THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 902 J.R.]

BETWEEN

R.C. (AFGHANISTAN)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 1st day of February, 2019

1. The applicant left Afghanistan in December, 2006 or January, 2007 and went to the U.K. He claimed asylum there, an application that was rejected. His father was then deported from the U.K. He came to Ireland in 2011 and applied for international protection under the false name of Matiullah Enayat. Presumably the idea was that a false name was necessary in order to frustrate the procedure for his potential return to the UK under the Dublin system as a failed asylum seeker there. It was not detected that he had abused the system but in any event his asylum application was refused. He then sought subsidiary protection and he was notified of an intention to grant this status on 29th May, 2015. Despite ministerial inquiries and his confession of his fraud on the protection system, he was granted subsidiary protection on 18th January, 2016 for a period of three years, apparently by reason of art. 15(c) of the qualification directive 2004/83/EC. He quickly set about putting in place chain migration, as it is called with refreshing transatlantic candour in the United States, or family reunification as it is more euphemistically called in Europe. On 4th October, 2016 he applied for family reunification for two brothers. On 31st December, 2016, the International Protection Act 2015 commenced. On 11th June, 2017 he married a Ms. S.H. by proxy. There is no evidence in the proceedings that they ever met each other, knew each other or had a meaningful relationship prior to that, although Mr. James O'Reilly S.C. for the applicant tells me his instructions are that they did know each other and met briefly in Pakistan, after the applicant was granted protection here. However such matters don't seem to have been communicated to the Minister so far.

2. On 15th August, 2017 the applicant applied for family reunification in respect of his wife. On 25th August, 2017 the Minister stated that that application could not be accepted under s. 59 (9)(a) of the 2015 Act as the marriage post-dated the protection application. On 20th November, 2017, leave was granted in the present proceedings, seeking *certiorari* of the decision of 25th August, 2017 refusing to accept the family reunification application, a declaration that s. 56(9)(a) was in relevant part unconstitutional or incompatible with the ECHR, as applied by the European Convention on Human Rights Act 2003, and damages.

3. On 31st July, 2018, I allowed an amendment to the statement of grounds and then allowed a further amendment on 5th November, 2018 to allow the applicant to identify a comparator for the purposes of a discrimination claim. The comparator was specified on the basis that the applicant was discriminated against vis-à-vis a person granted international protection who married before seeking international protection. Notice of the proceedings has been served on the Irish Human Rights and Equality Commission under O. 60A of the Rules of the Superior Courts, but that body has not appeared. On 18th January, 2019 the applicant's three year permission expired and I am told that it has been renewed until 18th January, 2022.

4. I have received helpful submissions from Mr. O'Reilly and Mr. David Leonard B.L., who also addressed the court, for the applicant, and from Ms. Denise Brett S.C. (with Ms. Emily Farrell B.L.) for the respondents.

Objection to affidavit of Nick Henderson

5. The applicant filed an affidavit of Nick Henderson, chief executive officer of the Irish Refugee Council. Objection was taken on behalf of the respondents to that affidavit. It largely contains advisory opinions and views and is more a discussion than evidence as such. I accept the affidavit for what it's worth but it is not really something of evidential weight and is more an argument as to the matters under discussion in the case.

The claim for an order of *certiorari*

6. No grounds are pleaded or have been advanced as to why *certiorari* should be granted independently of the constitutional or ECHR declarations. Thus, the applicant either succeeds or fails on those claims, and that determines whether an order of *certiorari* would follow.

Alternative remedy and prematurity

7. The issue of an alternative remedy, or as it could otherwise be conceptualised, prematurity, is pleaded at para. 13 of the statement of opposition. The respondents contend that the applicant could have applied under s. 4 of the Immigration Act 2004, the non-EEA Family Reunification Policy or another departmental policy known as IHAP: see affidavit of Declan Crowe at para. 4.

8. The applicant contends that such schemes do not provide an alternative remedy because one cannot have a scheme repealing or overruling legislation, relying on *N.H.V. v. Minister for Justice and Equality* [2017] IESC 35 [2018] 1 I.R. 246 at para 10. However, the context in *N.H.V.* was a prohibitory provision. The executive is not authorised to allow by fiat what is positively banned by statute. That principle does not apply if a statute permits situation X - that does not rule out X plus 1 being permitted administratively. It is argued by the applicant that the non-EEA family reunification policy has financial conditions but these can be waived: see para. 1.12. It is submitted that if family reunification is achieved under s. 56 of the 2015 Act, statutory rights follow, but that is not so if such reunification is achieved under the scheme. That may well be true but that does not deal with the point at issue here. If the applicant succeeds in achieving family reunification under the scheme, he could then seek for his spouse rights equivalent to those under s. 56. If the State refuses to afford such rights that may be a separate case. The issue here is one of principle about whether one can achieve family reunification at all and in that regard the applicant has not exhausted his options. That is a point I made in *North East Pylon Pressure Campaign v. An Bord Pleanála* [2016] IEHC 300 [2016] 5 JIC 3008 (Unreported, High Court, 12th May, 2016) at paras. 175 - 177, in the context of the principle that exhaustion of remedies is of particular importance where an applicant seeks to challenge the validity or ECHR-compatibility of a statute. Such a context invokes the principle that the court should "*reach constitutional issues last*" *per* Denham J., as she then was, in *Gilligan v. Special Criminal Court* [2005] IESC 86 [2006] 2 I.R. 389 at p. 407: see also *O'B. v. S.* [1984] I.R. 316 per Walsh J. at 328. This approach has a considerable history in US constitutional law: see

Ashwander v. Tennessee Valley Authority 297 U.S. 288 (1936) and as more recently put by Easterbrook J. in *Alliance for Water Efficiency v. Fryer* (US Court of Appeals, 7th Circuit, No. 15–1206, 22nd December, 2015) "*courts should not decide constitutional issues unnecessarily"* (p. 7). Clarke J., as he then was, dealt with the issue of alternative remedies in *E.M.I. Records v. Data Protection Commissioner* [2013] IESC 34 [2013] 2 I.R. 669 at paras. 41 and 42, in particular noting that "*the default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings*" (para. 41) but "*there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review*" (para. 42). The types of exceptions identified by Clarke J. could be described as falling under four headings:

> (i). Where the alternative remedy is inadequate, a point also discussed *in J.N.E. v. Minister for Justice and Equality* [2017] IEHC 96 [2017] 2 JIC 2004 (Unreported, High Court, 20th February, 2017) at para. 10.
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> (ii). Where the body to whom the alternative remedy lies would not have jurisdiction to deal with all of the issues.
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> (iii). Where the applicant was deprived of the reality of a proper consideration of a first instance decision. That of course does not have the implication that any procedural error at first instance means that an applicant can litigate; because that would deprive the doctrine of alternative remedies of all content.
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> (iv). Other exceptional circumstances, which is not a closed category, as Clarke J. recognised.

9. Here Mr. O'Reilly's main argument was under the first of these headings, namely the inadequacy of the proposed alternative remedy. However, the applicant has not established that the alternative remedy would be inadequate. The Minister has a broad discretion to grant permissions to the applicant's family members if he thinks it is appropriate, and there must be a presumption that any such decision would be lawful: see *North East Pylon* at para. 215, citing *Clune v. D.P.P.* [1981] I.L.R.M. 17, *Comhaltas Ceoltóirí Éireann v. Dun Laoghaire Corporation* (Unreported, High Court, Finlay P., 14th December, 1977), *Lancefort Ltd. v. An Bord Pleanála (No. 2)* [1997] 2 I.L.R.M. 508, *Weston v. An Bord Pleanála* [2010] IEHC 255, *Craig v. An Bord Pleanála* [2013] IEHC 402 (Unreported, Hedigan J., 26th August, 2013), *Klohn v. An Bord Pleanála* [2009] 1 I.R. 59, *Harrington v. An Bord Pleanála* [2014] IEHC 232 (Unreported, High Court, 9th May, 2014), *Ratheniska Timahoe and Spink (R.T.S.) Substation Action Group v. An Bord Pleanála* [2015] IEHC 18 (Unreported, High Court, Haughton J., 14th January, 2015).

10. The doctrine that exceptional circumstances could include a case where one is deprived of proper consideration at first instance does not really apply here because the legislation itself precludes the application being made and there are no other exceptional circumstances that are apparent. Thus the only heading by way of an exception that could apply here is the argument that the decision-maker, that is the Minister in the context of a separate permission application, does not have jurisdiction to decide all the issues in the sense of deciding whether the 2015 Act is unconstitutional or contrary to the ECHR. That does not appear to be the appropriate sense of the concept of deciding all the issues. The Minister can decide the substance of the applicant's complaint, namely whether his wife can be admitted to the State and as to what facilities or rights can be provided to her. To interpret the concept of jurisdiction to decide all the issues as meaning that there has to be some other way to have the constitutionality of the statute decided would mean that the doctrine could never apply because only the High Court has jurisdiction to determine constitutionality of an Act of the Oireachtas in the first instance. It would mean that it would be far easier to challenge the validity of a statute than that of an administrative decision. Of course there are cases where constitutional actions have been allowed to proceed, notwithstanding that there was an alternative process such as criminal appeal, but whether that is the best course or the general rules seems questionable. For example, O'Donnell J. in *Minister for Justice and Equality v. O'Connor* [2017] IESC 21 (Unreported, High Court, 30th March, 2017) at para. 22 noted the issue of whether an alternative route for an applicant's grievance was possible as being an issue there.

11. Mr. O'Reilly submits that "*there is nothing to indicate that the applicant would be successful"* but that is somewhat defeatist in the context and not easy to reconcile with the presumption that the Minister will carry out the obligation to act lawfully. Overall therefore, I would uphold the plea of prematurity and alternative remedy at paras. 17 to 19 of the amended statement of grounds. In doing so I would follow the judgment of Keane J. in *V.B. v. Minister for Justice and Equality* (Unreported, High Court, 1st February, 2019) at paras. 57 to 60 to the same effect.

12. There is a related complication here that the Minister has not as yet acknowledged the recognisability of the proxy marriage. In the absence of a determination of that issue in some definitive manner it is hard to see how the court can proceed to strike down the legislation. If hypothetically the legislation was struck down and then the application by the applicant fell to be considered by the Minister, it is conceivable that the Minister could decide that the proxy marriage was not recognisable. That would mean that the declaration of unconstitutionality would have been made inappropriately. The supplemental affidavit of Michael Quinn notes at para. 6 that the applicant must establish the existence of "*a valid marriage (capable of being recognised in Irish law)".* That has not yet been done. It would presumably have been determined if the applicant had pursued the option of making another immigration application.

13. It may also be an open question as to whether and to what extent proxy marriages are or should be recognised in Irish law. The Minister's policy document on non-EEA family reunification states at pp. 42 to 43 para. 15.6 that "*proxy marriages may be recognised under Irish law. Where this is the case the marriage will meet the requirements of this policy. However, a proxy marriage gives rise to additional concerns not only in immigration terms but also for the protection of the parties. The immigration authorities will enquire into the circumstances of the marriage and must be satisfied that the marriage is genuine and freely entered into by both parties and that is (sic) not a device aimed predominantly at securing an immigration advantage. The parties must also be able to show that they have met each other in person*". Insofar as the principle as to whether proxy marriages should be recognised is concerned, the case of *Hamza v. Minister for Justice and Equality* [2013] IESC 9 (Unreported, Supreme Court, 20th February, 2013) was largely decided on a concession. It also left open the assessment of the reality of the marital relationship: see the judgement of Fennelly J. at para. 55. That reflects the concerns as to the reality of a marriage, such as whether the parties have met each other, that emerge from the policy document at para. 15.6. Mr. Quinn's supplemental affidavit at para. 6 also notes the need to investigate whether "*questionable inconsistencies arise (such as between the family reunification application and prior information furnished in the protection application where an applicant will have already set out the family details)".* The Minister's entitlement to look at the reality of the marriage would be underlined if I am correct in the view expressed in *M.K.F.S. v. Minister for Justice and Equality* [2018] IEHC 103 [2018] 2 JIC 0604 (Unreported, High Court, 6th February, 2018) (currently the subject of a leave to appeal application) that a marriage entered into for immigration advantage is not valid. However, I do not have to address that issue here because either way the Minister is entitled to investigate how real or otherwise an alleged marriage is. It is nonetheless unsatisfactory that areas such as this are lacking in clarity and one might think that there is a case for legislative clarification.

14. If I am wrong about the question of prematurity or alternative remedies, I will consider the application on its merits.

Scope of constitutional equality
15. While conceptualising equality is a major exercise, at the level of broad generality one can say that there are at least three major dimensions to the notion of equality.

> (i). Firstly, there may be suspect classifications that require "*careful scrutiny*" *per* O'Donnell J. in *Minister for Justice and Equality v. O'Connor* [2017] IESC 21 (Unreported, Supreme Court, 30th March, 2017) at para. 20: see also *Murphy v. Ireland* [2014] IESC 19 [2014] 1 I.R. 198 [2014] 1 I.L.R.M. 457 para. 34 to 35. Examples of such classificatory distinctions would include sex: see *McKinley v. Minister for Defence* [1992] 2 I.R. 333, *T.O'G. v. Attorney General* [1985] I.L.R.M. 61; or descent, *Blascaod Mór Teoranta v. Commissioner of Public Works* [1999] IESC 4 [2000] 1 I.R. 6 [2000] 1 I.L.R.M. 401.
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> (ii). Secondly, there are certain contexts such as the administration of justice or the electoral process where strict equality is required: see for example *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10 [1996] 1 I.L.R.M. 81 per Denham J., *Minister for Justice and Equality v. O'Connor per* O'Donnell J. at para. 20, *Coughlan v. The Broadcasting Complaints Commission* [2000] 3 I.R. 1 and *McCrystal v. Minister for Children and Youth Affairs* [2012] 2 I.R. 726.
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> (iii). Thirdly, there is a general requirement of rationality and proportionality. A distinction must have a legitimate purpose and the distinction must be relevant to that purpose: see *An Blascaod Mór* at p. 19, *Brennan v. Attorney General* [1983] I.L.R.M. 355. This is a similar if not equivalent approach to that under the ECHR requiring a legitimate aim and proportionality.

A discrimination claim generally requires a comparator
16. The concept of discrimination involves treating the plaintiff or applicant less favourably than some other person who is or would be treated in such a case. As illustrated by O'Donnell J. in *M.R. v. An tArd-Chláraitheoir* [2014] IESC 60 [2014] 3 I.R. 533, there is generally a requirement to specify such a person: see the discussion under the heading of "Requirement of an appropriate comparator" in *J.M. Kelly: The Irish Constitution*, 5th ed. (Dublin, 2018) at pp. 1599 to 1600. Such a comparator should be specified in the pleadings and may require evidential exploration and specific consideration. It would not be a satisfactory procedure if such an important detail were to be introduced at a later stage of the proceedings, still less in a given case if an important feature of a case was introduced in Strasbourg as occurred in a different context in *O'Keeffe v. Ireland* (Application no. 35810/09, European Court of Human Rights, 28th January 2014), where arguments were introduced for the first time that were not made in the national courts. And of course arguments made in the national courts should properly be made initially in the court of first instance, otherwise an appellate court would be being asked in a constitutionally improper manner to decide the point at first instance itself. The applicant has now identified a comparator for the purposes of his case, being a person granted international protection who marries before the application for such protection; and as mentioned above I gave liberty to amend the proceedings to allow that to be particularised.

Is this a suspect classification?
17. The distinction between those granted international protection who married before and after their applications are made is based on a timing and nature of the applications. It is not based on the suspect factor as such. A time-based distinction of this nature does relate to human personality of course, but it does not cut along an axis of human personality such as sex, sexual orientation or race. That means that it is not a suspect classification but of course such a distinction may still be disproportionate in particular circumstances.

Is this a context where absolute or near equality is required?
18. The present context is not one such as electoral or political rights or the administration of justice as such. Rather it is embedded in an immigration context where traditionally and inherently, the broad executive discretion of the State looms large.

Is the distinction lacking in legitimate aim or disproportionate?
19. One then turns to the general test of whether the distinction involves a legitimate aim and reasonable proportionality. The affidavit of Michael Quinn at 26th June, 2018 at paras. 4 and 5 indicates that the intention of the legislation is to address the situation of persons forcibly separated by persecution or serious harm. He avers that those who married post-protection are "*materially different*" (para. 6). Nick Henderson contends in his (as noted above) somewhat argumentative affidavit that persons who come to Ireland for some reason other than protection, marry here and then seek protection *sur place* are not such persons. But those persons do not need family reunification rights *vis-a-vis* their spouses if those spouses are already here. If they are not here then the spouses are not being separated by the persecution which gives rise to protection *sur place*, so the distinction in the legislation makes sense notwithstanding the arguments advanced by Mr. Henderson. Thus I would uphold the plea at para. 9 of the statement of opposition that the "*distinction in treatment is objectively justifiable*" and at para. 13 "*the applicant is in a materially different position as his marriage was not ruptured by persecution*". I would uphold the plea at para. 14 of the amended statement of opposition that "*persons who marry after the making of an application for International Protection do not have their marriage involuntarily sundered by reason of the persecution or serious harm grounding their application for International Protection".* In these, circumstances the applicant has not demonstrated either that the distinction lacks a legitimate aim or that it is disproportionate to such aim.

Is s. 56 (9) contrary to family rights?
20. The applicant relies alternatively on Article 40.3 and Article 41 of the Constitution. Since there is an alternative option open to him that could, if satisfied, lead to the position that his wife could enter the State, it cannot be said that refusal of permission under s. 56 is in and of itself a breach of family rights. Thus the applicant's submission that "s*. 56(9)(a) effectively prevents the applicant's wife joining him in the State"* (applicant's submissions at para. 28) is misconceived.

The scope of a declaration of incompatibility
21. Mr. O'Reilly helpfully draws my attention to an interesting and eloquent discussion of declarations of incompatibility by Dr. Maria Cahill in Eoin Carolan (ed.), *Judicial Power in Ireland* (IPA, 2018) Chapter 8, "The rule of law or the rule of rights? Five ECHR misconceptions the courts convincingly refute". The chapter concludes at p. 197 with the crucial insight that "*the rule of law cannot be sacrificed to the rule of rights",* which perhaps should be put up alongside any inscriptions about *fiat justitia*. The concept of a declaration of incompatibility is of course provided for in law but one might be forgiven for wondering whether that concept is somewhat questionable. Strasbourg decides individual violations and does not declare legislation to be incompatible with the Convention, so one could legitimately raise the question as to why national courts should do so when purporting to apply the ECHR. The fact that the British do so in the Human Rights Act 1998 does not answer the question. However, taking the procedure as a given, one important principle is that for there to be a declaration of incompatibility, breach of the ECHR must necessarily follow from the statute: see *Donegan v. Dublin City Council* [2012] 3 I.R. 600, to the effect that there can be no Convention-compatible interpretation possible. That was the position in *Donegan* and in *Foy v. An tArd Chláraitheoir* [2002] 2 I.R. 1. In assessing this, the

court follows the general principles of the Convention, not an *avant-garde* application in an individual case. Interpretation of the Convention is primarily for the Strasbourg courts: see *per* Fennelly J. in *McD. v. P.L.* [2010] 2 I.R. 199 at 315 to 316. Reference was made there to *R. (Ullah) v. Special Adjudicator* [2004] UKHL 26 [2004] 2 A.C. 323, but the law has moved on somewhat since *Ullah*. Of particular relevance is O'Donnell J.'s comment in *D.E. v. Minister for Justice and Equality* [2018] IESC 16 (Unreported, Supreme Court, 8th March, 2018) at para. 3, noting that the Strasbourg court applies a civilian methodology rather than *stare decisis*, a point I noted in *Seredych v. Minister for Justice and Equality (No. 2)* [2018] IEHC 307 [2018] 4 JIC 2308 (Unreported, High Court, 23rd April, 2018). The U.K. Supreme Court has decided that the court is not bound to follow every decision of the Strasbourg Court: "*not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European Court of Human Rights which is of value to the development of Convention law*": see *Manchester City Council v. Pinnock* [2011] 2 AC 104 *per* Lord Neuberger at para. 48. Laws L.J. commented extracurially that Lord Bingham's view in *Ullah* that the domestic courts should "*keep pace with the Strasbourg jurisprudence" was "an important wrong turning in our law",* Hamlyn Lecture III, The Common Law in Europe, 27th November, 2013, paras. 25 and 37.

Is s. 56 incompatible with the ECHR?
22. Even if the applicant has a right under the ECHR to have his wife admitted to the State, applying the requirement for an ECHR-compatible interpretation is sufficient to save the legislation if the applicant could make an application to that effect under the administrative policy. That would allow for an individual assessment, as referred to in *F.H. (Iran) v. Entry Clearance Officer, Tehran* [2010] UKUT 275 IAC, paras. 23 to 25.

23. Turning to the prior question of whether the applicant has a right under art. 14 read with art. 8 to equal treatment with a protection seeker who married before the protection application, the applicant centres his case on the decision of the Strasbourg court in *Hode and Abdi v. the United Kingdom* [2013] 56 E.H.R.R. 27 (Application No. 22341/09, European Court of Human Rights, 6th February, 2013). *Hode* however was decided on certain factors which do not apply here. Firstly, the procedure adopted under the immigration rules did not allow for family reunification based on post-flight marriages: see para. 17 of the judgment. Secondly, the U.K. had changed the rules after the matters complained of (see para. 18). The new rules were not, as it happens, entirely equal as between pre and post-flight marriages. The Strasbourg Court did not identify a problem with such differences, albeit that that did not fall for formal decision. At para. 56, the judgment said that "*the situation giving rise to the breach no longer exists*". Thirdly, domestic caselaw in the U.K. had cast some doubt on the legitimacy of the distinction under challenge: see *A. (Afghanistan) v. Secretary of State for the Home Department* [2009] EWCA Civ. 825, *F.H. (Post flight Spouses: Iran) v. Entry Clearance Officer Tehran* [2010] UKUT 275 IAC. Fourthly, as far as the distinction between refugees is concerned based on the date of marriage, there does not appear to have been much, if anything, advanced by the U.K. as a rationale for the distinction other than compliance with international obligations: see para. 51 of the judgment. In the present case that is relied on, but only as one of a number of factors.

24. At para. 55 of the judgment, it is stated that "*the court sees no justification*" for a pre and post-flight distinction. With huge respect to the court, that is more of an assertion than a reasoned argument. Likewise, when one looks at the dismissal by the court of the argument that compliance with international obligations was relevant on the basis that this "*will not in itself justify the difference of treatment*" between otherwise analogous persons, one has to ask, why not? No reasons are immediately apparent. With immense respect to the Strasbourg court, the decision in *Hode* comes across as a somewhat improvident intervention in the delicate field of immigration. One could even make the case that improvident interventions on that particularly sensitive issue have the capacity over time to threaten the integrity of the overall European project. The scope of what might be upended in that regard is illustrated by para. 12 of the additional affidavit of Michael Quinn, "*the State is not a party to Council Directive 2003/86/EC on Family Reunification but the Minister is also cognisant that member states are permitted therein under Chapter V, Art 9 (2) 'Family Reunification of Refugees' to restrict such provisions to refugees whose family relationships predate their entry into the EU. This is the predominant position in the EU where more than half of the member states restrict the application of the more favourable family reunification rules for beneficiaries of international protection to family ties preceding the arrival of the sponsor in the member state".*

25. The dismissal of the need to comply with international obligations is particularly troubling. It means that if the door is opened a crack by Brussels, Strasbourg simply kicks the door in. A further feature highlighted by that case is the one-way ratchet system of the Strasbourg procedure, and the consequent unfairness to the State in the sense that an adventurous over-interpretation of the Convention by national courts stands unchallenged with no recourse to Strasbourg; only disappointed applicants can complain. A somewhat unequal if not positively rigged system where only one side has an effective remedy hardly vindicates the concept of equality of arms. The only remedy that might be available to the State is that of Protocol 16 to the ECHR, although it is not clear why that hasn't been signed or ratified by the State to date.

26. Ultimately, as I have noted above, Strasbourg decision-making is individual and fact-based rather than general, and in this case there is evidence as to the rationale underlying the legislation, supplemented by Michael Quinn's additional affidavit at para. 7: "*It has become clear that marriages which are created after an applicant has made an application for international protection which is ultimately successful may require more careful consideration than a marriage which subsisted prior to such application, at a time when the status of the applicant was an irrelevant factor. Immigration control is a significant concern for the respondent Minister, whether in respect of marriages of convenience or human trafficking or such matters, which are known to the Minister to occur. A more careful consideration of the bona fides of a marriage, whether of an international protection beneficiary or any other immigrant or Irish citizen enables the respondent to grant permission to genuine spouses in line with normal immigration policy of the State."* On the facts before the court in the present case, one must come to the view that the State's reasons are legitimate and that the legislation is proportional for ECHR (and indeed constitutional) purposes, particularly for the purposes of rectifying separation due to persecution or serious harm, prevention of immigration fraud and compliance with all relevant international obligations.

Damages
27. The question of damages does not arise having regard to the above.

Order
28. Before concluding, I might be forgiven for making a couple of final observations on issues touched on by the case. Firstly, given the fraudulent nature of the applicant's protection application he might not necessarily be immune from a heightened degree of ongoing attention as to whether the alleged state of indiscriminate violence in Afghanistan continues to exist. If not, it would of course be open to the Minister to consider whether subsidiary protection status should continue in being under ss. 11 and 52 of the 2015 Act. International protection is not meant to be indefinite in every case but only for so long as is required. In that regard I might add by way of postscript that it would seem that the UK doesn't accept the alleged state of indiscriminate violence in Afghanistan, as testified to by the fact that it returned the applicant's father there. If, eccentrically, Irish immigration decision-makers were to adopt an expansive view of the range of countries beset by indiscriminate violence that is out of line with that taken by other European states, particularly the neighbouring one, such a position would have predictably chaotic effects on immigration control. It is hard to immediately see the logic for a system where such a cross-cutting position can be taken by any one of dozens of individual decision-

makers in the tribunal rather than being a matter of more fixed and objective fact, widely-acknowledged at the international level. Not for the first time one might wonder whether the operation of the immigration system in this jurisdiction raises the question of the extent to which Ireland is a soft touch by comparison with its neighbour. As illustrated here, this applicant defeated the Dublin system by making a first unfounded asylum claim in the UK and a second bogus asylum claim in a different name; he then obtained protection only because a view was taken of the general country situation that is out of line with that taken in the county in which he should have been processed had he not fraudulently circumvented the system established by law. Having been granted protection, he is then handed a goody-bag labelled "rights" into which he is now tucking with gusto. Who says dishonesty doesn't pay?

29. Secondly, the case touches on the more general issue as to whether proxy marriages should be recognised by law and if so, in what circumstances. That perhaps calls for legislative clarification. Considerations of immigration control may militate against broad, or perhaps even any, recognition under this heading, although that is of course ultimately a matter for the legislature. Certainly, if such marriages are to be recognised there is a case for conditions to prevent abuse and to ensure reality in the marital relationship.

30. Finally, there may be some merit in considering whether Protocol 16 to the ECHR should be ratified, although I stress that is entirely a matter for the executive. There may be a case against but there certainly might be something to be said in favour in order to mitigate the one-way ratchet system whereby only an applicant can trigger recourse to Strasbourg, and pro-applicant decisions by domestic courts, however outlying or even incorrect, are unchallengeable in that forum.

31. For the reasons set out in the judgment the application will be dismissed.