THE SUPREME COURT

IN THE MATTER OF SECTION 5 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 (AS AMENDED BY SECTION 34 OF THE EMPLOYMENT PERMITS (AMENDMENT) ACT 2014) AND IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED)

Supreme Court Appeal No. 2018/0069

BETWEEN:-

M K F S (PAKISTAN) AND A F AND N F J (AN INFANT SUING BY AND THROUGH HIS MOTHER AND NEXT FRIEND A F)

APPELLANTS

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

-AND-

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

LEGAL SUBMISSIONS ON BEHALF OF THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

I. Introduction

1. On 29th July 2019, the Court granted the Irish Human Rights and Equality Commission ('**the Commission**') liberty to appear as *amicus curiae* in this appeal. As set out in the Commission's application to intervene, the Commission considers that this case raises an important issue of principle relating to the status of a marriage validly contracted under Irish law. In the Commission's submission, the status of such a marriage must be understood in light of the right to marry as protected under the Constitution, Article 12 of the European Convention of Human Rights ('**ECHR**'/ '**Convention**') and Article 9 of Charter of Fundamental Rights of the EU ('**the Charter**').

2. In its determination granting the Appellants leave to appeal to this Court directly from the High Court, the Court stated that the High Court judgments in this case[1] and in *Izmailovic v. Commissioner of An Garda Síochána & Ors* (**'Izmailovic'**)[2] were "*not easily reconcilable*".[3] In particular, Humphreys J in the High Court in the present case concluded that a marriage of convenience was a nullity in law and that the judgment in *Izmailovic* was incorrect. In its determination, therefore, the Supreme Court concluded that the question arising in this appeal was "*a matter of general public importance*", "*the significance of which goes beyond the facts of this particular case*".[4]

3. The Commission's submissions will focus on this fundamental issue of principle. The Commission does not propose to trespass on the factual circumstances of the case, save insofar as is necessary for the purpose of making its submissions on the issue of principle.

4. The Commission respectfully submits that the High Court erred in its conclusion that a marriage which the Minister has decided to be one of convenience for the purposes of the European Communities (Free Movement of Persons) Regulations 2015 ('t**he 2015 Regulations**') is a "*nullity in law*". Such a conclusion is consistent neither with the statutory framework governing marriage nor with the fundamental right to marry as guaranteed under the Constitution, the ECHR and the Charter. Furthermore, the Commission very respectfully submits that, depending on the facts of the particular case, family rights and the right to privacy may have to be considered as part of the decision making process irrespective of marital status of the parties asserting those rights - even in circumstances where the parties are not and never were married. It would follow that, in circumstances where it has been decided that a marriage is a "*sham marriage*", family rights and the right to privacy should still be considered when applying the legal test governing the decision in question and on the material before the decision maker.

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[1] *MFKS & Others v. Minister for Justice* [2018] IEHC 222 ('the Judgment').
[2] *Izmailovic v. Commissioner of An Garda Síochána & Ors* [2011] 2 I.R. 522.
[3] *MFKS & Others v. Minister for Justice* [2019] IESCDET 54, paragraph 10.
[4] *MFKS & Others v. Minister for Justice* [2019] IESCDET 54, paragraph 10.

II. The Judgment under Appeal

5. In the judicial review proceedings before the High Court, the appellants challenged the deportation order made by the Minister on 30th June 2017 and communicated to the first named appellant on 7th July 2017 ('**the Deportation Decision**').

6. Neither the first named appellant nor the appellants in general had challenged an earlier decision of the Minister, made on 20th March 2017, refusing the first named appellant a residence card for a family member of a Union citizen under Regulation 27(1) of the 2015 Regulations ('**the EU Residence Decision**').

7. The High Court examined the application on a number of grounds.

8. First, the High Court rejected the applicants' argument that the Minister should have revisited the facts of the case for the purposes of the decision on the issuing of a deportation order.[5]

9. Secondly, the High Court concluded that, because the appellants had not challenged the Minister's decision that the marriage was one of convenience, it was not open to the appellants to challenge that finding in the judicial review proceedings.[6]

10. Thirdly, the High Court found that, where the Minister had concluded that a marriage was one of convenience and "*the applicants' relationship is based on fraud*"[7]:

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[5] *MFKS & Others v. Minister for Justice* [2018] IEHC 222 ('the Judgment'), paragraph 13. The Commission notes that the Respondent makes reference to this Court's judgment in *Luximon & Anor v. Minister for Justice and Equality* [2018] IESC 24 in this regard: Respondent's Submissions, paragraph 15. It is indeed the case that, in its judgment in *Luximon*, the Court stated (at paragraph 86) that it would be "*unreal and unnecessary for the Minister to have to make more than one such decision on Article 8 private life and family rights*". However, the Commission notes that, in the decision of 20 March 2017 refusing the first named appellant a residence card, it is expressly stated that that decision "*does not interfere with any rights which you may have under the Constitution or Article 8 of the European Convention on Human Rights*" and that in any subsequent proposed decision where such interference may arise, "*full and proper consideration will be given to these rights*".

[6] Judgment, paragraph 14.

[7] The Minister does not appear to have used the term 'fraud' in the Decisions themselves. In this regard, it may be noted that the 2004 Directive distinguishes between fraud and abuse of rights: see Communication from the Commission to the Parliament and Council, COM(2009) 31 final, page 15.

> *…no "rights" can arise from such a relationship; and an absolutely necessary consequence is that no obligation arises under the Constitution, the ECHR or EU law to consider any such "rights".*

In support of its position in this regard, the High Court cited the admissibility decision of the European Court of Human Rights ('**ECtHR**') in *Schrembri v. Malta*.[8]

11. The Court went further and found that the application for judicial review constituted "*an abuse of process*":

> *Given the finding that the marriage was a fraud on the immigration system, the finding of an abuse of process is so whether or not the "marriage" is technically valid in law. But if I am wrong about that I will go on to consider the question of whether a marriage of convenience is a nullity in law.*[9]

12. In the alternative, insofar as the relationship between the first and third named appellants was concerned, the Court expressed the view that the Minister had in fact considered that issue and had held it to be "*of insufficient weight*".[10]

13. Fourthly, the High Court concluded that the Civil Registration (Amendment) Act 2014 ('**the 2014 Act**') "*provides that a marriage of convenience is a nullity*".[11] The 2014 Act was, according to the Court, "*necessitated by the troubling consequences of the decision of Hogan J. in Izmailovic*".[12] The Court criticised the judgment of the High Court in *Izmailovic* on a number of grounds: that it wrongly placed emphasis on English authorities; that it was based on a fundamental misreading of this Court's judgment in *H. v. S.;* that the High Court had failed to refer to the judgment of the High Court in *Kelly v. Ireland*; and, more generally, that the High Court erred in its analysis of the effect of an abuse of rights and in failing to have regard to the "*damaging consequences that were going to be unleashed by the decision*". For these reasons, the High Court

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[8] Judgment, paragraph 16.
[9] Judgment, paragraph 17.
[10] Judgment, paragraph 18.
[11] Judgment, paragraph 19.
[12] Judgment, paragraph 19.

disagreed with the conclusions of the High Court in *Izmailovic* and expressed the view that "*a marriage of convenience was void* ab initio, *even prior to the 2014 Act*".[13]

14. Finally, the Court concluded that it was appropriate to refuse relief on a discretionary basis because the appellants had been guilty of an egregious lack of candour and wrongful conduct in their interactions with the Minister. While acknowledging that it was "*certainly not possible to determine in any individual case that proceeds by way of judicial review whether the EU spouse's motivation is entirely voluntary or mercenary or whether on the other hand there is any element of coercion*", the Court nonetheless proceeded to express its hope that the Garda authorities "*would be in a position to make contact with the second named applicant.... to ensure that all appropriate support be made available and that similar support would be put in place for women in any other such case*".[14] The Court then referred to the position of persons who are trafficked for the purposes of marriages of conveniences and to a newspaper article on this issue. According to the Court, these matters supported "*an interpretation of the law of nullity of marriage that firmly closes the door on such an abuse of human rights, of the institution of marriage, of the immigration system and of the legal process*".[15]

15. While the judicial review proceedings challenged only the decision of the Minister to deport the first named appellant, the judgment of the High Court appears to address certain other matters of fact and law that go beyond the scope of the decision. The position adopted by the Minister in these proceedings in certain important respects also appears to go further than the position adopted by the Minister in the decisions concerning the first named appellant. In particular, neither the Deportation Decision the subject of these proceedings nor the EU Residence Decision referred to, or placed any reliance on, the provisions of Civil Registration (Amendment) Act 2014, which features centrally in the judgment under appeal. The Commission respectfully submits that it is difficult to distinguish between those elements of the judgment which may properly be

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[13] Judgment, paragraph 28.
[14] Judgment, paragraph 30. The second named appellant had sworn an affidavit in the proceedings in which she disputed the conclusion that the marriage was one of convenience: Affidavit of A.F. sworn on 7 August 2017.
[15] Judgment, paragraph 31.

regarded as *obiter dicta* and those which may not, particularly on the issue of principle of the validity of marriages of convenience.

16. In the Commission's submission, the issue of the validity of marriages of convenience turns on the proper interpretation and application of the legislative framework governing marriages of convenience in the State. This framework must be understood in light of the protection of the fundamental right to marry under the Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights. The Commission will address this question first.

III. The Fundamental Right to Marry under the Constitution, the ECHR and the Charter

17. The fundamental right to marry is guaranteed under the Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights. While this right is not absolute and may be regulated by the legislature in accordance with the common good, any limitations on the right to marry must be provided for by law and must be proportionate.

A. The Constitution of Ireland

18. The constitutional institution of marriage is enshrined in Article 41 of the Constitution which has been amended significantly over time. Under Article 41.4, introduced by the Thirty-fourth Amendment to the Constitution, marriage "*may be contracted in accordance with law by two persons without distinction as to their sex*". In Article 41.3.1°, the State "*pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack*". The Family in turn is recognised as "*a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law*".[16] The strength of the constitutional protection of the institution of marriage is reflected in the fact that the Constitution itself lays down the conditions for the dissolution of marriage.[17]

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[16] Article 41.1.1°.
[17] Article 41.3.2° and 41.3.3° (as amended by the recent Thirty-eighth Amendment to the Constitution).

19. As well as protecting the institution of marriage, the Constitution also protects the personal right to marry. Under Article 40.3.1°, the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. The Irish courts have long recognised the right to marry as one of the unenumerated personal rights guaranteed by Article 40.3.1°.[18] In accordance with well-established principles, any limitations on such rights must be proportionate. In line with the *Heaney* test, they must be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; they must impair the right as little as possible; and they must be such that their effects are proportional to the objective.[19]

20. Article 40.1, which provides that all citizens "*shall, as human persons, be held equal before the law*", is also important in this context. As this Court held in *N.H.V. v. Minister for Justice*, "*the obligation to hold persons equal before the law 'as human persons' means that non-citizens may rely on the constitutional rights, where those rights and questions are ones which relate to their status as human persons, but that differentiation may legitimately be made under Article 40.1 having regard to the differences between citizens and non-citizens, if such differentiation is justified by that difference in status*".[20] As the right to marry so clearly relates to non-citizens' status as human persons, the Commission submits that non-citizens are entitled to invoke and enjoy this constitutional right.[21]

21. In its judgment in *H.A.H. v. S.A.A.*, this Court has provided an important analysis of the contemporary constitutional conception of marriage.[22] In *H.A.H.*, the Court had to consider whether the State was obliged to recognise a foreign marriage that was polygamous in nature. While concluding that recognition of an actually polygamous marriage would be contrary to a fundamental constitutional principle and therefore contrary to public policy, the Court held that a potentially polygamous marriage was

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[18] *Ryan v. Attorney General* [1965] IR 294, 313; *O'Shea v. Ireland* [2007] 2 IR 313, 324.
[19] *Heaney v. Ireland* [1994] 3 I.R. 593; *Re Article 26 and ss 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *Damache v DPP & Others* [2012] 2 IR 266; *Leech v Independent Newspaper (Ireland) Ltd* [2015] 2 IR 214; *P. v. Minister for Justice* [2019] IESC 47.
[20] *N.H.V. v. Minister for Justice* [2018] 1 IR 246.
[21] On the entitlement of non-citizens to invoke the family rights under Article 41, see *Nottinghamshire County Council v. B.* [2013] 4 IR 662.
[22] *H.A.H. v. S.A.A.* [2017] 1 IR 372.

capable of being recognised as legally valid in the State and could be recognised as of the date of inception. In contrast to the present case, which is concerned with the validity and effect of a marriage concluded in accordance with Irish law, *H.A.H.* was concerned with a question of conflict of laws concerning the recognition of a foreign marriage. Nevertheless, many of the Court's statements of principle are of general application.

22. In the leading judgment, O'Malley J. traced the changing legal conception of marriage over time and underlined the importance of the amendments to the Constitution – in particular, the introduction of no-fault divorce and same-sex marriage – in defining the current legal institution of marriage, which, O'Malley J said, could no longer be described "*in terms of traditional Christian doctrine*".[23] This did not, however, mean that the concept of marriage no longer had a legal or definite meaning. As O'Malley J observed:

> *Despite the factual reality that many couples do not choose to marry, marriage remains a central feature of Irish life for the majority. The constitutional pledge to guard the institution of marriage with special care remains in place and must be accorded full respect.*[24]

23. The Court emphasized that the introduction of the right to same-sex marriage did not create a separate vision of marriage for same-sex couples but instead included same-sex couples within an existing structure which was based on the core assumption of "*a union between two people*".[25] The Court expanded on this concept in the following passage:

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

[23] [2017] 1 IR 372, 410.
[24] [2017] 1 IR 372, 410-411.
[25] [2017] 1 IR 372, 411.

consequences of the status of marriage in the fields of taxation, social welfare and succession law flow from that equality and mutuality of commitment.[26]

According to O'Malley J., it is this model of marriage, which is grounded in the concept of equality under Article 40.1, that must be guarded with special care.

24. While the Respondent has referred to *H.A.H.* in its submissions as illustrating "*the matters of which a genuine and subsisting marriage is made in Irish law, as a matter of constitutional law*",[27] the judgment itself does not use such terminology or indeed place reliance on the further factors such as cohabitation and joint decision-making relied upon by the Respondent in defining the institution of marriage.[28] The judgment focuses instead on compliance with the requirements of the law, capacity and consent, and equality and mutuality of commitments.

25. There are three other elements of the judgment in *H.A.H.* which are of particular importance in the context of the present case:

    - First, the Court made it clear that, even in the context of recognition of foreign marriages, public policy would provide a proper basis for non-recognition only in cases where the foreign marriage was "*fundamentally at variance with the Irish legal order*".[29] In the Commission's submission, the judgment does not support the Respondent's submission that it would be "*contrary to public policy and/or the interests of the common good*"[30] for the Court to hold that the first and second named appellants' marriage – which, as the Respondent appears to accept,[31] was validly contracted in accordance with the Irish law in force at the relevant time – is one to which constitutional protection extends, at the very least in the absence of a clear statutory basis for doing so.
    - Secondly, in both the judgments of O'Malley J. and Clarke C.J., the Court emphasized that it was a matter for the Oireachtas to determine the detailed rules governing the recognition of foreign marriages, including non-recognition on

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[26] [2017] 1 IR 372, 411 (emphasis added).
[27] Respondent's Submissions, paragraph 24.
[28] Respondent's Submissions, paragraph 31.
[29] [2017] 1 IR 372, 380-381.
[30] Respondent's Submissions, paragraph 33.
[31] Respondent's Submissions, paragraph

the grounds of public policy.[32] In a similar way, the detailed regulation of marriage *as a matter of Irish law* is a matter for the Oireachtas and has been the subject of detailed legislation, in particular in the Civil Registration Act 2004 (as amended). Such legislation is of course subject to constitutional limitations including those imposed by Article 41, in particular in the context of dissolution of marriage. It follows that questions of the validity of a domestic marriage must be assessed first and foremost by reference to that legislative framework, interpreted in light of the Constitution, the ECHR and the Charter.

- Thirdly, both O'Malley J. and Clarke C.J. underlined the complexity of the legal relationship of marriage, whether foreign or domestic, and the legal consequences of that relationship over time, including for third parties such as children. The Court acknowledged that a foreign marriage may be recognised for certain purposes but not for others[33] with this in mind. The Commission respectfully submits that the nuanced approach of the Court in *H.A.H.* is in contrast with the approach of the High Court in the judgment under appeal in this regard.

26. In the Commission's submission, while the earlier authorities on marriage – to which reference has been made in these proceedings – must now be understood in light of the revised text of Article 41 and this Court's judgment in *H.A.H.*, these authorities underline both the significance and solemnity of the constitutional institution of marriage validly contracted in accordance with Irish law, and the very real challenges facing public authorities and the courts in establishing the intention of parties contracting a marriage.

27. In *H. v S.*,[34] the petitioner sought a declaration of nullity in respect of her marriage to the respondent whom she had met while on holidays in Portugal. The High Court had heard evidence from the petitioner but not the respondent. Although it was clear that a significant factor in the parties entering into marriage at the particular time was for immigration purposes i.e. to facilitate the husband's admission to the United States, on the evidence of the petitioner, the High Court took the view that the relationship could

[32] [2017] 1 IR 372, 382-385 (Clarke C.J.), 415 (O'Malley J.).
[33] [2017] 1 IR 372, 382 (Clarke C.J.); 415 (O'Malley J.).
[34] *H. v S.*, Supreme Court, unreported judgment, April 3, 1992.

not "*be reduced to such simplistic terms*".[35] On appeal, the Supreme Court emphasized that irresponsibility, immaturity, infatuation or indeed an agreement to divorce if things did not work out were not grounds for nullity.

28. In *Kelly v. Ireland*,[36] the applicant – a Sudanese citizen by birth who had married an Irish citizen in London and thereafter obtained an Irish passport – successfully challenged a decision of the Minister for Foreign Affairs to impound her Irish passport and to declare her not to be an Irish citizen. Section 8(1) of the Irish Nationality and Citizenship Act 1956, which was then in force,[37] provided that a woman "*who is an alien at the date of her marriage to a person who is an Irish citizen (other than by naturalisation) shall not become an Irish citizen merely by virtue of her marriage but may do so by lodging a declaration in the prescribed manner with the Minister...*". In this case, the Court had the benefit of evidence from both parties to the marriage. The applicant's own evidence was that she had married in order to obtain an Irish passport but that she would not have married if she had not liked the man in question. The husband's evidence was that he had had no relationship with the applicant and had only ever met her at the registry office. While accepting that obtaining an Irish passport was a very significant factor in the decision to marry, the High Court preferred the evidence of the applicant and concluded that the Respondents had failed to establish that the marriage was a sham. In doing so, Barron J. emphasized that the onus lay on the respondents "*to establish that the marriage was a sham because the parties did not participate in the ceremony in order to become man and wife, but to prevent the applicant from being deported*".[38]

29. Earlier in his judgment in *Kelly v. Ireland*, Barron J. had observed that "*it must be understood that people marry for a great many different reasons*"[39] and referred to the following passage from the judgment of Barrington J. in *R.S.J v. J.S.J.* which merits quotation in this context:

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[35] *H. v S.*, Supreme Court, unreported judgment, April 3, 1992.
[36] *Kelly v. Ireland* [1996] 3 IR 537.
[37] This provision has been repealed by section 4 of the Irish Nationality and Citizenship Act 2001.
[38] [1996] 3 IR 537, 547.
[39] [1996] 3 IR 537, 545.

> *People have entered into a contract of marriage for all sorts of reasons, and their motives have not always been of the highest. The motive for the marriage may have been policy, convenience, or self-interest. In these circumstances it appears to me that one could not say that a marriage is void merely because one party did not love or had not the capacity to love the other.*[40]

This reflects the deeply personal nature of the right to marry – the meaning and significance of which may vary from individual to individual – and its close connection with the related right to private and family life. Any exercise in evaluating the motives of those entering upon marriage inevitably involves value judgments which may be based on, among other things, different personal experiences, cultural norms and societal expectations. In a society which has undergone significant social change in recent times, and is increasingly characterised by values of diversity, pluralism and tolerance, it is particularly important that any such exercise is carried out with care and circumspection and in accordance with clearly defined legal principles. Moreover, there is a very significant difference between a party voluntarily choosing to contract a marriage for particular reasons, whether convenience, self-interest or otherwise, and the phenomenon of forced marriage, to which the High Court makes reference at the end of its judgment. Forced marriage is now proscribed under section 38 of the Domestic Violence Act 2018.

30. In the Commission's submission, these authorities demonstrate that the Irish courts will not lightly intervene to set aside a marriage validly contracted under Irish law by two consenting adults with capacity and that they will be slow to second-guess the motives and intentions of the parties themselves. Moreover, while the cases are so fact-specific that their precedential value may in truth be limited, they do usefully illustrate a deeper underlying problem: whose role is it to determine that a marriage is not valid and how should that determination be made? It will be recalled that, in both *H. v S.* and *Kelly v. Ireland*, the courts had the benefit of oral evidence in determining this question. In light of the serious consequences of a finding of invalidity for the parties' legal status and constitutional rights, it is submitted that any process for the determination of this issue must be carried out in accordance with the constitutional right to fair procedures.[41]

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[40] *R.S.J v. J.S.J.* [1982] ILRM 263, 264.
[41] *Re Haughey* [1971] IR 217.

31. Marriage – as well as being a most important personal relationship for the parties – entails significant rights but also significant responsibilities as a matter of law, not only in the context of family law but also in matters of tax, employment, pensions and succession and indeed immigration. As a result, and as this Court recognised in *H.A.H.*, the effects of any finding of invalidity may be complex and have implications for third parties, including children. This makes it all the more important that any regulation of the validity of marriages of convenience is clearly provided for in law and goes no further than necessary in restricting the fundamental rights of the parties to the marriage and of others who may be affected by the relationship.

B. The Convention and the Charter

32. The constitutional protection of marriage is complemented by the protection of the fundamental right to marry under the ECHR, as given further effect in Irish law through the European Convention on Human Rights Act 2003,[42] and the Charter.[43] Article 12 ECHR provides that men and women of marriageable age "*have the right to marry and to found a family, according to the national laws governing the exercise of this right*". For its part, Article 9 of the Charter provides that "*[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights*". Both instruments recognise that the exercise of this right is a matter first and foremost for domestic law.

33. While, in light of recent amendments to the Constitution (in particular, the introduction of same-sex marriage), the constitutional right to marry extends beyond that guaranteed under the Convention, the jurisprudence which has developed under the Convention

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[42] In accordance with section 3 of the ECHR Act 2003, subject to any statutory provision or rule of law, every organ of the State – which includes the Minister – "***shall perform its functions in a manner compatible with the State's obligations under the Convention provisions***". In addition, under section 2 of the 2003 Act, in interpreting or applying any statutory provision or rule of law, a court "*shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions*".

[43] In circumstances where the first named appellant's residence in the State was primarily based on his status as the spouse of an EU national, the Minister was acting within the scope of EU law such that the Charter is also applicable: Article 51(1), Charter ("*The provisions of this Charter are addressed to ... the Member States only when they are implementing Union law*").

remains of assistance in understanding the scope and limits of the fundamental right to marry.

34. In particular, in *O'Donoghue v. United Kingdom*,[44] the ECtHR considered whether UK legislation that imposed certain additional requirements on persons who wished to marry within the United Kingdom while subject to immigration control was compatible with the Convention. The UK Government had introduced a scheme in 2005 known as the Certificate of Approval scheme. The scheme required that, in order to marry, persons subject to immigration control had to have either have been granted entry clearance for that purpose or a Certificate of Approval. In order to obtain a Certificate of Approval, it was necessary to submit an application form to the Home Secretary with an application fee; an applicant had to have been granted leave to enter or remain in the UK for a period of more than six months, with at least three months remaining at the time of the application. However, the scheme did not apply to persons who wished to marry in accordance with the rites of the Church of England. The scheme was challenged before the UK courts and, in *R (Baiai & Others) v. Secretary of State for the Home Department*,[45] the House of Lords upheld the lower courts' findings that the scheme was disproportionate and infringed Articles 12 and 14 ECHR. The scheme was later amended.

35. In the proceedings before the ECtHR, the first applicant was a British and Irish citizen who had formed a relationship with the second applicant, a Nigerian national who had claimed asylum in the UK, in 2004/2005. Both were practising Roman Catholics. In May 2006, the second applicant proposed to the first applicant and, in July 2007, they applied for a Certificate of Approval and requested an exemption from the fee which they were not in a position to discharge. The application was returned to them because of the failure to discharge the fee. In July 2008, they submitted another application, with the requisite fee, and, upon request, provided further sworn evidence as to their relationship. Following the granting of a Certificate of Approval on 8 July 2008, the applicants eventually married in October 2008.

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[44] *O'Donoghue v. United Kingdom* (Application No. 34848/07), Judgment of the Court (Fourth Section), 14 December 2010 ('*O'Donoghue*').
[45] *R (Baiai & Others) v. Secretary of State for the Home Department* [2008] UKHL 53

36. In its judgment, the ECtHR stated that Article 12 ECHR "*secures the fundamental right of a man and woman to marry and found a family*", noting that "*the exercise of the right to marry gives rise to social, personal and legal consequences*".[46] While acknowledging that the right to marry is "*subject to national laws of the Contracting States*", the Court stated that "*the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired*".[47] In this regard, the Court continued:

> *The Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy. In the context of immigration laws and for justified reasons, the States may be entitled to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage. However, the relevant laws – which must also meet the standards of accessibility and clarity required by the Convention – may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice (.....)*[48]

To this extent, therefore, the Court recognised that States may be entitled to limit the right to marry for the purpose of preventing "*marriages of convenience*". The Court then provided further clarification of the basis on which the right to marry in Article 12 ECHR could be limited:

> *The fundamental nature of the right to marry is reinforced by the wording of Article 12. In contrast to Article 8 of the Convention, which sets forth the right to respect for private and family life, and with which the right "to marry and to found a family" has a close affinity, Article 12 does not include any permissible grounds for an interference by the State that can be imposed under paragraph 2 of Article 8 "in accordance with the law" and as being "necessary in a democratic society", for such purposes as, for instance, "the protection of health or morals" or "the protection of the rights and freedoms of others". Accordingly, in examining a case under Article 12 the Court would not apply the tests of "necessity" or "pressing social need" which are used in the context of Article 8 but would have to determine whether, regard being had to the State's margin of appreciation, the impugned interference has been arbitrary or disproportionate (...).*[49]

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[46] *O'Donoghue*, paragraph 82.
[47] *O'Donoghue*, paragraph 82.
[48] *O'Donoghue*, paragraph 83.
[49] *O'Donoghue*, paragraph 84.

Thus, in summary, any limitations on the fundamental right to marry must respect the essence of the right, must meet the standards of accessibility and clarity required by the Convention, and must not be arbitrary or disproportionate.

37. Turning to assess the particular scheme at issue in the UK case, the ECtHR reiterated that a Contracting State "*may properly impose reasonable conditions on the right of a third country national to marry in order to ascertain whether the proposed marriage is one of convenience and, if necessary, to prevent it*".[50] However, the ECtHR had "*a number of grave concerns*" about the UK scheme on this basis of which it concluded that there had been a violation of Article 12 ECHR.[51] The ECtHR also found that, by reason of the scheme's discrimination on the ground of religion, the scheme was in violation of Articles 9 and 14 read together with Article 12.[52]

38. It is true that, in the context of Article 8 ECHR, the ECtHR has stated that the right to respect for "*family life*" presupposed the existence of a family or at least a potential family relationship. In the case of *E.B. v. France*, which is referred to by the Respondent, the ECtHR referred *inter alia* to "*the relationship that arises from a genuine marriage, even if family life has not yet been fully established*", citing the Court's judgment in *Abdulaziz & Others v. United Kingdom*.[53] At the same time, the ECtHR has long recognised that family life may exist outside marriage[54] and even in circumstances where a relationship has broken down.[55] In the admissibility decision of

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[50] *O'Donoghue*, paragraph 87.

[51] *O'Donoghue*, paragraphs 88-91. First, the scheme, at least as originally adopted, was not based solely on the genuineness of the proposed marriage and "*did not provide for or envisage any investigation into the genuineness of the proposed marriage*". Secondly, the scheme imposed a blanket prohibition on the exercise of the right to marry on all persons in a specified category, regardless of whether the proposed marriage was one of convenience or not; in this regard, it noted that a blanket restriction of this kind impaired the very essence of the right to marry and fell outside Contracting States' margin of appreciation; third, the ECtHR considered that a fixed fee which was not affordable for needy applicants could also impair the essence of the right to marry.

[52] *O'Donoghue*, paragraphs 103-109. In *Ramadan v. Malta*, the ECtHR rejected the applicant's complaint that the revocation of his citizenship – on the basis of a court's finding that his marriage to a Maltese citizen had been contracted for the sole reason of remaining in Malta and obtaining Maltese citizenship – was in violation of Article 8 ECHR: see *Ramadan v. Malta* (Application No. 76136/12), Judgment of the Court (Fourth Section), 21 June 2016.

[53] Respondent's Submissions, paragraph 43 (omitting the final clause). *E.B. v. France* (Application No. 43546/02; *Abdulaziz & Others v. United Kingdom*, Applications no. 9214/80; 9473/81; 9474/81.

[54] *Johnston v. Ireland* (1986) 9 EHRR 203 PC.

[55] *Keegan v. Ireland* (1994) 18 EHRR 342; *Berrehab v. Netherlands* (1988) 11 EHRR 322.

Schembri v. Malta, referred to by the Respondent, the Court's decision was based on the conclusion of the domestic courts that the applicant's marriage was not genuine which, on the basis of the evidence before it, was not "*unreasonable, much less arbitrary*".[56] For this reason, the Strasbourg Court, whose function is not to deal with errors of fact or law of the domestic courts but only violations of the Convention, decided not to intervene and found the case to be inadmissible. However, it may be noted that, even in that admissibility decision, the Court adopted a broad notion of family life in line with its case-law, in particular accepting that "*the existence of a stable union might be independent of cohabitation*".[57] More generally, in a wide range of contexts, the Court has recognised that deeply personal and intimate choices, such as those which may form the basis for a decision to marry, constitute an aspect of the private life, personal autonomy and personal identity of the individual protected under Article 8 ECHR.[58]

39. While the Court of Justice of the European Union has yet to examine Article 9 of the Charter, in the Explanations to the Charter,[59] it is stated that the provision is "*based on Article 12 of the ECHR*" but the wording "*has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family*". The provision "*neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex*" and the right "*is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides*".[60] Article 9 is subject to the general principle of proportionality laid down in Article 52(1) of the Charter. In its judgments in *Metock* and *McCarthy*, the Court of Justice has reiterated that any measure limiting free movement rights on the ground of

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[56] *Schembri v. Malta* (Application No. 66297/13), Decision of the Fourth Section of 19 September 2017, paragraph 53.
[57] *Schembri v. Malta* (Application No. 66297/13), paragraph 47.
[58] See e.g. *Dadouch v. Malta* (Application no. 38816/07); *Parillo v. Italy* (Application No. 46470/11); *Schlumpf v. Switzerland* (Application no. no. 29002/06); *Losonci Rose and Rose v. Switzerland* (application no. 664/06).
[59] 2007/C 303/02.
[60] See also to this effect the Opinion of Advocate General Jääskainen in *Römer v Freie und Hansestadt Hamburg*, C-147/08, EU:C:2010:425, paragraph 174. Article 52(3) of the Charter provides: "*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*"

fraud or abuse of rights, such as marriages of convenience, "*must be proportionate and subject to the procedural safeguards provided for in the directive*".[61]

40. Thus, under both the Convention and the Charter, it is recognised that the exercise of the right to marry is primarily a matter for domestic law. However, as is the case under the Constitution, any limitations on the fundamental right to marry – including in the regulation of marriages of convenience – must be proportionate. Such limitations must be provided for by law and respect the essence of the right and go no further than necessary to meet objectives of general interest or the need to protect the rights and freedoms of others.

IV. The Legislative Framework governing Marriage, including Marriages of Convenience, in Ireland

41. It is in light of these principles that the legislative framework governing marriages of convenience must be examined. There are two pieces of legislation which address marriages of convenience in Ireland: the Civil Registration Act 2004 (as amended by the 2014 Act); and the European Communities (Free Movement of Persons) Regulations 2015 (SI 548/2015). While the judgment under appeal focuses on the 2014 Act, the EU Residence Decision in this case, which concluded that the marriage was one of convenience, was made under the 2015 Regulations, which will be examined first.

42. Before examining these measures, it is instructive to recall that there is no suggestion that the marriage concluded by the appellants – which took place prior to the enactment of the 2014 Act – did not comply with the formal requirements of Irish law. The Minister does not dispute that the first and second appellants "*entered into a marriage on 12 February 2010*".[62] Instead, the Minister's case is that this was "*not a genuine or regular marriage notwithstanding that the marriage ceremony complied with the applicable legal or statutory requirements*".[63] The question is thus whether,

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[61] *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 75; *McCarthy*, C-202/13, EU:C:2014:2450, paragraph 47.
[62] Respondent's Submissions, paragraph 22.
[63] Respondent's Submissions, paragraph 22.

notwithstanding the fact that the marriage complied with the formal requirements of Irish law, these measures provide some basis for the invalidation of the marriage as a matter of law.

A. Marriages of Convenience under the 2015 Regulations

43. The 2015 Regulations give effect in Irish law to the State's obligations under Directive 2004/38/EC ('**the 2004 Directive**'). They were adopted by the Minister in the exercise of the powers conferred under section 3 of the European Communities Act 1972. The 2004 Directive, the EU Citizenship Directive, defines the right of free movement for citizens of the Union and their family members.

44. Article 35 of the 2004 Directive, entitled abuse of rights, permits Member States to *"adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience"*. However, *"any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31"*.[64] The concept of marriage of convenience is referred to in recital 28 to the Directive which provides that, to guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships *"contracted for the sole purpose of enjoying the right of free movement and residence"*, Member States should have the possibility to adopt the necessary measures.[65] Article 35 thus permits, but does not require, Member States to adopt measures to regulate marriages of convenience.[66]

45. In transposing the 2004 Directive, the State chose to adopt such measures.[67] In particular, Regulation 27(1) permits the Minister to revoke, refuse to make or refuse to grant certain rights where he decides, in accordance with the Regulation, that *"the right,*

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[64] Articles 30 and 31 lay down requirements to notify affected persons of decisions, of the reasons for those decisions, and of the entitlement to appeal the decisions.
[65] Emphasis added.
[66] For a valuable analysis of this provision and the 2004 Directive generally, see Guild, Peers and Tomkin, *The EU Citizenship Directive: A Commentary* (OUP, 2014).
[67] In the original regulations adopted to transpose the Directive, more limited provision was made for marriages of convenience: European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 226/2006), Regulation 24.

entitlement or status, as the case may be, concerned is being claimed on the basis of fraud or abuse of rights". Regulation 27(2) entitles the Minister to make inquiries in this regard where he suspects, on reasonable grounds, that a right has been claimed or obtained on grounds of fraud or abuse of rights. In accordance with Regulation 27(3), where the Minister proposes to exercise his powers under this Regulation, the Minister must give notice in writing to the person concerned, setting out the reasons for his proposal, and give the person concerned an opportunity to make any submissions in this regard which will be considered by the Minister.

46. Regulation 28 deals specifically with marriages of convenience. Under Regulation 28(1), the Minister, *in making his or her determination of any matter relevant to these Regulations*, "*may disregard a particular marriage as a factor bearing on that determination where the Minister deems or determines that marriage to be a marriage of convenience*".[68] Regulation 28(6) defines a marriage of convenience as "*a marriage contracted, whether inside or outside the State, for the sole purpose of obtaining an entitlement*" under the 2004 Directive, the 2015 Regulations or any measure adopted by a Member State to transpose the 2004 Directive or "*any law of the State concerning the entry and residence of foreign nationals in the State or the equivalent law of another state*". Regulation 28(5) lists certain factors to which the Minister shall have regard in determining whether a marriage is one of convenience. In accordance with Regulation 28(2), where the Minister has reasonable grounds for considering that the marriage is a marriage of convenience, "*he or she may send a notice to the parties to the marriage requiring the persons concerned to provide, within the time limit specified in that notice, such information as is reasonably necessary, either in writing or in person, to satisfy the Minister that the marriage is not a marriage of convenience*".

47. In its recent judgment in *Asif v. Minister for Justice*, the High Court (Keane J.) rejected an argument that Regulations 27 and 28 of the 2015 Regulations "*constitute an attack on the institution of marriage, contrary to Art. 41.3.1° of the Constitution*" and found that "*the exercise of those powers is not a usurpation of any judicial function, contrary to Art.34.1 of the Constitution*".[69]

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[68] Emphasis added.
[69] *Asif v. Minister for Justice* [2019] IEHC 616, paragraph 72.

48. The European Commission has provided detailed guidance on the transposition and implementation of the 2004 Directive, including in the context of marriages of convenience. In its 2009 Communication, the Commission distinguished between the concepts of fraud and abuse in this context. According to the Commission, a marriage "*cannot be considered as a marriage of convenience simply because it brings an immigration advantage or indeed any other advantage*" and the quality of the relationship is "*immaterial to the application of Article 35*".[70] Moreover, measures adopted by Member States to fight against marriages of convenience "*may not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights*"; they must not "*undermine the effectiveness of Community law or discriminate on grounds of nationality*".[71] The Commission then set out a set of indicative criteria which suggest that there is or is not likely to be an abuse of rights. Notably, the Commission emphasized that "*the burden of proof lies on the authorities of the Member States seeking to restrict rights under the Directive*" and that investigations – which may involve a separate interview with each of the spouses – must be carried out in accordance with fundamental rights, in particular Articles 8 and 12 ECHR.[72] In its 2014 Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens,[73] the Commission has provided further guidance to Member States in this regard, again laying emphasis on the importance of complying with fundamental rights, including the rights of the child in appropriate cases.

49. Leaving aside any issue as to the process adopted by the Minister in a particular case, in the Commission's submission, a determination by the Minister that a marriage was one of convenience for the purposes of the 2014 Regulations is limited in its effect. It applies only to a decision of the Minister under the 2014 Regulations (i.e. relating to the free movement of EU citizens and their family members) and, for this purpose, merely entitles the Minister to "*disregard*" such marriage as a factor bearing on such a

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[70] Communication from the Commission to the Parliament and Council, COM(2009) 31 final, page 15.
[71] COM(2009) 31 final, page 15.
[72] COM(2009) 31 final, page 17.
[73] COM/2014/0604 final; SWD(2014) 284 final.

decision. It is *not* a finding of general application that the marriage is void or invalid for all purposes. While the Minister may be entitled to *have regard to* this determination in other decisions relating to the person(s) concerned, the determination for the purposes of the 2014 Regulations does not render a marriage, otherwise properly concluded in accordance with Irish law, "*a nullity in law*" or void *ab initio*.

50. Indeed, notwithstanding the more far-reaching argument adopted by the Respondent and the High Court in these proceedings (i.e. that a determination by the Minister for these purposes renders a marriage a nullity in law), the Minister did not, in the EU Residence Decision, adopt the position that the marriage was void or invalid for all purposes. Not only was the Decision clearly expressed to be in accordance with Regulations 27 and 28 of the 2015 Regulations and Article 35 of the Directive, the Minister confirmed that the decision to refuse the first named appellant a residence card for a family member of a Union citizen did not "*interfere with any rights which you may have under the Constitution or Article 8 of the European Convention of Human Rights*" and that, in any subsequent proposed decision where such interference may arise, "*full and proper consideration will be given to these rights*".[74].

51. In this regard, it is important to recall that neither the 2014 Regulations, nor the 2004 Directive on which they are based, purport to regulate matters of substantive family law, including the law of marriage, which remain outside the scope of EU competence. As a matter of Irish law, these matters are governed primarily by the Civil Registration Act 2004 (as amended). Similarly, neither Article 35 of the 2004 Directive nor the relevant provisions of the 2015 Regulations confers on the Minister any power to make a finding of general application that a marriage is void or invalid. Indeed, having regard to the division of competence between the Union and the Member States in this field, and the requirements of the Constitution, Article 12 ECHR and Article 9 of the Charter as set out above, it must be open to question whether the Directive or Regulations could do so. If a decision under the 2015 Regulations had such an effect, it would arguably undermine the detailed legislative regime governing marriage enacted by the

[74] Affidavit of Alan King sworn on 1 December 2017, Exhibit AK9.

Oireachtas, under the Constitution, in the form of the Civil Registration Act 2004 (as amended).[75]

52. In conclusion, a decision by the Minister that there has been a marriage of convenience, under and for the purposes of the 2015 Regulations, does not have the effect of rendering any such marriage void *ab initio* or "*a nullity in law*". The 2015 Regulations contain no such provision to this effect and, in the EU Residence Decision adopted thereunder, the Minister made no such claim.

B. Civil Registration Act 2004 (as amended)

53. While a central finding in the judgment under appeal was that the Civil Registration (Amendment) Act 2014 provided that "*a marriage of convenience is a nullity*", as noted above, in neither the EU Residence Decision nor the Deportation Decision did the Minister make any reference to, still less place any reliance on, the provisions of the 2014 Act or the 2004 Act which it amended. Moreover, as also noted above, the marriage in this case took place a number of years before the enactment of the Civil Registration (Amendment) Act 2014 and its validity must be assessed first and foremost by reference to the law applicable at the time of its conclusion.[76] For these reasons alone, it is submitted that the High Court judgment was in error and ought not to be upheld on appeal.

54. Even leaving aside these fundamental difficulties, it is submitted that the High Court was in any event incorrect in its conclusion that the 2014 Act provides that "*a marriage of convenience is a nullity*". As the Appellants have pointed out, the 2014 Act contains no provision to this effect.[77]

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[75] In its recent judgment in *Asif v. Minister for Justice*, the High Court has described the regime under the 2015 Regulations and the 2004 Act as amended) as "*separate and mutually consistent legal provisions*": *Asif v. Minister for Justice* [2019] IEHC 616.
[76] See, however, *Asif v. Minister for Justice* [2019] IEHC 616, paragraphs 55-62.
[77] Appellants' Submissions, paragraph 46.

55. Instead, in the 2014 Act, the Oireachtas chose to adopt measures intended *to prevent* such marriages before they occur, rather than purporting to invalidate marriages after they have taken place. It put in place a system for prior scrutiny of intended marriages, with special provision for objections based on the concern that a marriage would be one of convenience.

56. A marriage of convenience is defined in section 2(1) of the 2004 Act (as amended by the 2014 Act) in the following terms:

> *a marriage where at least one of the parties to the marriage —*
> *(a) at the time of entry into the marriage is a foreign national, and*
> *(b) enters into the marriage solely for the purpose of securing an immigration advantage for at least one of the parties to the marriage*

Section 2(2)(g) provides that, for the purposes of the Act, there is an impediment to a marriage if "*the marriage would constitute a marriage of convenience*". The other impediments provided for in section 2(2) relate to issues of capacity, bigamy and prohibited degrees of relationship. Such impediments may form the basis for an objection to an intended marriage.

57. Section 58 of the 2004 Act (as amended by the 2014 Act) makes provision for objections to marriage and sets out a detailed procedure for the consideration of such objections. Under section 58(4), if the registrar who receives an objection believes "*that more than a minor error or misdescription exists in the relevant notification under section 46 and that the possibility of the existence of an impediment to the intended marriage concerned needs to be investigated*", he or she shall refer the objection to an tArd-Chláraitheoir for consideration and, pending the decision of an tArd-Chláraitheoir, he or she shall notify the parties to the intended marriage, request the return or suspend the issue of the relevant marriage registration form, notify the solemniser of the marriage and direct that person not to solemnise the marriage until the investigation is completed. The solemniser must comply with such a direction. Section 58(4A) permits the powers of an tArd-Chláraitheoir under this section to be exercised by a Superintendent Registrar where the objection is based on an alleged marriage of convenience. Section 58(4C) lists factors to which the registrar shall have

regard in forming an opinion under section 58(4A) and in referring a matter to the Superintendent Registrar.

58. In accordance with section 58(5), an tArd-Chláraitheoir or the Superintendent Registrar, as the case may be, must "*make a decision on the objection as soon as practicable*". If he/she decides that there is an impediment to marriage, section 58(7) obliges an tArd-Chláraitheoir or the Superintendent Registrar, in the case of marriages of convenience, to advise the registrar of that decision and the reasons therefor. The registrar must then notify the parties to the marriage that the marriage will not proceed and must "*take all reasonable steps to ensure that the solemnisation does not proceed*". In addition, in the case of a marriage of convenience, the Superintendent Registrar must notify the Minister for Justice and Equality. Finally, if, notwithstanding the steps taken by the registrar, the marriage is solemnised, section 58(8) provides that "*the marriage shall not be registered*".

59. In light of the serious implications of a decision to uphold an objection under section 58, provision is made for an appeal to the courts. Under section 58(9), a party to a proposed marriage may appeal to the Circuit Family Court against the decision of an tArd-Chláraitheoir (or the Superintendent Registrar as the case may be) in relation to the marriage under subsection (7).

60. Thus, while the legislation makes detailed provision for the prevention of marriages of convenience, it does not purport to establish any basis, mechanism or jurisdiction for the invalidation of a marriage validly contracted and registered in accordance with law on the ground that the marriage was a marriage of convenience. The 2004 Act (as amended) operates on the premise that a marriage, validly concluded in accordance with its requirements, is a valid marriage for the purposes of Irish law and, on this basis, entitled to constitutional protection. In the Commission's submission, this reflects the significance and solemnity of the constitutional institution of marriage, as described above, which may only be dissolved in accordance with strict conditions laid down in the Constitution and in legislation.

61. In circumstances where the Oireachtas has so clearly chosen to regulate marriages of convenience in this manner, it is submitted that there is no basis for the High Court's conclusion that the 2014 Act renders a marriage – which has been validly concluded

but which is subsequently determined by a Minister to have been "*a marriage of convenience*" – a nullity in law or void *ab initio*. Nor, it is respectfully submitted, would it be appropriate for the courts to recognise a new and freestanding ground for the invalidation of a marriage, in the absence of a clear and firm basis in the Constitution or otherwise in law. Having regard to the protection of marriage under the Constitution, the Convention and the Charter, any limitations on the right to marry must respect the essence of that right, must be provided for in law and must be proportionate. As this Court's judgment in *H.A.H.* signals, there may be significant unintended consequences – including for third parties such as children – to a simple finding, without nuance or qualification, that a marriage is invalid or void *ab initio*. For these reasons, it is submitted that a judicially developed doctrine of invalidity – of the kind envisaged in the judgment under appeal – would not be consistent with the requirements of the Constitution, the Convention and the Charter.

62. It is true that the impediment relating to marriages of convenience found in the 2014 Act discriminates, by its very nature, between Irish citizens and foreign nationals and indeed between foreign nationals with a secure immigration status and those without such a status. Such a distinction may be regarded as justified in light of the State's pledge to guard with special care the institution of Marriage, on the one hand, and the State's entitlement, as recognised in *NHV*, to differentiate between citizens and non-citizens if such differentiation is justified by their difference in status, on the other.

63. However, a doctrine of the kind proposed by the High Court would be significantly more far-reaching than the system provided for under the 2014 Act. Whereas the 2014 Act allows the State to intervene to prevent suspected marriages of convenience before they occur, such a doctrine would render marriages validly concluded under the law vulnerable to attack on the basis that they might be marriages of convenience long after their conclusion. This would have the effect of creating two tiers of marriage in the State. On the one hand, there would be marriages between Irish citizens or between Irish citizens and foreign nationals with secure or permanent residence status in the State. Such marriages would not at any stage be open to challenge on the basis that they were marriages of convenience. On the other hand, the validity of marriages in which at least one of the parties was a foreign national without secure or permanent residence status in the State would be open to challenge, potentially indefinitely, on the basis that

they might be marriages of convenience. In the Commission's submission, such a system would run contrary to the institution of marriage as protected under the Constitution and would infringe the fundamental right to marry as well as the constitutional guarantee of equality.

64. Of course, even if, contrary to the Commission's submission, the High Court were correct to conclude that a marriage of convenience so found was a nullity or void *ab initio*, this would not in and of itself mean that the parties to such a marriage could not rely on their private and family rights as guaranteed under the Constitution, Article 8 ECHR or Article 7 of the Charter, not least because the legal test under Regulation 27 of the 2015 Regulations is different to that under section 3(6) of the Immigration Act, 1999 (as amended). Whereas the conditions precedent to establishing a legal right to residency under Regulation 27(1) of the 2015 Regulations (as required by EU law) are expressly linked to the marriage or civil partnership status of the parties, the same is not true of the different test prescribed in section 3(6) of the Immigration Act, 1999 as governing consideration of whether or not to deport. The latter requires a consideration of "*family and domestic circumstances*". Furthermore, it is considered to be well established as a matter of Irish law that such rights require to be considered in the decision making process on *East Donegal* principles.

65. While the Appellants have taken issue with the manner in which the Minister has done so, in particular by reason of the Minister's reliance on the determination in the EU Residence Decision to the effect that the marriage was one of convenience in the context of the Deportation Decision, it nonetheless appears that the Minister did consider such rights in the Deportation Decision. The approach adopted by the Minister on the ground thus seems to be somewhat in tension with the more radical argument advanced on his behalf in these proceedings where it is contended that "*no rights*" arise from a relationship found to constitute a marriage of convenience and that there is as a consequence "*no obligation on the Minister to consider any such 'rights'*".[78] In the Commission's submission, such an argument is difficult, if not impossible, to reconcile

[78] Respondent's Submissions, paragraph 21.

with the system for protection of fundamental rights under the Constitution, the Convention and the Charter.[79]

[79] Somewhat similar arguments to the effect that a certain category of individuals were not entitled to rely on fundamental rights in the context of immigration decisions were advanced and rejected by the Supreme Court in *Luximon & Anor v. Minister for Justice and Equality* [2018] IESC 24.

V. Conclusion

66. For all these reasons, and for such further reasons as may be offered in oral submission, the Commission respectfully submits that the High Court erred in its conclusion that the effect of a decision by the Minister that there is a marriage of convenience for the purposes of the 2015 Regulations is that such a marriage is a "*nullity in law*" or void *ab initio*.

David Fennelly BL
Siobhán Phelan SC

13 September 2019

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