AN CHÚIRT UACHTARACH

THE SUPREME COURT

[2024] IESC 46

Record Nos: S:AP:IE:2023:000152

S:AP:IE:2023:000153

Between:

SANGEETA RANA

-AND-

LEHRASIB ALI

Respondents

-AND-

THE MINISTER FOR JUSTICE

Appellant

Dunne J.

O'Malley J.

Hogan J.

Collins J.

Donnelly J.

Judgment of Ms Justice Iseult O'Malley delivered the 18th day of October 2024

Introduction

1. These two cases have been heard together throughout and were the subject of composite judgments in the High Court and the Court of Appeal. They concern the refusal of the appellant ("the Minister") to grant permission to the respondents (Ms Rana and Mr Ali) to reside in the State pursuant to the terms of a particular administrative scheme. This was a "Special Scheme" for non-EEA nationals who had held a student permission at some stage during the period 1st January 2005 to 31st December 2010 but whose permission to be in the State had expired.

2. The refusals were in each case grounded on a finding that the person was not of good character and conduct. That determination was, in turn, grounded upon the fact that each of the respondents had, after the expiry of their student permissions, held a residence permission, on foot of marriage to a non-Irish citizen of the European Union, which had in both cases been revoked by the Minister. In the case of Ms Rana this was because of a finding by the Minister that she had entered into a marriage of convenience in order to obtain a derived right of residence under European Union law. In the case of Mr Ali it was based on a finding that he had submitted misleading documentation relating to his spouse's presence and economic activity in the State, in order to conceal the fact that she had departed from the State and was not exercising her EU rights here. When considering the applications under the Special Scheme, the Minister relied upon those earlier determinations in finding that the respondents had not been of good character and conduct and therefore did not meet the terms of the scheme.

3. In these judicial review proceedings, the respondents contend that, in taking that approach, the Minister did not properly assess the issue of "good character". Although unsuccessful in the High Court (Phelan J. – see *R. v Minister for Justice and Equality, A. v Minister for Justice and Equality* [2022] IEHC 142), they were granted orders of *certiorari* on appeal (Faherty and Haughton JJ, Costello J. dissenting – see *S.R. and L.A. v Minister for Justice and Equality* [2023] IECA 227). The Court of Appeal held that the Minister could not be said to have engaged sufficiently with the submissions made by the respondents at the review stage provided for under the Special Scheme. The Minister was directed to reconsider the applications.

4. Both of the respondents have subsequently been granted permission to remain under a different scheme, aimed at the regularisation of long-term undocumented migrants. However, the Minister sought leave to appeal to this Court on the basis of the significance of the decision of the Court of Appeal in relation to the extent of the "duty to engage" with all of the material submitted by an applicant. An issue was also raised on the question whether it was for the Minister (in the absence of irrationality) to determine the meaning of the Scheme or whether a court could impose its own interpretation. In granting leave, the Court requested the parties to address an additional issue – the status of the two unchallenged revocation decisions in respect of the respondents.

5. It may be noted here that although the respondents were anonymised in the judgments of the courts below, no reason has been offered to this Court as to why that should happen. Article 34.1 of the Constitution requires that justice be administered in public,

meaning that identification is the norm. The case does not appear to come within any of the categories where identification of a party is prohibited by statute. Nor has it been suggested that there are any features that would justify the exercise of the jurisdiction of the court, identified and discussed in *Sunday Newspapers Limited v. Gilchrist* [2017] IESC 18; [2017] 2 I.R. 284, to prohibit or limit the reporting of a litigant's identity in order to ensure that justice can be done in the case, or to protect weighty constitutional interests that would otherwise be damaged or destroyed.

Relevant aspects of the Free Movement of Persons Regulations

6. As noted already, each of the respondents entered into a marriage with a non-Irish citizen of the European Union, each of whom was at the time of the marriage exercising their right under EU law to reside and work in the State. Such a marriage confers considerable benefit on a non-EU spouse in terms of entitlements to move about and reside in the EU. It is not necessary for the purposes of these appeals to consider the detailed rules relating to that status, but three aspects are relevant.

7. At the times relevant to these appeals, the principal regulations applicable were the European Union (Free Movement of Persons) Regulations 2006 – 2008 (S.I.s 656/2006 and 226/2006). These regulations implemented 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 Member States of the EU. They have since been revoked and replaced by the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No 548/2015).

8. The first relevant point is that under regulation 21 a person to whom the regulations applied was entitled to seek a review of any decision concerning their entitlement, or claimed entitlement, to enter or reside in the State. The review was to be carried out by an officer of a grade senior to that of the person who made the original adverse decision. The reviewing officer could confirm the decision on the same or other grounds "*having regard to the information provided for the review*", or substitute their own decision, or set the decision aside and substitute their own determination.

9. The second point of relevance is that it was provided in regulation 24(1) that where it was established that a person to whom the regulations applied had acquired any rights or entitlements under the regulations by fraudulent means then that person would immediately cease to enjoy such rights or entitlements. Regulation 24(2) expressly provided that the terms "*fraudulent means*" included marriages of convenience.

10. Finally, under regulation 25 it was an offence (punishable by imprisonment for up to 12 months) to assert an entitlement to any rights under the regulations on the basis of information which the person in question knew to be false or misleading in a material particular. That continues to be an offence under the 2015 Regulations.

The Special Scheme

11. The Special Scheme was introduced in the wake of the decision of this Court in *Luximon v. Minister for Justice and Equality* [2018] IESC 24, [2018] 2 I.R. 542. That case concerned persons who had lawfully entered and remained in the State on foot of the terms of the then-extant administrative scheme under which visas could be obtained

by non-EEA citizens for the purpose of taking up an educational course, with permission to take up limited employment. The scheme in question operated for several years but in 2011 new time limits were introduced, with the result that a number of people lost the right to remain in circumstances where they had resided and worked here – lawfully – over a considerable period of time. In many cases the individuals concerned were in relationships and/or were bringing up children in the State. The decision of this Court was that the Minister was obliged to consider any rights of such persons under Article 8 of the European Convention on Human Rights in deciding whether or not to grant further leave to remain.

12. The new Special Scheme was intended to make provision for further residence permission for people who had previously resided here on the basis of a student permission granted between 2005 and 2010 (i.e., before the 2011 changes). It was time limited, in that applications had to be made before the 20th January 2019. Although occasionally referred to as "the Special Student Scheme" its beneficiaries did not have to engage in a further course of study and were entitled to work.

13. The terms of the Special Scheme relevant to this appeal included the following. Applicants were required to have commenced their residence lawfully with a student-type permission and to have maintained a lawful presence for at least two years. To be successful an applicant must also have attempted to avoid being unlawful in the State by engaging with the immigration authorities, must have contributed to the economy through their time as paying students and as workers, and must be able to demonstrate a certain connection with the State.

14. Paragraph 3.6 stated that an applicant must have no adverse criminal record in this or any other jurisdiction, and that a failure to disclose any convictions would result in the application being deemed ineligible.

15. Separately, paragraph 3.7 of the Special Scheme provided that an applicant must have been of "good character and conduct" prior to and since arrival in the State. The application form required an applicant to answer a series of questions on this aspect, ranging from questions about any criminal convictions, charges or investigations, through to actions or statements in support of terrorism. They included the more general question whether the applicant had engaged in "*any other activities*" that might indicate that they were not a person of good character.

16. Unsuccessful applicants had a right to seek a "*review*" of an adverse decision.

Factual background and pleadings

(i) Ms Rana

17. Ms Rana is an Indian national. She entered the State on a student visa in October 2009. Her permission was due to expire on the 29th October 2014. In the month of September 2014, she married a Lithuanian citizen, and on foot of that marriage to a citizen of the European Union she was granted a residence permission in March 2015. Such a permission was valid for five years, but the holder was supposed to renew a registration card periodically with the Garda National Immigration Bureau. The holder was also

obliged to notify the immigration authorities of any relevant change in personal circumstances or address.

18. In October 2016 Ms Rana gave birth to a baby whose father was an Indian national. She did not seek a renewal of her registration card when it expired in September 2017.

19. On the 20th April 2018 the Minister wrote to Ms Rana setting out a number of concerns about her marriage and the basis for her residence permission. The view was expressed that documentation furnished by her in relation to her marriage and the exercise by her husband of his EU rights was false and misleading and that she had knowingly submitted it to gain rights to which she would not otherwise have been entitled. She was given 15 days to respond and clarify matters, but did not reply to the letter.

20. On the 18th May 2018 the Minister wrote again. The birth of Ms Rana's child and the nationality and immigration status of the child's father were noted and the history of Ms Rana's dealings with the Department was outlined. It was stated that Ms Rana's husband had been linked to and residing with his partner in Lithuania since February 2011 and had a child with her.

21. The letter stated that the Minister was of the opinion that the documentation provided in support of her residence application, intended to evidence her residence and that of her spouse in the State, was false and misleading as to a material fact, and that it had been submitted in order to obtain a right of residence that she would not otherwise have enjoyed. This was a fraudulent act within the meaning of the regulations and Directive.

22. Further, the Minister was also of the opinion that Ms Rana's marriage was 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.

23. Ms Rana's residence permission was revoked. She did not seek a review under the regulations or otherwise challenge this decision.

24. In November 2018 Ms Rana applied for permission to remain under the Special Scheme. That application was initially refused on the basis that she was not eligible for the Special Scheme because she had held a residence card, on the basis of a different form of immigration status, in the period after the expiry of her student permission. Subsequent judicial review proceedings were compromised, and she renewed her application. However, it was again refused, on the 4th September 2020. On this occasion the first instance decision referred to the earlier finding that she had entered into a marriage of convenience and stated that, "*accordingly*", she did not meet the criterion of having been of good character and conduct since her arrival in the State. It was noted that she had been given an opportunity to address the Minister's concerns in the correspondence at the time and had not done so.

25. Ms Rana sought a review, in accordance with the terms of the Special Scheme. For the purpose of the review she submitted an account of her history and circumstances, and provided character references. Emphasis was placed on the fact that she had worked for the same company for ten years and had risen to a position of responsibility. She was raising her child as a single mother and would, for family and cultural reasons, find it

very difficult to return to India. She contended that the finding that she had not been of good character and conduct was disproportionate and unreasonable in the circumstances, and that it was based on circumstantial evidence. It was submitted that the Minister was obliged to conduct a balancing exercise between this finding and other evidence of good character.

26. The decision on the review stated that the reviewing officer had 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*". The officer noted the good character and conduct requirement in paragraph 3.7 of the Special Scheme and then said:

> *"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".*

27. Judicial review proceedings were initiated on the 30th November 2020. In her grounding affidavit Ms Rana averred that although her immigration status had been a factor in her marriage, the principal reason for it had been love and affection. However, she said, she and her husband had found after a period of time together that they were better suited to friendship with each other than marriage. They separated after about a year, and she did not seek to renew her registration card thereafter. She said that she had engaged an immigration consultant to appeal the decision of May 2018, simply in order to reverse

the finding of a marriage of convenience, but had subsequently discovered that the consultant had not filed an appeal.

28. The statement of grounds in the judicial review pleads that the Minister was operating a fixed policy and had fettered her discretion in determining that a previous finding of a marriage of convenience automatically disentitled an applicant under the Scheme. It is claimed that the Minister had failed to assess Ms Rana's specific conduct and the merits of her application, and had not conducted a proportionality assessment.

29. The statement of opposition and verifying affidavit deny that Ms Rana is entitled to any relief.

(ii) Mr Ali

30. Mr Ali is a Pakistani national who entered the State on foot of a student visa in 2007. The visa was renewed from time to time and finally expired on the 2nd January 2013. In September 2012 Mr Ali married an Estonian citizen and applied for residence based on his status as the spouse of an EU national. After an initial refusal he reapplied in April 2014. In support of his application, he furnished payslips purporting to show that his wife had been working for a particular company between December 2013 and March 2014. He was granted a five-year permission in October 2014.

31. However, within a few weeks of that date Mr Ali was informed that to the knowledge of the Minister his wife was no longer living in the State. He was further informed that it was proposed to revoke his permission. Mr Ali's solicitor replied on his behalf, stating

that Mr Ali's wife was indeed living with him at that time and was working in the State. The Minister responded on the 18th December 2014, enclosing information received from the Estonian embassy. Mr Ali's wife was living in Estonia with her partner and two children (one born in July 2012, and one born in May 2014). She had filed a tax return stating that she was resident in Estonia during 2013. Based on this information, the Minister had reason to believe that Mr Ali had submitted documentation that was false and misleading as to a material fact and that this was a fraudulent act within the meaning of the regulations and the Directive. His submissions were invited, but it does not appear that any were sent.

32. On the 17th February 2016 Mr Ali was informed that the Minister was satisfied that Mr Ali's wife had not been exercising her Treaty rights in the State during the relevant time and that the documentation submitted by him as to her employment here was intentionally misleading as to material facts. It was stated that this was a fraudulent act. His permission was accordingly revoked. He was further informed that a deportation order was proposed.

33. Mr Ali did not seek a review under the regulations or challenge this decision in any way.

34. In May 2016 Mr Ali obtained an uncontested divorce in an Estonian court. The decision of that court recites as a fact that the parties had been separated since the end of 2014.

35. In January 2017 Mr Ali sought to regularise his status by applying for a Stamp 4 permission to remain. In the otherwise comprehensive letter sent on his behalf for that

purpose it was stated briefly that his marriage had broken down because it had transpired that his wife was being unfaithful to him and had had two children in Estonia. No reference was made to the revocation decision or to the grounds upon which it was made. The letter stressed his extensive work experience, his employability as a qualified computer scientist, and the volatility of current conditions in Pakistan. Numerous character references were furnished.

36. On the 3rd March 2017 Mr Ali was informed that the Minister intended to make a removal order. The request for Stamp 4 permission was refused by letter dated 19th June 2018. It was noted in that letter that, at the time he had made that application, Mr Ali had not had a valid permission to be in the State since 2011.

37. In November 2018 Mr Ali applied for permission to remain under the Special Scheme. As with Ms Rana, this was initially refused on the basis that he had held a permission on a different footing after the expiry of his student permission but, again, judicial review proceedings were compromised and his application was reconsidered. The first instance decision noted the previous determination by the Minister that Mr Ali had furnished documentation that was intentionally misleading in order to circumvent immigration rules, and that this was fraudulent. Paragraph 3.7 of the Special Scheme was referred to and the application was refused, on the 3rd September 2020.

38. Mr Ali's solicitor sought a review, making the same arguments as were made in Ms Rana's case – that the decision was disproportionate, unreasonable and failed to conduct a balancing exercise. Mr Ali's employment record and his links with his local community were emphasised. It appears that the basis for the refusal had not been fully

understood, insofar as the solicitor addressed the matter as if the finding had been one of a marriage of convenience rather than the submission of misleading documents. Again, the decision was upheld on review, on the 23rd October 2020. Again, the reviewing officer stated that the material furnished for the review by Mr Ali had been considered. The conclusion was that the first-instance decision-maker had applied the appropriate procedures and the correct interpretation of the eligibility criteria.

39. Mr Ali commenced these proceedings on the 30th November 2020. It may be noted that, while his grounding affidavit sets out his immigration history in some detail, he does not in any way suggest that his marriage was genuine. Nor does he contend that the documentation submitted with his application for EU Treaty rights residence correctly reflected the situation. He does not deal with the grounds for the revocation decision.

The High Court

40. The challenges to the refusal centred on two main arguments – that the Minister was operating a fixed policy such that revocation of a previous permission automatically precluded an applicant from consideration under the Special Scheme, and that the Minister had erred in relying exclusively on the reasons for the revocation decisions without weighing other evidence of good character.

41. Phelan J. found, firstly, that there was no evidence of a fixed policy on the part of the Minister. It had not been suggested by either of the applicants that the earlier finding in their case – that residency had been improperly obtained in reliance on either a marriage of convenience or false or misleading documentation – was not relevant to good

character and conduct or that it could not, on its own, provide a sufficient basis for refusal under the Special Scheme. There was no evidence that the Minister had proceeded on the basis that permission under the Special Scheme could not be granted because of the previous decisions. The conclusion that had been reached, that the applications had failed to demonstrate good character and conduct, was supported by material that was clearly capable of justifying that finding.

42. Looking at the authorities on the question of "*good character*", Phelan J. noted that they were principally concerned with the criteria applicable to citizenship by way of naturalisation, with particular regard to s. 15 of the Irish Naturalisation and Citizenship Act 1956 as amended. That provision, as inserted by s. 4 of the Irish Nationality and Citizenship Act 1986, requires, amongst other matters such as a period of continuous residence, that an applicant be "*of good character*".

43. Phelan J. considered the judgment of Hogan J. in *Hussain v. Minister for Justice* [2013] 3 I.R. 257 to be authority for the proposition that in the context of naturalisation the Minister must measure the concept of good character and conduct by reasonable standards of civic responsibility. Hogan J. also held that the Minister must afford an opportunity to address the factual basis for an adverse character finding. No such opportunity had been afforded in that particular case. Phelan J. found that the instant proceedings did not raise the same issue. The decision to revoke EU residence rights in the cases of Ms Rana and Mr Ali had been taken on notice to them and had not been challenged. It had been referred to in the first instance decisions and had been addressed by them for the purposes of the reviews.

44. The decision in *GKN v Minister for Justice* [2014] IEHC 478 was also distinguished. There, MacEochaidh J. held that the assessment of good character for the purposes of naturalisation had to involve a comprehensive assessment, involving an exercise of judgment. In that case, the Minister's refusal had been based on the fact of a criminal conviction, without knowledge of the mitigatory aspects. In the instant proceedings, by contrast, the fraudulent basis advanced for residency in reliance on a marriage of convenience or misleading documents, was relied upon by the decision-maker as evidence that the applicants had not been of good character. The decision-maker knew exactly the nature of the concerns in relation to character and also had available to them the contrary evidence of good character.

45. The requirement for a comprehensive assessment of character in a naturalisation application was endorsed by the Court of Appeal in *Talla v Minister for Justice and Equality* [2020] IECA 135. In *Talla*, the applicant had convictions under the Road Traffic Act which had been dealt with by way of fine or a contribution to the District Court Poor Box. The mitigatory aspects, which had been accepted by the court and had been explained to officials by the applicant's solicitor, were not referred to in an adverse report to the ultimate decision-maker. Haughton J. said that while the commission of criminal offences was relevant to a decision on naturalisation it was necessary to take account of any mitigating factors, any lapse of time and any other factors relevant to good character.

46. Phelan J. did not accept that these authorities meant that the Minister was not entitled to rely upon the previous findings in determining that the applicants were not of good character. The Minister could not ignore evidence of character furnished by the

applicants, but the fact that the conclusion in the decisions – that they were not of good character – was based on those previous findings did not mean that the Minister had failed to consider the other evidence put before her. It had been accepted that those findings were relevant, and in Phelan J.'s view the conduct involved was in and of itself sufficient to justify the determination that they were not of good character.

47. While the decision letters did not expressly engage with the evidence of good character, it had been stated in each letter that all information submitted had been considered. Phelan J. referred to the presumption that material had been considered if the decision said so. She accepted that the presumption could be displaced if, for example, the reason given for a decision was not reconcilable with the material without further explanation, but that did not arise in the instant case. No unfairness had been established by reason of the failure of the reviewing officer to refer discursively to the new material.

48. Phelan J. accepted the submission made by the Minister to the effect that there was a difference between the requirement for naturalisation – that the applicant be of good character – and the requirement of the Special Scheme that the applicant "has been of good character and conduct". Under paragraph 3.6 of the Special Scheme, an adverse criminal record was a complete bar, whereas with a naturalisation application under the Act it was a relevant factor but not an automatic bar. In those circumstances, while the naturalisation caselaw was helpful in identifying the correct legal approach to the assessment of good character it was not directly applicable.

49. Phelan J. concluded that in assessing character (which, she accepted, was not a black and white issue) all relevant matters had to be considered. Negative and positive factors

had to be weighed in a manner that allowed for fair and proportionate decision making. Thus, the Minister was required to consider all of the aggravating and mitigating factors relevant to the question of whether an applicant could be deemed to have been of good character and conduct, notwithstanding that a finding of fraudulent conduct for the purpose of obtaining EU Treaty rights had already been made. However, although marriages of convenience could involve significantly different degrees of culpability, it was clear that in any case where such a finding had previously been made the applicant would have a steep hill to climb.

50. Adopting the approach of the naturalisation caselaw to the instant cases, Phelan J. found nothing to support a finding that the Minister had failed to consider the mitigating factors or a failure to demonstrate such consideration in the record of the decision made. The decision letters expressly stated that the decision-maker had considered the additional material submitted. The character references supplied as additional material in the review did not raise matters of such weight as to require to be specifically addressed.

> "*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*."

51. The cases were not like *Talla* or *GKN*, where relevant submissions or explanations had not been brought to the attention of the decision-maker. There was no real dispute about the facts that had led to the original adverse findings. Phelan J. concluded that 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 Court of Appeal

52. In the appeal, the respondents appear to have concentrated on two main arguments – firstly, that there was no evidence that the first-level decision-maker had assessed their applications in the round, or engaged in the necessary weighing exercise, and, secondly, that the reviewing officer had merely reviewed the first-tier decision without considering the merits of the review applications. The Minister essentially relied upon the fact that the decision-makers at both levels had expressly stated that they had taken everything submitted to them into consideration.

53. As noted above, the Court of Appeal was not unanimous.

54. Faherty J. accepted the argument made by the respondents that character could not be assessed by reference to one event in the past, but had to be assessed in the round, with all factors weighed. The previous findings made against the respondents did not operate as a bar to the Minister's obligation to assess whether they met the good character criterion. In the case of a marriage of convenience, the wrongdoing involved was on a spectrum of wrongdoing, and its position on that spectrum must be assessed. She therefore approved the trial judge's citation of *Talla* and *MNN* in this context.

55. Looking at the first instance decisions, Faherty J noted that it was stated in each that all information furnished had been considered. She found that the reasons for these

decisions were clearly stated, albeit in non-discursive fashion. There was a sufficient narrative for the respondents to understand why their applications had been refused. Moreover, the reference in each decision to the fact that the revocation decision had not been challenged suggested that the decision-maker engaged in the requisite weighing exercise and did not simply rely on the findings previously made.

56. Faherty J. also rejected efforts by counsel for the respondents to impugn the merits of the original revocation decisions. Those decisions had not been challenged at the appropriate time and the respondents had to live with the consequences. However, turning to the content of the two review decisions, she noted that neither referred in terms to either the previous findings or to the materials submitted in the review process. She felt that the Court could not be satisfied, on the face of the decisions, that the requisite weighing exercise had been conducted.

57. Counsel for the Minister had argued that the review procedure was simply a review of the first-tier decision, not a *de novo* assessment or reconsideration of the application. The function of the reviewing officer was to see if the decision-maker had erred in the context of the Scheme. Faherty J. accepted this, insofar as she accepted that the review was not a new decision-making layer. However, the opportunity to submit new information in a review meant that such information had to be considered, and Faherty J. considered that this meant that the question of character had to be reassessed at that level. It followed, in her view, that what was required, on the face of the decisions at that level, was unambiguous evidence that the review decision-maker had engaged in a real way with the arguments and materials advanced in the review applications, together

with some indication that the review decision-maker had engaged in the requisite weighing exercise. She felt that the Court could not be certain that this had occurred.

58. Haughton J. agreed with Faherty J. that the language of the review decisions indicated that fresh assessments had not been undertaken. In paragraph 2 of his judgment he said:

> "*These appeals again highlight the danger for administrative decision-makers of adopting boilerplate language in stating that all relevant material has been considered. To quote fully the dictum O'Donnell C.J. in Balz v. An Bord Pleanála [2019] IESC 90 referred to by Faherty J. in her judgment: –*
>
> *"[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."*

59. Haughton J. saw this as a general criticism of the use of formulaic words to indicate that relevant materials have been taken into account if there is nothing else in the decision to show that to be the case. His view was that it had to be apparent on the face of decision, not simply through the use of boiler-plate language, that the merits of the case had been considered and engaged with. The language of the review decisions suggested that the officer had focussed on due process by the deciding officer and had not engaged with the new material or undertaken a weighing exercise "in the round".

60. Dissenting, Costello J. noted that the Scheme was an *ex gratia* administrative scheme, and observed that no rights of applicants were engaged. The obligation on the Minister was simply to abide by the terms of the Scheme. This was a fundamentally different situation to a decision involving the exercise of a statutory power and it was necessary to be cautious in drawing comparisons.

61. Costello J. considered that the "*review*" available under the Scheme was neither an appeal nor a review of the application, but a review of the decision only. The fact that the reviewer had to consider any new material submitted did not mean that they had to engage in a *de novo* assessment.

62. Since the Scheme required an applicant to have been of good character and good conduct, Costello J. was of the view that one instance of bad conduct could indeed result in failing that criterion, without the necessity for the Minister to consider matters in the round. In the instant cases, there were previous findings of dishonest behaviour towards the State in the immigration context. Those findings were unchallenged, and the

decision-makers were entitled to act on them without conducting a balancing exercise. Evidence of good behaviour could not cancel out the evidence of dishonesty.

Submissions in the appeals

63. In both appeals, the appellant Minister submits that the majority in the Court of Appeal erred in its understanding of the nature of the Special Scheme. It is contended that they failed to appreciate the important distinctions between the operation of the Scheme and that of s. 15(1)(b) of the Irish Naturalisation and Citizenship Act 1956 as amended. The threshold criteria set out in the Special Scheme were more onerous than the Act, since the former required both good character and good conduct. It is further submitted that the Court of Appeal erred in finding that the reviewing officer had failed to adequately assess the material provided by the respondents.

64. The appellant notes the reliance placed by the respondents on *Talla* and *GKN*. These cases are distinguished on the ground that in each of them it was clear that the reports furnished to the decision-maker (respectively, the Minister and the Director General of the Immigration Service) did not include material that was relevant to the assessment of the significance of the criminal convictions in question.

65. The appellant submits that on the facts of the instant appeals the relevant authority is the decision of this Court in *G.K. v Minister for Justice* [2002] 2 I.R. 418. In that case, the applicants were seeking to challenge decisions of the Minister to refuse their asylum applications (on the ground that they were manifestly unfounded) and to make deportation orders against them. They were invited to make submissions and sought

permission to remain in the State, but the Minister decided to proceed with the deportation orders. The letter communicating that decision stated that the Minister was satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweighed such features of their case as might tend to support a grant of leave to remain. In the subsequent application for leave to seek judicial review, the applicants claimed that their submissions had not been considered.

66. The applications for leave to seek judicial review were out of time under the applicable statutory rules. The High Court, however, exercised its power to extend time for "good and sufficient reason" because the judge considered it possible that the decision letter might be simply "*a common form letter*". The Minister appealed the extension of time decision to this Court.

67. Giving the sole judgment in the appeal, Hardiman J. noted that the Court had recently approved the terms of the decision letter in a similar case (*P. v Minister for Justice* [2002] 1 I.R. 164). The letter clearly communicated that the Minister had considered the features of the case said to support a grant of leave to remain. The applicants' submission to the effect that what was said in the letter might not be true, and therefore would have to be supported by affidavit evidence, was rejected:-

> "*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."*

68. It is contended by the appellant that in this case there is no evidential basis for going behind the express statement by the reviewing officer that all material had been taken into consideration. The further statement, that the officer found the first decision to have been correctly carried out, did not create an evidential inference that the earlier statement – that the additional material had been considered – was false.

69. The appellant notes the reliance by the respondents on the judgment of O'Donnell J. in *Balz v An Bord Pleanála* [2019] IESC 90 (cited by Haughton J. in the passage quoted above). In *Balz*, the particular issue concerned certain guidelines relating to noise that had to be taken into account by planning authorities when considering applications for permission in respect of wind farms. The objectors, while acknowledging the obligation to consider the guidelines, submitted to the Board's Inspector that they had been shown by more recent science to be outdated and not fit for purpose. The Inspector said in his report that this was not "*a relevant planning consideration*". The guidelines, in his view, were what they were, and remained in force. Proposed revisions had not been brought into operation. The High Court considered that this meant that the Inspector had not evaluated the competing scientific material but held that he was not obliged to.

70. In the appeal in this Court, there was a dispute between the parties as to what the Inspector had meant, and therefore what the Board had meant in adopting his recommendations. The appellants argued that the Inspector had not considered the material they had furnished in support of their objection and that the Board had therefore refused to exercise its discretion to apply or disapply the guidelines. The Board contended that it had simply refused to accept the appellants' claim, which it

characterised as being that the guidelines should be disregarded. It said that it had, in fact, considered the submissions in setting noise limits.

71. This position was set out in correspondence before the appeal hearing, rather than in evidence. The Board relied in part upon the statement in its decision that "*[i]n making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions*".

72. O'Donnell J. considered the appellants' interpretation to be the more natural one. The Inspector had stated that the technical criticism of the guidelines was not a relevant planning consideration. It followed that he could not have had regard to the content of that criticism. That, the Court concluded, was a legal error.

73. In those circumstances, the appellant points out that in *Balz* the Court did, in fact, find that there was evidence to support the claim that a particular issue had not been considered. On this view *Balz* was, therefore, an example of the application of the principle in *G.K.* – that there must be evidence to support such a claim. By contrast, the judgment of Haughton J. in the instant case is said to carry the implication that there must be positive evidence that material has been considered, going beyond an express statement to that effect, before the Court can accept its veracity. This is said to create an impossible burden for decision-makers, who would have to engage in a narrative discussion of every piece of evidence submitted to them.

74. The appellant submits that she was entitled to rely upon the previous findings of bad conduct in each of the two cases, since in neither case did the respondent engage in any way with those findings or seek to challenge them. A person who has been found to have demonstrated bad conduct cannot overcome that finding by showing that their character has in general been good. The unchallenged revocation decisions were, therefore, relevant matters to be taken into account when reviewing the question of good character and conduct for the purposes of the Special Scheme (whereas in the context of a naturalisation application under the Act they would have to be balanced against other matters showing good character).

75. The respondents are represented by the same legal representatives and their submissions are similar to each other apart from setting out the factual background. The main difference in relation to that background is that Ms Rana continues to maintain that she entered into a genuine marriage and resided with her husband for approximately a year. However, she does not seek to challenge the finding of the Minister to the contrary. Mr Ali does not deal with the topic of his marriage.

76. The following analysis of the Special Scheme is proposed by the respondents:

- The Special Scheme is a non-statutory scheme where the Minister is entitled to set criteria as she deems appropriate.
- The criteria for eligibility under the Special Scheme are not unlawful or irrational.
- The onus is on an applicant to show that they satisfy the criteria.

- The assessment by the Minister of whether an applicant meets each of the criteria must be made in accordance with fair procedures and legal principle.
- In that assessment, all relevant matters must be considered and given appropriate weight.

77. The respondents accept that the decisions to revoke their earlier permissions, and the grounds for those decisions, were proper matters to be taken into account in considering their application under the Special Scheme. However, they argue that there is a spectrum of offending, and that there is a difference between the person who coerces another into a marriage for immigration purposes and one who enters a marriage of convenience because they are in desperate circumstances. A finding, based on the fact of a marriage of convenience, that the person has not been of good character and conduct should not be given insurmountable weight and should not be made without some assessment of where the particular case is located in the spectrum. The circumstances involved should be considered along with other relevant factors. Here, there was no analysis of their circumstances or of other aspects of their good character and conduct. It is pointed out that every person who applied under the Special Scheme had, more or less by definition, been in the State for some period of time without permission.

78. It is submitted that an application of this nature is analogous to a naturalisation application and that therefore the principles set out in *Talla* and the other authorities on naturalisation are applicable. The matter must be considered in the round. The contention of the appellant to the effect that a single instance of bad conduct is sufficient to bar further consideration under the Scheme is said by the respondents to be

unsupported by authority. Their position is that it would, again, be necessary to determine where on a spectrum of bad conduct that single instance might fall.

79. It is submitted that the majority in the Court of Appeal was correct in determining that the reviewing officer did not have regard to the additional material. The first instance decision had been made only on the basis of the previous adverse finding, excluding any decision on the merits and submissions put forward by the respondents, and the reviewing officer expressly found that that decision had been made correctly. There was, therefore, sufficient evidence to satisfy the *G.K.* test.

80. As a separate issue, the respondents point out that they now have permission to remain. This was granted under a different scheme, the "Regularisation of Long Term Undocumented Migrants Scheme" which also has a good character requirement. The appellant says, however that this later Scheme is quite different in purpose. At the request of the Court, an affidavit has been filed which exhibits a copy of the scheme and of the accompanying policy document (both of which are available online).

81. The scheme for long-term undocumented migrants was a time-limited scheme, expressly created in exercise of the executive power, which was intended to regularise the presence in the State of people who had been present without permission over a period of at least four years. The scope was, clearly, far broader than the Special Scheme under consideration in this appeal. It was open to migrants regardless of how they originally entered the State, breaches of conditions and expiry of permissions, and whether or not a deportation process was under way. The scheme was subject to the good character and conduct of applicants, but the existence of a criminal conviction

was not an automatic bar. On this aspect, it was stated that the Immigration Service would take into consideration information from the Garda Síochána and other public authorities regarding any behaviour of a criminal nature considered to be contrary to the common good and/or public policy, and might refuse to grant a residence permission to any applicant on that basis.

Discussion

82. As an overview of the nature of a scheme such as this, it may be helpful to begin with the judgment of Denham J. in *Bode v Minister for Justice* [2007] IESC 62, [2008] 3 I.R. 663. The issue concerned the entitlements under an administrative scheme of a particular cohort of foreign nationals who had children born in the State. The applicant in *Bode* was the father of a citizen child. He was refused permission to remain under the scheme because he had failed to establish in his application documentation that he had been resident in the State, with the child, since her birth. In the judicial review challenge to that decision, it was argued *inter alia* that the refusal breached the rights of the family members under Article 40 and 41 of the Constitution, and under Article 8 of the European Convention on Human Rights.

83. Denham J. (with whom the other members of the Court agreed) observed that the executive power of the State to control the entry, residence and exit of foreign nationals was fundamental. The power to control immigration included the power to decide that it was in the interests of the common good that residency should be granted to a particular category of foreign nationals, including by way of an *ex gratia* scheme. Such a scheme was distinct from any circumstances where the legal rights of individuals

might fall to be considered. It did not affect any substantive claim for permission to remain. An individual refused under its terms retained any relevant rights under the more formal procedures set out in legislation and also any rights arising under the Constitution or the European Convention on Human Rights. In other words, an adverse decision under the scheme did not involve the determination of such rights by the Minister and did not leave an applicant any worse off than they had been. The Minister was, therefore, entitled to apply the terms of the scheme and to refuse applicants who did not come within it.

84. It is clear that the Special Scheme now under consideration was an *ex gratia*, executive scheme that comes within the terms of this analysis. The Court is therefore construing the terms of the Scheme and not a statute. Any rights that individuals might have under statute, the Constitution or the ECHR (or, indeed, under a different scheme) remain unaffected by an adverse decision.

85. It seems to me that the following points emerge from all of the foregoing.

86. The words "*good character and conduct*" do not convey any particular legal meaning but must, I think, be assessed in the context in which they are utilised. For example, it seems clear that, as deployed in the Special Scheme, the concept was intended to be more strictly applied than in the scheme for the long-term undocumented migrants. The latter can more appropriately be seen as a kind of amnesty scheme, for people who had been in serious breach of immigration law for a lengthy period of time and in respect of which even criminal convictions and deportation orders were not necessarily a bar. I

do not, therefore, see any inconsistency in finding that an individual could fail a good conduct requirement for one purpose but pass it for another.

87. It was a requirement of the Special Scheme that applicants should have been of good conduct both prior to and after arrival in the State. Criminal convictions were an absolute bar. The implication is, in my opinion, that bad conduct falling short of a criminal conviction would not necessarily be a bar. It is, after all, correct to say that all applicants under the Scheme would have been in breach of immigration law for at least some period of time, insofar as they are likely to have remained after the expiry of their permission to be in the State under the pre-2011 scheme. I therefore agree that it would be an insufficient basis for an adverse decision under the terms of the Scheme to identify a single instance of bad conduct without regard to its gravity.

88. The particular bad conduct found to have been engaged in by the respondents did not result in criminal convictions. Nonetheless, it must be seen as having been at a very high level of gravity. It was in fact a criminal offence under the regulations to assert immigration entitlements on the basis of fraudulent means, including either a marriage of convenience or false or misleading documentation. Furthermore, it could be said that in this particular context the use of fraudulent means is an attack on the integrity of not only this State's immigration system but also, in a broader sense, the EU immigration system. Each of the respondents used the system to claim EU rights to which they were not entitled.

89. The Minister found the conduct, in each case, to be sufficiently serious to justify a decision to revoke all entitlements that the claimed status had given the respondents, leaving each of them without permission to remain. In each case that decision was made under a statutory power, was not reviewed under the regulations or challenged in any way at the relevant time. It is not now open to challenge. This situation would not justify an assertion that the respondents committed criminal offences, but it does justify the Court in assuming that the gravity of the conduct, and the appropriate response, was properly assessed at the time. In my view, it was not necessary for (and, arguably, would not have been open to) the decision-makers under the Special Scheme to reassess the question of gravity and to see where, on the spectrum of marriages of convenience, these particular transactions fell. That was a matter for the previous process, where it could have been argued by the respondents that, for example, revocation of permission to be in the State was based on erroneous grounds, or was disproportionate to what they had done.

90. I therefore consider that it was appropriate for the decision-makers to approach the assessment of the applications on the basis that the applicants had already been found to have engaged in very serious misconduct that had justified revocation of their immigration status. I would not, however, go so far as Costello J., in that I would not consider that such a finding meant, in effect, that the applications under the Special Scheme could in no circumstances have been successful. It was still necessary for the Minister to consider what they put forward as evidence of good conduct. Nonetheless, any person seeking to claim “good character” in such circumstances must, as Phelan J. said, have a steep hill to climb. In my view, the obligation is on them to show something

that, looking at all relevant factors, has the potential to counteract the previous finding, rather than there being an obligation on the decision-maker to reassess that finding.

91. The next question, then, is whether the decisions adequately comply with the duty to give reasons and engage with what was put before the decision-makers. The respondents say that they did not, because they did not expressly engage with the good conduct evidence.

92. The decision of this Court in *G.K.* makes it clear that a statement by a decision-maker that they have considered all the material put before them is sufficient, without further affidavit evidence, unless there is some evidence-based reason to think that they did not. I do not see *Balz* as affecting this principle. The Inspector in *Balz* did not claim to have considered the scientific material before him – on the contrary, he stated that it was not a relevant consideration. The Board's general statement to the effect that it had considered what it should have considered, and had not considered matters that it should not, was hardly apt to cover a situation where the particular material had been seen by the Inspector as something that should not be taken into account. The appellant is, therefore, correct in saying that *Balz* is an example of the *G.K.* principle and not a reversal or variation of it.

93. I would therefore hold that it is not, in general, necessary to support a statement that all material has been considered with further evidence to prove the veracity of the statement. Such a statement differs materially from the statement condemned in *Balz*. This does not, of course, exclude the possibility of cases where a particular feature demonstrates that the statement is unlikely to be completely correct. The point is that

decision-makers in this form of process are not required to list out everything that has been put before them and address each aspect individually.

94. The nature of a "*review*" under the terms of the Special Scheme is of some significance in this respect. The fact that there has been some dispute about what, exactly, was meant by this feature of the Scheme points to the desirability of spelling out, whether in regulations or an *ad hoc* scheme such as this, the nature and scope of the process available to initially unsuccessful applicants. I would not accept the argument of the appellant to the effect that the review in this Scheme is simply a review of the first-instance decision, if what is meant by that is just a check that procedures were followed properly and the terms of the Scheme interpreted correctly. The opportunity to present new information and material has to imply the possibility that such information and material may bring about a different outcome, and therefore has to imply an obligation to consider it. In turn, that can only make sense if the original information is also considered.

95. I am of the opinion that what was intended was a review along the same lines as that set out in the Free Movement of Persons regulations (see above at paragraph 8). On that basis, the reviewing officer could confirm the decision made at first instance on the same or other grounds "*having regard to the information provided for the review*", or substitute their own decision, or set the decision aside and substitute their own determination.

96. Here, the reviewing officer clearly agreed with the decision made. In each case, they stated that they had had regard to the new information. They did not substitute different

grounds for the decision, or reach a different conclusion. Accordingly, I find it clear that they were confirming the first-instance decision on the same grounds.

97. It is to my mind unarguable that the most significant feature was the fact of the previous finding of bad conduct. That finding was, inevitably, of particular relevance to a subsequent decision in the immigration context. The respondents asserted that the refusal decision was disproportionate – if they meant that it was a disproportionate response to the conduct, I would consider that to be a difficult argument to sustain in the light of the fact that the conduct had previously been found to be grounds for the unchallenged revocation of their immigration permission. Was it, in that context, necessary for the reviewing officer to state expressly that they did not find that the additional character evidence warranted a different result? Perhaps it would have been preferable to say so, but I cannot see that the clarity of the decision would have been greatly enhanced by the express statement that the new character references did not outweigh the bad conduct. I would agree with Phelan J. that nothing in the new material could have warranted setting aside the first-instance decision.

98. It is of course highly desirable that decision-makers should state clearly and concisely the reasons for their decisions, so that there can be no confusion about what was considered relevant and what was not. In the context of the general immigration system, it may be desirable that decisions such as these should refer expressly to matters such as character testimonials and explain why they are not seen as outweighing the bad conduct. To do so would, apart from the fact that it will be clearer to the individuals concerned why they did or did not obtain the outcome they desired, render challenges to decisions on grounds of inadequate reasoning or engagement less frequent.

99. However, it seems to me that the particular circumstances of these cases are so clear that there can be no doubt about the reasoning of the decision-makers, and no doubt about the justification for their decisions.

100. I would allow the appeal.