) of Directive 2004/38/EC.

5. The respondent Minister says the applicant has no continuing right of residence. The purpose of Directive 2004/38/EC is to facilitate the free movement of Union citizens throughout the Member States by permitting their family members including non-EU nationals to accompany or join them in the host state. The right of those family members to reside in the host state is tied to the legal presence of the EU spouse. If the EU spouse departs, then subject to defined exceptions which do not apply in this case, the non-EU spouse has no right to remain. It is not the case that if the EU spouse leaves, the remaining spouse can elect to remain and seek a divorce and then gain an individual right of residence in the host state. The provisions of the Directive concerning divorce, annulment and dissolution of civil partnership are intended to protect the non-EU spouse while his or her EU citizen spouse is living and working in the host state but not if the EU citizen has departed.

BACKGROUND TO THE REVOCATION OF THE APPLICANT'S RIGHT TO RESIDE IN IRELAND

6. The facts insofar as they were presented to the Minister and made known to the Court are as follows. It should be said that the applicant was never voluntarily forthcoming with information. He will henceforth be referred to as "the husband". He is a Moroccan national born in 1979. His wife Ms A.S. is a French citizen, seemingly of Moroccan background. She is eight years younger and is a distant cousin. They married on the 16th March, 2007, in Morocco. The husband has a brother working and living in Limerick. Ms A.S. came to Limerick in search of employment in or around July, 2007 and took up employment a short time thereafter. The husband

joined his wife in Limerick in December of the same year. The fact of his marriage to a Union citizen who was exercising her right to work in a Member State of the EU other than her home State entitled him to permission to reside in Ireland for a period of six months which was renewed for another six months and on the 7th September, 2008, he was granted permission to remain and work in Ireland for five years. He received a residence permit with a "Stamp 4 EU FAM" valid until June 2012 stamped on his passport. This was when his passport was due to expire. This is the residence permit which was revoked in November 2011.

7. The events after the issue of the 5 year residence card are hazy. Ms A.S. the EU citizen wife appears to have left her husband very shortly after the issue of the residence card. By letter dated the 10th September, 2008, she wrote to the Minister informing him that she had left Ireland and returned to France. The letter is strongly suggestive of a deeply unhappy marriage and a wife who felt that she was duped into marriage on false premises namely to facilitate lawful residency for the husband in Ireland. This letter was received by the Minister on the 16th September, 2008.

8. One year later, by letter dated the 24th September, 2009, the Minister wrote to the husband informing him that he proposed to revoke his right of residence on the basis that his wife was no longer resident in Ireland. The letter was returned the following week marked "gone away". No further steps were taken at that time and matters remained dormant until the 21st January, 2010, when a Detective Superintendent in Limerick wrote to the *Irish Naturalisation and Immigration Service* (INIS) referring to previous correspondence forwarded on the 16th December, 2008[1], and advising that on the 18th January, 2010, Ms A.S. had called to a Garda Station in Limerick to advise that she and her husband had separated and were no longer living together. Superintendent Noel J. Clarke reported that she repeated the allegations made in her earlier letter *that her husband married her in order to get permission to remain by way of EU Treaty and that their marriage was one of convenience* and advised that she intended returning to France in the near future.

9. The only inference which can be drawn from this information is that the EU citizen wife returned to Ireland at some time after her initial departure in 2008.

10. On the 5th May, 2010, the EU Treaty Rights Section of the Department of Justice issued a second proposal to revoke, again on the basis that the EU citizen wife had left the jurisdiction. The husband replied within days, stating that he and his wife had difficulties in January / February 2010 but they had talked it through and they had resumed living together three months earlier and were determined to make a go of their marriage. The husband told the Minister that he was actively looking for work. He furnished the Minister with a pay slip asserted to have been issued to his wife by her employer, a named company, on the 30th April, 2010, but the hours worked, salary received, tax and contributions paid were blacked out and were not legible.

11. The husband was now clearly aware that the wife's departure and a proposal to revoke his permission to be in the State were connected.

12. The *bona fides* of the husband's assertions seem to have been accepted as the EU Treaty Rights Section wrote by return of post indicating that his right to reside would not be revoked and was valid until 2013.

13. On the 9th November, 2010, the Minister was informed by an official in the Department of Social Welfare that Ms A.S. had left her job of her own accord and had returned to France. No date of the cessation of employment was provided. The following day the Minister wrote to the husband seeking evidence of any change in his circumstances. Legislation obliges non-nationals to register any change in circumstances. He replied the following week confirming that his wife had left Ireland and had told him she had no intention of returning. Again, no date was furnished for her departure. The husband sought *permission to remain in Ireland, to obtain work and to become independent*. He *hoped to be offered a job for which he had interviewed*. He also furnished a medical report relating to a recurring eye infection which he said had prevented him from working until then. He made no reference to the status of his marriage or of any intentions to seek a divorce.

14. On the 3rd December, 2010, the Minister wrote to the husband requesting documentary evidence that he had initiated divorce proceedings. The husband replied on the 25th January, 2011, stating that he had an upcoming meeting with a barrister and had been advised that he would have to return to Morocco to obtain a divorce. He said this might take time as he had to save money and arrange his travel. He confirmed that he had not commenced divorce proceedings. It has to be assumed that the husband was now fully aware that divorce was associated with any right he might have to be permitted to remain.

15. On the 9th February, 2011, a third proposal to revoke issued to the husband. He was given ten days to make written submissions as to why his permission to remain in the State should not be revoked. No response was made to that letter. In April 2011 his file was analysed and it was recommended that his permission to remain should be revoked on the basis that Ms A.S. the EU citizen was no longer residing in the State exercising her EU Treaty rights. Further, it was stated that the applicant was not employed and had not made any contribution since 2008. His removal was recommended under the *ECs (Free Movement of Persons) (No. 2) Regulations* (S.I. No. 656 of 2006), as amended by S.I. No. 310 of 2008.

16. The decision to revoke the husband's residence card was then made but for no identified reason this revocation was not notified to the husband and there followed a further unexplained period of delay until the 27h September, 2011, when a fourth proposal to revoke issued. That letter was returned to the Minister by An Post.

17. The husband's file was examined again on the 1st and the 8th November, 2011. The facts before the Minister were therefore as follows:-

- The parties married in 2007 in Morocco.

- The EU citizen wife Ms A.S. came to Ireland in 2007 in the exercise of her EU Treaty rights in search of employment and obtained such employment.

- Her husband followed her and was given permission to remain in the State for a period of 5 years from September 2008 on the basis that he was a qualifying family member of an EU citizen.

- The couple had been living together in Ireland since December 2007.

- Sometime in 2010, possibly July / August, the wife ceased working and left Ireland and ceased exercising her EU treaty rights.

- The parties were married for more than three years of which at least one year was spent in Ireland prior to their

separation.

• They had no children; the husband was seeking employment and had not been employed since 2008.

• The Minister had enquired in December 2010 whether the husband had obtained or was in the process of obtaining a divorce.

• The Minister was informed that the couple was not divorced and the husband had taken no steps to obtain a divorce. The husband informed the Minister that he would have to go to Morocco to obtain a decree and the travel arrangements would take some time.[2]

• The EU citizen wife left Ireland at least 17 months earlier.

18. The Minister's officials made the same findings as in April 2011 and the revocation order of his permission to reside in the State was notified to him by letter dated the 9th November, 2011. He was notified that as he no longer had immigration status in the State, his file had been referred to the Removals Unit for consideration and he was advised to report to his local Immigration Office. The *Garda National Immigration Bureau* (GNIB) was also notified of the revocation. When the husband attended at an Immigration Office in Limerick, his Stamp 4 was cancelled, his certificate of registration was retained and the cancellation of his permission to reside was notified to the EU Treaty Rights Section.

RELEVANT PROVISIONS
19. The provisions of the Directive which are relied on by both parties are as follows.

20. Article 12 deals with the effect on family members of the departure or death of the EU citizen. Paragraphs 1 and 2 relate to death while 3 deals with departure. Article 12 provides:

> *"1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State. Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).*
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> *2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death. Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4). Such family members shall retain their right of residence exclusively on a personal basis.*
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> *3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies."*

21. Article 13 regulates the retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership. Paragraph 1 deals with Union citizen family members and paragraph 2 deals with non-EU family members. Article 13 provides:

> *"1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.*
>
> *Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).*
>
> *2. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:*
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> > *(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or*
> >
> > *(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or*
> >
> > *(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or*
> >
> > *(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.*
>
> *Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have*

sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. 'Sufficient resources' shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis."

22. Regulation 10 of the *European Communities (Free Movement of Persons) (No. 2) Regulations 2006* (SI No. 656 of 2006) ("the 2006 Regulations") transposes Article 13 and provides:-

"1(a) Subject to subparagraph (b), a family member of a Union citizen who is a national of a Member State may retain a right of residence in the State on an individual and personal basis in the event of the Union citizen's divorce or annulment of his or her marriage.

(b) Before acquiring an entitlement to permanent residence under Regulation 12, a family member referred to in subparagraph (a) must satisfy one or more of the conditions referred to in Regulation 6(2)(a)(i) to (iv).

(2) (a) Subject to subparagraph (b), a family member of a Union citizen who is not a national of a Member State may retain a right of residence in the State on an individual and personal basis in the event of the Union citizen's divorce or annulment of his or her marriage.

(b) Subject to subparagraph (c), a right of residence referred to in subparagraph (a) shall only be retained where the Minister is satisfied that – (i) prior to initiation of the divorce or annulment proceedings, the marriage had lasted at least 3 years, including one year in the State, (ii) by agreement between the spouses, or by court order, the spouse who is not a national of a Member State has custody of the Union citizen's children, (iii) the retention of such right of residence is warranted by particularly difficult circumstances, such as the spouse having been a victim of domestic violence while the marriage was subsisting, or (iv) by agreement between the spouses, or by court order, the spouse who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the State, and for as long as is required".

THE ARGUMENTS

The Applicant's Submissions

23. Essentially the arguments focused on the interpretation of Article 13(2) (a) of Directive 2004/38/EC as transposed into domestic law by the 2006 Regulations. It was submitted that if there is any ambiguity about the meaning of that Article and its application to the applicant's situation, a preliminary reference should be made to the CJEU.

24. Reliance is placed on recital 15 of the preamble to the Directive which provides:

"Family members should be legally safeguarded in the event of the Union citizen's divorce, annulment of marriage or termination of a registered partnership with due regard for family life and human dignity and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis."

25. The applicant submits that if justice is to be done to the meaning of recital 15, then Article 13 must be interpreted to protect a spouse in this applicant's position rather than in the narrow way construed by the Minister who insisted that a divorce must first have been obtained before rights accrue to the non-EU spouse. Article 13(2) (a) provides safeguards against abuse of free movement rights and sham marriages by providing that marriages must have endured at least three years prior to the initiation of divorce proceedings with at least one of those years having been spent in the host Member State. There is therefore no question of whether the applicant is a spouse deserving protection. If the Minister is correct in his interpretation, then any EU national spouse can spitefully leave the host state and leave his / her non-EU spouse behind without rights or human dignity. The preferable interpretation of Article 13(2) is one which protects the abandoned non-EU spouse's right of residence in the period leading up to the institution of divorce proceedings and while those proceedings are going through the courts, irrespective of the departure of the estranged EU citizen spouse from the host state.

26. The husband argues that when dealing with the rights of family members and EU free movement rights, an interpretation must be applied to Article 13 which does not give the EU citizen the power to extinguish a spouse's right of residency in the event of marital breakdown or difficulty. Such a situation was envisaged by the European Court of Justice in *Diatta v. Land Berlin* (C–267/83) [1985] ECR I-00567 where the Court stated (at para. 10) that, "*[…] if co-habitation of the spouses were a mandatory condition, the worker could at any moment cause the expulsion of his spouse by depriving her of a roof*."

27. The husband submits that the criteria for the retention of a right of residence following the departure of the EU spouse under Article 12 are fairly strict: there must be children in education and family life has to be maintained by the non-EU parent having access to his children. However, under Article 13(2) (c), retention of the right of residence may also apply in the event of divorce or termination of marriage if there are particularly difficult circumstances such as the non-EU spouse being a victim of domestic violence. It would therefore be artificial to interpret Article 13(2) (a), which deals with *inter alia* the temporal requirements of the marriage prior to the divorce of the couple, as subjecting the right of retention to the additional requirement that the EU spouse must also remain in the host Member State until divorce proceedings are concluded. To interpret Article 13(2) in such a manner would be to deprive it of its effectiveness which is an incorrect interpretation of any provision of a Directive. The applicant relies on the guidance given by the Court of Justice in *Metock v. The Minister for Justice* (C–127/08, 25th July 2008) [2008] ECR I-06241, where at para. 84 the Grand Chamber held that, "*Having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness*". As to the general interpretation of EU measures the applicant also relies generally on the judgment of Bingham J., as he then was, sitting in the Queen's Bench division of the High Court in the commercial case of *Customs and Exercise Commissioners v. ApS Samex* [1983] 1 All ER 1042, where he stated (at p. 1056):

"The interpretation of community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations,

but on a broader view of what the orderly development of the community requires."

28. On the same point the applicant further relies on *Secretary of State for Work and Pensions v. Lassal* (C–162/09, 7th October 2010) [2010] ECR I-09217, where the Court of Justice held that Article 16(4) of Directive 2004/38/EC had to be given the most effective interpretation which is not necessarily an interpretation which expressly follows "from the provision". At para. 49 the Court stated that "*[…] it should be recalled that in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part*". The Court further held at para. 51 that "*where a provision of EU law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness*". The applicant points out that the schematic and teleological method of interpretation sought is not new and has been considered in the Irish courts by Murphy J. in *Lawlor v. The Minister for Agriculture* [1990] 1 I.R. 356 and *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Minister for Transport* [1994] 2 ILRM 551. In the latter case, Murphy J. held at p. 558 that "*[…] there is no doubt that the schematic and teleological approach is the fundamental principle of interpretation to be applied to EC regulations and directives*."

29. In the applicant's contention, the Minister's narrow interpretation would do injustice to the scheme and purpose of Directive 2004/38/EC and to the wider interpretation applied by the Court of Justice in all cases involving the free movement of EU citizens and members of their family. The purpose of Article 13(2) is to protect estranged third county national spouses from the possibility of their EU spouses having the power to end their right of residence. Article 13 must be given an interpretation which avoids that possibility.

30. Finally, the applicant distinguishes the reasoning of Herbert J. in *Shyllon v The Minister for Justice* [2010] IEHC 153 as the points raised and argued in this challenge were not raised in that case, where leave was refused because the learned Judge did not find sufficient reason to grant an extension of time.

The Respondents' Submissions

31. The respondent Minister strongly refutes the applicant's arguments and submits that Directive 2004/38/EC confers derivative rights of residence on third county nationals in certain circumstances where such persons are qualifying family members of an EU citizen who join or accompany an EU citizen who is undertaking one of the activities specified in Article 7(1) of the Directive. Those derivative rights are intended to promote the integration of EU nationals in the host Member State so that no disadvantage will accrue to them when exercising free movement rights. The entire purpose of the Directive is to ensure that Union citizens may lead a normal family life in the host Member State and was not designed to provide autonomous rights for third country family members.

32. The Minister argues that in this particular case, the applicant only ever enjoyed a derived or secondary right of residence under Directive 2004/38/EC. That right was contingent upon his wife undertaking the activities specified in Article 7(1) (a), (b), (c) or (d). When his wife ceased working in the State during the initial five year period of her residence, the applicant's derived right to remain was extinguished unless he brought himself within one of the exceptions contained in Articles 12(3) or 13(2).

33. The EU citizen wife left the State sometime in 2010 and returned to France. Although the applicant remains married to her, he is not divorced and therefore he has no right to remain in the State and the Minister was correct in revoking his residence permit. Article 12(3) does not provide for retention of residence for non-EU family members on the departure from the host state of the Union citizen. The clear exception to this principle is designed to protect school-going children of the Union citizen, regardless of their nationality, upon the departure of the Union citizen from the host Member State. This, the Minister argues, is designed to protect a vulnerable sector of society who may well, due to their tender age, have integrated into the society of the host Member State despite the brevity of their residence in that state, but that qualified right has no application to the applicant in this case.

34. The Minister further contends that the triggering event for the right of retention in Article 13(2) is not the initiation of divorce or annulment proceedings, but the decree of divorce or annulment.

35. The respondent relied heavily on the Court of Justice's reiteration of the purposes of Directive 2004/38/EC in its recent decision in *Iida v. Stadt Ulm* (C–40/11, 8th November 2012), where it held that a Japanese man married to a German national, who remained in Germany after his wife's move with their child to Austria to take up employment, was not a beneficiary of the Directive as the husband had not accompanied or joined his EU national wife in Austria. The Court of Justice repeated that the purpose of the Directive, as previously stated in *Metock*, was to facilitate the freedom of movement of the Union citizen and at para. 64 it stated that, "*[i]t thus follows that the right of a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement to install himself with that Union citizen pursuant to Directive 2004/38 can be relied on only in the host Member State in which that citizen resides*".

36. The Minister argues that the issue for determination in this case has already been considered in *Shyllon* (cited above), where Herbert J. held that "*[t]he purported rights contended for by the applicant, which would have the effect of transforming a consequential right into a personal right and, would involve a very material interference with the sovereign right of this Member State to control its own borders, could only, in my judgment be created by a clear and express legislative provisions and, could not arise by way of inference or by implication*." In the Minister's contention, the case law and legislation referred to in *Shyllon* are identical to those opened and determined in this case. The Minister further argues that the principle of effective interpretation cannot do violence to the terms of the Directive itself.

37. The Minister relies on a decision of the Court of Appeal in the case of *Amos and Theophilus v. Secretary of State for the Home Department* [2011] 1 WLR 2952 where non-EU nationals divorced from EU nationals asserted a right of permanent residence in the host State. Stanley Burton L.J. reviewed the relevant provisions of EU law including Regulation 1612/68/EEC and Directive 2004/38/EC as well as the case of *Diatta* (cited above) and interpreted the Directive as follows:

> "The requirements of the Directive applicable to the applicants were as follows:
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> 1. At all times while residing in this country until their divorce, their spouse must have been a worker or have been self-employed (or otherwise satisfy the requirements of Article 7(1).
>
> 2. Their marriages had to have lasted at least three years, including one year in this county.
>
> 3. They must be able to show that they are workers or self-employed persons or otherwise satisfy the requirement of the penultimate paragraph of Article 13(2) (see *Okafor & Ors. v. Secretary of State for the Home Department* [2011] 1 WLR 3071)."

38. Ultimately, the Minister contends that the purpose of the Directive is to facilitate the movement of EU nationals from their home

State to another Member State for the purpose of exercising an activity protected by EU law. Once the conditions set down in Article 7 are no longer met by the EU national, there is no basis for a separated non-EU spouse to remain on in the host Member State, save for the very specific exceptional circumstances provided for by Articles 12(3) and 13(2) of the Directive. Those circumstances do not apply in this case and the law cannot be interpreted to give the applicant an entitlement to continue in lawful residence in this State.

THE COURT'S ANALYSIS

39. There can be little doubt that the Court may only consider the material before the Minister at the time he took the decision to revoke the husband's five year residency permit. The Minister's decision was based on facts known to him at the time and which are outlined at paragraphs 6 to 18 above. That decision was notified to the applicant by letter dated the 9th November, 2011. No suggestion has ever been made that the facts relied on by the Minister were not correct. New information was put before the Minister after the revocation when, for instance, the Minister was informed that the EU citizen wife brought a petition for divorce based on her husband's matrimonial default, issued in Morocco in August 2010, and in January 2012 the husband himself commenced separate divorce proceedings in Morocco based on his wife's desertion. Furthermore, he entered a relationship with an Irish woman who was due to give birth to the couple's child in autumn 2012. As the issue before the Court is the legality of the Minister's decision as notified to the applicant in November 2011 the Court cannot give any consideration to the information furnished to the Minister after that decision was notified to the applicant. The only issue open for consideration is whether the Minister was correct in law in holding that because the EU spouse had departed leaving her spouse behind in circumstances where they were not divorced, Mr Lahyani had lost his right of residence in this State.

40. It falls upon this Court in those circumstances to consider the meaning of Articles 12(3) and 13(2) and in particular the question of whether Article 13(2) (a) permits the applicant to establish a right independent of his wife to remain in the State. The Court's interpretation must place the measures contained in those two Articles in their specific context within the spirit, history, object and purpose of the Directive and its general scheme, together with their specific wording and the case law of the Court of Justice.

41. There is no dispute that Ms A.S. is an EU national within the meaning of Article 2(1) of Directive 2004/38/EC and that the applicant as her husband is a "family member" within the meaning of Article 2(2). While the applicant's wife was working in Ireland, the applicant and his wife were "beneficiaries" of the Directive within the meaning of Article 3. They had a right of entry into the State pursuant to Article 5 and they enjoyed an initial right of residence for three months pursuant to Article 6 subject only to visa and passport conditions. While Ms A.S. was working in Ireland they both had a right to reside in Ireland pursuant to Article 7. It is not disputed that after Ms A.S. departed Ireland, the applicant lost his derivative right to residence under Article 7 and that a right of residence could only be retained on an individual basis if he qualified under Articles 12(3) or 13(2).

42. The major point of difference between the parties is whether the applicant's situation is solely governed by the *departure* provisions of Article 12(3), bringing his right to reside to an end or whether, irrespective of the departure of his wife, his situation may also fall to be determined under Article 13(2) where *divorce* provisions apply. The area of dispute is even more refined as it is common case that Articles 12(1) and Article 12(2) do not apply and that Article 12 (3) is the only *departure* provision of any potential application to Mr Lahyani as the non-EU spouse of a departed Union citizen. It is immediately clear that as the couple have no children, he cannot possibly retain his right of residence under that provision. Similarly, Article 13(1) and Article 13(2) (b), (c) and (d) are of no relevance as the circumstances envisaged do not arise. It seems to be common case that the only possible relief lies in retention of rights under Article 13(2) (a), as the facts establish the temporal pre-conditions of marriage insofar as the couple was married for at least three years including (it appears) at least one year spent in Ireland.

43. The question as it appears to the Court is therefore:

> *Can the applicant retain his right of residence under Article 13(2) (a) of Directive 2004/38/EC*
>
> > *(i) irrespective of the departure of his Union citizen spouse from the host State and*
> >
> > *(ii) even though while de facto separated he has not yet obtained a decree of divorce?*

44. It will be necessary to first examine the Directive and then Articles 12(3) and 13(2).

The History, Object and Purpose of Articles 12 and 13

45. The provisions of Directive 2004/38/EC, which regulates the conditions governing the exercise by EU citizens and their family members of the right of free movement and residence within the territory of the Member States, have evolved over the last five decades. The free movement of workers was one of the four freedoms recognised under the original Treaty of Rome. Article 48 of that Treaty (now Article 45 TFEU) provides:

> *"1. Freedom of movement for workers shall be secured within the Union.*
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*
>
> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
>
> > *(a) to accept offers of employment actually made;*
> >
> > *(b) to move freely within the territory of Member States for this purpose;*
> >
> > *(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;*
> >
> > *(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.*
>
> *4. The provisions of this Article shall not apply to employment in the public service."*

46. Those Treaty provisions make no mention family members. Family members of migrant workers first acquired rights under *Council Regulation (EEC) No 1612/68*. The fifth recital to that Regulation indicated that "*freedom of movement, in order that it may be*

exercised, by objective standards, in freedom and dignity, requires that […] obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country". To that end, Articles 10, 11 and 12 of the Regulation established a right of residence for certain family members of migrant EU workers. Those provisions provided:-

> *"Article 10*
>
> *1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21 years or are dependants; (b) dependent relatives in the ascending line of the worker and his spouse.*
>
> *2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.*
>
> *3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed […].*
>
> *Article 11*
>
> *Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State.*
>
> *Article 12*
>
> *The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."*

47. The right of free movement was thereafter extended beyond workers and self-employed persons to service-providers, students, persons who have ceased occupational activity and economically inactive persons with sufficient personal resources to avoid becoming a burden on the host State.[3] Directive 2004/38/EC, which became applicable in April 2006, codifies the piecemeal instruments and extended family rights. As noted above, the Directive has been transposed into Irish law by way of the 2006 Regulations, as amended in 2008 after the *Metock* ruling (C-127/08, 25th July 2008) [2009] ECR I-06241.

48. Directive 2004/38/EC, sometimes referred to as 'the Citizenship Directive' and at other times 'the Free Movement Directive', establishes rights on an incremental or ascending basis as is clear from recital 24 which states that "*the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be*". The initial right established by the Directive is a right for Union citizens and their family members, irrespective of nationality, to enter and reside in the host State for three months conditional only on visa and passport requirements (Articles 5 and 6). The next acquired right is a right of residence for longer than three months provided that the Union citizen is working or self-employed in the host Member State or has comprehensive sickness insurance and sufficient resources for his / her self and family members not to become a burden on the social assistance system of the host State (Article 7). The rights afforded by the Directive culminate for the first time in a right of permanent residence without conditions after five years of continuous lawful residence subject only to grounds of public policy, public security or public health (Article 16).

49. Article 12 more or less repeats previous rights and consequences in the event of the death or departure of the Union citizen while Article 13 establishes new rights not previously recognised in any EU legislation. Together the two Articles provide for autonomous rights for family members in the host state in the event of the death or departure of the Union citizen from the host State (Article 12) or in the event of a divorce, annulment or termination of a registered partnership (Article 13).

Departure

50. The terms of Article 12 are set out at paragraph 20 above. There is no provision in Article 12 for the non-EU spouse of a Union citizen who has left the host State to lawfully remain on in that State unless there are dependent children in education. Article 12(3), which applies to non-EU spouses in the event of departure of the Union citizen spouse, is designed solely to ensure that the children of the marriage or registered partnership of an EU citizen can complete their education in the host State if this is desired by the custodial parent or by the children themselves rather than creating any autonomous rights for the non-EU spouse. The Court of Justice has consistently given this provision and its predecessor, Article 12 of Regulation 1612/68, a wide and expansive interpretation once children of a Union migrant worker have been installed in the host State – see e.g. *Echternach & Moritz v. Netherlands Minister for Education and Science* (Cases 389 and 390/87, 15th March 1989) [1989] ECR 00723; *Baumbast and R v. Secretary of State for the Home Department* (C-413/99, 17th September 2002) [2002] ECR I-07091; *London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department* (C-310/08, 23rd February 2010 [GC]) [2010] ECR I-01065; and *Teixeira v. Lambeth London Borough and Secretary of State for the Home Department* (C-480/08, 23rd February 2010) [2010] ECR I-01107. In all of these cases, the Court of Justice has applied a very liberal interpretation to Article 12 of the Directive and its predecessor and in particular has found that the custodial parent of dependent children in education is not required to fulfil the requirements of Article 7(1) while he or she is in the host State subsequent to the departure of the Union citizen from that State. However, accompanying non-EU spouses without dependent children in education are not afforded the same rights on the departure of the Union citizen as such spouses are expected to travel with the Union citizen and continue their life with those persons. They are not viewed as vulnerable persons in the context of the objectives of social cohesion and family unity.

51. Recital 15 to the Directive is relied upon by the applicant in support of his argument that persons in his situation where a marriage has broken down but a divorce has not been obtained require legal safeguarding. Its terms are set out at paragraph 24 above and clearly do not provide for the effect of departure.

52. The *travaux préparatoires* to the Directive confirm that with the exception of non-EU school-going children and their non-EU parents, Article 12 creates no autonomous rights for the family members in the event of the Union citizen's departure from the host State. The Commission's original Proposal (COM (2001) 257 final) states:

"Family members who are not nationals of a Member State have a right of residence via the Union citizen on whom they are dependent. However, they may retain the right of residence in the event of the Union citizen's death. Family members who are not nationals of a Member State do not retain the right of residence in the event of the Union citizen's departure, but must leave together with the citizen. An exception is provided for by paragraph 3 as regards children […]." (Emphasis added)

53. This is reiterated in the Commission's simplified publication for Union citizens, *Guide on how* to get the best out of Directive 2004/38/EC, which states as follows:

"Your death shall not entail loss of the right of residence of your third country family members provided that they have been residing in the host Member State as your family members for at least one year before your death. In case of your departure, they do not retain their right of residence." (Emphasis added)

54. The above recited extracts satisfy this Court that the husband in this case had no right to remain in Ireland after the departure of his wife pursuant to Article 12(3).

Divorce
55. It is now necessary to examine the provision of Article 13, which is set out in full at paragraph 21 above. The relevant provisions for the purposes of the present case are:-

"Retention of the right of residence by family members in the event of divorce […].

1. […].

2. Without prejudice to the second subparagraph, ***divorce […] shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where****:*

(a) prior to initiation of the divorce […], the marriage […] has lasted at least three years, including one year in the host Member State*; or*

(b) […]; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) […].

[…] ***Such family members shall retain their right of residence exclusively on personal basis****." (The Court's emphasis)*

56. The applicant does not claim to fall within the category of vulnerable spouses who are deserving of protection under Article 13(2)(c) but he points to that sub-paragraph as an indicator of the flexible approach to be taken to the interpretation of Article 13(2) as a whole. The applicant's primary argument was that Article 13(2) must be interpreted in a manner which permits a non-EU spouse to remain in the host State while either party to the marriage petitions for divorce, even after the departure of the Union citizen spouse, and that any interpretation which fails to allow for this would render the legal protections to the family members of a migrant Union citizen a nonsense. For the reasons to be outlined hereafter, the Court considers that the caselaw of the CJEU and especially the cases of *Diatta* and *Metock* (cited above) provide strong support for this proposition. While Article 13 does not expressly mention such a possibility, Article 13(2)(c) itself envisages the need for discretionary application of the retention of the right of residence in "*particularly difficult circumstances*". It follows that the Court is not convinced that the divorce, annulment or termination which triggers the vesting of autonomous rights in the non-EU spouse under Article 13(2) must take place solely during the period of joint lawful residence in the host state.

57. It is not difficult to envisage circumstances where an interpretation which confines retained rights of residence exclusively to spouses who have obtained divorces while the Union citizen is exercising treaty rights in the host state might be unduly restrictive in light of the need to interpret the provisions of the Article 13 "*with due regard for family life and human dignity and in certain conditions to guard against abuse*" (recital 15). An example of how a strict interpretation of Article 13 might breach the object of the Directive and render it ineffective could be found where the non-EU spouse is deserted in the host state without any warning that the marriage was in difficulty and before the possibility of divorce arose. The object of the Directive is to facilitate the free movement of Union citizens and their family members and Articles 12 and 13 are clearly designed to provide for compassionate consequences when negative but predictable life events such as matrimonial breakdown, death and divorce occur. As the wording of Article 13 clearly demonstrates that a spouse,[4] no matter what the nationality, retains a right to reside in the host state in the event of divorce, it would be unfair to exclude from Article 13 those non-EU spouses who through no fault of their own have not had the opportunity to obtain a divorce or even to obtain a final decree where, for instance, divorce proceedings were initiated but the Union spouse left before the process was complete so as to frustrate or upset the plans of the non-EU national.

58. There must be multiple variations of family breakdown where the Union citizen might depart the host state leaving the non-Union spouse behind. It would render the protections afforded by Article 13 ineffective if host states were to expel a deserted non-EU spouse before the expiry of a reasonable period during which the non-EU spouse could seek dissolution of the marriage with a view to claiming a personal right of residence under Article 13(2), subject to the Article 7 conditions which are applicable to divorced non-EU spouses. To revoke the lawful status of such non-EU spouses without affording an opportunity to seek a divorce would do a disservice to Article 13. If, to give another example, the non-EU spouse had already commenced divorce proceedings which were being pursued at the time of departure of the Union citizen and the interpretation urged by the Minister were applied, the non-EU spouse would face the choice of uprooting from the host country in which he was installed and, pending finalisation of the divorce, becoming the unwelcome guest of the estranged EU spouse in whatever EU State she went to, or of returning to his own country. That choice would seem contrary to the spirit and object of Article 13 and again, it seems to the Court it would be an unnecessarily restrictive interpretation of that Article.

59. Another consideration which leads the Court to this view is that divorce may not always be an available option to the parties to a marriage which has irretrievably broken down as procedural requirements differ enormously from state to state within the EU. Divorce proceedings in Ireland are governed by constitutional provisions and are restrictive. There is an absolute requirement that the parties must have been separated for a minimum of 4 years out of the previous five years before matrimonial proceedings for a decree of

divorce can be commenced. Even judicial separation requires a minimum period of 12 months separation before the institution of proceedings and even so, a judicial separation may not be sufficient to trigger rights under Article 13. In other member states where agreement is reached on a division of property and there are no children, a consent divorce can be obtained in a matter of months. That is not an option in this State. If Directive 2004/38/EC is intended to apply uniformly across the Member States without discrimination, then a spouse of a migrant Union citizen should not be prejudiced in his / her right to benefit from Article 13 by the choice of host state made by the Union citizen and the domestic law relating to dissolution of marriage in that state.

60. It is therefore the view of this Court that Article 13 must be interpreted expansively to provide for the occasions where marriages and civil partnerships do not work out and where the Union worker simply deserts and quits the host state before matrimonial proceedings are contemplated. Each case must be determined by its own facts and a measure of discretion applied to allow for the almost infinite variations in the way that genuine relationships and marriages disintegrate. Having expressed that view, the Court is equally convinced that it cannot be the general rule as postulated by the husband that departure of the Union citizen worker confers either an indefinite or permanent right of residence while the deserted non-EU spouse considers his / her options and whether or not divorce is being contemplated. The wide interpretation of Article 13 – with due regard for human dignity and to prevent abuse – must be restricted to genuine marriages and genuine irretrievable breakdown of relationships. As the Court has already noted, if the relationship has not broken down irretrievably, the non-EU spouse is expected to leave the host state and travel with the Union citizen.

Application to this Case

61. An expansive interpretation of Article 13 which allows a reasonable period to the remaining spouse to bring divorce proceedings will not avail the applicant in this case. In the particular circumstances pertaining to Mr Lahyani, it is obvious that the Minister did not in fact apply an unduly strict interpretation of Article 13(2) (a) in the period after the departure of Ms A.S. when he considered revocation. The Court is not satisfied that it has been established that the Minister erred in law in his approach to the applicant's case. His letter of the 9th November, 2011 to Mr Lahyani mirrors the legal sentiments in the letter referred to in the judgment of Herbert J. in *Shyllon* (cited above) and strongly suggests that the Minister took the same expansive application of Article 13 in that case. The letter to Mr Shyllon is recorded as stating:

> *'I am directed by the Minister for Justice, Equality and Law Reform to refer to your above named client. As your client is separated from his EU national spouse in order for him to renew his permission to remain (Stamp 4 based on his marriage to an EU citizen) one of the qualifying criteria is that he must have started legal divorce proceedings or must be already legally divorced from his spouse, provided that prior to the initiation of divorce or annulment proceedings the marriage lasted at least three years including one in this State." (Emphasis added)*

62. In this case, although aware that Ms A.S. had voluntarily quit her employment and departed from Ireland, the Minister enquired by letter if Mr Lahyani had taken steps to seek a divorce. The Minister was told – at least six months after the wife's departure – that Mr Lahyani had recently received advice that he would have to go to Morocco to obtain a divorce and that this required some planning. The date of the Minister's letter, which put Mr Lahyani on notice that he would need to start divorce proceedings if he wished to rely on Article 13, was the 3rd December, 2010. The revocation of his permission to remain was notified to him by letter dated the 9th November, 2011, more than 11 months later. As far as the Minister was aware at that time, no steps were taken by Mr Lahyani to seek dissolution of his marriage in the 18 months after his wife left him, the host state and the marriage in what appear to have been acrimonious circumstances.

63. While an expansive and purposive interpretation of Article 13 would undoubtedly allow a reasonable period for a vulnerable deserted spouse to regulate his or her affairs in order to benefit from the clear intention to protect divorced spouses contained therein, 18 months was not a reasonable period in the circumstances of this case. The only information as to Ms A.S.'s intentions when she departed her husband was provided by the husband when he stated to the Minister that she had left permanently. He cannot resile from the fact that no steps were taken to effect a divorce in France, Morocco or Ireland in the period after her departure notwithstanding that, as the Court was informed, Mr Lahyani is now in a relationship with an Irish woman whom he hopes to marry once his divorce from Ms A.S. is finalised.

64. The Court also recalls that leave was granted by Cooke J. to seek declarations that (a) for so long as his divorce petition is pending and is being prosecuted expeditiously by him, and is not dismissed, the applicant retains his right of residency in the State and (b) that the Minister's purported termination of that right was unlawful. At the date of the revocation of his right of residence, the husband was not divorced, had taken no steps to obtain a divorce, there was no divorce petition pending which was being prosecuted expeditiously or otherwise and further, he had disengaged with the Minister during the 12 month period after he was first asked if he had commenced divorce proceedings. His application fails on simple judicial review principles as he has not made out the grounds on which leave was granted.

65. For the sake of completion, the Court is satisfied that no difficulties arise with the interpretation of Article 13(2) where, although separated and seeking a divorce, both spouses continue to reside in the host state and where the Union citizen is continuing to work or is self-sufficient. In accordance with the principle set down in *Diatta* (cited above), the non-EU spouse retains a derivative right of residence at all times up to the finalisation of the couple's divorce, provided that the Union spouse is resident in the host state and exercising free movement rights. Once the divorce is finalised, working or self-sufficient non-EU spouses gain a personal right of residence under Article 13(2), irrespective of whether the Union citizen continues to reside and exercise free movement rights in the host state, in the same way that death and departure provisions apply to family members of the EU worker previously living and working in the host state. Article 13 is a new departure in free movement rights which, when read with recital 15 to the Directive, is clearly intended to protect non-EU spouses from being obliged to leave the host state because their legal status in the host state has been altered by the dissolution of their marriages. The Article is clear – divorce obtained while the Union citizen is exercising free movement rights in the host state does not adversely affect the right of the non-EU spouse to reside in the host state, provided that the marriage has lasted for at least three years with at least one of those years in the host state before the divorce proceedings were commenced and provided that the non-EU spouse is not a burden on the state. In the period between commencing such proceedings and the final decree, the parties are still legally married even if living apart (see *Diatta*) and the non-EU spouse retains his / her derivative right of residence until the divorce is finalised, at which point he or she gains a right of residence under Article 13 on an exclusively personal basis. There is also a parallel right to return with the Union spouse to his or her home state, while the marriage is subsisting. The Court of Justice has held in *Surinder Singh* (C-370/90, 7th July 1992) [1992] ECR I-04265 and *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind* (C-291/05, 11th December 2007 [GC]) [2007] ECR I-10719 that the family members of a Union citizen who has exercised his right to free movement in a host State and who has returned to his home State are entitled to equivalent rights in the home State as they enjoyed in the host State. The Court explained the rationale behind this principle as follows in Eind:-

> *"35. A national of a Member State could be deterred from leaving that Member State in order to pursue gainful*

employment in the territory of another Member State if he does not have the certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State.

36. That deterrent effect would also derive simply from the prospect, for that same national, of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification.

37. Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter."

66. *Eind* and *Singh* both related to Regulation 1612/68 but there is no reason why the same principles should not apply under Directive 2004/38/EC. There is no question therefore of such a non-EU spouse being in situation of suspended legality between the issue of the proceedings for divorce and the final order as suggested by the applicant. Provided that the EU citizen spouse continues to work and reside in the host state, the estranged couple continue to benefit from a right to reside under Article 7. If they divorce while the EU citizen is exercising free movement rights in the host state, the non-EU spouse is protected under Article 13(2) (a) and acquires a personal right of residence. Even a failing or frail marriage is a continuing marriage in accordance with *Diatta*, ensuring that the non-EU spouse is entitled to accompany the Union citizen spouse to any other part of the Union or to his / her home state if only to eventually obtain a divorce and acquire rights under Article 13. This is an interpretation which, in the opinion of this Court, has due regard for *family unity* and *human dignity* and also protects the vulnerable non-EU spouse from *abuse* at the hands of the Union citizen, in accordance with the spirit, object and purpose of the Directive as a whole and Article 13 in particular.

67. Notwithstanding those protections, difficulties may arise in situations where a deserted spouse may not know where his / her Union citizen spouse is or the marriage may have broken down to such an extent that he / she is simply not welcome to join the Union citizen in another Member State or in the Union citizen's home state and the cooperation of that spouse to complete immigration forms or to participate in matrimonial proceedings is not available. It would be contrary to the spirit of the Directive and the clear terms of recital 15 if Article 13 was read so restrictively that such a vulnerable non-EU spouse would be immediately liable to expulsion upon the departure of the Union citizen from the host state. The non-EU spouse in such a situation can ensure continuity of legal residence in the host state by informing the appropriate immigration authority of the change in status and ensuring that divorce proceedings are commenced and prosecuted expeditiously.

68. However, it is simply not feasible that Articles 12 and 13 could ever be interpreted to permit a non-EU spouse to remain for an indefinite period and *at any time* after the departure commence divorce proceedings as argued by the applicant herein. A non-EU citizen cannot elect to stay in the host state after the Union citizen has departed on the basis that he might someday consider if, when or how to obtain a divorce as occurred in this case where no attempt was made by the husband to notify the Minister that his wife had ceased working and left. It was the Minister who made his own enquiries putting the husband on notice that his legal position was precarious and that divorce was an issue. His letter did not provoke any action by the husband to leave, follow his spouse or commence divorce proceedings. In fact, no action was taken relating to his matrimonial status until *after* he was notified that his derivative right to reside under Article 7 was revoked.

69. The several decisions to which the court was referred including *Amos and Theophilus* (cited above) and *Okafor* (cited above), decisions of the Court of Appeal; Iida (cited above) and *Ziolkowski, Szeja & Others v. Land Berlin* (C-245/10 and C-246/10, 21st December 2011 [GC]), decisions of the Court of Justice, were not of any real assistance as they all deal with the right to permanent residence. The issue of permanent residence does not arise in this case. While not an issue for determination in this case, it is nevertheless interesting to note that the UK Court of Appeal in *Okafor* took a strict view of the circumstances in which non-EU family members may acquire a right of permanent residence when it found the exercise of a right of residence under Article 12(3) does not create any entitlement to a right of permanent residence. The Court of Appeal held that a custodial parent and children in full time education have no autonomous right to permanent residence in the host state once their education has been completed. They first had to establish five years continuous lawful residence by the Union citizen prior to claiming such a right. As the Union citizen in *Okafor* had not been exercising treaty rights for any of the period of five years before her death in the UK, her family did not acquire an entitlement to permanent residence. However, it should be noted that this restrictive interpretation of the right to permanent residence is not a decision of the Court of Justice.

70. Further, the Court agrees with Dr Forde S.C., counsel for the applicant herein, that the decision in *Shyllon* (cited above) is not binding as the primary preliminary issue was whether circumstances existed for an extension of time to commence judicial review proceedings and therefore the substantive issues in the case were outlined rather than fully argued. Similarly, the Court is not assisted by the findings made by Stanley Burnton L.J. in *Amos and Theophilus*.

71. The Court is, however, assisted by the reasoning of the Court of Justice in *Diatta*, *Singh* and *Metock* (all cited above) which provide for the protection for the non-EU spouses of Union citizens and outline the extent of those rights. In *Diatta*, the Court of Justice held:

"18. In providing that a member of a migrant worker's family has the right to install himself with the worker, Article 10 of the regulation does not require that the member of the family in question must live permanently with the worker […]. A requirement that the family must live under the same roof permanently cannot be implied.

19. In addition such an interpretation corresponds to the spirit of Article 11 of the regulation, which gives the member of the family the right to take up any activity as an employed person throughout the territory of the Member State concerned, even though that activity is exercised at a place some distance from the place where the migrant worker resides.

20. It must be added that the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date."

72. While both spouses in *Diatta* were still living in the host state at the time of the challenge, a significant distinction from the facts of this case, this Court is nevertheless persuaded by the principle expressed by the Court of Justice that free movement rights are interpreted *in the spirit* of the relevant article. The Court is also mindful of the expansive approach taken by the Court of Justice in *Metock* at para. 52 where it held that "*the fact that Article 5(2) provides for the entry into the host Member State of family members of a Union citizen who do not have a residence card shows that Directive 2004/38 is capable of applying also to family members who were not already lawfully resident in another Member State*". At para. 54 the Court of Justice further held:

> *"In those circumstances, Directive 2004/38 must be interpreted as applying to all nationals of non-member countries who are family members of a Union citizen within the meaning of point 2 of Article 2 of that directive and accompany or join the Union citizen in a Member State other than that of which he is a national, and as conferring on them rights of entry and residence in that Member State, without distinguishing according to whether or not the national of a non-member country has already resided lawfully in another Member State."*

73. In *Metock* the Court of Justice was prepared to extend the meaning of "accompany" or "join" to include those spouses who, while facing deportation from the host state, met and married EU citizens exercising free movement rights in the host state. This interpretation was applied generally to family members of Union citizens provided the marriage was a genuine one, because "*if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed*" (para. 62). The respondent Minister argued in that case that such a wide interpretation would have serious consequences for Ireland by increasing the number of persons able to benefit from a right of residence not previously recognised. The Court of Justice did not accept the validity of this submission noting *inter alia* that:

> *"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, it being understood that any such measure must be proportionate and subject to the procedural safeguards provided for in the directive".*

74. This Court is guided by the Luxembourg Court's repeated advice in *Metock* at para. 84 that "*Having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness (see, to that effect, Eind, paragraph 43).*"

75. Having found as outlined above that this Court believes that in certain circumstances such as the desertion by departure from the host state by the Union citizen before divorce proceedings were in being and where divorce subsequently becomes an objective, where divorce proceedings are contemplated but have not been commenced or where such proceedings have been commenced but not completed, it would be too restrictive and would render the protection provided by Article 13(2) (a) ineffective if a reasonable period were not afforded to the non-EU spouse to commence divorce proceedings.

76. Even if the Court has fallen into error in its interpretation, the key decision in this case is that the applicant's challenge fails as at the time of the impugned decision, notified by letter of the 9th November, 2011, the marriage was not dissolved, no proceedings had been commenced, no discernible steps had been taken to commence such proceedings, the Union citizen was no longer exercising her free movement rights in Ireland and she had departed Ireland in July or August 2010 with no intention of returning or reuniting with the applicant.

77. The Court is conscious that on any wide interpretation of the Directive, there is potential for third country nationals to abuse the system and that it would be counterproductive to interpret the Directive in a manner which could facilitate such abuse. However, Member States are not powerless in this regard. As noted by the Court of Justice in *Metock*, among other cases, Member States have ample capacity to tackle situations of abuse under Article 35 of Directive 2004/38/EC which reflects the well-established principle that EU law cannot be relied on in cases of abuse. This is also reflected in recital 28 to the Directive which states that "*To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures*."

78. The Court of Justice has held that abuse may be defined as an artificial conduct entered into *solely* with the purpose of obtaining rights under EU law which, albeit formally observing of the conditions laid down by EU rules, does not comply with the purpose of those rules {see *e.g. Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas* (C-110/99, 14th December 2000) [2000] ECR I-11569; *Centros Ltd v. Erhvervs- og Selskabsstyrelsen* (C-212/97, 9th March 1999) [1999] ECR I-01459}. In this case, suspicions may have been raised by the letter written by Ms A.S. to the Minister and following the report of Detective Superintendent McMahon, as Ms A.S. complained that the applicant entered into marriage with her solely for the purpose of obtaining a right of residence in Ireland under the Directive. The veracity of this information has not been established but it was a clear basis for suspicion as to the husband's *bona fides* and could reasonably have triggered an investigation under Regulation 24 of S.I. No. 656 of 2006, which transposes Article 35 into Irish law. While it is obvious that suspicions of abuse linger in this case, nothing was done to investigate the validity of the assertions. The Court has therefore had no regard to the obvious undercurrent of mistrust in the Minister's representations.

79. Similarly, while no information generated after the 9th November, 2011 is relevant to this judicial review, both parties introduced the following as information supporting their opposing arguments. The Court has ignored this information in arriving at its conclusions but considers that the information should nonetheless be outlined.

Events since the revocation

80. On the 29th November, 2011, the husband's current solicitors wrote to the Minister advising that their client's relationship with his wife had broken down, that he had sought legal advice and intended to initiate divorce proceedings "*as soon as possible*". They outlined their understanding of Article 13 of Directive 2004/58/EC which was that the husband qualified for retention of his right of residence on an individual and personal basis as he met the criteria set out in Article 13(2) (a). These were that he had been married for three years; at least one year of the marriage was spent in the State; that he was working and was financially independent and had comprehensive sickness insurance in the State. A letter was furnished indicating that he had been employed in a restaurant in Limerick on a full time basis since the 5th September, 2011. No explanation was provided for the return of the Minister's earlier letters or the failure to make submissions to the Minister when so requested and no evidence was provided that the applicant had taken any steps such as, for instance, saving money for the purpose of a return trip to Morocco to obtain a divorce.

81. The Minister was later informed that the husband filed for divorce in Morocco[5] on the 28th December, 2011, but that the proceedings have not progressed and he does not yet have a decree of dissolution of his marriage. A translation of his petition states that divorce is sought on the basis of the wife's desertion and neglect of her husband. Further correspondence from his solicitors suggested that the proceedings would be completed in five months but his presence in Morocco was required to sign the documents before his divorce could be finalised. It was submitted to the Court that the husband has not gone to Morocco as he now has no permission to re-enter this State once he leaves. The Court was not prepared to accede to a subsequent application to *order* the Minister to allow his re-entry into the State so he could go to Morocco to obtain a divorce.

82. Correspondence dated the 26th January, 2012 introduced more information not previously before the Minister. It was stated for the first time that the wife Ms A.S. had actually petitioned for a divorce on the 9th August, 2010. A translated copy of an Order of the Family Division of the Court of First Instance in Taza, Morocco dated the 29th December, 2011, was furnished. That document

recites that "*the case was called for hearing on September 20th 2010 but the Plaintiff did not appear and that in accordance with Article 81 of Family Law she is considered as having waived her petition*."[6]

83. The parties then engaged in an exchange of correspondence where their respective positions were maintained up to and including these proceedings.

84. In written submissions as to why he should not make a removal order, the Minister was informed that the husband was now in a relationship with Ms J.K. an Irish national who was due to give birth to their child in August 2012 and that he hoped to marry her as soon as his divorce was finalised. In the light of the anticipated birth, submissions were also made under *Zambrano* (Case C-34/09, 8th March 2011) [2011] ECR I-01177 for leave to remain.

85. There is no evidence that a removal order was ever made and when the case came before this Court some time after the hearing, no information was available as to the status of the *Zambrano* application.

Conclusion
86. For the reasons outlined above the applicant is not entitled to the reliefs sought. The application fails. The question as to whether the applicant can retain his right of residence under Article 13(2) (a) of Directive 2004/38/EC (i) *irrespective of the departure of his Union citizen spouse from the host State;* and (ii) *even though while de facto separated he has not yet obtained a decree of divorce*, is answered thus:-

> (i) In the circumstances of this case, no. In other circumstances, it may be possible; and
>
> (ii) In the circumstances of this case, no. In other circumstances, if the EU spouse deserted and left the host state, Article 13(2) (a) of Directive 2004/38/EC must allow the non-EU spouse a reasonable time to commence and prosecute divorce proceedings before rights of residence are revoked.

1. No letter of that date was before the Court. It may be that the Detective Superintendent was referring to the letter sent by Ms A.S. to the Minister dated 16th September 2008.

2. Until his right of residence was revoked, the husband was free to travel in and out of the state.

3. See e.g. *Council Directive 68/360/EEC of 15 October 1968* on the abolition of restrictions on movement and residence within the community of Member States and their families, *Council Directive 73/148/EEC of 21 May 1973* on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, *Council Directive 90/364/EEC of 28 June 1990* on the right of residence, *Council Directive 90/365/EEC of 28 June 1990* on the right of residence for employees and self-employed persons who have ceased their occupational activity and Council *Directive 93/96/EEc of 29 October 1993* on the right of residence for students.

4. In the case of non-EU nationals after a marriage of at least three years duration of which at least one year was spent in the host state before the issue of divorce proceedings.

5. The divorce seems to have been filed through Moroccan attorneys suggesting no impediment to the same action taken being taken in 2010.

6. It is noted that the petitioner and respondent were described as domiciled at two different addresses in Taza while it is very probable that neither was domiciled there. The husband did not provide any evidence that he engaged in the divorce by consenting, going to Morocco or otherwise.