THE COURT OF APPEAL

CIVIL

[No Redaction Needed]
Neutral Citation Number [2023] IECA 227

Costello J.
Faherty J.
Haughton J.

BETWEEN

Court of Appeal Record Number: 2022/108

L.A.

APPLICANT/APPELLANT

- AND –

MINISTER FOR JUSTICE

RESPONDENT

- AND –

Court of Appeal Record Number: 2022/107

S.R.

APPLICANT/APPELLANT

- AND -

MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 3rd day of October 2023

Introduction

1. This is my judgment on the appeals from the judgment and orders of the High Court (Phelan J.) of 30 March 2022 refusing the appellants judicial review of decisions to refuse to grant the appellants permission under the Special Student Scheme to remain in the State.

The facts in the case of L.A.

2. L.A. is a Pakistani national. He came to Ireland on a student visa on 15 January 2007. On 13 September 2012 he married an Estonian national, V.K. On 5 October 2012 he applied for a residence card under the European Communities (Free of Movement of Persons) Regulations 2006 and 2008, and 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 (the "Regulations" and the "Directive") on the basis that both he and his spouse, an EU citizen, were residing in the State and that she was exercising her right of free movement under the Directive and the Regulations and was working in the State. As proof that this was so he submitted a letter from the "Kebab House" relating to V.K.'s employment and her payslips with her employer.

3. On 8 April 2013 his application was refused on the basis that he had failed to notify the INIS that the EU citizen had changed employment in February 2013 until April 2013. Thus, the Minister was not satisfied that V.K. was exercising her rights through employment in accordance with the provisions of Regulation 6(2)(a) of the Regulations. In refusing the application, L.A. was warned that:

> *"Where it is established that a person has acquired any rights or entitlements by fraudulent means, including marriages of convenience, then that person shall immediately cease to enjoy such rights or entitlements. A person who asserts an entitlement to any rights under the Regulations on the basis of information which he or she knows to be false or misleading in a material particular, or fails to comply with*

any requirement of the Regulations, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €5,000 or a term of imprisonment not exceeding 12 months, or both."

4. He was thus alerted to the grave implications of applying for a Residence Card pursuant to the Regulations and the Directive to which he was not entitled.

5. On 17 April 2013 he requested a review of the decision. By letter dated 20 May 2013 he was asked to provide the current letter from the employer setting out the terms and conditions of employment and/or a signed contract of employment, two recent pay slips and the most recent P.60 or Tax Credit Certificate of his EU citizen spouse. In response to this letter and in support of his application, L.A. submitted pay slips in respect of V.K. from "Tasty Spice" for 10 March 2013, 17 March 2013 and 24 March 2013.

6. On 19 November 2013 L.A. was informed that while his review was pending, he could attend at the local immigration office to have his passport stamped with a Stamp 4 endorsement which would be valid until 10 January 2014.

7. On 6 January 2014 he was informed that the decision to refuse his application had been affirmed for the following reasons:

"You submitted documentary evidence to show that your EU citizen's spouse (V.K.) was in exercise of her EU Treaty rights in the State through her employment with Mr. [T.B.] t/a Tasty Spice. This office contacted the EU citizen's employer and was informed the EU citizen left this employment some months ago. It is noted that you have not informed this office of the material change in your circumstances, and you have not provided any documentary evidence to show that your EU citizen spouse continues to exercise EU Treaty rights in the State.

Therefore, the Minister is not satisfied that the EU citizen is exercising their rights through employment…in accordance with the requirement of Regulation 6(2)(a) of the Regulations. Therefore, you are not entitled to reside in the State in accordance with Regulation 6(2)(b) of the Regulations."

8. On 14 April 2014 L.A. again applied for a Residence Card under the Regulations and the Directive. He enclosed a P.60 for the tax year end 31 December 2013 for V.K. and six pay slips from "Rana Foods" for V.K. for the period 9 December 2013 – 17 March 2014. On 9 October 2014 his application was accepted, and he was granted a residence card for a period of 5 years on the basis that he was the spouse of V.K., an E.U. citizen, who was residing in the State and exercising her E.U. Treaty rights. When L.A. went to his local garda station to stamp his passport based on this decision, it was refused.

9. One month later, on 13 November 2014 the INIS wrote to L.A. stating that it had come to their attention that the E.U. citizen, V.K., was no longer resident and exercising her E.U. Treaty rights in the State: *"In light of the above, I am to inform you that it is proposed to revoke your permission to remain, as you do not quality for residency under the provisions"* of the Regulations. He was then invited to make written submissions to the office setting out reasons as to why his permission to remain in the State should not be revoked.

10. L.A. replied to this letter through his solicitors, Trayers & Company, on 25 November 2014. The letter stated:

"We are instructed that Ms. [K.] is resident in the State in exercise of her EU Treaty rights, that she resides at [an address in the State] and that she is in employment with Indian Taste, [in Dublin]."

11. On 18 December 2014 the INIS responded that:

"..this office received information from the Estonian Embassy (copy enclosed) which states that [V.K.] lives in Estonia with her Estonian partner [A.K.] and their son [A.K.] DOB 26/05/2014. [K's] older son [N.K.] DOB 15/07/2012 also lives at this address.

The Estonians also state that on 07/02/2014 [V.K.] submitted her 2013 Declaration of Income to Estonian Tax & Customs Board declaring her residence as: [a specific address] Estonia.

Based on the above, the Minister has reason to believe that your client has submitted documentation which was intentionally misleading as to a material fact and that this constitutes a fraudulent act within the meaning of Regulations 24 and 25 of the Regulations and Article 35 of the Directive, which provides that Member States may refuse, terminate or withdraw any rights conferred under the Directive "in the case of abuse of rights or fraud, such as marriages of convenience.""

12. He was invited to make further submissions within 10 working days.

13. Despite the fact that L.A. had solicitors acting on his behalf, he made no further submissions, and he did not contest either the information provided by the Estonia Embassy or advance any explanation which could support the validity of his position.

14. On 17 February 2016 the INIS wrote on behalf of the Minister to inform him that his residence card had been revoked. In material part the letter provided as follows:

"It is noted that you were granted permission to remain for a period of 5 years on 09/10/2014 on the basis that you were a family member of an EU citizen, [V.K.] who was residing in the State and in exercise of her EU Treaty rights.

However, the grounds under which you were granted permission to remain no longer apply as the EU citizen is resident in Estonia with her partner and two children. Ms. [K] gave birth to her two children, one in 2012 and one in 2014 in Estonia while she was supposedly residing and working in the State.

As advised in our letter of 18/12/2014, the Estonian authorities have advised that on 07/02/2014 Ms. [K] submitted her 2013 Declaration of Income to the Estonian Tax and Customs Board declaring her residence in Estonia.

The Minister is satisfied based on the information available to her that Ms. [K] is not resident in the State and has not been in the State in exercise of her EU Treaty rights. The Minister believes that the documentation submitted regarding Ms. [K]'s employment in the State was intentionally misleading as to material fact and that this constitutes as (sic) a fraudulent act within the meaning of Regulations 24 and 25 of the Regulations and Article 35 of the Directive, which provides that Member States may refuse, terminate or withdraw any rights conferred under the Directive in the case of abuse of rights, such as fraud or marriages of convenience.

Therefore, the permission to remain which was granted under the provisions of Regulation (EEC) Number 1612/68, the European Communities (Free Movement of Persons) Regulations 2006 and 2008 has now been revoked for the reasons stated above."

15. It is clear that the residence card was revoked on the basis that L.A. had submitted documentation which was *"intentionally misleading as to a material fact and that this constitute[d] as (sic) a fraudulent act"* within the meaning of the Regulations and the

Directive. V.K. had not been residing in the State as he had asserted and was not exercising her E.U. Treaty rights. Therefore, the appellant was not entitled to claim a residence card or to retain it once granted. It amounted to an ongoing fraudulent act.

16. The letter further notified L.A. that he could request a review *"if you feel that the deciding officer has erred in fact or in law."* L.A. did not request a review and he did not seek to judicially review the decision. In his grounding affidavit in these proceedings, he did not explain why he neither sought a review of the decision nor sought judicial review nor submitted any response to the letter of 18 December 2014 contesting or answering the information provided by the Estonian Embassy. He does not assert that it was based on incorrect facts. The inference to be drawn from the evidence before the court therefore is that the information was correct, and that L.A. accepted that he had perpetrated a fraud in applying for and retaining a residence card in the circumstances.

17. On 27 January 2017 L.A. employed the Immigration Services Centre to apply for permission to remain pursuant to s.4 of the Immigration Act 2004 or pursuant to the Minister's executive discretion to grant permission to remain. He submitted a 23-page letter with attachments. It is remarkable that in the voluminous material submitted the sole reference to his character and conduct both prior to and following his arrival in the State was:

> *"**Character and conduct both within and outside the State (including any criminal convictions):***
>
> *The Applicant has not come to the attention of the Authorities in this country. He has no criminal convictions in Ireland, Pakistan or elsewhere."*

18. No reference whatsoever was made in the application to the decision of 17 February 2016 to revoke his permission to remain. The s.4 application was unsuccessful, and on 19 June 2018 he was informed that it was intended that he now be issued with a proposal to

deport pursuant to s.3 of the Immigration Act 1999 (as amended). By letter sent by registered post of the same date, he was informed that the Minister purposed to make a Deportation Order under s. 3 of the Act.

19. In November 2018 L.A. applied to remain in the State under the Special Student Scheme. The details of this scheme will be discussed fully later in this judgment. On 13 February 2019 he was informed that he was unsuccessful on the basis that he did not satisfy the criteria in para. 3.4 as his immigration stamp had changed other than a student type permission "*during the period referred to"*. He was informed that it was open to him to seek a review of the decision and that the mandatory method for applying for a review was to submit a Form SSS as enclosed with the letter. He was also informed that he should set out the reasons why he did not agree with the decision to refuse his application and that this should be supported by documentary evidence.

20. On 28 February 2019, L.A. sought a review of the decision and completed the relevant form. He attached a letter from his solicitors dated 1 March 2019 which said that the Minister erred in applying para. 3.4 to the appellant as she took into account a permission granted (but no longer extant) "*subsequent to the period referred to"* in the scheme. He said it was clear that the appellant did not have his *"immigration stamp changed other than a student type permission* ***during the period referred to****."* (Emphasis added).

21. The review was conducted by a reviewing officer and on 19 June 2019 he wrote a three-page letter setting out his decision. The letter commenced by stating:

> *"I have considered all of the information and documentation contained in your scheme application (Res 7201800122230), your immigration records as held by INIS, and the additional material provided in your application for a review. I have found that the decision of 13 February, 2019 to refuse you permission to reside under the Special Scheme was correct. You did not meet the Scheme eligibility criterion 3.4 as you were*

granted a stamp 4 EU FAM as a family member of an EU national during your time in the State."

22. The reviewing officer said he had taken L.A.'s legal representative's submissions into consideration and quoted from them. He then refuted the submission over the following page and a half and on the third page he concluded:

"Having regard to all of the above, it is the case ***that you sought and were granted a change in permission in 2012 and in 2014 other than a student type permission during your time in the State****. Therefore, you do not meet the requirement of criterion 3.4." (Emphasis in original)*

23. Having given his reasons for his conclusions, he then stated:

"In arriving at this Scheme refusal decision, I found that the appropriate procedures were applied and the decision maker applied the correct interpretation of the eligibility criteria as detailed in the Special Scheme for Students Notice which is available on the INIS website."

24. L.A. sought judicial review of this decision. The proceedings were compromised on the basis that his application under the Special Scheme for Students would be reconsidered. On 3 September 2020 that decision issued. The decision maker stated:

"Your application has been assessed in accordance with the Scheme criteria and all information available and documentary evidence provided.

Please note Section 3.7 of the criteria for the above mentioned Scheme:

3.7 Have been of good character and conduct prior to your arrival and since your arrival in this State…".

Information available to the Minister shows that an application pursuant to the European Communities (Free Movement of Persons) Regulations 2006 and 2008 (the "Regulations") and Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (the "Directive") was submitted by you in April 2014. Having examined the application, it was approved under the Regulations and the Directive. You were issued with the appropriate permission by letter dated 09 October 2014. However, this permission was revoked on 17 February 2016 on the basis that the documentation provided appeared to be intentionally misleading in order to circumvent immigration rules and that this constitutes as fraudulent (sic) within the meaning of Regulations 24 and 25 and Article 35.

You did not submit a review of this decision.

As a result, your application for permission under the Special Scheme for Students from 01/01/2005 to 31/12/2010 is refused because your case does not meet the stipulated criterion for the above reason."

25. The letter concluded by stating that he was entitled to apply to review the decision upon the enclosed Form SSS setting out his reasons for not agreeing with it and any supporting documentary evidence.

26. On 29 September 2020, L.A.'s solicitors, Martin & Grove Solicitors, sought a review of the decision. The Form SSS is not exhibited in the papers. L.A. exhibits his solicitors' letter which sets out the reasons he disagrees with the decision of 3 September 2020.

27. The letter of 29 September 2020 mis-states the basis for the decision to revoke his permission to remain of 17 February 2016. It wrongly states that the Minister is:

"... not satisfied that our client is of good character owing to the finding that he engaged in a marriage of convenience in October 2014."

28. The letter then continued:

"The grounds upon which we seek to review this decision are that in reaching the conclusion that our client has not been of good character and conduct since his arrival in the State, on the basis that the Minister previously found him to have engaged in a marriage of convenience, is disproportionate and unreasonable in all of the circumstances."

29. The challenge to the decision was thus on the basis that it was disproportionate and unreasonable in the circumstances. The letter identifies no material relevant to the revocation decision of February 2016 upon which the decision to refuse the application under the scheme was based. Instead, the letter challenged the validity of the 2016 decision and continued:

"We note that the burden of evidence for (sic) which the Minister must meet to make a finding of a marriage of convenience is well below that of a criminal matter. We respectfully submit that the onus is on the Minister to engage in a balancing act between this finding and between the other known characterizations of our client. The evidence upon which the Minister has based his finding of a marriage of convenience is all circumstantial and we respectfully submit that to use this finding in the absence of any other consideration being given is in breach of the laws of natural justice and fair procedures."

30. Thus, the application for a review was also based upon a claimed breach of L.A.'s right to fair procedures in respect of the application under the scheme. On the second page of the letter the solicitors set out his studies and qualifications, his work experience in the State and his contribution to the local community. It concluded by stating that L.A. has not come to

the attention of the authorities in this country nor has he any criminal convictions in Ireland, Pakistan or elsewhere. The Minister is asked, *"in order to exercise her discretion in a fair manner and in accordance with law and natural justice"*, to accede to his application to remain. By letters dated 1 and 2 October 2020 the solicitors forwarded references in support of the application from work colleagues, his mosque and sport groups in which he was involved which had been omitted in error from their earlier letter.

31. On 23 October 2020 the reviewing officer issued her decision. It is appropriate to quote it in full:

> *"I refer to your above application received in Unit 1 Residence Division. I have considered all of the information and documentation contained in your Scheme application, your immigration records as held by INIS, and the additional material provided in your application for a review.*
>
> *Please note eligibility criterion 3.7 of the Special Scheme for Students 2005 to 2010 states that you can apply for this permission if you "have been of good character and conduct prior to your arrival and since your arrival in this State."*
>
> *In arriving at this Scheme refusal decision, I found that the appropriate procedures were applied and the decision maker applied the correct interpretation of the eligibility criteria as detailed in the Special Scheme for Students Notice which is available on the INIS website."*

32. The letter concluded by stating that the review request was closed and requesting relevant information to allow the department to refund the fee accompanying the application.

33. On 30 November 2020, the High Court extended the time in which the appellant could apply for judicial review of the decision of 23 October 2020 to that date and granted the

appellant leave to seek judicial review on the grounds set out in his Statement to Ground the application.

Grounds for seeking judicial review in the case of L.A.

34. L.A. was given leave to seek judicial review of the decisions of 3 September 2020 and 23 October 2020 on four grounds as follows:

"(a) The Respondent has a fixed policy such that the previous finding of use of fraudulent documents automatically precluded the Applicant from consideration under the Scheme. As such, the Respondent has fettered her discretion in determining that a previous finding of use of fraudulent documents disentitles an applicant for consideration under the Scheme because that finding automatically means that they do not meet the requirement to have been of good character and conduct before entering the State and since entry to the State.

(b) The Respondent failed and/or refused to give lawful consideration to the application by failing and/or refusing to assess the specific conduct of the Applicant and/or failing and/or refusing to assess the merits of the Applicant's application. Further, by so refusing and/or failing the Respondent fails to then conduct any type of proportionality assessment in the assessment of the Applicant's application.

(c) The Respondent has unreasonably and unlawfully determined that a finding of use fraudulent documents, regardless of the circumstances of that finding, is of such gravity in terms of the Applicant's conduct that she need go no further in her assessment of the Applicant's application. As such, the Respondent failed to take account of relevant matters in reaching her decision. The Applicant made a detailed application under the Scheme. The Respondent was bound to give it lawful consideration. The Respondent has failed and/or refused to consider the

application at all beyond seeing that there was a finding that the Applicant had used fraudulent documents. In all the circumstances of the Applicant's case, that determination that he did not qualify under the Scheme because he was not of good conduct because he had previously used fraudulent documents was disproportionate.

(d) The Respondent failed to address the appropriate issues for determination and accordingly acted outside her jurisdiction. The Respondent has failed and/or refused to consider the merits of the Applicant's application or even to consider whether there were any circumstances, exceptional or otherwise, such that she would consider the application."

35. The issues in respect of which he was given leave to seek judicial review, and which thus delimit the scope of these proceedings are

- Whether the Minister operated a fixed policy and thus fettered her discretion in determining that a previous finding of use of fraudulent documents disentitled an applicant for consideration under the scheme because the finding automatically means that they do not meet the requirement to have been of good character and conduct before entering the State and since entry to the State.
- Whether the Minister failed to give lawful consideration to the application by failing/refusing to consider the specific conduct of the applicant and/or the merits of his application and further by failing to conduct a proportionality assessment.
- Whether the Minister failed to take account of relevant matters in reaching her decision and refused to consider the application at all beyond the fact that there

was a previous finding that the applicant had used fraudulent documents and this was disproportionate.

- Whether the Minister acted outside her jurisdiction in failing to address all the appropriate issues for determination.

The facts in the case of S.R.

36. S.R. is a citizen of India. She arrived in the State on 12 October 2009 on foot of a student permission. She worked and studied in compliance with the terms of that permission until it expired on 29 October 2014. In March 2013, she met G.P., a Lithuanian national. They married in the State in September 2014. Shortly after her marriage, S.R. applied for a Residence Card under the Regulations and the Directive on the basis that both she and her spouse, an EU citizen, were residing in the State and that her spouse was exercising his right of free movement under the Directive and the Regulations and was working in the State. By letter dated 21 March 2015 S.R. was informed that her application had been approved. The letter informed her that she must advise the INIS of any change in circumstances which might affect her right to reside in the State under the Regulations such as a change of residence, change in activities of the EU citizen or change in relationship to the EU citizen. The letter concluded with the warning quoted in para. 3 above.

37. In her affidavit grounding her application for judicial review sworn on 19 November 2020, S.R. averred that *"regularising my immigration status was not the sole purpose of our marriage and we principally married out of love and affection"* and *"it soon became apparent that we should not have married and that we were more suited to being friends, which we still are to this day"*. S.R. says she separated from her husband after about a year together and she did not inform the respondent of her change in circumstances.

38. By letter dated 18 May 2018, Ms. Elizabeth Coyle of the EU Treaty Rights section of the INIS wrote to S.R. concerning her current immigration status in the State. The letter

noted that she was granted permission to remain for a period of five years on 21 March 2015 on the basis that she was a family member of an EU citizen, G.P., who was residing in the State and in exercise of their EU treaty rights. The writer stated:

> *"In support of your application you submitted documentation including Utility bill, PRTB letters, Rent receipt, Letting agreement and letter from landlord, Mr. [AA] as evidence of your residence at [an address in Dublin]. You submitted further documentation including P.60 payslips, contract of employment and a letter from employer as evidence of the employment of Mr. [G.P.] with Domino's Pizza and with MJP Cleaning Services."*

39. The letter said that the Minister sought to contact her at her last known address and registered post was returned marked "not called for". The letter pointed out she had failed to inform the office of any change in her circumstances or change of address as required by Regulation 11(2) of the Regulations. It was further noted that her Stamp 4 EUFam GNIB registration card expired on 27 September 2017. It continued:

> *"Information available to the Minister from the Department of Social Protection informs that on 28/10/2016 you gave birth to baby [K.S.]. You are in receipt of Child benefit for this baby since 22/11/2016. [K]'s father is an Indian National who possesses a student permission to reside in this State. Your EU spouse, Mr. [G.P.] is linked to and resides with his Lithuanian partner since 28/02/2011. Mr. [G.P.] has a child with his Lithuanian partner.*
>
> *Based upon the above information, the Minister is of the opinion that the documentation you provided in support of your residence application to evidence the residence of you and your spouse in this State is false and misleading as to a material fact. The Minister is also of the opinion that the documentation you provided to*

evidence the exercise of rights by your spouse in this State are also false and misleading as to a material fact. You knowingly submitted this documentation in order to obtain a right of residence which you otherwise would not enjoy. This constitutes a fraudulent act within the meaning of the Regulations and Directive, which provides that Member States may refuse, terminate or withdraw any rights conferred under the Directive "in the case of abuse of rights or fraud, such as marriages of convenience". ***If this is found to be the case the Minister will proceed to revoke your permission to remain in accordance with the provisions of Regulation 27(1) of the Regulations and Article 35 of the Directive.***

In addition to the above, based on an assessment of your application to date, the Minister is also of the opinion that your marriage to Mr. [G.P.] ***is one*** *of convenience, contracted for the sole purpose of obtaining a derived right of free movement and residence under EU law as a spouse who would not otherwise have such a right.* ***If this is found to be the case, the Minister will proceed to revoke your permission to remain in accordance with the provisions of Regulations 27(1) of the Regulations and Article 35 of the Directive.****"* (Emphasis in original)

40. The letter concluded by pointing out that the Minister had attempted to correspond with her, but no submissions or correspondence had been received from S.R. The letter informed her that her permission to remain has now been revoked for the reasons stated above.

41. Ms. S.R. says in her affidavit that she engaged an immigration consultant and asked him to appeal the decision but that the decision was not appealed. She gives no further explanation for her failure to challenge the revocation of her permission to remain in the State. She says she does not seek the return of her residence card, but she seeks to overturn

the finding of fact that her marriage was one of convenience and she has now asked her solicitor to appeal that finding, more than two years later.

42. S.R. says that she *"then"* became involved with an Indian national, presumably after she split up from her husband, and they had a baby together, her daughter, who, at the time of the swearing of the affidavit in November 2020, was four years old. S.R. avers that the child's father was extremely abusive and violent and that *"we are no longer together"*. She says she raises her daughter as a single mother without his assistance and her daughter knows no other country than Ireland. They would bring shame on their family if she was forced to return to live in India and they would be ostracised.

43. She says that in November 2018 she sought permission to remain in the State under the Special Student Scheme. As in the case of L.R., that application was refused on the basis that she had previously held a permission (the residence card) after her student permission. Ultimately, she too sought judicial review of that decision and those proceedings also were compromised on the basis that her application under the scheme would be reconsidered by the respondent. Her application was reconsidered and refused by letter dated 4 September 2020. The letter stated that her application *"has been assessed in accordance with the Scheme criteria, all information available and documentary evidence provided"*. It referred to s.3.7 of the criteria for the scheme. It recited the fact that she applied for and was granted a right of residence under the Regulations and the Directive on 21 March 2015 and that the permission was revoked on 18 May 2018 *"on the basis that The Minister is of the opinion that your marriage to Mr. [G.P.] is one of convenience contracted for the sole purpose of obtaining a derived right of free movement and residence under EU law as a spouse who would not otherwise have such a right".*

44. The letter continued by referring to the attempt to contact her by letter, the return of the letter marked "Not Called For" and the fact that no submissions or correspondence had

been received and that therefore her permission to remain was revoked. The letter then continued:

> *"As a result, your application for permission to reside in this State on Stamp 4S conditions has been refused for the reasons set out above."*

45. As in the similar letter provided to L.A., she was informed of the possibility of seeking a review of the decision and of the possibility of providing further documentary evidence in support of that review.

46. By letter dated 29 September 2020, her solicitors wrote seeking a review of the decision under the scheme. They did so on the same grounds as those set out in the identical letter for L.R. which are cited at para. 28 above. The letter set out the fact that she is an extremely hard worker and has worked as a manger of a pizza delivery company for a large number of years showing a great level of trustworthiness and a strong work ethic. It also reviewed her studies and qualifications and contributions to the local community. The letter concluded by enclosing references letters from friends and a former colleague of S.R. and a P.60 dated 28 January 2019.

47. The SSS review form was not enclosed with the letter of 29 September 2020, but it was duly forwarded under cover of a letter dated 19 October 2020.

48. On 23 October 2020, the reviewing officer issued her decision in terms identical to those issued to L.R. and which I have quoted at para. 31 above**.**

49. On 30 November 2020, S.R. was granted leave to seek judicial review to quash the decision of 4 September 2020 and the review decision of 23 October 2020. The grounds upon which she sought relief mirrored those in the case of L.R. In her submissions to the High Court she identified the single issue in her case as follows:-

"Was the decision to refuse [S.R.] a permission under the Scheme because of a previous finding that she had entered into a marriage of convenience made in accordance with law"?

The decision of the High Court

50. Phelan J. commences her judgment by setting out the facts in respect of S.R. and L.A. and she then identifies the grounds of challenge. She summarised these at para. 23 of her judgment as follows:

> *"(i) the Minister operated a fixed policy such that a previous finding leading to the revocation of residence permission automatically precluded the applicant from consideration under the Scheme and that the application of this policy resulted in a failure to properly consider the application;*
>
> *(ii) The Minister erred in law in failing to properly assess the applicant's character and conduct by relying exclusively on the finding which led to the revocation of EU residence permission and failing to weigh the other evidence of good character against the evidence relied upon to revoke EU residency permission in assessing whether the applicant had been of good character and conduct for the purposes of the scheme."*

51. She first addressed the claim that the Minister operated a fixed policy. At para. 26 of her judgment she held:

> *"It is not contended on behalf of either applicant that the fact that a finding had been made that residency had been improperly obtained either in reliance on a marriage of convenience or on misleading documentation is not relevant to a consideration of character and conduct and could not on its own provide a basis for a refusal under the paragraph 3.7 criterion. Absent evidence that the Minister proceeded on the basis that the permission under the Scheme could not be granted where a residence*

permission had been revoked because of a marriage of convenience or the submission of misleading evidence, I am satisfied that this argument cannot be sustained. There is no such evidence in either case."

52. She next considered whether there was a failure properly to consider the applications on their merits because of a flawed approach to the assessment of good character and conduct criterion and a failure to have regard to all relevant consideration. The applicants relied upon four decisions in the context of citizenship applications pursuant to s.15 of the Irish Nationality and Citizenship Act, 1956 (as amended), namely, *Hussain v. Minister for Justice* [2013] 3 IR 257; *GKN v. Minister for Justice* [2014] IEHC 478; *Talla v. The Minister for Justice and Equality* [2020] IECA 135 and *MNN v. The Minister for Justice and Equality* [2020] IECA 187. The applicants argued that a proper application of the good character and conduct criterion requires a consideration of all of the evidence in relation to character and conduct as established by the case law in the naturalisation context. Phelan J. considered the four authorities and distinguished them from the facts in these two cases. At para. 34 she held:

"The Minister must not ignore other evidence of character but the fact that the Minister concludes that the applicants have not been of good character and conduct because of a finding that they have been involved in a marriage of convenience or had relied on misleading documents does not mean that the Minister has engaged in a tick box exercise and has failed to consider other information before her. After all, it is accepted that the fact of involvement in a marriage of convenience or reliance on misleading documents are a relevant consideration and evidence bad character. In my view such involvement, in and of itself, is enough to justify the decision that the applicants have not been of good character and conduct even where other evidence of good character is before the decision maker."

53. In para. 36 and 37 she addressed arguments that because the review decision letters do not reflect a balancing of the employment history of the applicants in the State as against the evidence of bad character that this exercise was not undertaken by the decision maker. The trial judge held as follows:

> *"36… While the good character evidence is not engaged with, an assertion is made that all information submitted was considered. Counsel for the applicant pointed out that this expression appeared in identical terms in both cases and he described it as "boilerplate." On the other hand, counsel for the respondent contends that the Court is not entitled to look behind this statement and relied on the decision in Olakunori (A Minor) v. Minister for Justice & Equality [2016] IEHC 473 where the Court found (Humphreys J.) at para. 64 that:*
>
> > *"(iv) the applicant's submissions should, in the absence of evidence to the contrary, be regarded as having been considered if the decision maker states that they were considered; narrative discussion is not generally required and would only arise in special circumstances (of which the present case is clearly not one)."*
>
> *37. The Decision letters in these cases expressly record that the additional information submitted as part of the review was considered. I agree with the respondent that just because the application failed and the new materials submitted are not discussed in the reasoning does not mean that the application itself and the materials submitted were not considered. There is a presumption that material has been considered if the decision says so, albeit that this presumption may be displaced on the basis of factors in the case (G.K. v. Minister for Justice [2002] 2 I.R. 418 & MH (Pakistan) v. IPAT & Anor [2020] IEHC 364) such as, for example, where a reason given is not reconcilable*

with the material without further explanation. These are not such cases. Looking at substance of the decisions (as per the dicta of Power J. in MNN), in my view the applicants have not established any unfairness in the decision-making process by reason of a failure to refer discursively to the new material submitted for the review.

54. The trial judge accepted the submissions of the respondent that the test of good character under s.15 of the Act is not the same as the test under Clause 3.7 of the scheme and further that the case law in respect of naturalisation cases is not *"directly applicable"* to decisions under the scheme. She noted that the test under the scheme is a higher or more restricted one. At para. 41 she observed:

"Accordingly, even though the test under the Scheme is directed to narrowing eligibility and is parsed in restrictive terms, it seems to me that the better approach to decision making when assessing character, which is not a black and white issue but requires a moral judgment, is to ensure that all matters relevant to character are considered and that negative and positive factors are weighed in a matter which allows for proportionate and fair decision making."

55. It is thus clear that the focus of this part of her judgment is the assessment of character, and she does not separately consider the assessment of conduct. At para. 43 she accepts that the appropriate approach to the assessment of good character *"in this context is as set out in Talla and MNN and this requires that the respondent consider all of the aggravating and mitigating circumstances relevant to the question of whether an individual can be deemed to have been of good character and conduct, notwithstanding a finding of fraudulent conduct for the purposes of the E.U. Regulations already made by the respondent, in determining Scheme eligibility."*

She then observed:

"It is clear, however, that where such a finding has been made, a person seeking to establish that they have been of good character and conduct when applying under an immigration scheme has a steep hill to climb and properly so."

56. She concludes by saying she did not see anything which would:

"…support a finding that the decision-making process in these cases was tainted by a failure to properly consider mitigating factors advanced on behalf of the applicants or a failure to demonstrate such consideration in the record of the decision made. The applicant in each case was refused permission under the Scheme in accordance with its terms. While there may be circumstances in which the mere assertion by a decision maker that regard was had to particular matters without further engagement with the substance of the material said to have been considered on the face of the decision undermines the decision making process whether because of the nature of the material or the reasons identified for the decision which may not [be] reconcilable with this material without further explanation or some other factor, the character references relied upon in these cases and said to have been considered by the decision maker did not raise matters of such moment or weight as might require to be specifically addressed to ensure a sustainable decision."

57. She expressed her view that:

"44…What was contended in the supportive material in the form of character references from colleagues and friends and partial explanation for previous conduct was insufficient to disturb the negative conclusion to be drawn from the findings made in revoking the residence permissions and to either demonstrate that the applicant satisfied criterion 3.7 of the Scheme or to require further explanation as to why not."

And at para. 45.

"There was simply nothing in the additional material which would warrant the respondent setting aside the refusal on review having regard to the nature of the fraud on the immigration system which had been identified as disqualifying the applicant in each case."

And at para. 47:

"Nothing in the material submitted on behalf of either applicant was of sufficient substance or moment to require further explanation from the respondent as to why, on full assessment of the material before her, she did not consider that good character and conduct had been demonstrated in accordance with the Scheme criterion. This was clearly a decision which was supported by the evidence and was one which it was open to the respondent to take."

58. Ultimately, her conclusion is based upon a failure by the applicants to have been of good conduct rather than any character assessment. At para. 46 she holds:

"The evidence of a previous finding of involvement in a marriage of convenience or reliance on misleading documents provided a proper basis for a negative decision in relation to conduct sufficient to ground refusals of both applications under the Scheme."

The grounds of appeal

59. Both L.A and S.R. filed Notices of Appeal on the 28 April 2022 which essentially mirrored each other. They are unfortunately somewhat discursive and do not clearly identify the asserted errors of the trial judge in reach her decision. First, it was argued that the High Court erred in law and in fact in finding that the respondent did not operate a fixed policy when it came to determining *"good character and conduct"* on the basis, it was said, that it was clear that the determination that the applicants were not of *"good"* character and conduct was based solely on a previous finding by the respondent that, in the case of L.A., he had

submitted misleading documentation in respect of his EU citizen wife in order to circumvent immigration rules and to secure an E.U. Residence Card in 2014, and , in the case of S.R., that she contracted a marriage of convenience with G.P. in 2015 for the sole purpose of obtaining a derived right under EU law to remain in the State. This was the only reason provided for the finding of *"bad"* character or conduct and this, in turn, was the only reason for the refusal. There was no analysis at all of the circumstances of the applicants or other aspects of his or her character or of the nature and effect of these findings made against him in 2016 and her in 2018. It was also claimed that the trial judge erred in deeming that *"mere reference to the submitting of unspecified misleading documents in May 2012 Residence Card application determined in 2014 suffice for concluding that the applicant was not of "good" character and conduct"* in the absence of any further analysis or reference to the positive points on L.A.'s character.

60. In the case of S.R. she pleads that the High Court erred in failing to have regard to the respondent's case that once there was a funding of a marriage of convenience she need go no further in assessing "character and conduct" and could refuse the application under the scheme on that basis alone.

61. It was further submitted that the High Court erred in making its own determination on the merits of the Review Applications in order to justify the lack of reasoning provided by the decision maker. It was alleged that the trial judge erred in determining that the decision makers carried out a proper or sufficiently rigorous assessment of the character and conduct either at first instance or on review. It was said that beyond a bald assertion that the additional information submitted for the review had been considered in the review, there was no evidence in the cases of the comprehensive consideration and assessment of the individual applicant's characters as detailed in *MNN v. Minister for Justice and Equality* [2020] IECA 183 and *Talla v. Minister for Justice and Equality* [2020] IECA 135. It was contended that

the High Court should not have read into the review decisions that the character references and other information submitted for review were, in fact, considered, particularly in circumstances where they were not referred to or considered explicitly in the review decisions and the review *"appears to have been a review of the procedures and decision making at first instance rather than a consideration/ re-consideration of all of the evidence, including the evidence of 'good' character"* submitted for the review.

62. In their (largely identical) written submissions delivered on 9 August 2022, three issues are identified to be decided on the appeal. The first was that the High Court erred in finding that the respondent adopted the approach for the assessment of good character and conduct set out in *MNN* and *Talla* for the purposes of the scheme in her assessment of good character and conduct in relation to L.A. and S.R.

63. Secondly, whether the High Court made irreconcilable findings when she held that (a) the level of wrongdoing in respect of the E.U. Residence Card applications/marriage of convenience is on a spectrum which required to be assessed and (b) finding that the fact that L.A. had submitted misleading documentation/ that S.R. had contracted a marriage of convenience was in and of itself sufficient to ground the Respondent's refusals at first instance and upon review. The third issue identified was the alleged error of the High Court in speculating how the respondent had made her findings that L.A. and S.R. were not of good character and conduct by herself assessing the weight of the submissions and supporting documentation and dismissing them as insufficient.

64. When considering the arguments advanced on appeal, it is important that they do not stray outside the grounds upon which L.A. or S.R. were given leave to seek judicial review of the relevant decisions. Further, the Court's consideration is confined to the evidence on affidavit which was before the High Court. In their written submissions, both L.A. and S.R. referred to and sought to rely upon matters of alleged fact which were not in evidence. It is

not permissible to do so. There are procedures to be followed where a party seeks to adduce new evidence on appeal which was not before the High Court, and these were not availed of. It is not open to either appellant to circumvent the Rules of the Superior Courts and in any event, written submissions may never be relied upon to advance factual matters unsupported by any evidence. I have not taken the alleged facts set out in the written submissions into account in determining these appeals.

65. The essential issue for this court on appeal is whether, having regard to the grounds upon which leave to seek judicial review was granted, the evidence before the High Court, and the grounds and arguments advanced in the Notices of Appeal and written submissions (and subsequent oral submissions), L.A. or S.R. is entitled to the relief he or she seeks.

The nature of the impugned decisions and the scope of these judicial review proceedings

66. Judicial review is concerned with the lawfulness of an administrative decision or act. Usually, the court will grant *certiorari* of a decision or act if it is unlawful. However, the court must bear in mind that decision makers must be allowed to administer and to make decisions, and judicial review is not to be granted in pursuit of some form of administrative perfection: the question is not whether the decision-making process or the statement of the decision could have been improved; it is whether or not a decision or act is unlawful. Finally, as has been frequently stated, it must always be borne in mind that judicial review is concerned with the process, and not with the merits, of the impugned decision.

Judicial review of administrative schemes

67. In assessing the validity of the process, the nature of the impugned decision is critical. There is a fundamental difference between a challenge to a decision reached pursuant to the exercise of a statutory power on the one hand and a decision made under an administrative

scheme on the other. This was made clear by the Supreme Court in *Bode v. Minister for Justice, Equality and Law Reform & Another* [2008] 3 IR 663. Denham J. (as she then was) described the power of the State to control the entry, the residency and the exit of foreign nationals as *"an aspect of the executive power to protect the integrity of the State."* She specifically approved of the observations of Gannon J. in *Osheku v. Ireland* [1986] IR 733 at p.746 where he stated as follows:

> *"That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is for the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution."*

68. Denham J. observed that the inherent power of the State includes the power to establish an *ex gratia* scheme which gives the benefit of residence to a category of foreign nationals as a gift: *"Such an arrangement is distinct from circumstances where legal rights of individuals may fall to be considered and determined."* She observed that unsuccessful applicants under the scheme at issue in *Bode "remained in the same situation as they had been prior to their application. They were still entitled to have the Minister consider the Constitutional and Convention rights of all relevant persons."* She said it was the duty of the Minister to consider each application to see if it met the criteria of the scheme. Neither

constitutional nor convention rights were in issue. At issue was whether or not the Minister acted within the stated parameters of the executive scheme.

69. In para. 89 she held:

> *"The Minister was merely required to consider the application within the ambit of the scheme. There is no general duty on an administrative body to give the opportunity to provide additional material after the closing date for application. The fact that the Minister may have chosen to give a second chance does not make it an obligation. The Minister's obligation was to consider the application within the requirements of the scheme. Given the nature of the administrative scheme, the factual history presented by the second named applicant, the documents provided, and the fact that the administrative decision does not relate to any Constitutional or Convention rights, but leaves the second named applicant in the same position as he was prior to making the application, there was no breach of fair procedures, and consequently the issue of an order of certiorari does not arise."*

70. Thus, the issue for consideration in these appeals is whether the Minister considered the applications within the ambit of the scheme. No rights of the appellants are engaged as such and therefore they have no right to particular procedural safeguards. The Minister is merely required to abide by her own scheme.

71. By reason of this fundamental distinction between an administrative scheme on the one hand and statutory and Convention and Constitutional rights on the other hand, in my judgment there is little to be gained in considering cases based upon the exercise of a statutory power. Therefore, these authorities must be read with a considerable degree of caution when considering cases concerned with an administrative scheme. What is required under a statutory scheme, the want of which may be fatal to a decision reached under such a scheme, may not be required under an administrative scheme. Thus, the self-same omission

in reaching a decision may be fatal in one case but not in the other. It is therefore necessary to consider what is required by the scheme at issue in these appeals.

The Special Student Scheme

72. The scheme is a non-statutory *ex gratia* scheme to provide immigration permission for a cohort of non-EEA nationals who held a student permission in the State during the period 1 January 2005 and 31 December 2010. Qualifying persons will be granted an initial immigration permission for 2 years. The scheme was introduced in 2018 and applications were accepted until 20 January 2019. The applicants must apply online and file certain specified documents in support of their application. There is no right to a hearing. Paragraph 2 in its relevant part provides:

> *"A decision will be made solely on the merits of the information supplied in the online application form and any ancillary checks that may be performed by the Irish Naturalisation and Immigration Service (INIS) in ariving at a decision…*
>
> *To be successful, the applicant will also have attempted to avoid being unlawful in the State through engaging with the immigration authorities and have contributed to the economy…"*

73. The eligibility criteria are set out in para. 3. All ten criteria must be satisfied. Para. 3.1 requires that the applicant registered as a student between 1 January 2005 and 31 December 2010. Para. 3.2 requires that they have held a student type permission for a minimum of 2 years, para. 3.3, that they have attempted to avoid being unlawfully in the State through engaging with immigration authority. Para. 3.4 requires that the applicant has not had his or her immigration stamp changed other than a student type permission during the period referred to. Para. 3.5 requires the applicant to be living in the State continuously since their arrival and that they provide supporting documentary evidence of their continued presence

in the State at least throughout 2016, 2017 and 2018 to date. Paras. 3.6 and 3.7 provide that they:

> *"3.6 have no adverse criminal record in this State or any other jurisdiction. Please note that failure to disclose any criminal convictions in any jurisdiction will result in your application being deemed ineligible; and*
>
> *3.7 have been of good character and conduct prior to your arrival and since your arrival in this State."*

74. Para. 3.8 requires them to prove that they have been lawfully employed in the State while under a student permission by furnishing documentary evidence and at para. 3.9 that they can provide a history of their enrolment/registration as a student and at para. 3.10 that they can demonstrate a connection to the community in which they live.

75. As is clear from the decision in *Bode*, the Minister must consider the application and the submissions and supporting documentation. The Minister may also consider any ancillary checks which may be performed by INIS. The Minister is then required to reach a conclusion whether the applicant is eligible under the scheme. The Minister must notify the applicant of his/her decision. The Minister is not required to give discursive reasons for her decision.

76. Where an applicant is unsuccessful para. 11 of the Scheme states:

> *"[y]ou may submit a request for a review of the decision, at no additional cost, within 20 working days of the date of your refusal letter."*

77. The applicant is not entitled to an appeal, and he or she is not entitled to a review of the *application*; it is a review of the decision to hold the applicant ineligible under the scheme. The letter notifying an unsuccessful applicant informs the applicant of the possibility of seeking a review of the decision and states:

"The review must be submitted on Form SSS enclosed with this letter.

Please state why you do not agree with the decision to refuse your application. This should be supported by documentary evidence."

78. The form provides *inter alia* that the applicant *"must submit new supporting documentation as appropriate"* and (in Section 2, Review Reasons), the form states:

"• You may include any new information that you believe is relevant.

• You should provide documentary evidence with this application to back up your reason."

79. As an applicant is invited to submit material which he or she had not previously submitted, it is implicit that the reviewer will consider any such material which is submitted. However, in my judgment, this does not mean that this is a *de novo* assessment of the application. It remains a review, not an appeal, still less a rehearing and the additional material submitted needs to be assessed by the second decision maker in the context of a review of the decision in question.

Scope of the proceedings

80. In an application for judicial review, it is for the applicant to prove all the constituent elements of their case on the balance of probabilities. Each of the appellants was granted leave to seek judicial review on four grounds. The appellants did not seek and were not granted leave to seek judicial review on the basis of a failure to give reasons as required in *Mallack v. Minister for Justice, Equality and Law Reform* [2012] 3 IR 297. In their written submissions the appellants identified three issues to be determined on the appeal as follows:

(i) Whilst the learned High Court judge accepted (para. 43) that the appropriate approach for assessment of good character and conduct for the purposes of the

Scheme set out in *MNN v. MJE* [2020] IECA 183 and *Talla v. The Minister for Justice and Equality* [2020] IECA 135, it is respectively submitted that the learned High Court judge erred in finding that the Respondent adopted that approach in her assessment of good character and conduct in relation to the Appellant.

(ii) The learned High Court judge made irreconcilable findings that the level of wrongdoing in respect of these EU Residence card applications/ 'marriages of convenience' is on a spectrum and that this required assessment (para. 42 referring to marriages of convenience but it is presumed that the same principles apply to using documentation in a misleading way) but that the finding that L.A. had submitted misleading documentation and that S.R. had contracted a marriage of convenience was in and of itself sufficient to ground the respondent's refusals at first instance and upon review (para. 46).

(iii) The learned High Court judge erred in speculating how the Respondent had made her finding that the appellants were not of good character and conduct by herself assessing the weight of submissions and supporting documentation supplied by the appellants and dismissing them as insufficient and speculating that the respondent had made the same assessment in the absence of any evidence as to how the respondent had made her assessment.

81. It is necessary to apply the principles outlined above to the facts in this case when considering both the grounds upon which leave to seek judicial review was granted and the issues arising in the appeals.

Decision

82. The appellants, L.A. and S.R., argue that a proportionality assessment arises under para. 3.7 of the Scheme. They rely on the decisions of this Court in *M.N.N. v. The Minister*

for Justice and Equality [2020] IECA 187; Talla v. The Minister for Justice and Equality [2020] IECA 135 and G.K. v. The Minister for Justice [2014] IEHC 478 in support of their submission that the reviewing officer was *required* to undertake a comprehensive assessment of each appellant as an individual and must consider all aspects of his or her character in a holistic manner. This, it is said, the reviewing officer failed to carry out and therefore the decisions ought to be quashed.

83. This submission fails to appreciate the crucial difference between a statutory scheme which engages the constitutional and convention rights of an applicant on the one hand and the far more limited rights of an applicant under an administrative scheme, on the other. Each of the authorities relied upon by the appellants concerned decisions taken under s.15 of the Irish Nationality and Citizenship Act, 1956 (as amended) where the court was required to protect and uphold their constitutional and convention rights. That is not the case here, as the court is concerned with a decision taken under an administrative scheme and the Supreme Court has clearly stated in *Bode* that no such rights arise under an administrative scheme. The respondent is required properly to apply the terms of her own scheme, whatever they may be, and she is not obliged to afford applications the whole panoply of rights which are engaged when administering a statutory scheme or EU law. Arguments predicated on such rights, as this one, simply do not arise in this case for this reason.

84. Secondly, the submission fails to take account of the differences in the test under the Act and under the scheme. The test under s.15 is less stringent than that under the scheme. *G.K.N., Talla* and *M.N.N.* were all concerned with the assessment of an applicant for citizenship's good character in the context of a variety of criminal convictions. They establish that the mere fact that an applicant had a criminal conviction did not entitle the Minister to conclude *as a result* that they were not of good character within the meaning of the Act. The Minister was required to consider all of the surrounding circumstances and any

exculpatory or potentially exculpatory material in order to determine the weight to be attributed to the criminal conviction in question. It was only then that he could properly conduct the required assessment of the character of the applicant for citizenship as an individual.

85. In contrast, under the scheme, para. 3.6 provides expressly that an applicant who has a criminal conviction is ineligible under the scheme. There is no scope for assessing the surrounding circumstances, as there is in a similar assessment under s.15. It simply does not arise. This is permissible because the Minister is free to apply stringent eligibility requirements in an administrative scheme if she chooses. As no rights of the applicants under the scheme are engaged, there can be no issue of proportionality rendering such an approach unlawful. There is no allegation in these proceedings that the scheme is irrational and therefore ought not to be applied. This means that the Minister is required to apply the terms of the scheme, even though those terms might lead to what may appear to be a harsh result in a given case, but no more.

86. It follows that the comprehensive analysis of the character of each applicant under s.15 as set out in the caselaw does not apply to every application under the scheme; the assessment of the good character and good conduct of an applicant may be truncated if the applicant has been guilty of a criminal offence. The fact of a conviction disqualifies the applicant regardless of any issue of moral culpability or any other considerations, which, accordingly, are not required to be separately assessed.

87. Similarly, when the decision maker comes to para. 3.7 of the scheme, the requirement is that the applicant have been of good character *and* good conduct prior to and since their arrival in the State. This means that one incident of bad conduct (assuming it to be of sufficient gravity) may result in the applicant failing this criterion. In such a case, as with an applicant who has been found guilty of a criminal offence, a comprehensive analysis of the

individual's character as a whole is not required, as the applicant must satisfy both limbs of the test. If the applicant has failed one limb of the two-limb test in para. 3.7, the decision maker is not required to consider the second limb before the decision maker may validly conclude that the applicant has not satisfied this criterion.

88. A person of otherwise impeccable good character and good conduct who has engaged in behaviour which can properly be characterised as not "good conduct" fails to satisfy this criterion, regardless of their overall merits as an individual. The test under the scheme is thus more arduous than the test under the section. Further, because it is open to a decision maker to conclude on the basis of evidence of one (or more) example(s) that a person has failed this requirement, the decision maker is not required to conduct a more holistic assessment of the individual's character as the decision maker would be if he or she were operating a statutory scheme. This is because an applicant who has been shown not to have been of "good conduct" while in the State has failed to satisfy the requirements of para.3.7 and countervailing evidence of good character does not cancel this out under the scheme, where it might in a section 15 assessment.

89. The appellants accept (correctly in my view) that the revocation decision was a relevant matter to be considered and that a decision maker under the scheme could validly decide that an applicant had failed to meet the requirement to have been of good character and good conduct since their arrival in the State on the basis that they had applied for a permission to remain in the State, which permission, having been granted, was subsequently revoked on the basis that the applicant had obtained the permission on the basis of materially misleading documentation, or a marriage of convenience entered into solely for the purpose of obtaining a derived right of residence. In my judgment, this is fatal to this element of the appellants' cases. It was open to the reviewing officer to conclude that the appellants had not been of good conduct since their respective arrivals in the State within the meaning of

para.3.7 on the grounds that the conduct of each applicant which resulted in the revocation of their respective permissions to remain in the State established that they each had engaged in conduct which could properly be classified as bad conduct. It was, it will be recalled, expressly characterised in each revocation letter as fraudulent and it amounted to continuing conduct where neither appellant informed the INIS of the material changes in their respective circumstances. They were findings of dishonest behaviour towards the State in the immigration context. In such circumstances the decision maker was not required to proceed to conduct a balancing of their egregious conduct with the evidence they each provided to support their claim to have been of good character since their arrival in the State. Accordingly, their arguments that this did not occur, even if substantiated, are of no avail.

90. Quite apart from this conclusion, I am not satisfied that the appellants have in fact established that there was any failure properly to assess their applications by the reviewing officer and I would agree with the trial judge's conclusions to this effect. In her letters of 23 October 2020, the reviewing officer stated that she had considered all of the information and documentation contained in the appellant's scheme application, his/her immigration records as held by INIS and the additional material provided in his/her application for a review. She does not discuss the grounds of review raised by the solicitors for the appellants in their letters, in contrast to the earlier review decision of 19 June 2019. The appellants say they were entitled to a reappraisal of the finding that they had not been of good character and good conduct prior to and since their arrival in the State; that the reviewer was required to assess his/her character in the round and to weigh the positives with the negatives. The appellants submit that there is no evidence that this occurred and that the letter suggests, in fact, that this did not occur.

91. The appellants also suggest that the decision maker and the reviewing officer ought to have considered the strength of the two decisions to revoke each of the appellant's

permissions to remain in the State and imply that the grounds upon which their respective permissions were revoked ought not, in the circumstances, to have been determinative of their applications under the scheme.

92. I am not persuaded by the appellants' submissions. The appellants cannot go behind the decisions to revoke L.A.'s permission to remain on 17 February 2016 and S.R.'s permission to remain on 18 May 2018. Neither decision has ever been challenged and the original decision maker and the reviewing officer were each required to treat them as valid decisions when considering the applications under the scheme. It would be an impermissible collateral challenge to those decisions were the subsequent decision makers to review the substance of the revocation decisions when considering the appellants' applications under the Special Student Scheme. If it were otherwise, it would lead to administrative chaos and potentially facilitate persons whose permission to remain had been revoked to circumvent the consequences of their actions which led to the revocation of that permission. That being so, the decision maker and the reviewer were correct to accept as valid the revocation decisions *and the reasons for them*. It follows that the reviewing officer was entitled to have regard to the revocation decisions *and the basis for each decision*, including the fact that they established that the appellants wrongfully applied, on the basis of misleading information/ a marriage of convenience, for a right to remain in the State to which he/she knew he/she was not entitled. The reviewer was entitled to have regard to the fact that this was a finding of fraud and dishonesty. As such, it was evidence that the appellants each had not been of good character or good behaviour since arriving in the State within the meaning of para.3.7 of the scheme.

93. Furthermore, it was apparent from the INIS records that L.A. did not dispute the information provided by the Estonian Embassy or advance any explanation which might exculpate him or otherwise contest the decision of the Minister. In his application for a

review of the decision to refuse his application under the scheme L.A. did not address the substance of the revocation decision or contest its validity; his argument was that it should be balanced against other, positive, evidence before concluding that he had been of good character and good behaviour since his arrival in the State. Similarly with regard to S.R., she did not in fact challenge the finding that she contracted a marriage of convenience with G.P. in order to obtain a derived right under EU law to which she was not otherwise entitled at the time and she did not advance any explanation to the INIS which might exculpate her . Her application to review the decision of 4 September 2020 addressed the finding of 18 May 2018 stating she was adamant that at all times *"this was a genuine relationship"* and that while her immigration status *"may have been a consideration in their decision to get married it was not the sole purpose for so doing".* She acknowledged that the time for appealing the decision *"has well expired"* and that the point *"is now moot"*. Thus, she accepted the fact of the decision and that it was no longer open to her to challenge it.

94. In these circumstances I cannot see how the appellants can contend that the original decision maker or the reviewer ought to have reassessed their conduct which led to the revocation decisions as part of an overall assessment of their characters and conduct in the State. The problem with the submission is that they accept that the revocation decisions (and the facts leading to the making of the decisions) are relevant to the assessment of their applications. It follows that the weight to be attached to these uncontested facts is a matter for the decision maker as it goes to the merits of the decision. Further, if bad conduct is established, that suffices as a basis to refuse the application under the scheme. The decision makers must comply with the terms of the scheme and consider the information provided by the appellants. Once the decision maker does so, the merits of each application are a matter for the decision maker (absent any claim of irrationality which does not arise in these cases) and not for the court on an application for judicial review. In effect each of these appeals

seek to challenge the merits of the decisions, in my view, rather than the process of decision making.

95. The additional material submitted by the appellants did not engage with the revocation decisions and did not purport to contradict them or the facts grounding them in any way (even if this were permissible) (other than a bare denial on the part of S.R. as quoted above). At its height, the additional material submitted by the appellants was counterweight evidence of their good character and *otherwise* good behaviour while in the State. It could not cancel the evidence of dishonesty (i.e., bad conduct within the meaning of clause 3.7) which, regardless of any other evidence, was a valid basis for concluding that this criterion had not been satisfied.

96. Even if one accepted, for the sake of the argument, that the conduct of each appellant which resulted in the decisions to revoke their respective authorisations to remain in the State did not suffice to cause them each to fail the test in clause 3.7, the weight to be attached to all of the evidence in their applications was a matter for the reviewing officer to assess. It is not a matter for this court on an appeal in an application for judicial review to determine the merits of the application. The issue then would be whether such material had in fact been considered which brings me to the appellants' contention that this did not occur.

97. The appellants were entitled to have their review applications, including their submissions and additional material, considered and the eligibility criteria correctly applied. It is accepted (a) that the decision maker is entitled to consider their immigration history, including the revocation decisions, and (b) that revocation of a permission could justify a conclusion that an applicant had not been of good character and good conduct while in the State. For reasons which I shall discuss next, I am satisfied that this occurred, or, more accurately, the appellants have failed to establish that it did not occur. Any further

engagement with this issue would result in the court straying into the merits of the decision which is not permissible in this judicial review.

98. The appellants asserted that their applications were not properly considered by the reviewing officer. They do so on their interpretation of the letters of 23 October 2020. No other evidence is adduced to support the contention. In particular, they say the decision maker did not consider the additional material provided and their extensive submissions because the letters make no reference to either.

99. The decision maker said she had considered all of the information and documentation contained in their applications, their immigration records and the additional material submitted in the application for a review. If this is factually correct, then the decision was made in accordance with the requirements of the scheme and this ground of appeal must fail.

100. In *G.K. v. Minister for Justice* [2002] 2 IR 418, 426-427, Hardiman J. speaking for the Supreme Court, held that:

> *"A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case."*

101. Accordingly, this court must accept the truth of the express statement of the decision maker unless the appellant produces some evidence to the contrary. It is also worth observing that this comment was made in the context of an application for leave to seek judicial review where the applicant is merely required to establish an arguable case whereas this court is concerned with an appeal from a refusal to grant judicial review, which is assessed on the balance of probabilities, a higher threshold.

102. There is no express evidence that the decision maker did not consider either the original information and documentation or the additional material provided in their

applications for reviews. Therefore, the appellants' case on this point can only succeed on the basis that this court can infer that, contrary to her express statement in her letters of 23 October 2020, the reviewer did not consider the appellants' additional materials and submissions. The appellants seek to do so on two bases:

(1) The failure expressly to refer to the substance of their submissions and material in the decision; and

(2) The concluding sentence in the letter which, it is said, contradicts the statement at the beginning of the letter.

103. The failure to refer to the substance of the submissions cannot logically *contradict* a statement that they have been considered. I agree with the observation of Phelan J. that there is a presumption that material has been considered if the decision says so and it is for the challenger to rebut the presumption. In truth the appellants' complaint is, in fact, a complaint as to the adequacy of the reasons for the rejection of the submissions. This is not part of these judicial review proceedings. The *evidence* is that their submissions were considered and the correct interpretation of the eligibility criteria – specifically para. 3.7 – were applied. They may not impermissibly morph the judicial review into an "*adequacy of reasons*" case in order to contradict the factual statement in the letter.

104. In *F.P. v. Minister for Justice* [2002] 1 IR 164 at p. 175 Hardiman J. held:

> *"Where an administrative decision must address only a single issue, its formulation will often be succinct. Where a large number of persons apply, on individual facts, for the same relief, the nature of the authorities' consideration and the form of grant or refusal may be similar or identical. An adequate statement of reasons in one case may thus be equally adequate in others. This does not diminish the statements essential validity or convert it into a mere administrative formula."*

105. Thus, it is not sufficient for a person challenging the veracity of a statement in a decision to point to identical language in different decisions under a scheme and to therefore conclude that the individual application has not been individually considered and determined. More is required to satisfy the threshold of arguability set out in *F.P.*

106. In *G.K.* Hardiman J. reaffirmed this passage from *F.P. v. Minister for Justice*. He accepted that a letter in a form complying with *F.P.* was adequate and thus that the letter in *G.K.'s* case was adequate. In the absence of evidence contradicting what was said in the letter, it *"must be taken accurately to represent the first respondent's proceedings."* He rejected the applicant's argument that his further submissions had not been considered on the basis that there was *"simply no evidence whatsoever for this proposition"*.

107. As was accepted by Hardiman J., a decision which does not give discursive reasons is permissible. If an applicant wishes to challenge the truth of a statement that certain steps have been taken or submissions or information considered in the letter, he or she must do so by reference to evidence. The appellants have failed to adduce any such evidence in this case. Further, if the appellants' case is that contrary to what was stated in the decision of the reviewer, the additional material was not in fact considered by the reviewer, that must be clearly pleaded so as to afford the respondent the opportunity to respond to the allegation and, if deemed necessary, adduce evidence to the contrary. This was not part of the appellants' cases and does not form one of the grounds upon which they were granted leave to seek judicial review.

108. The appellants' reliance on the decision in *Balz v An Bord Pleanála [2019] IESC 90* is misconceived in my view. *Balz* was an application for judicial review under the planning code of a decision of An Bord Pleanála. It was not a challenge to a decision under an administrative scheme. The Supreme Court granted the applicants in that case leave to appeal on the issue of the statutory obligation of planning authorities to "have regard to" ministerial

guidelines issued under s. 28 of the Planning and Development Act 2000. The particular issue was whether the inspector, and thereafter the Board, had considered the material furnished by the applicants in support of their contention that the guidelines in issue were out of date. The allegation was advanced on the basis that the inspector's report stated that the guidelines existed and whether they were out of date was not a relevant planning consideration. They remained in force and new guidelines had not yet been adopted. During case management of the appeal, it emerged that there was an unresolved dispute on the evidence as to what the Board actually did and what it intended when it adopted the inspector's report. The crucial, fundamental disagreements as to what in fact occurred, emerged very late in the case and in fact the appeal turned out to be an appeal on the facts rather than on the statutory obligation to have regard to ministerial guidelines and the obligation to consider the submissions of objectors . At paragraph 46 of his judgment O'Donnell J. (as he then was) stated:

"46. It is unsettling, for example, that when an issue arises where it is suggested that the Inspector (and therefore the Board) has not given consideration to a particular matter, it should be met by the bare response that such consideration was given (for a limited purpose) and "nothing has been proven to the contrary". Similarly, while the introductory statement in the Board's decision that it has considered everything it was obliged to consider, and nothing it was not permitted to consider, may charitably be dismissed as little more than administrative throat-clearing before proceeding to the substantive decision, it has an unfortunate tone, at once defensive and circular. If language is adopted to provide a carapace for the decision which makes it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision."

109. He was thus condemning as insufficient a statement that the decision maker had considered everything it was obliged to consider and nothing it was not permitted to consider. This is hardly surprising as it amounts to a statement, not of fact (what was actually considered) but a legal conclusion (what was considered was permissible, and nothing impermissible was considered). He then analysed the evidence and concluded that the appellants in that case had adduced sufficient evidence to lead to the inference that the inspector had not in fact considered their submissions and the Board had adopted and approved that approach and the Board had not adduced any evidence which rebutted that inference.

110. In these cases, the appellants, in my view, for the reasons outlined, have not adduced evidence sufficient to displace or rebut the evidence that the reviewer considered all of their material, documentation and additional material. For these reasons I would reject this argument.

111. The second basis upon which it is said that the first sentence in the decision ought not to be accepted on face value by this court turns on the final sentence in the letter which I reproduce here for convenience:

> *"In arriving at this Scheme refusal decision, I found that the appropriate procedures were applied and the decision maker applied the correct interpretation of the eligibility criteria as detailed in the Special Scheme for Students Notice which is available on the INIS website."*

112. It is said that this means that the reviewer did not consider the substance of the application, and thus the review, but considered only whether the first instance decision maker had followed the correct procedures and properly interpreted the eligibility criteria when arriving at her decision and therefore, by implication, that the reviewer had not in fact

considered all of the materials, contrary to the first sentence in the letter, and had not herself carried out any review as required under the scheme.

113. In my judgment, this sentence does not contradict the first sentence in the letter. I do not believe it is appropriate to read individual sentences in the letter in isolation. The decision must be read as a whole. It should not be parsed in a manner more appropriate to statutory construction. When one reads the decision as a whole, what emerges is that the reviewing officer has (a) reviewed the procedures followed by the decision maker, (b) reviewed the interpretation of the eligibility criteria and (c) has *herself* considered all of the information and documentation contained in the scheme application and the additional material provided by the appellants. The letter refers to *"this"* scheme refusal decision, which to my mind means that it is *her* decision, and it does not refer to the decisions of 3 September 2020 (in the case of L.A.) or 4 September 2020 (in the case of S.R.) (which she was reviewing). It does not lead to the conclusion that she did no more than "review" the process followed in reaching the first instance decision or that she did not consider the information and materials which she expressly states were considered by her.

114. My construction of this letter is reinforced by my consideration of the review decision of 19 June 2019. Precisely the same terminology was used in both letters. The decision of 19 June 2019 starts *"I have considered all of the information and documentation contained in your Scheme application… your immigration records as held by the INIS, and the additional material provided in your application for a review."*

115. The letter then concludes:

> *"Having regard to all of the above, it is the case that* ***you sought and were granted a change in permission in 2012 and in 2014 other than a student type permission during your time in the State****. Therefore, you do not meet the requirement of criterion 3.4.*

In arriving at this Scheme refusal decision, I found that the appropriate procedures were applied and the decision maker applied the correct interpretation of the eligibility criteria as detailed in the Special Scheme for Students Notice which is available on the INIS website."

116. There is no question of that latter sentence in the letter of 19 June 2019 giving rise to the inference that the reviewing officer simply conducted an administrative form of judicial review and did not in fact consider the submissions and materials provided for review. Logically, the self-same phrase in the impugned decisions should not give rise to the opposite conclusion. The impugned decisions contain the statement that the materials were considered as did the letter of 19 June 2019. The difference between the letters is that in the earlier letter, the decision maker discusses the grounds for review and gives his reasons for rejecting them while the decision maker in the impugned decisions does not. However, it must be emphasised again that this judicial review does not involve a complaint as to want of reasons. So, neither the adequacy nor even the alleged lack of reasons arises in these cases. In my judgment, the final sentence does not displace the first sentence in the letter and thus does not meet the threshold in *G.K.* which requires an appellant to establish evidence upon which a court can conclude that the decision maker did not, in fact, consider material, when the letter expressly states that the decision maker did consider same.

117. Finally, it is important to bear in mind the nature of the review under the scheme. It is a review of the decision, not a rehearing of the application *de novo*, albeit that the reviewer is required to consider the additional material and the arguments advanced by the applicant in seeking a review of the refusal decision. It is also important to bear in mind the nature of the scheme. As was emphasised by Denham J. in *Bode:* no rights of the appellants are engaged, though successful applicants under the scheme may obtain a considerable benefit.

If an applicant is found to be ineligible, they are no worse off than they were if no such scheme had been introduced by the Minister. If further statutory steps are taken, the unsuccessful applicants will be entitled to a variety of rights including those under the Constitution and the Convention in relation to any such step. The courts must be cautious against making administrative schemes unduly arduous to administer by imposing unwarranted standards or by intruding standards applicable where constitutional and convention rights are at play into schemes where they simply do not arise.

Conclusion

118. The onus is on the appellants to establish that the decisions and the review decisions in these cases were unlawful and that they ought therefore to be quashed by this court. I am not satisfied that they have done so. There was uncontroverted evidence before the decision makers of dishonest and fraudulent conduct by each applicant in applying for and retaining an authorisation to remain in the State to which they were not entitled. It was therefore open to the decision makers to conclude that this established that the appellants had not been of good behaviour while in the State and to refuse their applications under the scheme under clause 3.7. The decision maker in the circumstances was not required to conduct a holistic assessment of their character in order to determine whether they had been of good character while in the State.

119. The decisions of 23 October 2023 state that the reviewer had considered all the materials, documentation and additional materials submitted for review by the appellants. There was no evidence to refute this statement. Therefore the court was entitled to accept it and the appellants have failed to rebut this evidence. It follows that they have not established that the relevant materials were not assessed by the reviewing officer when reaching her decision. The final sentence in the letter of 23 October 2020 does not contradict the positive statement that the materials were considered and it does not lead to the conclusion that the

reviewer of the original decision did not, contrary to her express statement, consider the materials.

120. The appellants do not challenge the decisions on the basis that they are invalid because of a failure to give (adequate) reasons, so it is not open to them to complain that the letter of 23 October 2020 does not address their individual submissions, as this is not an issue in the proceedings and it is not permissible to attempt to morph the case at this stage into a challenge based on a want of reasons.

121. The decisions impugned in these proceedings were made under an administrative scheme which does not engage the rights of the appellants. The court's concern is narrow and focused: were the criteria of the scheme correctly interpreted and applied? In my view they were, and the appellants have failed to establish the contrary.

122. For all of these reasons, I would refuse these appeals and refuse the appellants the relief sought.