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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Mbebe's application [2008] NIQB 108

AN APPLICATION FOR JUDICIAL REVIEW BY NONZUKISO MBEBE

GILLEN J

Application

[1] The applicant is a female South African national and the respondent is the UK Immigration Service. She seeks judicial review of a decision by the respondent on 28 July 2007 to declare her an unlawful entrant who was subject to removal and detention. By way of an amended Order 53 statement of 30 January 2008 the applicant further seeks a declaration that Local Instruction 1/2007 issued by the respondent is unlawful. Her grounds are essentially that her detention is in breach of EC law and in particular contrary to Directive 2004/38 EC ("the Directive") and the Immigration (European Economic Area) Regulations 2006. Finally the applicant, through her counsel Mr Lavery asserts that the respondent has acted in bad faith in processing her case.

Background

[2] The applicant is the holder of a UK residence card valid until 30 January 2011. She has undergone a ceremony of marriage in Dungannon on 30 July 2004 with Bruno Parente a Portuguese national who, she alleges, is working and living in the UK. The respondent asserts that this was a sham marriage of convenience and the residence card is invalid.

[3] There was evidence that prior to the date of her detention the applicant had entered the UK on a number of occasions in particular from Paris at Belfast International airport on 5 July 2007. She had subsequently travelled to Scotland. On 28 July 2007 at 7.00 am the applicant was stopped by Immigration Officers at Belfast Docks having arrived from Scotland. She presented a South African passport which contained a 1 year EEA family permit issued in Pretoria valid from 4/10/04 - 4/10/05. On the passport was a Home Office stamp granting permission to remain until 30 September 2011. The permit was based on her marriage to Bruno Parente. She was questioned and served with a form IS151A, Notice of a Person Liable to Removal, Form IS91R, Reasons for Detention and Bail Rights and Notice of Immigration Decision. The notices were served on the basis she was a person who had used deception in seeking leave to remain.

[4] The applicant contacted her legal representative Ms Muldoon of Drinan & Co Solicitors who wrote to the respondent challenging the lawfulness of the applicant's detention on the basis, inter alia, that she was entitled to reside in the UK by virtue of rights derived under EC law.

[5] The respondent, by way of letter dated 29 July 2007 signed by A Garrett Immigration Officer, challenged the validity of the residence card of the applicant on grounds that:

(a) the applicant has not resided with her husband in this country for a number of years;

(b) she is unable to provide any evidence of a subsisting relationship;

(c) she is unable to provide any evidence that her husband is exercising his treaty rights by residing in the UK.

[6] That letter went on to assert that the applicant had failed to declare the following matters:

(a) she had previously entered the Republic of Ireland and claimed asylum in the identity of Ziyanda Moyo date of birth 23 March 1976;

(b) a Deportation Order was issued by the Irish Authorities on this identity on 20 September 2001;

(c) she entered the UK unlawfully across the Irish land border on or around January 2004;

(d) the Irish authorities issued a further deportation order on 22 April 2004 in the name of Lark Nonzukiso Mbebe date of birth 23 March 1976;

(e) the applicant has therefore previously issued a "false name, varied her own name, and her EEAP has been obtained by giving a variation of her year of birth".

[7] It is also right to observe at this stage that I consider the respondent does have cause for suspicion as to whether or not the marriage is a genuine or a sham marriage. There is evidence before me on behalf of the respondent that the applicant made misrepresentations during the course of her interview on 28 July 2007 with Mr Garrett an immigration officer present and on duty at Belfast docks on the relevant date in Belfast. She misrepresented to the immigration officer that she lived with her husband in Carrickfergus and Dungannon and had done so since 2004. She also misrepresented that her husband had not stopped living with her and now was briefly in Portugal with her daughter for the previous 10 days. These assertions are untrue. In her affidavit of 14 September 2007, the applicant admits to these false representations. At paragraph 20 she stated:

> "As I did not want Mr Garrett phoning my husband I said he was in Portugal. I said he was there with my daughter. My daughter is in fact currently in Bradford with my friend Tuleka who agreed to look after her while I sorted out my work for university . . .
>
> 21. I did not give incorrect details to Mr Garrett to benefit in any way. There would be no benefit in the details I gave to Mr Garrett. I did not give him incorrect details to try and deceive him in any way. I gave these details because I simply found it impossible to discuss the incredibly painful circumstances of my marriage to Mr Garrett in front of him and in front of other immigration officers and in front of other passengers and because I feared the panic of my friend if phoned by Mr Garrett."

[8] Mr Garrett also relied upon two further conversations which he had on 28 July 2007. First, he had spoken to an individual William Seville who had arrived at Belfast Docks to collect the applicant at 8.25 am. According to Mr Garrett's affidavit, when he asked Mr Seville if he knew the applicant was married he replied "I think she is, I have been told he lives in Canada by Nonzukiso. I have seen two men once".

[9] Mr Garrett also avers that he spoke to an individual named Sithembela Silolo, a South African national born on 25 February 1980 who had also arrived at Belfast Docks for the applicant. He interviewed Mr Silolo on 29 July 2007.

When asked if the applicant had lived with any gentleman at her house he stated, "I never saw anybody at the address". He stated he did not know what the applicant's marital status was.

[10] Mr Garrett deposed also that when he advised the applicant during his questioning that Mr Seville had said that she had lived alone since he met her two years previously she replied, "interesting". When he advised that Mr Silolo had stated that the applicant had lived alone with her daughter the applicant replied, "No, he only knows where I live".

[11] It is the applicant's case that because of the embarrassing nature of the questions posed by the Immigration Officers she asked to speak with a solicitor and despite this request the interview was started without the applicant having such access. She says she stated her husband was in Portugal because she did not want him to be contacted by the Immigration Authorities given the nature of the breakdown of the relationship. It is her case that she was not given a full opportunity to state her position and to have gathered all the information required to substantiate the validity of her residence permit. In her affidavit of 14 September 2007 she offers explanations for the statements of Mr Seville – he was aware that she only recently separated from her husband and that she lived with him until January of 2007 – and Mr Silolo who she had only known since December 2006 and he does not know her husband. In essence it is her case that she was not given a reasonable opportunity to provide the authorities with such information as they might require before coming to a fair conclusion based on all of the facts. She asserts through counsel that no proper investigation had taken place. Had she been given an opportunity to make representations and submissions as set out in her affidavits and those of her husband and her legal representatives then she felt that there would have been no basis for concluding that she had entered into a marriage of convenience.

[12] The applicant also relies on the affidavit of Mr Parente who, in an affidavit of 15 September 2007, states that he was properly married to the applicant after they had had a three month relationship and that they did live together for some time in Dungannon. He contends that that even after she moved to Carrickfergus for work reasons he continued to spend the weekends with her there as was the case when she moved to Belfast. He accepts responsibility for the break down of the relationship in December 2006 when he informed her that he had been unfaithful to her.

Statutory background

[13] An important principle of European Community law is the removal of barriers to movement between member states. A key measure is the Directive 2004/38.

[14] Both Directive 2004/38 and earlier legislation make provision about the presence and residence in the host state of family members of the Union citizen, according to the category of relation into which those members fall. Directive 2004/38 identifies such categories. By Article 2(2) "family members" of the Union citizen fall into two classes: A. Those whose rights are based simply on their relationship with the Union citizen, i.e. spouses, registered partners and children under 21. B. Those who in addition to their relationship with the Union citizen have to prove their dependence on him or his spouse or partner, i.e. children over 21 and direct relatives in the ascending line.

[15] Article 3 of Directive 2004/38 then declares that the beneficiaries of its provisions are, first, all Union citizens and their Article 2 family members "who accompany or join them".

[16] Under Article 10 of the Directive, the right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called a "residence card of a family member of a Union Citizen". That document is valid for a period of 5 years.

[17] The European Court of Justice has stressed that the integration of EEA nationals and their family members into the host State is a fundamental objective required to ensure that workers and their families resident in a host State enjoy no disadvantage with respect to those who are nationals of the host State (see Case 267/83 Diatta v Land Berlin [1985]ECR 567).

[18] Article 35 of the Directive provides as follows:

> "**Abuse or rights**
>
> Member States may adopt the necessary measures to refuse, terminate or withdraw any rights conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measures shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31".

[19] Article 30 of the Directive sets out specific provisions for notifications of the decision together with a need to specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal, etc.

[20] Article 31 provides a number of procedural safeguards where the person concerned shall have access to judicial and, where appropriate, administrative

redress procedures to appeal against or seek review of any decision taken against them.

[21] Thus the right to exclude "a party to a marriage of convenience" is given but its exercise is subject to two of the key procedural safeguards and must be a proportionate exercise of national power.

[22] The Directive was transposed into UK law from 30 April 2006 by the Immigration (EEA) Regulations 2006. By reg.2, "EEA national" means a national of an EEA State and "EEA State" means (a) a member State, other than the United Kingdom; (b) Norway, Iceland or Liechtenstein; or (c) Switzerland.

[23] Transposing Directive 2004/38/EC, the 2006 Regulations provide for an initial right of residence of up to three months duration at Regulation 13.

[24] The 2006 Regulations then provide for an extended right of residence for so long as the EEA national remains a "qualified person", as follows.

> "14. — (1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person.
>
> (2) A family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a permanent right of residence under regulation 15 is entitled to reside in the United Kingdom for so long as he remains the family member of the qualified person or EEA national.
>
> (3) A family member who has retained the right of residence is entitled to reside in the United Kingdom for so long as he remains a family member who has retained the right of residence.
>
> (4) A right to reside under this regulation is in addition to any right a person may have to reside in the United Kingdom under regulation 13 or 15.
>
> (5) But this regulation is subject to regulation 19(3)(b)."

[25] A qualified person is defined in Regulation 6, as follows:

"6. — (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as—

(a) a jobseeker;
(b) a worker;
(c) a self-employed person;
(d) a self-sufficient person; or
(e) a student.

(2) A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and—

(i) he was employed for one year or more before becoming unemployed;

(ii) he has been unemployed for no more than six months; or

(iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(3) A person who is no longer in self-employment shall not cease to be treated as a self-employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-

> employed person as the result of an illness or accident.
>
> (4) For the purpose of paragraph (1)(a), "jobseeker" means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged."

[26] Regulation 11 is also pertinent. Its relevant parts provide as follows,

> "11. - …
>
> (2) A person who is not an EEA national must be admitted to the United Kingdom if he is a family member of an EEA national … and produces on arrival –
>
> (a) a valid passport; and
>
> (b) an EEA family permit, a residence card or a permanent residence card."

[27] Finally, the 2006 Regulations provide for the definition of a family member where relevant as follows.

> "7**.** — (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person—
>
> (a) his spouse or his civil partner;"

[28] I have outlined these provisions in great detail – even where the provisions do not apply in this instance – to illustrate the enormous care and detail which has been invested in these provisions to ensure the core principle of freedom of movement of EC nationals is rigorously protected and free from conceivable impediment. Prima facie Bruno Parente is a "qualified" person and the applicant is a family member as his spouse.

The European Casework Instructions

[29] The importance of UK officials carefully adhering to this principle is well illustrated by the European casework instructions drawn up by the Border Immigration Agency which provides a number of matters of guidance pursuant to the Directive and the 2006 Regulations. Relevant provisions include the following:

[30] First Chapter 5 at paragraph 3.2 provides:

> "A marriage of convenience is a sham marriage entered into solely for immigration purposes.
>
> The burden of proof is on the Secretary of State.
>
> Cases to be considered as possible marriages of convenience are to be arrived at by a process of elimination in which strict criteria are applied.
>
> Where the case involves a person seeking admission to the UK (a port asylum applicant) the Europe team, BCPI, should be contacted. They need to be made aware that a European application is being considered and they need to be advised of the outcome in due course.
>
> Where an application is refused on marriage of convenience grounds a right of appeal exists under Regulations 26 of the Immigration (European Economic Area) Regulations 2006 in both "in country" and "court cases"."

[31] Section 3.9 under the heading "investigation of marriage cases" provides:

> "Suspect marriages can be investigated either by asking IS to undertake a home visit or by inviting the applicants to attend an interview".

[32] Section 3.4 under the heading "sham marriages or other relationships provides:

> "Where a person is suspected of having entered into a sham marriage of civil partnership or where an unmarried partner's relationship is not considered to be genuine, any investigations concerning the relationship must only be carried out with the authorisation of European casework".

The Applicant's case

[33] It is Mr Lavery's contention that the applicant's residence card can only be revoked in using a set procedure proscribed in Article 35 of the Directive and the 2006 Regulations. The applicant of course is a holder of such a residence card which remains valid until 2011.

[34] Counsel made the case that since the applicant was a family member of an EEA national i.e. the wife of Bruno Parente who is a Portuguese national working and living in the UK, she was entitled to rely on the provisions of Directive 2004/38 EC and the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). By virtue of these provisions, although the exercise of family rights depends on the exercise of Community rights by the principal (in this case Bruno Parente), in content they are virtually the same as the principal's right to enter, reside in and remain in another EEA country (see Gul v Regierungsprasident Dusseldorf (1986) ECR 1573). These provisions of community law relating to family members are designed to give effect to the free movement rights of the EU national, and are based upon the notion that obstacles to workers being joined by their families and integrated into the host State are obstacles to free movement within the EU.

[35] Mr Lavery drew attention to the fact that pursuant to Regulation 20 of the 2006 Regulations, a decision to revoke an EEA residence card can only be made by an Immigration Officer at the time of the person's arrival in the United Kingdom. Once a person is in the United Kingdom a residence card can only be revoked by the Secretary of State and a full in-country right of appeal is enjoyed by that person. Outside Article 35 of the Directive he contended that the only grounds whereby an EEA residence card could be revoked or refused was on grounds of public policy, health or security where clear written reasons were given and the relevant person notified of an in-country rights of appeal.

[36] It was Mr Lavery's submission that the decision taken by the Immigration Officer to revoke the residence card was therefore ultra vires. The applicant had not been informed of any in-country right of appeal.

[37] Counsel contended that the Immigration Officer had confused the right to remain in the UK as a family member of an EEA National with entry clearance or leave to remain. To this end he relied upon references in the affidavit of Mr Bradshaw, an immigration officer who had been present in Belfast on the 27 July2001, at paragraph 7 wherein he stated of the applicant "She was not entitled to enter or remain in the United Kingdom as an EEA dependant". Counsel reminded the court that there is no requirement of dependency under EC law in connection with the right of a spouse of an EEA National to reside in the United Kingdom. Such references instanced the

general confusion and misunderstanding of immigration officials in this case he argued.

[38] In addition counsel asserted that the European Court of Justice has emphasised the need to give effect to fundamental rights and in particular the right to respect for family life protected by Article 8 of the European Convention on Human Rights; see Mouvemant Contre Le Racsme etc v. Belgium [2003] 1 WLR 1073.

[39] I observe at this stage that Mr Lavery also contended that the applicant had made full disclosures of all matters referred to in the second part of the letter of 29 July 2007 from the Immigration Office during the course of an interview at Glasgow Airport on 14 October 2004. He asserted that this interview was uncontradicted.

[40] Mr Lavery argued that the applicant had been given no opportunity to make full and proper representations prior to the decision being taken, that she had been denied access to legal representation and that the decision of the Immigration Officer had been made in bad faith. In particular he asserted that the applicant's interview notes had been altered by Mr Garrett, that the decision of the Immigration Officer had been made contrary to the guidelines set out in the respondent's Operations Enforcement Manual namely the right to legal advice pursuant to 50.1.4 of Annex 2 and the guidelines on marriage to an EEA national under paragraph 36.5 Annex 1. It was counsel's contention that the enforcement manual ("the manual") makes it clear that a person's right of residence does not cease upon a separation or break down in marriage and only ceases on a divorce. He urged on the court that for a marriage to be categorised as a marriage of convenience there needs to be evidence that it was one of convenience at the time the marriage was entered into. (See Diatta v. Land Berlin 267/83 (1985) ECR 567.)

The Respondent's Case

[41] It was the respondent's case that the applicant was an illegal entrant under the provisions of the Immigration Act 1971 ("the 1971 Act").

[42] Mr Soutter an Immigration Inspector for Scotland and Northern Ireland with the Border and Immigration Agency of the Home Office and who is the regional manager responsible for operational enforcement by the UK Border and Immigration Staff throughout Northern Ireland, made an affidavit of 28 February 2008. In it he specifically refers to instances where immigration officers encounter persons holding residence permits based upon marriage to an EEA national, but did not live with that spouse, knew little or nothing about their spouse and often the spouse was not even living in the UK. He refers to the fact that in such cases, Immigration Officers have been required to consider

if the person encountered had entered a marriage of convenience in order to remain in the UK.

[43] Mr Soutter in that affidavit goes on to record that he discussed this type of case with and sought guidance from Mr Clinton Nield, then Assistant Director of the European and International Policy Directive at Border and Immigration Agency HQ in Croydon.

[44] At paragraph 6 of that affidavit Mr Soutter avers:

> "In summary the advice I received was that the possession of an EEA family permit in itself did not confer any legal status. It was simply a document intended to facilitate travel and to assist with other similar business e.g. obtaining employment. The central issue to test was whether the non EEA national benefited from rights under EEA/EU law. If they did benefit they had a right to remain in the United Kingdom (save for certain specific exceptions) but if they did not, they needed leave to enter under the normal Immigration Rules. Any residence permit issued to a person who did not qualify under EEA law was to be regarded as a nullity or an "erroneous document".
>
> 7. If a non EEA national had entered the United Kingdom without leave, when leave was a required (whether by deception or otherwise) then it followed that they must be an illegal entrant.
>
> 8. I was further advised that any decision to remove such a person, even if in possession of a residence permit, would not attract an in country right of appeal under EEA/EU legislation for the simple reason that EEA/EU law was not engaged and so the person could not benefit from it. There would, however, be a right of appeal from outside the United Kingdom.
>
> 9. Mr Nield also advised that because EEA/EU law was not engaged, any decision to remove someone as an immigration offender was one to be taken locally (as is the norm with other such decisions) and not one that needed to (sic) referred to the EEA/EU section at the headquarters of the Border and Immigration Agency.

> 10. In response to this guidance I issued a Local Instruction to my staff (Local Instruction 1/2007 dated 26 July 2007). The purpose of this Instruction was to assist the immigration officers to reach proper decisions with regard to this type of case."

Other issues in this case

[45] Much of the time of this court was taken up with a detailed analysis of the alleged bad faith of the Immigration Officer, Mr Andrew Garrett. It was alleged that he had been party to the altering of the notes at the interview he had with the applicant in respect of her date of birth as given to the authorities in the Republic of Ireland. The evidence of Mr Garrett in affidavit form was that following the conclusion of the interview under caution with the applicant he did not make any further changes to the document and whilst he initially had recorded an erroneous date of birth which was corrected by the applicant, he was not responsible for the apparent discrepancy that later occurred.

[46] On three separate occasions Mr Lavery sought leave to have Mr Garrett cross-examined on this matter. I was satisfied that this was a peripheral issue which did not require the attendance of Mr Garrett in order for me to make a determination. The fact that someone had altered the date of birth, unwittingly or otherwise, did not amount to establishing bad faith on the part of the respondent relevant to the issues in this case. The original or altered date of birth have never been used by the respondent before me as evidence to be relied on against the applicant and the heavy burden of proving a lack of honesty on the part of the respondent has not been made out in my view.

[47] Moreover I found no substance in the suggestion that the applicant had been deprived of access to a solicitor since it is quite clear that she spoke with her solicitor prior to the interview under caution according to the evidence of Mr Garrett. In any event in light of the conclusion at which I have arrived the issue did not influence the outcome.

[48] I observe also that I am satisfied that the Immigration Officers, Mr Garrett and Mr Bradshaw were enforcing administrative powers during the encounter with the applicant. I accept the assertion in Mr Soutter's affidavit of 18 February 2008 that the Border and Immigration Agency did not intend at any stage to pursue criminal prosecution of the applicant and that the purpose of the interview was to ascertain her immigration status and whether it was appropriate to detain and remove her pursuant to the Immigration Act 1971. Accordingly I am satisfied that Article 59(1) of the Police and Criminal Evidence Order 1989 does not apply in this instance.

[49] Leaving no stone unturned in his very lengthy submissions Mr Lavery had submitted that I should consider invoking Article 234 of the EC Treaty which confers jurisdiction on the European Court of Justice to assist national courts in their task of enforcing Community law by giving preliminary rulings concerning the interpretation of Community law and the validity of acts of the institutions of the Community at the request of the national court. Mr Lavery submitted that I should consider suggesting the following questions:

> "If a Member State determines that a holder of a residence card has obtained such a document by way of deception is it entitled to detain and expel that person without reference to the procedural safeguards set out in Directive 38/2004?".

[50] Initially I found attraction in the submission of Ms Connolly on behalf of the respondent who drew attention to paragraph 6 of the preamble to the Directive. This provides that the situation of those persons who are not included in the definition of family members under the Directive and who therefore do not enjoy an automatic right of entry and residence in the host Member States should be examined by the host Member State on the basis of its own national legislation in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union Citizen or any other circumstances. The 2006 Regulations of course implement the Directive into domestic law and a spouse is defined in Regulation 2 as not including a party to a marriage of convenience. The Directive does not define a marriage of convenience. She therefore argued that this court should determine whether the applicant had entered into a sham marriage and thus whether it was reasonable for the respondent to have so determined. Hence referral to the ECJ was unnecessary.

[51] However upon reflection I have concluded that referral was unnecessary for a quite different reason. It is quite clear that the issue for me to decide is not whether there has been a sham marriage but rather whether by virtue of her alleged marriage and the events since then she has had the benefit of an EC right conferred on her which the respondent is now seeking to withdraw without due process under the terms of Article 35 of the Directive and the Regulations.

The Central Issue

[52] The crucial issue in this case thus invites a conclusion as to the division of competences between the Member States and the Community. Has an EC right been conferred on this applicant by virtue of her marriage to an EC

national? If so can such a right be withdrawn by the Member state without complying with Article 35 of the Directive ?

[53] At stake in this matter is the fundamental question as to whether Union Citizens and their families as defined by Article 2.2 of the Directive are to be allowed to lead a normal family life in the host Member state *within the terms of Community law* so that the exercise of their freedoms that are guaranteed by the Treaty are not seriously obstructed or can domestic law alone intervene if deception is suspected.

[54] An allegation of a "sham" marriage is a very serious one and not to be dealt with lightly. It is complex and requires very careful analysis since it strikes at the heart of an EC right if proved. The person's right of residence does not cease upon a separation or a breakdown in marriage but only on divorce (or of course if the EEA national no longer exercises his rights or work and movement within the UK). This automatic right once conferred must not be confused with leave to enter or remain or with the concept of dependency . A marriage/civil partnership is not invalid under the general law simply because it is entered for a purpose other than mutual cohabitation (see Vervaeke v. Smyth [1983] 1 AC 145) and the parties to such a marriage have the relationship of man and wife. But the Immigration Rules requires parties to intend to live together permanently as husband and wife and the policy generally is only to permit admission as a spouse for the purpose of matrimonial cohabitation.

[55] McDonald's Immigration Law and Practice 7th Edition at paragraph 11.65 states:

> "We suggest, that the core requirement of a sham marriage is that the parties do not intend to live together as husband wife. However this is a complicated and difficult area. The judgment of the ECJ in Secretary of State for the Home Department v. Akrich [2004] QB 756 suggests that a marriage of convenience is one which is entered into solely for the purpose of circumventing immigration control which is consistent with the public policy set out in Article 35 of the Citizen's Directive. The fact that there is still no definition of a marriage or partnership of convenience still makes for difficulties in establishing instances of same in relevant circumstances".

[56] The importance of the respondent establishing by proper means whether or not this was a marriage of convenience/sham marriage should not be underestimated. Marriage to an EC national confers an automatic

right of residency in the host state. It does not depend on whether the spouse is financially dependent on him as Mr Bradshaw seemed to countenance in paragraph 7 of his affidavit of 18 February 2008. Withdrawal of that right should not be lightly undertaken particularly given the complexity of the task.

Conclusions

[57] I am not at all convinced that the respondents, through Mr Bradshaw, Mr Garrett or Mr Soutter have fully grasped the complexity of the EC issues at large in this matter.

[58] I have come to the conclusion that the respondent in this case has misconceived the nature of the right being asserted by the applicant. It is important that the right to residency should not be confused with leave to enter or to remain. It is an automatic right upon marriage to an EEA national. As I have already indicated the ECJ has stressed that the integration of EEA nationals and their family members into the host state is a fundamental objective required to ensure that workers and their families resident in a host state enjoy no disadvantage with respect to those who are nationals of the host state. (see paragraph 17 of this judgment).

[59] The fact of the matter is that this applicant has gone through a ceremony of marriage with an EEA national which has been registered in marriage registration records in Northern Ireland. Her husband Bruno Parente has asserted that this was the case. There is evidence that they have lived together as husband and wife in Northern Ireland for some time even though the marriage may now have broken up. On foot of this the applicant applied for a residence card as the family member of an EEA national. To obtain this she satisfactorily completed a form and provided evidence that she was married to an EEA national with evidence that her husband was working and residing in the UK.

[60] It seems to me that prima facie therefore she has enjoyed the benefit of a right conferred by the Directive and the 2006 Regulations. A Member State of the EEC may of course terminate or withdraw that right in the case of abuse of rights or fraud such as a marriage of convenience. In other words if information comes to light that reveals that the right conferred by the Directive has been achieved by fraud, such as a marriage of convenience, then that prima facie right may be withdrawn under Article 35 of the Directive. However such a measure must be proportionate and must be subject to the procedural safeguards set out in Articles 30 and 31 .

[61] In my view the approach of the respondent in this case has been all too perfunctory and has failed to recognise the importance of the right conferred by the terms of the Directive. Parliament can never have intended, and the

Directive never envisaged, such a serious and weighty decision to withdraw that right being taken without thorough, informed and fair investigation. A decision that a marriage has been one of convenience once the benefit thereunder has been conferred should not be taken without the appropriate consideration and safeguards provided by Article 35 of the Directive.

[62] Mr Soutter, in his affidavit of 28 February 2008 had rationalised the position adopted by immigration officers on 28 July 2007 in Belfast on the basis that her previous entry to the UK from Paris was somehow illegal because of his conclusion that she had gone through a sham marriage. I have difficulty reconciling this proposition with the evidence of Mr Bradshaw or Mr Garrett. In any event if Mr Soutter's approach was the correct one, a person who had gone through a marriage with an EU national and thus had conferred on her the right of residency for many years could have that right terminated each time she left the country (whether to travel to another EC country or not) and re-entered on the view of an immigration officer at the port of re-entry without any reference to the European casework instructions, Article 35 of the Directive. Thus he/she would have no in-country appeal or any of the other protections under the Directive etc. I do not accept that such an interpretation is consonant with the spirit of the Treaty.

[63] Paragraph 5 of Mr Bradshaw's affidavit of 28 February 2008 deals with the grounds upon which he concluded that a marriage of convenience had occurred. His relies on her adverse immigration history in the Republic of Ireland, her illegal entry across an Irish land border, the fact that her husband was not contactable, the applicant had stated that he and her daughter were not in the UK, the allegations of a neighbour and a travelling companion. As I have already set out in paragraphs 7-12 of this judgment I am satisfied that there are grounds for suspicion which require investigation. However no realistic attempt was made to reappraise this information or revisit these witnesses in light of the applicant's information or that of her solicitor. No proper attempt was made to implement the European Casework Instructions or Article 35 of the Directive. Mr Garrett deposed that he consulted with the Home Office EEA permit issuing authorities and was simply advised that the onus lies on the holder of the permit to prove that she should be a beneficiary of EEA residence conditions. He thereupon briefed Chief immigration Officer Bradshaw about his interview with the applicant, Mr Seville and Mr Silolo. Mr Bradshaw then authorised the service of the forms outlined in paragraph 3 of this judgment. I consider that this is all too inadequate in terms of proper investigation of this complex issue and is disproportionate to the seriousness of the matter involved namely the withdrawal of a right conferred by the Directive. The issue should have been subjected to the scrutiny and procedural safeguards provided in the European Casework instructions and in Articles 35, 30 and 31 of the Directive .

[64] The local instruction 1/2007 may have some merit where no EC right has yet been conferred for example where the applicant has not yet obtained the right to enter or reside. For that reason I do not propose to accede to the applicant's argument that it should be declared unlawful. It may be correct in certain circumstances that paragraph 4 should provide that the issue of whether the marriage is one of convenience should not even be explored and the issue simply confined to whether the person qualifies as an EEA dependent or family member. This was obviously not the view taken by Mr Garrett and Mr Bradshaw (the latter having expressly indicated that he had come to a conclusion there was a marriage of convenience) in this instance. Indeed Ms Connolly's case was based on the proposition that the key issue was the finding by the respondent that a marriage of convenience had occurred. I am satisfied that all of this betrays an element of confusion on the part of the respondent as to the approach to be adopted in cases which potentially invoke EC rights.

[65] Implementation of Article 35 of the Directive together with the European casework instructions is the appropriate path to follow where prima facie a right has been conferred under EU law. In my view the facts in this case of the applicant's marriage and her subsequent history prima facie confers on her an automatic EC right to remain and a decision that that right had been obtained fraudulently can only be arrived at under the scrutiny of the protections afforded by Article 35 of the Directive .

[66] In the circumstances therefore I have come to the conclusion the decision to declare the applicant an unlawful entrant subject to removal and detention must be quashed and the matter remitted back to the respondent to carry out a proper investigation of this marriage in compliance with the terms of the Directive.