



THE SUPREME COURT

Supreme Court Appeal No. 2018/69

High Court Record No. 2017/659 JR

O'Donnell J

McKechnie J

MacMenamin J

Charleton J

Irvine J

Between/

**M.K.F.S. (PAKISTAN) and A.F. and N.F.J. (an infant suing by and through his mother
and next friend A.F.)**

Appellants

-and-

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

-and-

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 24th day of July,

2020

Introduction

1. Whilst this case is technically an immigration case, it also has a direct impact on the status of marriage, not only within that context but also more generally. As will be explained a little later, in July, 2016 the Respondent refused an application by the First Appellant for a residency card under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548/2015) (“the 2015 Regulations”) on the basis that his marriage to the Second Appellant was a “marriage of convenience”. That finding was upheld on review in March, 2017. On the same date, the required procedural steps were activated by the Minister with a view to the making of a deportation order in respect of the First Appellant, which ultimately he did on the 30th June, 2017. These judicial review proceedings followed, with Humphreys J. dismissing each of the asserted claims in February, 2018; in so doing, the learned judge held that a marriage of convenience is a nullity at law for all purposes and that no rights could arise therefrom. He also refused leave to appeal. This Court, however, granted such leave in its Determination referred to at para. 31 below, with the central question for resolution being whether that particular finding by the trial judge was sustainable as a matter of law, and how should the same be dealt with on this appeal. Some associated issues must also be discussed. As a result, it will be necessary to scrutinise different pieces of legislation as these touch upon that issue. It would be convenient to set the relevant legislation out at the commencement of this judgment.

Legal Framework

2. Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States defines the right of citizens of the Union and their family members, as so defined but irrespective of nationality, to move and reside freely, *inter alia*, within the territory of the Member States; it is also sometimes referred to as the “European Citizen Directive” or the “Free Movement Directive”. Recital (28) provides 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.”* Article 35 of the Directive, headed *“Abuse of rights”*, provides as follows:

“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.”

As can be seen, the Directive permits, but does not require, Member States to adopt measures to regulate marriages of convenience; Articles 30 and 31 thereof have no direct relevance in this case.

3. The 2015 Regulations, which give effect to the Directive, contain such measures.

4. Pursuant to Regulation 2 thereof, “*‘spouse’ does not include a party to a marriage of convenience*” (similar provision is made in respect of parties to a civil partnership).

Regulations 27 and 28 will feature in the discussion below, and so should be set out in full.

Regulation 27 is headed “Cessation of entitlements” and provides as follows:

“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:

(a) a decision under Regulation 5(3) that a person be treated as a permitted family member;

(b) a residence card, a permanent residence certificate or permanent residence card;

(c) a right of residence under Regulation 9(1);

(d) a right of residence under Regulation 9(2);

(e) a right of residence under Regulation 9(3);

(f) a right of residence under Regulation 10(1);

(g) a right of residence under Regulation 10(2);

(h) a right of residence under Regulation 12(1).

(2) Where the Minister suspects, on reasonable grounds, that a right, entitlement or status of being treated as a permitted family member conferred by these Regulations is being claimed, or has been obtained, on the basis of fraud or abuse of rights, he or she shall be entitled to make such enquiries and to obtain such information as is reasonably necessary to investigate the matter.

(3) Where the Minister proposes to exercise his or her power under paragraph (1), he or she shall—

(a) give notice in writing to the person concerned, which shall set out the reasons for his proposal and shall give the person concerned a period of 21 days within which to give reasons as to why the right, entitlement or status concerned should not be revoked, and

(b) consider any submissions made in accordance with subparagraph

(a).

(4) In this Regulation, ‘abuse of rights’ shall include a marriage of convenience or civil partnership of convenience.”

5. Regulation 28 is headed “Marriages of convenience”. It states the following:

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

(2) Where the Minister, in taking into account a marriage for the purpose of making a determination of any matter relevant to these Regulations, has reasonable grounds for considering that the marriage is a marriage of convenience, he or she may send a notice to the parties to the marriage requiring the persons concerned to provide, within the time limit specified in that notice, such information as is reasonably necessary, either in writing or in person, to satisfy the Minister that the marriage is not a marriage of convenience.

(3) Where a person who is subject to a requirement under paragraph (2) fails to provide the information concerned within the time limit specified in the relevant notice, the Minister may deem the marriage to be a marriage of convenience.

(4) The Minister may exercise the power under paragraph (2) in respect of a particular marriage whether or not—

(a) that marriage has previously been taken into account in determining any matter relevant to these Regulations or the Regulations of 2006, or

(b) that paragraph has previously been invoked in respect of that marriage.

(5) The Minister shall determine whether a marriage referred to in paragraph (2) is a marriage of convenience having regard to—

(a) any information furnished under these Regulations, and

(b) such of the following matters as appear to the Minister to be relevant in the circumstances:

(i) the nature of the ceremony on the basis of which the parties assert that they are married;

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

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

(iv) the extent to which the parties have been dealing with other organs of the State or organs of any other state as a married couple;

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

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

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

(viii) whether a sum of money or other inducement was exchanged in order for the marriage to be contracted (and, if so, whether this represented a dowry given in the case of persons from a country or society where the provision of a dowry on the occasion of marriage is a common practice);

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

(x) the history of each of the parties including any evidence that either of them has previously entered into a marriage of convenience or a civil partnership of convenience;

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

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

(xiii) any information provided by an tArd-Chláraitheoir or registrar within the meaning of the Civil Registration Act 2004;

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

(6) For the purposes of these Regulations “marriage of convenience” means a marriage contracted, whether inside or outside the State, for the sole purpose of obtaining an entitlement under—

(a) the Council Directive or these Regulations,

(b) any measure adopted by a Member State to transpose the Directive,

or

(c) any law of the State concerning the entry and residence of foreign nationals in the State or the equivalent law of another state.”

(Emphasis added)

6. Marriages of convenience are also addressed by the Civil Registration Act 2004, as amended by the Civil Registration (Amendment) Act 2014. All references to the 2004 Act are to the legislation as so amended, unless otherwise noted. A marriage of convenience is defined as follows in section 2(1) of the 2004 Act:

“‘marriage of convenience’ means a marriage where at least one of the parties to the marriage —

(a) at the time of entry into the marriage is a foreign national, and

(b) enters into the marriage solely for the purpose of securing an immigration advantage for at least one of the parties to the marriage”

A similar definition is provided in respect of a civil partnership of convenience.

7. Section 2(2) provides, *inter alia*, that:

“(2) For the purposes of this Act there is an impediment to a marriage if—

(a) ...

...

(g) the marriage would constitute a marriage of convenience.”

Other listed impediments include the fact that the parties are within the prohibited degrees of relationship, that one or both of the parties are already married, that one or both of the parties lack capacity to marry, that one or both of the parties are already party to a subsisting civil relationship, and so on.

8. The terms of section 58 should also be summarised. Subsection (1) provides that a person may at any time before the solemnisation of a marriage lodge an objection in writing with any registrar and the objection shall state the reasons therefor. The section sets out detailed provisions for what should follow when such an objection is lodged. If the objection relates to a minor error or misdescription in the relevant notification, there is provision for the mistake to be rectified in a straightforward way. However, where the registrar believes that the possible existence of an impediment to the intended marriage concerned needs to be investigated, the objection is referred to an tArd-Chláraitheoir for consideration and the marriage cannot be solemnised until the investigation is completed. Subsection (4A) is important for present purposes; it provides as follows:

“(4A) A registrar who —

(a) in the performance of his or her functions under this Part forms the opinion that an intended marriage would constitute a marriage of convenience, or

(b) receives under subsection (1) an objection the stated reason for which is that the intended marriage would constitute a marriage of convenience, and forms the opinion that grounds for the objection possibly exist and need to be investigated,

shall refer the matter to the Superintendent Registrar of the registration area where the registrar who formed the opinion is assigned, for a decision and in that case and for that purpose, this section shall apply and have effect according to [certain necessary modifications].

9. Pursuant to subsection (4B), the registrar shall furnish his or her written report of the reasons for the forming of his or her opinion under subsection (4A) when referring the matter to the Superintendent Registrar. Subsection (4C) sets out the matters to which the registrar shall have regard when forming that opinion, including, for example, whether the parties to the intended marriage speak a common language, how long the parties have known each other, whether they live together, the extent to which they know one another, their immigration status, etc.

10. If the Superintendent Registrar decides that there is an impediment to the intended marriage as a result of forming the conclusion that the intended marriage is one of convenience, he or she shall advise the registrar concerned to that effect and of the reasons for the decision and the registrar shall notify the parties of this decision and the reasons therefor and that the solemnisation will not proceed; further, he/she shall take all reasonable steps to ensure that the solemnisation does not proceed (subsection 58(7)). Moreover, where a

Superintendent Registrar decides under subsection (7), in a case referred to him or her under subsection (4A), that a marriage would constitute a marriage of convenience he or she shall, as soon as practicable after making that decision, notify the Minister for Justice and Equality (subsection (7A)). If the marriage is solemnised notwithstanding the steps taken by the registrar, it shall not be registered. A party to a proposed marriage may appeal to the Circuit Family Court against the decision of an tArd-Chláraitheoir in relation to the marriage under subsection (7) (subsection (9)).

11. The other statutory provision of immediate relevance is section 3(1) of the Immigration Act 1999 (“the 1999 Act”), whereunder the Minister may make a deportation order requiring any non-national therein named to leave the State within such period as may be specified and thereafter to remain out of the State. Section 3(6) thereof provides that in determining whether to make such an order, the Minister shall have regard to certain prescribed factors, one of which is “*the family and domestic circumstances of the person*” (section 3(6)(c)).

Background Facts

12. The First Appellant is a national of Pakistan. The Second and Third appellants are nationals of Latvia who are lawfully resident in the State on foot of their European Union citizenship. The First and Second Appellants are a married couple. The Second Appellant is the mother of the Third Appellant, who is biologically unrelated to the First Appellant. The First Appellant has been appointed guardian of the child by the District Court (although one should note the observations of the learned trial judge on this matter: see para. 21 below).

13. The First Appellant (“Mr. M.S.”) came to Ireland on the 12th June, 2009. Originally on a valid visa, he later overstayed the permission as granted. He applied for asylum on the 9th February, 2010. During his asylum interview which followed, he said that his wife (in Pakistan) had died on the 1st March, 2009; this appears to be inconsistent with the information he provided in his application for an Irish visa on the 18th March, 2009, wherein he said he was married.

14. The First and Second Appellants, having given the required notice under section 46(1) of the 2004 Act, married on the 12th February, 2010, three days after Mr. M.S. made his application for asylum. He then applied for a residence card under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656/2006), based on his marriage to a Union citizen. Later that year, on the 22nd October, 2010, he was granted a five-year permission to reside in Ireland on the basis of his being a spouse of an EU national. In that notification letter he was informed that the onus was on him to keep the Respondent up-to-date at all times of any change in his circumstances. He was also advised that where it was established that a person had acquired any rights or entitlements by fraudulent means, including by virtue of a marriage of convenience, he would immediately cease to enjoy such rights or entitlements.

15. On the 14th February, 2011, the Minister refused a declaration of refugee status; the asylum application was deemed to be withdrawn on the basis of the First Appellant’s failure to complete the asylum questionnaire or to attend for interview with the immigration services.

16. The First and Second Appellants separated in March, 2011, and began to reside separately. This was not conveyed to the Department of Justice. During this time the Second

Appellant commenced another relationship and during the currency of this relationship conceived; the Third Appellant was born on the 18th May, 2012. The Second Appellant's relationship with the father of the Third Appellant broke down in late 2011; the child's father has since died.

17. It seems that the First and Second Appellants reconciled in April, 2015. In October of that year they began to live together again, along with the Third Appellant. On the 21st October, 2015, a day before the expiry of the residence card previously issued, Mr. M.S. applied once again for residency in the State on the basis of his being married to the Second Appellant, this time under the 2015 Regulations. Whilst his application was being considered, he obtained temporary permission to reside here until the 20th May, 2016. Apparently, he did not inform the Department that he and his wife had been living apart for a substantial period during the previous number of years.

18. On the 4th May, 2016, the First Appellant was informed that the Minister was considering refusing his application on the basis that his marriage was a marriage of convenience, and had been entered into for the purpose of his obtaining an immigration permission in the State; he was invited to make submissions in relation to this. On the 9th July, 2016, the Minister decided, under the 2015 Regulations, that the marriage was one of convenience. The First Appellant applied for a review of this decision and submitted representations on the 29th July, 2016; by decision of the 20th March, 2017, the Minister upheld his original decision with the reasons therefor being specified in the notification of the same date. While the Appellants maintain that they have never accepted that their marriage is one of convenience, it should be noted that no challenge has ever been taken to the Minister's decision under the 2015 Regulations.

19. In both the notification of the 9th July, 2016, and the 20th March, 2017, the First Appellant was informed that *“the decision to refuse you a residence card for a family member of a Union citizen does not interfere with any rights which you may have under the Constitution or Article 8 of the European Convention on Human Rights. In any subsequent proposed decision where such interference may arise, please note that full and proper consideration will be given to these rights”*. As the extract in the following paragraph will show, the Minister subsequently decided that he had no such obligation.

20. By a separate letter also dated the 20th March, 2017, the Minister wrote to Mr. M.S., pursuant to section 3 of the 1999 Act, and issued a proposal to deport him. Representations were made outlining the reasons why the First Appellant should not be deported, but such were to no avail. The deportation order was made on the 30th June, 2017 and notified to the First Appellant on the 7th July, 2017. As confirmed by the Minister in his submissions to this Court, *“[i]n the analysis which preceded the making of the order, the Minister did not consider any substantive constitutional or ECHR family rights said to derive from the First and Second Appellants’ marriage.”*

21. The Court has been informed that the First and Second Appellants are no longer residing together due to financial reasons, though they intend to do so again should Mr. M.S.’s immigration status be resolved, enabling him to work. The First Appellant was appointed by the District Court as guardian of the Third Appellant on the 3rd October, 2016. Humphreys J., at para. 8 of his judgment, raised doubts about the validity of that guardianship order and a subsequent custody order; however, such issue is not central to the point before

the Court and has not been pressed in any serious way by the parties. Accordingly, it is not necessary to delve further into this issue.

Judgment of the High Court

22. On the 8th August, 2017, the Appellant issued judicial review proceedings challenging the deportation order made by the Minister on the 30th June, 2017. An interim injunction was granted on the 14th August, 2017, with leave to seek judicial review being granted by the High Court (Humphreys J.) on the 11th October, 2017.

23. Humphreys J. heard the application for judicial review; the learned judge delivered his *ex tempore* judgment, the judgment under appeal, on the 6th February, 2018; a written copy of the judgment was furnished to the parties on the week commencing the 19th March, 2018 (*M.K.F.S. (Pakistan) and Ors v. The Minister for Justice and Equality* [2018] IEHC 103). He first rejected the Appellants' proposition that there is an obligation on an administrative decision-maker to go back and review previous decisions when a later decision is made in the process, holding that "*no administrative system could work if there was some sort of free-floating obligation to revisit any formal and unchallenged decision merely because a further step in the process predicated on that decision had to be taken*". When dealing with a submission that the passage of time and the death of the child's biological father created such an obligation, the learned judge said that "*[a] decision-maker is entitled to act on the premise that a course of action taken for fraudulent purposes remains fraudulent notwithstanding the passage of time*" (para. 13).

24. Next the learned judge held that where an unchallenged determination is made that a marriage is one of convenience, it is not open to a party to challenge that in later proceedings.

Time, for the purposes of judicial review, runs from when the grounds for judicial review first arise (Order 84, Rule 21(1) of the Rules of the Superior Courts). The Minister's formal finding that this was a marriage of convenience, which was affirmed on review, was not challenged. Time having expired without challenge, it was not open to the Appellants to contest that finding in these judicial review proceedings (paras. 14 and 15 of the judgment).

25. Humphreys J. continued by holding that where a marriage is one of convenience, no rights arising out of the relationship can be asserted. He stated that “[w]here it is determined that the applicants’ relationship is based on fraud, no ‘rights’ can arise from such a relationship; and an absolutely necessary consequence is that no obligation arises under the Constitution, the ECHR or EU law to consider any such ‘rights’” (para. 16). It is not open to the parties to put forward a case based on fraud: to do so would amount to an abuse of process and, in the view of Humphreys J, the present application clearly amounted to such an abuse. This finding, in his view, would stand whether or not the marriage is technically valid in law.

26. Nonetheless, in the event that he was wrong about this, the learned judge went on to consider the question of whether a marriage of convenience is a nullity in law, and came to the conclusion that it is. He noted that the Civil Registration (Amendment) Act 2014 provides that a marriage of convenience is a nullity. This legislation, he said, “*was necessitated by the troubling consequences of the decision of Hogan J. in Izmailovic v. Commissioner of An Garda Síochána & Ors [2011] IEHC 32, [2011] 2 I.R. 522 (“Izmailovic”) to the effect that a marriage of convenience was valid in law.*” He described the State as having launched “a direct attack” on the correctness of that decision in these proceedings and therefore dealt with their contention (paras. 19 and 20 of the judgment).

27. For a number of reasons, dealt with in greater detail below, Humphreys J. disagreed with the conclusion reached by Hogan J. in *Izmailovic*. In short, he felt that Hogan J. had been overly influenced by English law, particularly the decision of the House of Lords in *Vervaeke v. Smith* [1983] 1 A.C. 145; had misread the decision of this Court in *H.S. v. J.S* (Unreported, Supreme Court, 3rd April, 1992); and had failed to have regard to the relevant case of *Kelly v. Ireland* [1996] 3 I.R. 537. He further rejected Hogan J’s contention that the common law traditionally has never provided for a general abuse of rights doctrine of this nature in the sphere of private law, finding this to be “*a considerable overstatement and oversimplification*”. Finally, in this regard, Humphreys J. took the view that *Izmailovic* paid little attention to “*the damaging consequences that were going to be unleashed by the decision*”; he referred to an *Irish Times* article attributing a rise in trafficked women to that judgment and held that “[*s*]uch consequences ... support an interpretation of the law of nullity of marriage that firmly closes the door on such an abuse of human rights, of the institution of marriage, of the immigration system and of the legal process” (paras. 21-25 of the judgment).

28. Additionally, the learned judge held that if he was incorrect in relation to the foregoing, he would in any event refuse relief on a discretionary basis in light of the Appellants’ egregious lack of candour and wrongful conduct in their interactions with the Respondent (paras. 29-31 of the judgment).

29. In a further judgment delivered on the 16th April, 2018, Humphreys J. dismissed the Appellants’ application for leave to appeal to the Court of Appeal from his original judgment (*M.K.F.S. (Pakistan) v. The Minister for Justice and Equality (No. 2)* [2018] IEHC 222). He

was not persuaded by the Appellant’s contention that there existed a conflict between *M.K.F.S. (Pakistan) (No. 1)* and the judgment of Hogan J. in *Izmailovic*; Humphreys J. stated he had disagreed with *Izmailovic* because he had taken the view that Hogan J. had not properly taken into account the judgment in *H.S. v. J.S* and had not taken *Kelly v. Ireland* into account at all. Thus, this was entirely different from the conflict-of-view situation which arises where a judgment has taken into account all relevant jurisprudence and produces a conclusion which is at odds with another decision where all of the relevant material had been reviewed. He moreover held that the question proposed by the Appellants (concerning whether the marriage was rendered a nullity by virtue of the Minister’s decision that it was a marriage of convenience) was not suitable for leave to appeal in any event, as it could not be a decisive point: the reason for this was that Humphreys J. had additionally dismissed the application (i) on the basis that one cannot assert constitutional rights based on a marriage of convenience even if it is valid and (ii) on discretionary grounds.

Appeal to this Court

30. The Appellants subsequently sought leave to appeal to this Court from the judgment of Humphreys J. In their written application for leave, the Appellant framed the proposed issue thus:

“Is a marriage entered into in the State pursuant to the provisions of the Civil Registration Act, 2004 (as amended) rendered a nullity at law as a result of a decision reached by the executive after the marriage has taken place that the marriage is one of convenience or may rights still emanate from the marriage depending on the facts and circumstance of the individual case?”

31. By Determination dated the 26th February, 2019, this Court granted the Appellants leave to appeal (*M.K.F.S. (Pakistan) v. The Minister for Justice and Equality* [2019] IESCDET 54). The Court was satisfied that the application raised a matter of general public importance, going beyond the facts of this particular case, and that there is a need to clarify the law as, on the face of it, there are two High Court judgments which are not easily reconcilable.

32. On the 29th July, 2019, the Court granted the Irish Human Rights and Equality Commission (“the Commission” or “the Amicus Curiae”) liberty to appear as *amicus curiae* in this appeal.

Submissions

33. Helpful oral and written submissions were received from the Appellants and Respondent as well as from the Amicus Curiae, for which the Court is most grateful to counsel.

Submissions of the Appellants

34. The Appellants submit that Humphreys J. erred (i) in failing to distinguish between a specific residence process and the making of a deportation order; (ii) in holding that a marriage of convenience confers no rights arising out of the relationship and that such a marriage is a nullity in law and (iii) in his analysis of discretion.

35. The Appellants accept that the Minister may, in the context of the Immigration Acts, reach a finding that a marriage is not genuine and therefore family life does not arise on foot

of it. However, they contend that he must consider the real facts of the relationship and must then weigh these facts against the potential abuse of the immigration system.

36. It is submitted that in this case the Respondent fettered his discretion and erred by refusing to properly consider this matter in the context of making the impugned deportation order; instead, he deemed himself bound by his earlier decision made in a different context, *i.e.* when dealing with the residency card application. They say that the Minister erred in relying on this earlier decision to deem the marriage to be one of convenience in the context of the later decision concerning the deportation order. They say that the Minister's decision under the 2015 Regulations was to refuse an EU based residency right but that this cannot amount to a free-standing adjudication upon the current status of the marriage for all purposes. It is claimed that by importing the findings made in the latter process the Minister in effect re-wrote the Immigration Act 1999 to incorporate provisions concerning marriages of convenience. By holding that the Minister could import the earlier finding into the later decision, the High Court failed to appreciate that different laws and legal issues were engaged and unlawfully conflated two very separate processes.

37. The Appellants also submit that the Minister was obliged to consider the statutory, constitutional and ECHR issues at the time of the making of the deportation order, and not at the earlier date of the marriage. In their case, there was a different factual matrix as of March, 2017 in that the couple, validly married, were then cohabiting as a marital family. They also rely on what they say was a notification by the Minister that his original residence decision would not be imported into any other process. (para. 19 *supra*)

38. While Humphreys J. held that “[t]he Civil Registration (Amendment) Act 2014 provides that a marriage of convenience is a nullity”, the Appellants submit that there is no such provision in the Act. The primary purpose of the 2014 Act is to enjoin parties from entering into marriages of convenience; however, it does not purport to allow for the *ex-post facto* nullity of marriages on the basis that the Minister might deem them to be marriages of convenience. The Appellants cite Dicey, Morris & Collins on *The Conflict of Laws* (15th ed.) assert at §17-047 for the proposition that a formally valid marriage is presumed valid. Furthermore, per *Kelly v. Ireland* [1996] 2 I.R. 537, the onus is on the Respondent to establish that the marriage was a sham.

39. As regards *Izmailovic*, the Appellants submit that while Hogan J. found that a marriage of convenience is a valid one, he did not find that it would enjoy all of the constitutional and ECHR rights that flow from a marriage. They contend that there was no error in Hogan J’s treatment of *Vervaeke* and that the finding in that case – that a sham marriage is nevertheless formally valid – is consistent with *Izmailovic*. They submit that *Kelly v. Ireland* does not undermine *Izmailovic* and while they accept that there was an error in Hogan J’s factual treatment of *H.S v. J.S*, they submit that that error was not fatal to the application of *H.S. v. J.S* in substance and, further, that that decision (particularly the judgment of McCarthy J) supports the proposition that a marriage validly entered into is a valid marriage in law.

40. The Appellants submit that there is no basis in law for the conclusion of Humphreys J. that a marriage of convenience would be “void *ab initio*, even prior to the 2014 Act” – there is no authority for the contention that a marriage of convenience is a basis for a decree of

nullity, much less that the same could be unilaterally and privately be declared by the Minister.

41. The Appellants further argue that the High Court’s approach to statutory interpretation at paras. 25-28 strayed “from interpretation to judicial legislative intervention” and that its approach is in breach of section 5 of the Interpretation Act 2005. Finally, they contend that the High Court should only refuse relief on discretionary grounds in exceptional cases and that Humphreys J. had no basis for refusing relief on such ground in this case.

Submissions of the Respondent

42. The Minister summarises his case as follows: a marriage which has been entered into for the purpose of conferring an immigration advantage on one or both of the parties to it, can be treated as not being a valid marriage or, alternatively, that if it remains valid as a matter of form, no constitutional or ECHR rights flow from it as would be required to be taken into account by the Minister when deciding whether or not to make a deportation order in respect of one or both of the parties to it. The Minister therefore submits that he was entitled to make a deportation order in respect of Mr. M.S. without having to consider the constitutional and ECHR provisions relied upon by him pertaining to his marriage, the resulting family status and the underlying relationship.

43. The Respondent submits that there was no obligation on him to revisit, in the deportation process under section 3 of the 1999 Act, the decision already made under the 2015 Regulations. While accepting that he must have regard under section 3(6)(c) of the 1999 Act to “the family and domestic circumstances of the person”, the Minister submits that by the time he was obliged to have regard to these matters he had already determined the

Appellants' marriage to be one of convenience. The Minister says that it is incorrect to say that the High Court "unlawfully conflated two very separate processes": he says that the two processes (i.e. that under the 2015 Regulations and the deportation process) were entirely interlinked in terms of the factual matrix and conclusion and that it would be entirely artificial to ask him to disregard the former process when considering the latter. Given the inextricable link between the processes, the Minister says that it would introduce an absurdity into the immigration system if he could not have regard to the decision under the 2015 Regulations during the deportation process. He submits that the Appellants are incorrect in stating that they were not notified that the earlier decision could be imported into the deportation process. Moreover, he says that while the Appellants appear to be suggesting before this court that the process were drawn-out such that the family situation had differed or developed in some way by the time of the deportation decision, the Appellants never claimed that the analysis under section 3 of the 1999 Act missed out on any relevant facts.

44. Thus the Minister submits that given that he already determined that the marriage was one of convenience, he was not obliged to have regard, within the meaning of section 3(6)(c) of the 1999 Act, to the "family and domestic circumstances" of the First Appellant alleged to flow from such a marriage. That marriage was either not a valid marriage or, alternatively, did not attract any protection under the Constitution or the ECHR. Either way, the Minister says that his approach to the making of the deportation order was lawful.

45. The Minister submits that the Appellants never challenged his determination, pursuant to the 2015 Regulations, that their marriage was one of convenience: he was therefore entitled to rely on that decision in the deportation context. The High Court held that the time for challenging the decision that theirs is a marriage of convenience has expired and that it was

therefore not open to the Appellants to question that finding in these proceedings; the Minister also says that the Appellants have not engaged with this finding. The Respondent says that there must be certainty in the area of administrative decision-making and that the section 3 process is not a vehicle for re-opening the validity of earlier decisions: see *Luximon v Minister for Justice and Equality* [2018] IESC 24, [2018] 2 I.R. 542 at para. 86.

46. While the Minister accepts that the Appellants entered into a marriage in February 2010, he submits that the rights asserted by the Appellants do not however extend to their marriage, it being a marriage of convenience: such is not a genuine or regular marriage notwithstanding that the marriage ceremony complied with the applicable legal or statutory requirements. The Minister contends that what the Appellants are seeking to do is to disregard the uncontested finding that there is no genuine and regular marriage and find that there is a valid marriage which attracts constitutional protection. He refers, in this regard, to the decision of this Court in *H.A.H. v. S.A.A.* [2017] 1 I.R. 372 and says that the Appellants' marriage does not come within the defining characteristics of marriage as therein discussed, nor is it consistent with the comments of Humphreys J. in *KP v. Minister for Justice* [2017] IEHC 95 (Unreported, High Court, Humphreys J. 20th February, 2017). He submits that it would undermine the constitutional protection of marriage if those who marry to commit a fraud on the immigration system can claim the legal protections arising from such a marriage. Further, it is clear from the terms of section 2(2) of the Civil Registration (Amendment) Act 2014 that marriages of convenience are considered by the Oireachtas to be contrary to public policy and therefore do not attract constitutional or ECHR protection, and it would be contrary to public policy for this Court to hold that such protections attach.

47. The Minister says that it is clear from the case law of the European Court of Human Rights (*EB v. France* (Application No. 43546/02, 22nd January, 2008); *Schembri v. Malta* (Application No. 66297/13, 19th September, 2017)) that the ECHR protects only genuine marriages, while the same is true of EU law (C-109/01 *Akrich* at para. 61).

48. In respect of the question of nullity, the Minister submits that Humphreys J's finding that no rights could flow from a marriage of convenience was sufficient to dispose of the case, and that *Izmailovic* was discussed only in a narrow alternative, and *obiter*, context. The Minister says that in the High Court he contended that *Izmailovic* is not authority for the proposition that a marriage contracted for the purpose of avoiding immigration laws is valid and, without prejudice to that argument, that if such marriage is valid it does not attract the full panoply of constitutional/ECHR rights protection available to valid and *genuine* marriage. The Minister submits that the decision of this Court in *H.S. v. J.S* places very considerable emphasis on the circumstances and the parties' intention. He says that the *ratio* of the majority judgments is that a marriage will not be invalid simply because one or both of the parties to it goes through the ceremony of marriage intending to divorce if the marriage is not successful; however, the case does not stand for the proposition that a marriage designed to confer an immigration advantage on a party to it (i.e. a marriage of convenience) is a valid marriage in Irish law or, if it is, that it attracts any or any meaningful protection under the Constitution or the ECHR, and to that extent the consideration of the case in *Izmailovic* was unsound. He further argues that it is implied from the judgment of Barron J. in *Kelly v. Ireland* that where the sole purpose of the parties to a marriage is to circumvent immigration laws, the courts may conclude that the marriage is a "sham" and that this has implications for the protections afforded to that marriage. The Minister says that Humphreys J's interpretation of this case law is to be preferred to that of Hogan J. in *Izmailovic*.

49. As regards the discretion to refuse relief, the Minister submits that Humphreys J. did not err in this regard. The doctrine of abuse of rights militates against recognising the Appellants' marriage or permitting them to assert rights arising out of it. A statutory process such as civil marriage should not be used as a mechanism of fraud. He says that the First Appellant showed a lack of candour in his interactions with the asylum authorities and that the High Court was entitled to refuse the relief sought on this basis. Finally, while the Appellants submit that the Minister has arrogated to himself the jurisdiction vested in the Circuit Court under section 29 of the Family Law Act 1995, the Minister says that he cannot absolve himself from an obligation resting on him under a statutory provision by seeking to delegate responsibility for it to the Circuit Court under s. 29 of the Act of 1995: see *Hamza v. Minister for Justice* [2013] IESC 9 and *Hassan v. Minister for Justice* [2013] IESC 8 (both unreported, Supreme Court, 20th February, 2013).

Submissions of the Amicus Curiae

50. The Commission appears in the matter because it is of the view that this appeal concerns an important issue of principle relating to the status of a marriage validly contracted under Irish law. It submits that the status of such a marriage must be understood in light of the right to marry as protected under the Constitution, Article 12 ECHR and Article 9 of Charter of Fundamental Rights of the EU ("CFR"). The Commission submits that the High Court erred in its conclusion that a marriage which the Minister has decided to be one of convenience for the purposes of 2015 Regulations is a nullity in law. It further contends that, depending on the facts of the particular case, family rights and the right to privacy may have to be considered as part of the decision-making process irrespective of the marital status of

the parties. Thus family and privacy rights should still be considered even where it is a “sham marriage”.

51. The Commission submits that the issue of the validity of marriages of convenience turns on the proper interpretation and application of the legislative framework governing marriages of convenience in the State, understood in light of the right to marry as protected by the Constitution (under Articles Article 40.3.1° and 41.3.1°), the ECHR and the CFR. Reference is made to the judgment of this Court in *H.A.H. v. S.A.A.* [2017] IESC 40, [2017] 1 I.R. 372 where O’Malley J. stated that the defining characteristic of marriage under the Constitution in this era is that “*it entails the voluntary entry into mutual personal and legal commitments on the basis of an equal partnership between two persons, both of whom possess capacity to enter into such commitments, in accordance with the requirements laid down by law.*” (para. 131 of the reported judgment). The Commission contends that the focus of that judgment is on compliance with the requirements of the law, capacity and consent, and equality and mutuality of commitments. It is said that *H.A.H.* reflects a nuanced approach to marriage which is in contrast with the judgment under appeal.

52. It is submitted that *H.S. v. J.S.* and *Kelly v. Ireland* demonstrate that the Irish courts will not lightly intervene to set aside a marriage validly contracted under Irish law by two consenting adults with capacity and that they will be slow to second-guess the motives and intentions of the parties themselves. The Commission points out that any exercise in evaluating the motives of those entering upon marriage inevitably involves value judgments which may be based on, for example, different personal experiences, cultural norms and societal expectations. Such exercise must be carried out with care and circumspection and in accordance with clearly defined legal principles. Moreover, the Commission submits that

these authorities illustrate a deeper underlying problem: whose role is it to determine that a marriage is not valid and how should that determination be made? In *H.S. v. J.S.* and *Kelly v. Ireland*, the courts had the benefit of oral evidence in determining this question. Given the serious consequences of such a finding, the process must be carried out in accordance with fair procedures.

53. The Commission refers to the decision of the ECtHR in *O'Donoghue v. United Kingdom* (Application No. 34848/07), Judgment of the Court (Fourth Section), 14 December 2010, where the court recognised, to an extent, that States may be entitled to limit the right to marry for the purpose of preventing marriages of convenience. However, it is said that under both the ECHR and the CFR, as under the Constitution, any limitations on the fundamental right to marry must be proportionate.

54. It is said that two pieces of legislation govern marriages of convenience in Ireland: the Civil Registration Act 2004 and the 2015 Regulations. The IHREC notes that there is no suggestion that the Appellants' marriage did not comply with the formal requirements of Irish law. The question is whether the marriage can be invalidated notwithstanding its formal compliance with Irish law. The Commission refers to Regulations 27 and 28 of the 2015 Regulations. It is submitted that a determination by the Minister that a marriage was one of convenience for the purposes of the 2015 Regulations is limited in its effect: it applies only to a decision under those Regulations and merely entitles the Minister to "disregard" such marriage as a factor bearing on such a decision. The Commission contends that it is not a finding of general application that the marriage is void or invalid for all purposes and that such determination does not render a formally valid marriage a nullity in law, or void *ab initio*. Indeed, it is submitted that the Minister himself did not, in the EU residence decision,

adopt the position that the marriage was invalid for all purposes. The Commission further submits that the 2015 Regulations do not purport to regulate matters of substantive family law, nor do they or the 2004 Directive give the Minister any power to make a finding of general application that a marriage is void.

55. The Commission submits that while Humphreys J. stated that the 2014 Act provides that “a marriage of convenience is a nullity”, the Act in fact contains no such provision and neither of the Minister’s decisions in fact refers to the 2014 Act. What the Act seeks to do is prevent marriages of convenience before they occur, rather than purporting to invalidate such marriages after they have taken place. It is submitted that the 2004 Act operates on the premise that a marriage concluded in accordance with its requirements is valid for the purposes of Irish law, is entitled to constitutional protection, and may only be dissolved in accordance with strict conditions laid down by the Constitution and legislation. There is therefore no basis for the High Court’s conclusion that the 2014 Act renders a marriage a nullity in law on the basis of a determination by the Minister, after the fact, that it was a marriage of convenience, nor would it be appropriate for the courts to recognise a new freestanding ground for the invalidation of a marriage in the absence of a firm basis in the Constitution. The doctrine proposed by Humphreys J. would be more far-reaching than the 2014 Act, in that it could allow for the invalidation of marriages years after their conclusion – potentially indefinitely. This would be contrary to the institution of marriage as protected by the Constitution. Furthermore, the marriage in question here took place a number of years before the 2014 Act was passed, and must be assessed by reference to the law then applying. It is said that the appeal should be allowed on this basis alone.

56. Additionally, the Commission observes that even if the High Court was correct that a marriage of convenience is void *ab initio*, this would not mean that the parties to such marriage could not rely on their private and family rights as guaranteed by the Constitution, ECHR and the Charter: section 3(6) of the 1999 Act refers to “family or domestic circumstances” and so, unlike Regulation 27(1) of the 2015 Regulations, it is not expressly linked to the marriage or civil partnership status of the parties. Thus while the Minister argues that no rights arise from a relationship found to constitute a marriage of convenience, the Commission says that this is not so.

Discussion/Decision

57. Having regard to the circumstances of the case, the judgment of the High Court and the submissions of the parties, it seems to me that there are, in essence, three major questions which require resolution. First, whether the decision (made in the context of the residence application under the 2015 Regulations) that the Appellants’ marriage was one of convenience may be relied upon by the Minister in the course of the separate process in respect of the making of a deportation order against the First Appellant (para. 58). Second, whether a decision made by the Minister under the 2015 Regulations that a marriage is one of convenience renders that marriage a nullity at law and/or void *ab initio* (para. 67). Third, whether, if the Minister is entitled to import the earlier decision into the deportation process, he must nonetheless have regard, in operating that process, to any rights that arise from or are predicated on the underlying relationship between the parties (para. 99). Some subsidiary issues of less systemic importance also arise and these are addressed below.

Whether the Minister can rely on his decision that the marriage is a marriage of convenience, made in the context of the 2015 Regulations, when considering the deportation of the First Appellant?

58. Having been informed that the refusal of his residency application was under active consideration, on the basis that his marriage was a marriage of convenience, the First Appellant was provided with an opportunity to make submissions in relation to this. Nonetheless, the Minister so determined: in making such decision, he must have had regard to the circumstances listed in Regulation 28(5)(b) of the 2015 Regulations as well as any information furnished. Mr. M.S. applied for a review of this decision and again submitted representations; the Minister, however, upheld his original decision. The First Appellant has not sought at any stage to challenge that decision: it is too late to do so now for several reasons (see, for example, Order 84, Rule 21(1) RSC) and also because trying to unravel decisions along this pathway could create uncertainty and unacceptable unpredictability in what is otherwise a defined and sequential administrative system. Thus, the case must proceed on the basis that the Minister has made a determination, having regard to the representations made and the specific list of circumstances set out, that the marriage was contracted *for the sole purpose* of his obtaining an entitlement under the Directive or the Regulations or any law of the State concerning the entry and residence of foreign nationals (Regulation 28(6) of the Regulations) and further that while the Appellants contest that this is so, such finding of the Minister was never formally challenged by way of judicial review.

59. The Appellants contend that the Minister, in the immigration/deportation process, foreclosed on his function by failing to properly consider anew the quality, nature or extent of family life for the purposes of the proposed deportation decision, instead importing into that process his finding made under the 2015 Regulations. Mr. M.S. argues that the Minister acted

unreasonably and irrationally by relying on his earlier decision. The Appellants further maintain that within the analysis required by section 3 of the 1999 Act, the Minister was required to have regard to the evidence submitted as to the circumstances prevailing at that time, rather than relying on his previously made finding in the separate context of the residence application.

60. On the factual side there is, in my view, an air of unreality to the Appellants' submission. Perhaps there might be some validity to their contention if matters really had moved considerably during the time interval between the two processes. If, say, the Minister determined in year one that there existed a marriage of convenience, in the context of the 2015 Regulations, and for whatever reason, the question of deportation did not arise until several years down the line, would the Minister still be entitled to rely on that earlier finding if the parties had, for example, continued to reside together throughout that time and had had a child together? I doubt very much whether he could automatically rely on the earlier decision, with no fresh consideration, in the face of radically changed circumstances of such a nature.

61. For these reasons, I would not characterise the statement of Humphreys J. at para. 13 of his judgment, to the effect that there is no obligation on an administrative decision-maker to go back and review previous decisions when a later decision is made in the process, as a binding principle of administrative law. I do agree, of course, that there is no general obligation to revisit a previous decision every time a further step is required to be taken in the process. Such self-evidently could have the potential of rendering the system quite unworkable. The true position, however, may, depending on the circumstances, be more nuanced than is presented in the passage referred to (para. 23 above).

62. However, the type of developments or the nature of changed circumstances which may require such reconsideration are far from the facts presenting in the instant situation. While the Appellants make the case that the Minister's determination in the deportation process must be reached in light of the evidence presented at that time and in that context, they have not pointed to a single additional factor or piece of evidence that was any different, much less materially so, when the Minister was making that decision, as compared with when he had rejected the review three months previously. Indeed, the request for representations in respect of the deportation process was communicated to the Appellant on the same day as he was told that the residence review was unsuccessful. The two decisions seemed very much to take place within the same timeframe and based on the same fundamental underlying circumstances.

63. The Minister points out that the letter of the 20th March, 2017, proposing the deportation of the First Appellant, referred specifically as its basis to the fact that the decision of the same day under the 2015 Regulations demonstrated that the Mr. M.S. had "*...failed to show that you are a family member of an EU citizen. You have no current permission to remain in the State and you are therefore unlawfully present in the State*". I am satisfied that, at a factual level at least, the two processes in question were interlinked in the sense that they were based on the same factual matrix, and quite clearly the two decisions were made within quite a narrow and confined timeframe. Indeed, given, as the Minister submits, that the file analysis carried out under section 3 referred extensively to the process under the 2015 Regulations and to the reasoning leading to the latter decision, it would appear in many respects, at least on the facts as presented in this case, that one process flowed into the next. To this extent I accept the Minister's submission concerning the artificiality of his being

asked to disregard the extensive residence process immediately preceding the deportation process, although, as against that, it must be acknowledged that it is far from unheard of for administrative decision-makers to have regard to certain information for the purposes of one decision and not for another.

64. As indicated above, on the legal side of this issue the founding piece of legislation, giving rise to the 2015 Regulations, is Council Directive 2004/38/EC, an essential aim of which was to make provision for the free movement and residence of Union citizens. It intended to achieve this by obliging each Member State, and the other countries to which it applies, to facilitate and implement the objective of what was proposed. Self-evidently, the area of law under consideration relates to the entry into and the right to remain in a jurisdiction different from that of which a person might be a citizen. In other words, such persons could immigrate and remain in any third country which the Directive covered.

65. These measures also apply to family members of the Union citizen, as so defined but regardless of nationality. Without these provisions, but of course subject to any other international obligations so entered into, it would have been the sovereign right of each state to control its borders *via* its own asylum and immigration system. As we know, the 2015 Regulations gave effect in domestic law to this Directive. Accordingly, it seems to me that at the level of principle there is an inextricable link and direct relationship between the various legislative measures which deal with the right to enter and remain in this jurisdiction and on what basis, and being refused that right or being removed from the State, as the case may be. Such of course would have to yield to any express or necessarily implied reservation outlined in any such legislation. It is against that broad backdrop that the Appellants' submission that the Minister's finding of a marriage of convenience cannot be transposed into or relied on in

the immigration process must be considered. This argument is based on an asserted interpretation of Regulation 28, taking subpara. (1) as an example. It reads:

“The Minister, in making his or her determination of any matter relevant to these Regulations, may disregard a particular marriage ...” (emphasis added)

It is suggested therefore that the finding can only apply to the residency card situation, and cannot find its way through any avenue of law into the deportation process.

66. Leaving aside altogether how disjointed and incoherent an interpretation this would give rise to, I am satisfied that Regulation 28(6) provides a complete answer to this assertion. That provision defines a marriage of convenience as one entered into for the sole purpose of obtaining an entitlement under the Directive or the 2015 Regulations; or under any other measure adopted to transpose the Directive; or, it then continues, under:

“(c) Any law of the State concerning the entry and residence of foreign nationals in the State or the equivalent law of another State.”

In my view the reference to “entry and residence” must necessarily include removal. The whole point of having a marriage of convenience provision under Regulation 28 is to prevent one obtaining an advantage or entitlement, in the general immigration process, by reason of that fact. Accordingly, it seems to me that on any proper interpretation of the measure last mentioned, the Immigration Act 1999, or more accurately section 3 thereof, must be regarded as coming within its provisions. That Act clearly covers, inter alia, the entry and residence of persons like the First Appellant, who is not a Union citizen. Having been unsuccessful in his residence card application, he was then a person, as pointed out in the letter of the 20th March, 2017, who had no right to be in the State. That being the situation, the Minister was perfectly entitled to regulate and determine his status within this jurisdiction. Hence, the operation of section 3 of the 1999 Act. The previous finding was thus directly relevant to the

matters which the Minister must consider under subs (6) of that section. Accordingly, I am satisfied that the Minister was entitled to carry into the immigration process the decision previously made by him under the 2015 Regulations.

Whether a marriage of convenience is a nullity and/or is void ab initio and who can so declare?

67. The second issue is whether, as found by the High Court, a marriage of convenience is a nullity and void *ab initio*. Perhaps the question is better framed as whether a marriage of convenience, *as deemed or determined by the Minister under the 2015 Regulations and as applying to the deportation process*, can be so described and can have no consequences or give rise to no rights. This is a very difficult question and one of considerable general importance.

68. It should be first noted that the formal requirements to enter into a valid marriage in this State were observed by the parties as part of the ceremony which they entered into: on its face this renders their marriage a valid one, with all of the legal consequences that such entails for them, both individually and collectively, and also for third parties. No issue is taken with their age, capacity, consent to marry, or the giving of the required statutory notice. No impediment to that marriage exists within the meaning of section 2(2) of the 2004 Act and they appear *ex facia* to satisfy Article 41.3.4° of the Constitution which reads that “*marriage may be contracted in accordance with law by two persons without distinction as to their sex*”. There is therefore no suggestion, aside from the marriage of convenience point, that these Appellants did not otherwise meet the requirements for marriage. No issue of it being a marriage of convenience was raised at the time or immediately before the marriage, unlike the case of *Izmailovic*, nor was any point taken when Mr. M.S. made his first application for a

residence card in April, 2010 (see Regulation 28(4)); whilst the notification letter of the 22nd October, 2010, did point out that rights acquired by fraudulent means, including a marriage of convenience, would immediately cease to have effect when so established, such warning must be regarded as a standard insertion in a letter of this type and should not be read as implying any underlying concern personal to them. The issue only seriously surfaced more than five and half years later in the course of the second residency card application.

69. At the outset, it may be helpful to refer briefly to the high level of respect and recognition afforded to marriage in our system of law. Both the right to marry and marriage as an institution derive protection at constitutional level. The right to marry is recognised as one of the personal rights of the citizen which the State, *via* Article 40.3.1^o of the Constitution, guarantees in its laws to respect and, so far as practicable, by its laws to defend and vindicate (*Ryan v. Attorney General* [1965] I.R. 294; *O’Shea v. Ireland and Attorney General* [2006] IEHC, 305, [2007] 2 I.R. 313). Pursuant to Article 41.1.1^o:-

“The State recognises the Family as the natural, primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.”

The succeeding paragraph goes on to read:

“The State therefore guarantees to protect the family in its constitution and authority as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.”

The family so referred to is that based on marriage (*McD. v. L.* [2010] 2 I.R. 199). The institution of marriage finds particular protection in Article 41.3.1^o:

“The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.”

To underpin its constitutional value, Article 41.3.2°, which provides for the possibility of divorce, goes on to set out what conditions must be satisfied before such a decree can be obtained: the fact that subpara (4) refers to further conditions as may be prescribed by law does not detract from the overall constitutional perspective of marriage. At the international level, the right to marry is given express protection, subject only to national laws, in both Article 12 ECHR and Article 9 CFR, which by various means have application in this jurisdiction.

70. Of course, what is meant by “marriage” in this country has changed quite considerably in recent decades. Many of the older authorities on the topic, which were essentially based on the Christian notion and understanding of marriage, must now be reviewed; indeed, some of these cases are not so old. Leaving aside *Griffith v. Griffith* [1944] I.R. 35 for a moment, this Court in *T.F. v. Ireland* [1995] 1 I.R. 321 said the following at p. 373:-

“As to how marriage should be defined, the court adopts the definition given by Costello J. in Murray v. Ireland [1985] I.R. 532 at p. 535: -

‘...the Constitution makes it clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of [a partnership] based on an irrevocable personal consent, given by both spouses, which establishes a unique and very special life long relationship.’

And in N. [(otherwise K.)] v. K. [1985] I.R. 733 McCarthy J. said in his judgment at p. 754:-

‘Marriage is a civil contract which creates reciprocating rights and duties between the parties but, further, establishes a status which affects both the parties of the contract and the community as a whole.’”

71. However, in light of several events, including the Family Law (Divorce) Act 1996, as amended, *inter alia*, by the Family Law Act 2019, the Fifteenth and Thirty-fourth Amendments to the Constitution, and the clear, obvious and acknowledged diversification of society during the past thirty years or thereabouts, such a view must be reconsidered. This Court provided an important analysis of the contemporary constitutional conception of marriage in its judgment in *H.A.H. v S.A.A. (Validity of marriage)* [2017] IESC 40, [2017] 1 I.R. 372. The case concerned the question of whether the State was obliged to recognise a foreign marriage that was polygamous in nature, but many of the Court’s statements of principle are of general application. The leading judgment of the Court was delivered by O’Malley J; the following comments are instructive:

“[128] ... [I]t seems to me that some of the more recent authorities from the 1980s and 1990s have been overtaken by the amendments to the Constitution. The combination of the introduction of no-fault divorce and, in particular, the amendment of the Constitution providing for the introduction of same-sex marriage have resulted in a legal institution of marriage that cannot be described in terms of traditional Christian doctrine.

[129] This does not mean that the concept of marriage no longer has a legal meaning, or that the legal meaning is a concept flexible enough to accommodate any variation no matter how different to the traditional model. Despite the factual reality that many couples do not choose to marry, marriage remains a central feature of Irish life for the majority. The

constitutional pledge to guard the institution of marriage with special care remains in place and must be accorded full respect.

[130] The Thirty-fourth Amendment, when introducing the right to same-sex marriage, clearly did not create a separate version of marriage for same-sex couples. It is also clear that it did not create a new version of marriage for all couples. It enabled the inclusion of same-sex couples into an already existing structure. Looking at the plain wording, the amendment achieved this on the basis of a core assumption that a marriage, before and after the amendment, is a union between two people.

[131] In my view the defining characteristic of marriage as envisaged by the Constitution in this era is that it entails the voluntary entry into mutual personal and legal commitments on the basis of an equal partnership between two persons, both of whom possess capacity to enter into such commitments, in accordance with the requirements laid down by law. (This is not a case in which questions of voluntariness and capacity, which might in the case of some foreign marriages raise issues of approbation or retrospective consent, need consideration.) All of the remedies for marital breakdown, and all of the legal consequences of the status of marriage in the fields of taxation, social welfare and succession law flow from that equality and mutuality of commitment.

[132] *If that view of marriage is correct, then that is the model to be guarded, as the Constitution requires, with special care. ...*” (paragraph numbers are per the Irish Reports)

72. It must of course be remembered that people marry for a great variety of reasons. As stated by Barrington J. in *R.S.J. v. J.S.J.* [1982] I.L.R.M. 263, at p. 264: *“People have entered into a contract of marriage for all sorts of reasons, and their motives have not always been of the highest. The motive for the marriage may have been policy, convenience, or self-interest. In these circumstances it appears to me that one could not say that a marriage is void merely because one party did not love or had not the capacity to love the other”.*

73. As is obvious and to be hoped for, a great number of people marry for love, but it would be a naive view of the world to assume that this holds true for everyone. Some marry for money, or security, or status, or fame. Others marry to secure some tax or inheritance advantage. Certainly there are some others, without referring to any couple in particular, who marry to secure an immigration advantage for one or other of them. Sometimes marriage will be motivated by some mix of the foregoing, as well as other factors. And while it was more a feature of times gone by, in this country, at least, sadly some people are still married off to secure some advantage for others: to gain power, to form alliances, or simply because that is the will of the family. The same would of course require to be looked at in light of the essential component of voluntariness discussed in *H.A.H.* and the prohibition on forced marriages. But leaving aside such marriages which really do give rise to entirely different considerations, the point remains that people voluntarily chose to contract marriage for all sorts of reasons, whether it be love, convenience, self-interest or otherwise. Certainly one could not say that in all such cases “legal consent” was absent. Sometimes the parties will

make their motivations known to all; other times only the couple themselves will know the truth behind the marriage; occasionally, one spouse may keep his or her secret intention entirely to himself or herself. So, the reasons can be as diverse as the parties themselves.

The Law of Nullity

74. Before considering the Minister's role and the High Court's judgment on this matter, a quick word should be said about the law of nullity, though it must be acknowledged that in general it did not form a substantive part of this case. However, the Minister in his written submissions followed enthusiastically the judgment of the High Court on the "nullity point" from paras. 19-28. In his oral presentation, however, he recoiled somewhat from this position, offering a number of caveats: first, that he had never argued in the High Court that such a marriage was a nullity; secondly, that what consequences might flow from such a finding were likewise not considered; and, thirdly, that in any event it was unnecessary for the learned trial judge to enter into the nullity area at any level. He adds that the judgment of Hogan J. on this issue in *Izmailovic* is likewise *obiter*. In effect, the Minister is satisfied to leave apart this issue as, in his view, the judgment of the High Court on the other issues fully supports the making of the deportation order. However, there are now apparently two conflicting decisions of the High Court on the consequences of such a "disregard" finding. Of necessity, some observations have to be made on these.

75. The law of nullity in general is not at issue in these proceedings and little has been said about it by the parties. It is necessary, however, to give some sort of overview of this area of the law in order to contextualise the issue arising. Per Crowley, *Family Law*, (1st Ed. Round Hall, Dublin, 2013) at para. 12-01:

“Nullity of marriage relates to the legal validity of the marriage at the time of its inception and is a means whereby the court can declare, based on the evidence before it, that whilst two parties may have participated in a marriage ceremony, the marriage was never legally valid and as a result, in the eyes of the State, the parties were never married. ... [P]arties who seek a decree of annulment can only do so on the basis that there existed at the time of entering into the union an impediment to that union being validly formed. The effect of a decree of annulment is that the marriage is void and never existed in law, thereby divesting the parties, post-nullity, of the rights and obligations that would otherwise attach to them in their status as spouses, or former spouses.”

76. An application for a decree of nullity can be made to the Circuit Court or the High Court by either of the spouses or by any other party who, in the opinion of the court, has a sufficient interest in the matter (see section 29(1) and (7) of the Family Law Act 1995). Whether these provisions constitute procedural exclusivity does not arise. The onus is on the petitioner to rebut the presumption which stands in favour of the marriage being valid.

77. It should be noted that a marriage may be void or voidable. The grounds upon which a nullity order can be sought are not contained in legislation but rather have been developed by case law. A marriage may be void (i) on the ground of lack of capacity (for example, where one or both of the parties is within the prohibited degree of relationships, or is already married, or is under the age of 18 without consent of the court) or (ii) as a result of the non-observance of the appropriate formalities (for example, non-compliance with the notice requirement); or (iii) due to the absence of the full, free and informed consent of one or both of the parties to the marriage (e.g. as a result of duress). A marriage may be voidable if either

party has not the mental capacity to marry or is impotent. A decree of nullity may also be granted as a result of the inability of one of the spouses to enter into and sustain a normal marital relationship, for example as a result of a psychological impediment. A void marriage is considered as never having had legal effect (void *ab initio*), whereas a voidable marriage is regarded as valid until a decree annulling it has been pronounced by the courts.

78. A court-ordered decree of annulment declares the marriage to be void and, therefore, in legal terms it never existed. A declaration of nullity can have significant consequences for the parties to the marriage across a range of matters including their property and tax affairs, inheritance, pension entitlements, maintenance, their banking arrangements *etc.* It may have an impact on their future relationships, on their children, and on third parties. Of particular note is the fact that like the question of marriage, the issue of nullity is a status matter. A decision to that effect, therefore, is not simply a declaration *in personam*, but rather is a declaration *in rem*.

The Role of the Minister on this Issue

79. As set out earlier in this judgment, the involvement of the Minister in the area under discussion stems from the power given to him by the 2015 Regulations, in particular Regulations 27 and 28. Save for one point, the former can be quickly dealt with: that entitles the Minister to “revoke, refuse to make, or refuse to grant” any of the matters specified where such is being claimed on the basis of “fraud or abuse of rights”. The latter phrase includes a marriage of convenience. The Minister did not, in the determination under consideration, make any finding of fraud. As the marriage of convenience issue is more fully explored in Regulation 28, it is that measure which is central to the Minister’s role on this point.

80. As explained, in certain circumstances the Minister can determine or deem a marriage to be a “marriage of convenience”: it is clear that where he comes to such a conclusion, the Minister “in making his or her determination of any matter relevant to these Regulations may disregard the marriage as a factor bearing on that determination” (Regulation 28) (emphasis added). Thus, whilst the Minister may make such a determination, there are three constraints built into this measure. First, the finding only comes into play when he is making a determination of any matter under the Regulations, which, when properly understood includes operating the provisions of section 3 of the Immigration Act 1999. Under Regulation 27 (para. 4 above), the matters involved essentially relate to a right of residence in this jurisdiction (see what is listed at subpara (a) to (h) of para. (1)). Second, Regulation 28(6) defines a marriage of convenience as a marriage entered into for the sole purpose of obtaining an entitlement under the Directive, any transposing measure, the 2015 Regulations or any domestic law dealing with the entry and residence of foreign nationals in the State (para. 5 above). Accordingly, in both situations the consequences of such a finding are strictly tied to the narrow context of residency matters and the overall immigration process. The 2015 Regulations do not provide for any further consequences or effects outside of that setting: in effect, these are all what might loosely be described as “immigration issues”. Third, the sole consequence of the Minister taking this view of a marriage is that he “may disregard” it as a factor bearing on his determination. The word “disregard”, in its ordinary and natural meaning, has the effect that the Minister may discount it in any assessment or consideration which he may have to undertake as part of the Regulations, or under the immigration process as described. That is the sole and exclusive purpose for which the “disregard” provision exists.

81. Regulation 28, either read individually or with Regulation 27, or in fact when considered in the context of the overall Regulations, goes no further. There cannot be any suggestion that Regulation 28 should be read as conferring an additional power or authority on the Minister. The Regulations quite evidently do not expressly or otherwise grant any wider powers, including that of nullity, to the Minister, nor could any such powers conceivably be implied into the Regulations. I am satisfied that the Minister's competence to deem a marriage to be one of convenience for the purposes of disregarding it from his consideration of the residence application does not carry with it any statutory justification for him to deem such a marriage as a nullity. As a decision maker in an administrative process, the Minister is part of the executive: he is not a judicial personage as understood in constitutional terms and in statutory law giving effect where necessary to those terms. He has no jurisdiction save that as expressly conferred. He therefore can go no further, on foot of such a finding, than to "disregard" or ignore it. Self-evidently to "disregard" for a particular purpose cannot be elevated to pronouncing upon the general validity of a marriage, or the issuance of a declaration that such a marriage is a "nullity", much less that such a marriage is devoid of all rights in all circumstances, that is, at personal level, at third party level, and, quite significantly, at public level. In fairness, in his assessment under section 3 of the 1999 Act, the Minister did not purport to so do. Stressing that such a submission was not made in the court below, nonetheless if it had been, I would seriously question whether any purported delegation of such a power by statutory instrument to the Minister would be valid. Such would, in my view, be highly questionable, given the strong protections afforded to marriage under the Constitution and the detailed statutory schemes which govern the creation and dissolution of such unions.

The Judgment under Appeal on this Issue

82. In a consideration of this it is necessary to consider a number of decisions which the Court has been referred to such as *H.S. v. J.S.*, *Kelly* and *Izmailovic*, as well as the judgment in *Vervaeke*, which was relied upon by Hogan J. in coming to the conclusion which he did in *Izmailovic*. Together with the judgment under appeal in this case, what do these cases show?

83. The decision in *Vervaeke*, despite *Kelly*, is not impotent of effect or importance and should not be disregarded. The subject marriage in that case was entered into by the applicant solely to obtain British nationality, which in fact she did, so as to prevent her deportation as a prostitute. Several years later, so as to inherit under a second purported marriage, she issued a petition seeking a nullity from Mr. Smith. That decision is in reality reflective of one of two schools of thought regarding the “validity” of marriages, which directly impacts on a nullity application, a point expressly acknowledged by Barron J. in *Kelly v. Ireland*. One school looks solely to the formal requirements of a marriage: if conducted in accordance with the *lex loci celebrationis*, it is valid. *Vervaeke* is a good example of this, where the House of Lords endorsed the following passage from the trial judge, Ormrod J: “*Where a man and woman consent to marry one another in a formal ceremony, conducted in accordance with the formalities required by law, knowing that it is a marriage ceremony, it is immaterial that they do not intend to live together as man and wife ... or that they intend the marriage to take effect in some limited way...*” (p. 151/152). Lord Hailsham, in the House, continued: “*the fact is that in the English law of marriage there is no room for mental reservations or private arrangements regarding the parties’ personal relationships, once it is established that the parties are free to marry one another, have consented to the achievement of the married status and observed the necessary formalities*”. One can add that the motives or reasons for

marriage, or the existence of some secret agreement or arrangement between the parties, are not factors which affect the formal validity of a marriage.

84. *Vervaeke*, however, also acknowledged that there is a second view, according to which the circumstances surrounding the marriage may also be looked at, in order to determine whether, if otherwise regular in form, it is or is not a valid marriage. Various judgments describe the basis of this approach in a variety of ways: (i) where it was agreed that the parties would not cohabit and where the marriage had not been consummated, it was held that there was no consent to enter the marital relationship and that no marriage had been effected (*United States v. Rubenstein* [1945] 151 Fed. Rep. 2nd 915: (ii) for a marriage to be valid the parties “must assent to enter into the relationship as it is ordinarily understood, and it is not ordinarily understood [where the marriage is] merely a pretence or cover to deceive others” (*United States v. Rubenstein*): (iii) where it can be established that the marriage was only designed as a sham, it should be set aside (*Orlandi v. Castelli* [1969] S.C. 113). On the other hand, cases such as *Martens v. Martens* [1952] 3 SALR 771, favoured the first mentioned approach; here, a decree of nullity was refused upon the grounds that the parties intended to marry, it being irrelevant that the purpose was to enable the defendant to enter South Africa and immediately on entry and marriage to live with another man, Mr. Holden. A similar view was taken in *H (Orse. D.) v. H* [1954] P. 258; [1953] 3 W.L.R. 849, where a Hungarian lady married her cousin, a French citizen, so that she could obtain a passport and leave Hungary. The marriage was never consummated and she left for England some one week later, where she stayed and subsequently petitioned for a decree of nullity. As the marriage was formally satisfied, Kaiminsky J. would have held the parties to it were it not for a finding that the reason for the marriage was her fear of what would occur to her under the communist regime in Hungary. These are but examples of multiple cases where judges

have taken a different approach, not easily reconcilable with the alternative school of thought, whichever you might belong to.

85. As the judgment in *Kelly v. Ireland* outlines, many decisions of foreign jurisdictions have subscribed to this second view of marriage, while others favour the first. Given that the question falls to be considered in the particular constitutional and statutory context of this jurisdiction, and in light of the fact that the case law from elsewhere appears to point in conflicting directions depending on which you consult, it must follow that the issue should be approached essentially from the Irish perspective, though perhaps not exclusively so.

Conflicting Views

86. Although Barron J. did not expressly state which view he preferred in *Kelly*, I agree with the Respondent that the clear implication of his judgment is that he favoured the second approach. If it were otherwise, there would have been no need for the learned judge to look beyond the formal technical requirements of the marriage ceremony in reaching his conclusion; instead, however, he set out in considerable detail the evidence of the applicant and her husband as it pertained to their motivation for marrying and the circumstances leading up to the ceremony. I do not think that the learned judge would have engaged in the analysis which he did if he subscribed to the first view.

87. The judgment in *Izmailovic* reflects a preference for the former view, where the fact that the motivation to marry is to gain an immigration advantage did not deprive the said marriage of its legal validity. Humphreys J, in the decision under appeal, took the view that *Izmailovic* was based on a misreading of *H.S. v. J.S.* It is true that when stating that “[t]hey agreed to marry on the understanding that they would later divorce once the parties arrived in

the United States”, Hogan J. misdescribed the evidence as found by the trial judge in that case. It seems clear that Carroll J. did not consider it to be solely a “marriage of convenience”, as it might now be termed. To use the contemporary terminology, while one motivation was to confer an immigration advantage insofar as it would have allowed the husband to enter the U.S., the wife also hoped that the marriage would work out between them, and that they would be together for a long time. Thus, that finding by the learned judge, as upheld by Finlay CJ. as part of the majority in this Court, was not that a marriage is valid despite being a marriage of convenience (as they are now called), but rather that the marriage in question was not a marriage of convenience at all: while the immigration advantage was *a* purpose of the marriage, it was not the sole purpose. The wife wanted it to work out, even if there was an acknowledgement that they would divorce if it did not.

88. The misstatement of these findings by Hogan J. may have stemmed from the fact that the judgment of McCarthy J. (with whom Hederman J. concurred) comments on the position of parties to a marriage who do not intend it to be a marriage at all. The Respondent submits, and Humphreys J. pointed out at para. 22 of his judgment, that this remark of McCarthy J. must be *obiter*, as such observations do not seem compatible with the findings of fact made by Carroll J. in the High Court. Nonetheless, this *obiter* comment, if that be the correct reading, indicates that in the learned judge’s view it would have been a valid marriage even if the intention had been to immediately divorce upon entering the U.S. This would seem to support the proposition that a marriage of convenience is not a nullity in law, or, at least, that McCarthy and Hederman JJ. did not so consider in 1992.

89. As can therefore be seen, Hogan J. appears to have taken one view, albeit without as thorough a consideration of the case law as might have been adopted, and Barron J. and

Humphreys J. have taken another. In truth, in light of the facts in *H.S. v. J.S.*, that decision does not shine much light on the question one way or another.

90. As noted above, a decree of nullity is declared by a court in accordance with the statutory procedure provided therefor (para. 76 above). The High Court has held, in this case, that a marriage of convenience, falling within the 2015 Regulations, is a nullity at law. However, it is the Minister for Justice, under those measures, who “deems or determines” a marriage to be a marriage of convenience. As above explained, where the Minister comes to such a conclusion concerning a marriage, his competence is simply to disregard it. I do not mean “simply” in a trivial sense, but rather to indicate the consequences which flow from such a finding.

91. Let us suppose that the parties to a legally valid marriage (in terms of complying with the formal requirements), who are residing together and apparently wish to continue to do so, one of whom has made a residence application under the 2015 Regulations, contest that they are in a marriage of convenience. The Minister may conclude that theirs is a marriage of convenience for such purposes but nonetheless subsequently decide not to deport the applicant spouse (for example, due to health reasons, as sometimes happens). I cannot see that this determination by the Minister, which of course would be made in the particular context of immigration law, could have the consequence of rendering the marriage a nullity at law, such that for all other purposes discussed above it is as though the marriage never existed.

Legislative Intervention

92. It is highly relevant that insofar as the Oireachtas addressed its mind to marriages of convenience in the 2014 Act, the measures outlined in that legislation are designed to allow the State to intervene to prevent the solemnisation of such suspected marriages before they occur. The system put in place is one of prior scrutiny. This, in my view, is clear from the wording of the 2004 Act, as amended by the 2014 Act. Marriages of convenience are addressed in section 58 thereof, which concerns objections to marriage. Section 58(1) speaks of a person raising an objection “*at any time before the solemnisation of a marriage*” (emphasis added). Sections 58(4A)(a) and (b) refer to “*an intended marriage*” (emphasis added). So too do subsections 58(4), 58(4C)(a)-(j), 58(5A), 58(6) and 58(7). The latter subsection is clear on what is to happen in the event that an objection is made out and there is an impediment to marriage (e.g. that it is a marriage of convenience): the parties are to be notified that the solemnisation of the marriage “*will not proceed*” and the registrar is to take all reasonable steps to ensure that it “*does not proceed*”. If the marriage does proceed, it “...shall not to be registered...” (section 58(8)); in my view this subsection does not in any way take from this analysis of the section. In my view it is clear from the foregoing that the 2004 Act, as amended by the 2014 Act, is concerned with prospective marriages only. It provides the grounds and the procedure for objecting to a marriage before it happens. It does not purport to regulate, or provide for the dissolution of, marriages that have already taken place.

93. Therefore, I must respectfully disagree with the comments of the learned High Court judge to the effect that “*[t]he Civil Registration (Amendment) Act 2014 provides that a marriage of convenience is a nullity.*” There is no such provision in the Act. The relevant sections of the 2014 Act do not contain any provisions providing for the nullity of already

concluded marriages; rather, they speak to the grounds for objecting to an intended marriage before it occurs – one such ground being, of course, that the intended marriage would be a marriage of convenience.

94. It might be said that the Oireachtas has, by the amending provisions, clearly signalled its policy view of such marriages. However, it could have chosen to legislate for a decree of nullity based on a finding that a marriage is one of convenience, although surely the underlying factual finding would be for a court to decide, with all of the attendant procedures and safeguards that such would entail. This, it has not done, whether in the 2014 Act, the 2015 Regulations (which would in any event be a most unusual place to find such a widescale power) or elsewhere. This can be directly contrasted with section 46(1) of the 2004 Act, which states:-

“A marriage solemnised in the State,...between persons of any age shall not be valid in law unless the persons concerned...[give the required notification to the registrar...].”

In any event, as the existing grounds for nullity have been judicially developed over the years in the context of court applications seeking such a decree, perhaps the law may evolve to recognise the fact that a marriage of convenience is a ground for nullity. But can it be said that this has yet happened?

Observations on the Current Situation

95. As for this question, the jurisprudence as of now certainly appears to point in conflicting directions, although notably this precise point has not arisen in the context of nullity proceedings before a court exercising its matrimonial jurisdiction. Barron J. in *Kelly v. Ireland* implicitly favoured the “second approach” above discussed, whereby one may look to

the circumstances surrounding a marriage to determine whether it was a sham, although it should be recalled that those were judicial review proceedings seeking the return of a passport and a declaration of citizenship and on the facts of that case the learned judge was not satisfied that it was a sham marriage in any event. Similarly, on the facts as found in the High Court in *H.S. v. J.S.* there was no marriage of convenience between the parties, and the comments of McCarthy J. which appear to endorse the “first approach” (see para. 92, *supra*), whereby the marriage is valid so long as the strict legal requirements are satisfied, must be understood as being *obiter* only. Hogan J. took a clear view in *Izmailovic*, although again the point must be regarded as *obiter* insofar as that case proceeded as a *habeas corpus* application and did so, as it had to, on the basis that the intended ceremony never in fact took place due to the last minute intervention of the State, still less was one of the parties to the marriage seeking a declaration of annulment.

96. It should be recalled that the within proceedings are a judicial review application in the deportation context. The Minister, in making his finding under the 2015 Regulations that the Appellants’ marriage was one of convenience, did not purport to make any consequent decision, with far-reaching legal effects, that the marriage was therefore a nullity at law for all purposes; quite rightly so, for the 2015 Regulations do not permit him to do so. Though the Minister seems to have argued in the High Court that *Izmailovic* was wrongly decided and maintained that position in his written submissions before this Court, in his oral submissions he resiled somewhat from that position, being content to point out that the treatment of the issue in both this case and in *Izmailovic* was *obiter*.

97. In my view, these proceedings are not an appropriate vehicle for this Court to pronounce on this wider question of whether a marriage of convenience is a legal nullity for

all purposes and whether such arises only from the common law or also from the 2014 Act.. The established grounds for the granting of decrees of nullity have been developed judicially in the context of an application by either party to the marriage to that end. In my view, if the fact that a marriage is a marriage of convenience is to be recognised as a ground for nullity, it should arise in such a context, wherein a party to such a marriage seeks an annulment on that ground. It is clear that there are two views, or schools of thoughts, concerning this issue, with case law and policy considerations leaning either way. It will be for the parties to such an annulment application to make their legal arguments to the appropriate court. If the fact of it being a marriage of convenience is to be a ground for nullity, it will be for court to make the underlying factual determination concerning the marriage, with all of the attendant procedures that attach to the court process.

98. This, fundamentally, is an immigration judicial review. The family status jurisdiction of the Circuit Court or of the High Court is not invoked in these proceedings. Moreover, it is clear from the wording of the 2015 Regulations that the Minister's determination concerning such a marriage is doubly constrained: first, such finding has relevance only in the immigration/deportation context, and, further, all that it enables him to do is to disregard the marriage for such purposes. His determination that it is a marriage of convenience cannot lead to the marriage being a nullity at law for all purposes, all the more so here where both parties to the marriage contest that very finding. However, while the *Minister's* decision does not mean that the otherwise legally valid marriage is thereby a legal nullity, I do not rule out that a court, properly seised of an appropriate annulment application by a party with standing, may conclude that such a marriage is a grounds for a nullity; then again, it may not. This, however, is not the case in which to reach such a conclusion. It will suffice to say that the Minister's finding regarding the marriage of convenience is confined to the

immigration/deportation context and the sole consequence, as explained in this judgment, is that he may disregard the marriage for such purposes.

Whether the Minister must nonetheless take into account any family/private rights of the parties?

99. This, then, leads onto the third question, which is whether, the marriage having been disregarded as a factor bearing on the deportation decision, no family rights arising from such marriage could be asserted as part of that process. It may be correct to say, as a matter of principle, that, in such context no rights *arising from the marriage* may be relied upon by the Appellants. However, the effect of the submission of the Minister on appeal is to go much further and assert that no family or private rights arising out of their relationship may be asserted on behalf of the Appellants at all. This would seem to reflect what the learned judge said at para. 16 of his judgment, namely that “*Where it is determined that the applicants’ relationship is based on fraud, no ‘rights’ can arise from such a relationship.*” But both the judgment and the submission go even further again, asserting that “an absolutely necessary consequence [of such a view] is that no obligation arises under the Constitution, the ECHR or EU law to consider any such ‘rights’” (see also *Schembri v. Malta* (App. No. 42583/06)).

100. It will be recalled that section 3(6)(c) of the 1999 Act refers to “*the family and domestic circumstances of the person*”. That reflects at least two of the four interests which are protected by Article 8(1) of the Convention, namely private life and family life. Any interference with the exercise of those rights must comply with Article 8(2). This means that where some evidential basis exists for engaging these rights, then an assessment must be conducted having regard to the matters specified in subpara (2). Neither such an engagement nor such an exercise are confined to rights arising out of marriage. I am of the view that the

First Appellant's family rights under section 3(6)(c) cannot be entirely set at nought simply because the Minister has decided that his is a marriage of convenience; it may well be the case that he is not entitled to invoke the protection of marriage guaranteed by Article 41 of the Constitution, but his rights under Article 8 ECHR are not so confined and when invoked will require to be balanced in the mix by the Minister.

101. Of course, the Minister may well, and indeed often will, conclude that very little weight can be attached to such rights, particularly where he has reached the view that the parties have attempted by their marriage to perpetrate a fraud, or constitute an abuse on the immigration system. Even where no such fraud or abuse of rights is committed, the requirements of an orderly immigration system may be found to trump the family rights of the applicants. However, those rights must nonetheless be taken into account by the Minister, and this applies even where he has concluded that there has been a marriage of convenience between the spouses: certainly this must apply where others are involved in an underlying relationship. I accept that in practical terms this may make little difference to the outcome in many cases where he has found that such a marriage was entered, although this will not always be so: a good deal will depend on, *inter alia*, the nature, extent and duration of such a relationship. In principle, however, I believe that the Minister remains under an obligation to take the family and private rights (particularly those under Article 8 ECHR) of the applicant into account even where he has found that there is a marriage of convenience, though of course those rights will fall far short of the full panoply of rights which could be invoked by the parties to a genuine marriage. Accordingly, while it may not be possible to assert strict "marital" constitutional rights as such, that is not to say that the relationship between the Appellants (including as between the First and Third Appellants) may not nonetheless give

rise to certain rights which must be factored in by the Minister as part of his consideration under section 3(6)(c) of “*the family and domestic circumstances of the person*”.

102. It should be further noted and as is obvious, the bases upon which Article 41 rights can be asserted are different from those on which Article 8 rights may be invoked: different in both a legal and factual sense. Where the latter are said to arise, but rest upon a relationship springing from a marriage of convenience, then the same must be looked at with a degree, if not with a high degree, of suspicion. In such circumstances, it may take something exceptional, to be asserted and established by an applicant, to outweigh the right of the Minister for Justice to preserve the integrity of the immigration system.

103. Despite the written submissions of the Minister, as set out above, it was stated on his behalf in oral argument that an underlying relationship between parties, even where a marriage of convenience was found to exist, could give rise to Article 8 rights. Furthermore, as part of this acknowledgment, he argued that he did in fact engage with the evidence as presented under this heading and considered, as part of the Article 8 ECHR assessment, all that was offered by way of submissions or representations. As a result, it was not necessary for him to rely on that part of the judgment of the learned judge as quoted above, or on what was originally submitted on his behalf.

104. In fact, this approach is entirely consistent with the Minister’s declared view as expressed in his letters of the 9th July, 2016, and of the 20th March, 2017 (para. 19 above), where he confirmed that these decisions did not interfere with any Article 8 rights of the First Appellant and that if the same were further re-asserted they would be fully and properly considered. In neither does he mention fraud, as such; rather he refers to the marriage of

convenience as being an abuse of rights and states that the initial application for a residency card and its review were being rejected on that basis. Notwithstanding this, in the High Court and in his submissions to this Court, the Minister went considerably further, maintaining that there was no duty on him to consider any rights arising from the relationship at all. For the reasons set out in the preceding paragraphs, I am of the view that that would not be the correct approach. So what in fact did the Minister do?

105. In response to the proposal to make a deportation order, submissions were made on behalf of the First Appellant by his solicitor in a letter dated the 7th April, 2017. Dealing with section 3(6)(c) of the 1999 Act, it was asserted that he is married and lives with his wife and her young child at a certain address. He says that after a period of initial separation, himself and his wife re-established contact in May 2015, and this led to a reconciliation of the marriage. Since that time it is claimed that he has played an active and important father's role in the life of the child and has agreed to raise him as his own son. The letter continues that "the three of them have been living together as a family unit since October 2015 ... [the son] does not remember his birth father but lives happily with (Mr. M.S.), playing this important role in life".

106. In the section 3(6) assessment, conducted on the 23rd June, 2017, all of the essential matters referred to in the submission regarding family and domestic circumstances of the persons concerned were outlined. In addition, there is general and detailed reference to the application for a residency card, how that was processed through the system and what the ultimate outcome was. Under various other headings there are further references to matters which may correctly be classified as coming within section 3(6)(c) of the 1999 act. There is then a section entitled "Consideration under Article 8 of the European Convention on Human

Rights (ECHR)”. Under the heading “Private Life” it is expressly acknowledged that “*in considering the first question, [being those set out by the House of Lords in R. (Razgar) v. Home Secretary [2004] 2 A.C. 369] ... it is accepted that if the Minister decides to deport ... Mr. M.S... that this has the potential to be in interference with his right to respect for private life within the meaning of Article 8 of ECHR...*” There is a further heading “Family Life” under which is recorded various pieces of information as previously supplied in the submissions. The assessment then concludes:

“I have considered that the immigration permission enjoyed by Mr. M.S. for the period of five years beginning on the 26th October, 2010 ... was derived from his marriage ... which the Minister subsequently deemed to be a marriage of convenience ... contracted for the purposes of obtaining EU residency rights for him in Ireland ... Mr. M.S. has been without permission to reside in the State since the expiry of his permission ... on the 22nd October, 2015 ... Mr. M.S., in light of the finding of his marriage to be deemed a marriage of convenience, he is not considered to be a settled migrant given that his expired immigration process was derived from this marriage.

Therefore, it is submitted that a decision by the Minister to deport Mr. M.S. does not constitute an interference of his right to respect for family life under Article 8(1) of ECHR.”

107. In my view, the last sentence quoted certainly seems to suggest a view on behalf of the Minister that no Article 8(1) rights were engaged in the deportation process at all. In view of the evidence above (see para. 105, *supra*), this conclusion seems difficult to support. It would certainly appear that the First Appellant is living with the Second Appellant and her

young son, and moreover that he has a manner of paternal relationship with her son. There is certainly an argument to be made, notwithstanding the earlier finding of a marriage of convenience, that this is a family unit potentially attracting protection under Article 8(1) ECHR. This being so, it would then be necessary for the Minister to have engaged in at least a broad assessment of the extent of any interference therewith, pursuant to Article 8(2). This does not appear to have occurred. Given the First Appellant's assertions concerning the underlying relationship with his wife and her son, the *prima facie* engagement of Art 8(1) cannot be dismissed *in limine* by the Minister simply because of his previous finding that this was a marriage of convenience. Thus, some level of assessment was required under Article 8(2). The precise balancing exercise required and the weight to be attached to the factors would, of course, be for the Minister to perform and determine. Of course, it may well be that he would reach the view that the Article 8 rights in play can in no way displace the public interest right in upholding the integrity of the immigration system. However, notwithstanding his submission to the contrary, it would appear on the facts that the Minister failed to engage in a proper analysis under Article 8.

Discretion

108. Judicial review is a discretionary remedy. As noted above, Humphreys J. decided in this case that, in addition to his other reasons for dismissing the application, he would exercise his discretion to refuse relief in light of the Appellants' lack of candour and wrongful conduct in their interactions with the State's immigration authorities.

109. I considered this issue of the discretion in my recent judgment in *P.N.S. and anor v The Minister for Justice & Equality* [2020] IESC 11, which incidentally was another case arising in the general immigration context in which Humphreys J. exercised his discretion to

refuse relief by way of judicial review in light of the applicant’s “massive abuse of the immigration system” both of Ireland and another EU Member State. One of the questions posed for this court was “[i]n circumstances where the appellant has asserted a right to remain in the State under and by virtue of EU law, in what circumstances is a court seized of judicial review proceedings entitled to refuse relief on a discretionary basis?” This issue is addressed at paras. 93-99 of the judgment. In fact, given the views which I reached in respect of the other issues in that case, it was not necessary to reach a separate conclusion on this ground, though I did note the following from the jurisprudence on this point:

“Firstly, a court undoubtedly has jurisdiction to terminate the proceedings on such basis and may do so where it is satisfied that the disclosed facts so demand. However and secondly, given the clear desirability of reaching a conclusion on the facts and the law, particularly where the asserted right is EU derived, a court should be reluctant to exercise this power unless quite satisfied that it should do so.” (para. 99)

In short, having surveyed the case law, I observed that while the High Court has jurisdiction to dismiss an application for judicial review under the 2015 Act for abusive conduct, the same must be exercised sparingly and only where that conduct can be considered serious and significant in the context of the system as a whole.

110. This Court, in granting leave, did so in respect of the issues of general public importance arising from the judgment of the High Court, and in particular on the basis of the apparent conflict between the judgment in this case and that in *Izmailovic*. For the reasons set out above, the appeal must be allowed in two respects: first, insofar as the High Court implicitly held that the Minister’s determination, under the 2015 Regulations, that the marriage was one of convenience rendered the marriage a legal nullity for all purposes, this was not correct; the Minister has no power to so declare, he does not now assert that he has

any such power, and in fact he never purported to make any such far-reaching declaration. Furthermore, given that these proceedings arise in the immigration context and do not concern the matrimonial jurisdiction of the High Court, the views expressed by Humphreys J. in this case cannot be held to represent the correct position in law, which will fall to be resolved in due course in a case in which the matter properly arises. Second, I have concluded that the learned High Court judge erred in concluding that because it is a marriage of convenience, *no* family/private rights arising from the underlying relationship between the parties arise to be considered in the deportation context; for the reasons set out above, the Appellants' rights under Article 8 ECHR still require to be balanced in the mix. As a result, it follows that Humphreys J. was incorrect in stating "*an absolutely necessary consequence is that no obligation arises under the Constitution, the ECHR or EU law to consider any such 'rights'*". Given these findings on the points of principle, I would be reluctant to disentitle the Appellants to the reliefs sought on a discretionary basis. Perhaps more fundamentally, I find it difficult to believe that the term "abuse of process" as properly understood, could encompass the situation at hand. The First and Second Appellants have consistently maintained that theirs is not a marriage of convenience and this certainly does not appear to be a typical abuse of process situation. Having regard to what was stated in *P.N.S.*, I am not satisfied that the conduct of the Appellants reaches the high threshold for disentitling them to the reliefs sought on this basis.

Conclusion

111. To conclude in respect of the three questions set out at para. 57, *supra*, I would hold (i) that the Minister's determination (made in the context of the residence application under the 2015 Regulations) that a marriage is one of convenience, may be relied upon by the Minister in the context of the subsequent deportation process; (ii) that the said determination

made by the Minister under the 2015 Regulations does not have the effect of rendering that marriage a nullity at law; rather, such determination is limited to the immigration/deportation context the sole consequence thereof is that it entitles the Minister to “disregard” the marriage in the very specific context as set out above; and (iii) although the Minister is entitled to import the earlier decision into the deportation process, he must nonetheless have regard, in operating that process, to the Article 8 rights of the Appellants as founded on the underlying relationship between the parties; it does not appear that he did so here.

112. I would therefore allow the appeal in part.