IRLANDA

SOBRE LA LEGALIDAD DEL MATRIMONIO DE CONVENIENCIA COMO MEDIO DE ADQUISICION DE LA NACIONALIDAD[1]: el caso Izeailovic & Anor -v- Commissioner of an Garda Siochana & Ors, de 31 de enero de 2011[2]

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En virtud de lo establecido en la Directiva sobre libre circulación de los ciudadanos de la Unión Europea, todo ciudadano de la Unión tiene derecho a circular y residir en el territorio de otro Estado miembro como trabajador o estudiante si dispone de un seguro de enfermedad que cubra todos los riesgos y de recursos suficientes para no convertirse en una carga para la asistencia social del Estado en que se encuentre. Los miembros de la familia de un ciudadano de la Unión Europea tienen derecho a circular y residir en los Estados miembros con ese ciudadano. Pueden entrar en un Estado si poseen un visado de entrada o una tarjeta de residencia emitida por un Estado miembro[3].

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[2] Sentencia del Tribunal Supremo Irlandés de 31 de enero de 2011, Izmailovic & Anor -v- Commissioner of an Garda Siochana & Ors [2011] IEHC 32.

[3] Directiva 2004/38/CE del Parlamento Europeo y del Consejo de Europa, de 29 de abril de 2004, relativa al derecho de los ciudadanos de la Unión y de los

La normativa irlandesa que adapta el Derecho interno a esta Directiva prevé que un nacional de un tercer país, miembro de la familia de un ciudadano de la Unión, sólo puede residir con el ciudadano en Irlanda o reunirse con él si ya reside legalmente en otro Estado miembro[4]. La cuestión de la acomodación de la normativa irlandesa a la Directiva europea se ha planteado en cuatro asuntos ante el Tribunal Supremo de Irlanda. En cada uno de esos asuntos, un nacional de un tercer país entró en Irlanda y solicitó asilo político y en todos los casos se le denegó la solicitud. Durante su estancia en Irlanda, esos cuatro nacionales contrajeron matrimonio con ciudadanos de la Unión que no tenían la nacionalidad irlandesa, pero residían en Irlanda y ninguno de esos matrimonios ha sido considerado como matrimonio de conveniencia. Tras el matrimonio, cada uno de los cónyuges no comunitarios solicitó una tarjeta de residencia como cónyuge de un ciudadano de la Unión. Dichas solicitudes fueron denegadas por el Ministerio de Justicia por considerar que el cónyuge no reunía el requisito de residencia legal previa en otro Estado miembro. Los interesados interpusieron sendos recursos contra esas resoluciones ante el Tribunal Supremo Irlandés, quien plantea al Tribunal de Justicia Comunitario la cuestión de si ese requisito de residencia legal previa en otro Estado miembro es conforme a la Directiva europea y si las circunstancias del matrimonio y el modo en que el cónyuge no comunitario de un ciudadano de la Unión entró en el Estado miembro de que se trata, tienen consecuencias para la aplicación de la mencionada Directiva sobre libre circulación de ciudadanos.

El Tribunal de Justicia declara que, por lo que se refiere a los miembros de la familia de un ciudadano de la Unión, la aplicación de la Directiva no está supeditada al requisito de que hayan residido previamente en un Estado miembro. La Directiva

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miembros de sus familias a circular y residir libremente en el territorio de los Estados miembros (DO L 158, p. 77).

[4] *Vid.*, S.I. No. 226/2006 - European Communities (Free Movement of Persons) Regulations 2006; S.I. No. 656/2006 - European Communities (Free Movement of Persons) (No. 2) Regulations 2006.

se aplica a cualquier ciudadano de la Unión que se traslada o resida en un Estado miembro distinto del de su nacionalidad, así como a los miembros de su familia que le acompañen o se reúnan con él en ese Estado miembro. La definición de "miembros de la familia" que figura en la Directiva no establece distinción alguna en función de si dichos miembros ya han residido o no legalmente en otro Estado miembro. Esta interpretación es confirmada por varios artículos de la Directiva y avalada por la jurisprudencia del Tribunal de Justicia, recogida, entre otras, en la sentencia Akrich[5], en la que declaró que, "*para poder disfrutar de los derechos de entrada y de residencia en un Estado miembro, el cónyuge no comunitario de un ciudadano de la Unión no debe necesariamente haber residido legalmente en un Estado miembro cuando se desplace, en compañía de un ciudadano de la Unión, a otro Estado miembro. El ejercicio de tales derechos no debe depender de una residencia legal previa del cónyuge en otro Estado miembro*". Este Tribunal subraya que "*si no se permitiera a los ciudadanos de la Unión llevar una vida familiar normal en el Estado miembro de acogida, el ejercicio de las libertades que el Tratado les garantiza se vería seriamente comprometido, puesto que se les disuadiría de ejercitar su derecho de entrada y de residencia en ese Estado*".

Frente a las alegaciones del Ministerio de Justicia y de varios Estados miembros según las cuales una interpretación de la Directiva en el sentido adoptado por el Tribunal de Justicia tendría graves consecuencias al suponer un aumento enorme del número de personas que podrían disfrutar de un derecho de residencia en la Comunidad, el Tribunal de Justicia responde que "*sólo los miembros de la familia de un ciudadano de la Unión que haya ejercido su derecho de libre circulación pueden disfrutar de los derechos de entrada y de residencia según lo establecido en esta norma. Además, los Estados miembros pueden denegar la entrada y la residencia por razones de orden*

[5] Asunto C-109/01, Akrich, de 23 de septiembre de 2003 (véase asimismo el comunicado de prensa nº 76/03, http://curia.europa.eu/es/actu/communiques/cp03/aff/cp0376es.htm.).

público, de seguridad pública o de salud pública, basando dicha denegación en un examen individual de cada caso". Añade que "*los Estados miembros pueden también denegar, extinguir o retirar cualquier derecho conferido por la Directiva, en caso de abuso de derecho o fraude de ley, como ocurre en el caso de que se celebren matrimonios de conveniencia*", cuestión que es objeto de la resolución que analizamos en esta sede.

Por último, el Tribunal de Justicia declara que "*un cónyuge no comunitario de un ciudadano de la Unión que acompaña o se reúne con ese ciudadano puede acogerse a la Directiva independientemente del lugar y la fecha en que contrajo matrimonio y del modo en que el citado cónyuge entró en el Estado miembro de acogida"*. El Tribunal precisa que "*la Directiva no exige que el ciudadano de la Unión haya fundado ya una familia en el momento en que se desplaza, para que los miembros de su familia, nacionales de un tercer país, puedan disfrutar de los derechos que dicha Directiva les reconoce*". Además, considera que "*es irrelevante que los nacionales de un tercer país, miembros de la familia de un ciudadano de la Unión, hayan entrado en el Estado miembro de acogida antes o después de pasar a ser miembros de la familia de ese ciudadano, sin perjuicio del derecho del Estado miembro de acogida de sancionar, dentro del respeto a la Directiva, la entrada y la residencia en su territorio que se hayan producido infringiendo las normas nacionales en materia de inmigración*".

Pare poder apreciar la trascendencia de este tema, es preciso tener en cuenta que según el Departamento de Justicia del Gobierno Irlandés, durante el año 2010 se registraron en torno a trescientas solicitudes de matrimonios presentadas por ciudadanos naturales de Pakistán y más de un centenar se trataba de uniones con mujeres letonas. El gobierno letón ha hecho un llamamiento a su homólogo irlandés puesto que, a pesar de que se acredite que se trata de matrimonios de conveniencia, la Ley Irlandesa no reconoce a las mujeres letonas cono víctimas de tráfico humano llevado a cabo por ciertas mafias. Ante esta situación, la República de Irlanda no ha respondido de forma

clara ante la petición de las autoridades letonas que solicitan que se dicten normas similares a las que existen en la mayor parte de los países europeos, cuya legislación penaliza con sanciones severas este tipo de matrimonios. No así Irlanda, a la que se pide un cambio legal para hacer frente al problema y criminalizar los matrimonios de conveniencia y las organizaciones que existen detrás de ellos.

En el marco de lo dispuesto en esta Directiva, se dicta la Sentencia Anor Izmailovic v. Comisionado de la Garda y Ors[6], en cuya virtud se plantean cuestiones de interés público en las que se abordan aspectos relacionados con la legislación europea, el derecho constitucional, el derecho de familia, la ley de inmigración y la ley de detención.

A.- HECHOS

1.- La primera demandante es de nacionalidad letona. Se trata de una contratista decoradora que conoció al segundo demandante a través de internet a principios de 2009. Se trasladó a Irlanda en 2010, año en que registró su negocio en el Registro Mercantil y dio parte a las autoridades fiscales para contribuir por el desempeño de su actividad profesional.

2.- El segundo demandante es un ciudadano egipcio que presentó en el año 2008 una solicitud de asilo y no prosperó. Posteriormente fue objeto de una orden de deportación y al no presentarse en el Departamento de Inmigración, fue declarado prófugo de la justicia, por lo que es evidente que actualmente no tiene derecho a permanecer en el Estado y reside de forma ilegal en él.

[6] Sentenia del Tribunal Supremo. Número de Registro: (2011) 51 JR, Fecha de entrega: 31/01/2011, ELMORSY ADS IZMAILOVIC y Mahmoud SOLICITANTES Y COMISIONADO de la Garda, MINISTRO DE JUSTICIA, IGUALDAD Y LA REFORMA DE LA LEY. Emitida el día 31 de enero 2011.

3.- Los demandantes sostienen que han vivido juntos en Dublín desde mayo de 2010, acreditando este extremo mediante facturas de servicios públicos suministrados en la vivienda que compartían. Incluso, alegan haber celebrado matrimonio religioso islámico en una mezquita, en julio de 2010, aunque al no aportar prueba de la inscripción de este matrimonio, no tiene efecto civil alguno[7].

4.- Consta que, con tres meses de antelación, como exige la legislación irlandesa, se notificó a la Oficina del Registro Civil la celebración del matrimonio y se confirmó a los contrayentes que la documentación necesaria estaba en orden.

5.- Momentos antes de la celebración del matrimonio, se personaron, en el lugar de celebración, agentes de la Oficina Nacional de Inmigración, quienes informaron a los contrayentes sobre la imposibilidad de celebrar el matrimonio ante la sospecha

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[7] *Vid.*, FERNÁNDEZ CORONADO. A (direcc). MURILLO MUÑOZ. M., "El matrimonio y el derecho a fundar una familia" *El derecho de la libertad de conciencia en el marco de la Unión Europea: pluralismo y minorías*, pp. 313-314. El texto constitucional Irlandés establece el principio de separación Iglesia-Estado desde 1871, sin embargo acepta un evidente respeto al factor religioso en general. En materia matrimonial, desde la *Marriages Ireland Act* de 1844, rige el principio de libre opción entre matrimonio civil o religioso. El matrimonio civil en Irlanda existe desde la entrada en vigor de esta Ley, pero éste suele actuar de forma subsidiaria porque la mayoría de los matrimonios se celebran de acuerdo con los ritos religiosos, matrimonios que tienen reconocidos efectos civiles una vez inscritos en el correspondiente registro civil, previo el cumplimiento de una serie de requisitos legales. Por lo tanto, el matrimonio religioso produce efectos civiles siempre que se hayan cumplido las condiciones previstas en la ley civil, que no siempre coinciden con las establecidas por el derecho confesional. La diferencia entre el matrimonio celebrado en forma religiosa católica y el resto de formas religiosas, se encuentra en que en este último caso es preciso previa licencia y certificado para la celebración del matrimonio. De igual modo, la Iglesia Católica es la única que mantiene una jurisdicción sobre los matrimonios canónicos, pero las decisiones de los Tribunales eclesiásticos no pueden ser homologadas civilmente al no existir procedimiento alguno para ello. *Vid.*, CASEY. J., "Estado e Iglesia en Irlanda", en ROBBERS G., (ed.), *Estado e Iglesia en la Unión Europea.*, Baden-Baden, Nomos Verlagsgesellschaf ,1996, pp. 112-115 y 168 y ss.

de que pudiera tratarse de un matrimonio de conveniencia, asunto que estaba siendo investigado por el Servicio de Inmigración.

6.- Acto seguido se les comunica a los demandados la orden de detención sobre la base de que, con el matrimonio que se pretendía celebrar, se estaba evitando la deportación acordada contra el ciudadano no comunitario. En vista de esta detención, se plantea un recurso ante este alto tribunal para impugnar la validez de la detención por entender que vulnera el art. 40.4.2 de la Constitución.

B.- FUNDAMENTOS DE DERECHO

1.- SOBRE LA LEGALIDAD DE LA DETENCIÓN

1.1.- La primera cuestión que se plantea es la relativa a la legalidad de la detención. El Tribunal estima que la detención de una persona en una Oficina del Registro Civil inmediatamente antes de la celebración de su matrimonio, requiere un alto grado de justificación. No hay duda de que los agentes de Inmigración actuaron de conformidad con lo establecido en el art. 5.1 de la Ley de 1999 que prevé que "cuando un oficial de inmigración, con causa razonable, sospecha que una persona contra la que se ha emitido una orden de expulsión en vigor, no ha cumplido alguna de las disposiciones de la orden, puede detenerla aunque carezca de orden judicial". En consecuencia, la policía irlandesa actuó conforme a Derecho, puesto que se trataba de una persona que había eludido las leyes de inmigración, no tenía derecho a permanecer en el Estado y se había decretado contra él una orden de deportación. Sin embargo, todo poder legal de detención, debe ser ejercido de conformidad con los principios básicos del ordenamiento constitucional, lo que significa que estas competencias deben ejercitarse de manera razonable y para los fines previstos por la Ley.

1.2.- Uno de los motivos de la detención era garantizar que el matrimonio no tuviera lugar. Sin embargo, en una sociedad libre,

donde está constitucionalmente prevista la institución del matrimonio, (art. 41.3.1), los tribunales deben ser especialmente cautelosos para asegurar que los agentes del Estado no traten de evitar lo que, a priori, parece resultar un matrimonio legal, al menos sin justificación suficiente.

1.3.- Es evidente que se debe poner en conocimiento del encargado del Registro Civil la apertura del correspondiente expediente para investigar un matrimonio que se propone celebrar bajo la sospecha que va a tener lugar de forma fraudulenta y con la única finalidad de obtener los derechos que se reconocen a los ciudadanos comunitarios, conforme a la Directiva 2006 sobre libre circulación de personas. La propia legislación ofrece un mecanismo para realizar estas actuaciones, de acuerdo con lo previsto en el art. 58.1 de la Ley de Registro Civil de 2004. Esto obliga a examinar si el matrimonio que se proponen celebrar los demandantes es válido conforme a la legislación irlandesa.

2.- SOBRE LA VALIDEZ DEL MATRIMONIO PROPUESTO

2.1.- No concurre en el caso ninguno de los impedimentos previstos por la Ley irlandesa que obste a la válida o lícita celebración del matrimonio que se proponen contraer los demandantes. A saber, los contrayentes eran mayores de edad, tenían suficiente capacidad y habían notificado la celebración del matrimonio a la autoridad competente, en la forma prevista por la legislación vigente. Además, se trataba de personas de diferente sexo que nunca habían estado casadas previamente. Pero la objeción que se plantea a este matrimonio es que se trata de un matrimonio de conveniencia que se pretende celebrar para eludir las normas de inmigración. De manera que, si los ciudadanos de otros estados de la Unión Europea están siendo inducidos a este tipo de matrimonios para obtener beneficios económicos, la sombra de la delincuencia organizada, la trata de personas y la prostitución, no puede estar muy lejos.

2.2.- A pesar de estas consideraciones, es evidente que el matrimonio que se pretende celebrar es válido, según la

legislación irlandesa, de conformidad con la Ley de 2004, art. 2, aunque hubiese sido convenido con la intención de eludir las leyes de inmigración. Así lo ponen de manifiesto las decisiones de la Cámara de los Lores *Vervaeke v. Smith [1983] AC 145* y de la Corte Suprema *H v. S,* 3 de abril de 1992. Ambas resoluciones judiciales se expresan en los siguientes términos: "*cuando un hombre y una mujer prestan el consentimiento para casarse en una ceremonia formal, llevada a cabo con arreglo a las formalidades exigidas por la Ley y conociendo que se trata de una unión matrimonial, es indiferente que no tengan intención de vivir juntos como marido y mujer*". En este mismo sentido, "*en la Ley Irlandesa de matrimonio, no hay espacio para las reservas mentales o arreglos privados una vez que queda acreditado que las partes son libres para celebrar el matrimonio, han otorgado su consentimiento válidamente y han observado las formalidades legales*". Además "*aunque el matrimonio se hubiese celebrado para facilitar la inmigración a un Estado extranjero o para evitar la deportación de este Estado y los contrayentes nunca hubieran vivido juntos, se trataría de un matrimonio válido conforme a la legislación irlandesa, incluso si se trata de un matrimonio de conveniencia*".

2.3.- Los Códigos Civiles de la mayoría de los países europeos prohíben el abuso de derecho, tanto en el ámbito del derecho público como del derecho privado. De ello se deduce que, en el caso del ejercicio de un "derecho privado", como es la celebración de un contrato matrimonial, con un fin ilegítimo, que no tiene protección en esa legislación, no puede considerarse válido. De ahí que en estos ordenamientos jurídicos el matrimonio de conveniencia se considere nulo o, al menos "ab initio", ineficaz. Esta fue, en esencia, la razón por la cual el tribunal belga descubrió *que el matrimonio de la Sra. Vervaeke y el señor Smith (un extracto de la sentencia que se cita en [1983] AC 145 at 153), debe ser anulado*: "*dado que las partes crearon la falsa imagen de una ceremonia de matrimonio sin su consentimiento, hay que considerar que se comportaban en contra del orden público. La alteración del orden público, la*

protección de lo que pertenece a la esencia de un verdadero matrimonio y de la dignidad humana, exige que ese simulacro de matrimonio sea declarado nulo."

2.4.- Sin embargo, en el contexto de la "*common law*" nunca se ha previsto la doctrina del abuso de derecho de esta naturaleza en el ámbito del derecho privado de forma generalizada, aunque se pueden deducir principios similares de otras instituciones de derecho civil, como el principio general de equidad, la doctrina del fraude de ley o el deber de actuar de buena fe o con las "manos limpias". Por eso las autoridades deberían estar abiertas a legislar sobre esta doctrina, bien sea en el ámbito de la ley del matrimonio o, en términos generales, en el ámbito del derecho privado.

3.- SOBRE LA OBJECIÓN A LA CELEBRACIÓN DEL MATRIMONIO VÁLIDO

3.1.- La objeción que se plantea a la celebración del matrimonio se centra en que existen sospechas fundadas de que está teniendo lugar un contrato matrimonial con la única finalidad de eludir las normas sobre entrada y residencia de nacionales de terceros países en Irlanda o bien con la pretensión de obtener un permiso de residencia en este u otro estado de la Unión Europea. La cuestión estriba en determinar si esta objeción es posible plantarla de acuerdo con lo previsto en el art. 58.1 de la Ley del Registro Civil de 2004. En virtud de lo establecido en este precepto, "una persona puede, en cualquier momento, antes de la celebración del matrimonio, presentar una objeción por escrito (...) y la oposición deberá indicar los motivos de la protesta (...)". Sin embargo, interpretado el precepto en su contexto, de acuerdo con lo dispuesto en el resto de artículos que integran la sección, es evidente que la facultad de presentar una objeción debe limitarse a los supuestos en que concurra un impedimento matrimonial, en los términos previstos en la Sección 2 (2) del mismo precepto legal, art. 58. A los efectos de esta Ley, sólo se considera que hay

impedimento para la válida celebración del matrimonio, en los siguientes casos:

a).- Cuando los contrayentes se encuentren vinculados por parentesco en los términos establecidos por la Ley de Matrimonio de 1835, modificada en 1907 y 1921.

b).- Cuando una de las partes o ambas ya estaban casadas.

c).- Cuando una o ambas partes es menor de 18 años en la fecha de la celebración del matrimonio, en el caso de que no se haya concedido la licencia para esta celebración prevista en el art. 33 de la Ley de Familia de 1995.

d).- Cuando el matrimonio, de haberse celebrado, hubiese sido declarado nulo conforme a lo establecido en la Ley de Matrimonios de personas dementes.

e).- Cuando las dos partes son del mismo sexo.

3.2.- En consecuencia, ningún precepto hace referencia a la *reserva mental* como impedimento para la válida celebración del matrimonio y el concepto de impedimento debe interpretarse en el sentido apuntado porque, de no ser así, es decir, de admitir que cualquier persona pudiera oponerse a la celebración del matrimonio por cualquier motivo y en cualquier momento, se generaría una total inseguridad jurídica que impediría la celebración de multitud de matrimonios por las más diversas razones.

4.- SOBRE LA LIBRE CIRCULACIÓN DE CIUDADANOS EN VIRTUD DE LA LEGISLACIÓN EUROPEA

4.1.- Las disposiciones de la Directiva 2004/38/CE son traspuestas al derecho irlandés en virtud de lo establecido en un Reglamento de 2006 y estas disposiciones recogen la mayor parte de la normativa comunitaria dictada sobre libre circulación de ciudadanos. El art. 3 de la esta Directiva debe interpretarse en el sentido de que si un nacional de un país extracomunitario es

cónyuge de un ciudadano de la Unión y reside en un Estado miembro, aunque no tenga la nacionalidad de este país, debe beneficiarse, como cualquier otro ciudadano de la Unión, de las disposiciones de dicha Directiva, independientemente de cuándo y dónde se haya celebrado su matrimonio y de cómo el nacional de un tercer país haya entrado en el Estado miembro de acogida.

4.2.- No obstante lo cual, el art. 35 de la Directiva prevé que los Estados miembros podrán adoptar las medidas necesarias para denegar, extinguir o retirar cualquier derecho conferido por la presente Directiva en el caso de abuso de derecho o fraude de Ley, como ocurre en los casos de matrimonios de conveniencia. Estas medidas deberán ser proporcionadas y estarán sometidas a las garantías procesales previstas en los artículos 30 y 31. Las únicas medidas de este tipo adoptadas por el ordenamiento jurídico irlandés se encuentran en los artículos 2.1 y 24 del Reglamento de 2006. Esta afirmación es de especial relevancia, puesto que un Estado miembro no puede invocar el contenido de una Directiva si lo establecido en esta norma no está previsto en el Reglamento interno dictado para la trasposición de la misma. De producirse esto así, significaría que la Directiva tendría una forma de "efecto directo horizontal" (véase, por ejemplo, la sentencia de la *Corte Suprema de Albatros Feeds Ltd v. Ministro de Agricultura y la Alimentación [2006] IESC 52, [2007] 1 IR 221).*

4.3.- El artículo 2.1 del Reglamento de 2006 reconoce que el concepto de cónyuge no se aplica a las partes de un matrimonio de conveniencia y el artículo 24 del mismo texto legal dispone que "cuando se compruebe que una persona a la que se aplica este Reglamento, ha adquirido alguno de los derechos que en el mismo se reconocen de forma fraudulenta, inmediatamente dejará de gozar de tales derechos o prerrogativas", "medios fraudulentos" dentro de los cuales se incluyen los matrimonios de conveniencia. Pero lo que está claro es que en el derecho irlandés, como hemos podido constatar, no constituye impedimento para la válida celebración del matrimonio el hecho de que se trate de un matrimonio de conveniencia. En consecuencia, según las

disposiciones vigentes y, teniendo en cuenta los términos del Reglamento de 2006, *sólo después de la celebración del matrimonio* se podrá constatar si la persona ha adquirido algún derecho de forma fraudulenta para, de esta forma, privarle inmediatamente de tal derecho o prerrogativa. En definitiva, no puede admitirse la objeción a la celebración de un acto en cuya virtud pueden adquirirse derechos que sólo una vez celebrado se puede determinar si ha sido realizado de forma fraudulenta a no.

4.4.- De acuerdo con este planteamiento, el Tribunal llega a la conclusión de que la apreciación de si se trata o no de un matrimonio de conveniencia debe efectuarse necesariamente después de su celebración y deben observarse las debidas garantías procesales. En consecuencia, los funcionarios de inmigración no están facultados para impedir la celebración del matrimonio sobre la base de que tengan razones fundadas de que se trata de un matrimonio de conveniencia. Además, se trataría, en todo caso, por las razones expuestas, de un matrimonio válido a todos los efectos, salvo los previstos para la adquisición de derechos en el ámbito de la Unión Europea. Por lo tanto, el cónyuge no perteneciente a la Unión Europea no puede verse privado "prima facie" de los beneficios derivados de la celebración de un matrimonio, a los efectos previstos por el Reglamento de 2006, de conformidad con lo establecido en el artículo 31 de la Directiva 2004/38/CE.

5.- CONCLUSIONES

5.1.- La razón principal de la detención fue impedir la celebración del matrimonio para evitar que el ciudadano no comunitario adquiriera los beneficios de los ciudadanos de la Unión, en virtud de lo establecido en el Reglamento de 2006, por el que se transpone la Directiva 2004/38/CE sobre libre circulación de ciudadanos.

5.2.- Conforme a la legislación irlandesa, el matrimonio que se celebra, es un matrimonio válido, incluso aunque se trate de un matrimonio de conveniencia.

5.3.- La cuestión de si se trata o no de un matrimonio de conveniencia sólo podría haberse determinado una vez celebrado el mismo, de conformidad con el artículo 21 del Reglamento 2006.

5.4.- No existe impedimento alguno para la celebración del matrimonio, según lo establecido en el artículo 2 de la Ley de 2004, por lo que la oposición planteada a la celebración del mismo no se trata de una objeción válida en el sentido del artículo 58.1 de la Ley.

5.5.- No es de recibo admitir una detención cuyo objeto principal es impedir a la persona detenida el ejercicio de un derecho que, una vez ejercido, regularizaría su situación evitando que, de esta manera, pudiera ser objeto de un arresto por este motivo.

5.6.- En consecuencia, teniendo en cuenta las circunstancias del caso, el Tribunal declara ilegal la detención del ahora demandante, de conformidad con lo establecido en el artículo 40.4.2 de la Constitución y decreta su liberación de inmediato.

5.7.- Esta decisión puede plantear serios problemas a las autoridades de inmigración, pero la cuestión sólo se puede resolver por vía legislativa acomodando la legislación de los países miembros a la normativa comunitaria, no sólo en materia de libre circulación, sino también y, sobre todo, en materia de matrimonio y de inmigración.

ANEXO[8]

HIGH COURT RECORD NUMBER: 2011 51 JR.

DATE OF DELIVERY: 31/01/2011

COURT: HIGH COURT

COMMISSIONER OF AN GARDA SIOCHANA, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

JUDGMENT of Mr. Justice Hogan delivered on the 31st day of January, 2011.

1. This application under Article 40.4.2 of the Constitution raises issues of very considerable public importance. As we shall presently see, these are difficult issues of some novelty involving an overlap of aspects of European law, constitutional law, family law, immigration law and the law of arrest.

2. The first applicant is a Lithuanian national who is a self employed painting and
decorating contractor. She apparently met the second applicant over the internet in early 2009. She came to Ireland in May 2010. Some time after her arrival Ms. Izmailovic registered a business name with the Companies Registration Office and she also registered with the Revenue Commissioners for tax purposes.

3. The second applicant is an Egyptian national who unsuccessfully applied for asylum in 2008. He was subsequently made the subject of a deportation order which was issued on 5th November, 2010, by the Minister for Justice, Equality and Law Reform. He then failed to present himself as required at the Garda

[8] URL: http://www.bailii.org/ie/cases/IEHC/2011/H32.html.Cite as: [2011] IEHC 32.

National Immigration Bureau, 13/14 Burgh Quay, Dublin 2 on 2nd December, 2010, whereupon he was then classified as an evader. It is plain that at present he has no entitlement to remain in the State and that he is here illegally.

4. The applicants maintain that they have been living together at an address in Dublin since shortly after Ms. Izmailovic's arrival in the State in May, 2010. They apparently rented the premises for a twelve month period for €550 per month. In her affidavit Ms. Izmailovic has exhibited utility bills which appear to show that the parties were both living at this address in the autumn 2010. She also maintains that the parties went through a religious ceremony of marriage in a mosque in Clanbrassil Street, Dublin 8 on the 12th July, 2010, although it is not contended that this religious marriage has in itself any legal significance.

5. What is not in dispute is that the parties gave notice on 12th October, 2010, to the Civil Registration Office in Cavan of an intended marriage between them on 12th January, 2011 at 2.30pm. This application was duly acknowledged by the Registrar, Ms. Annemarie McQuaid, and it was confirmed that the necessary documentation was in order.

6. On 12th January, 2011, the parties travelled to Cavan with some friends for the marriage ceremony. However, shortly before the marriage solemnisation was about to take place, two officers from the Garda National Immigration Bureau arrived on the scene. According to the affidavit of Detective Garda Moran, he first spoke with Ms. McQuaid to explain the purpose of their visit. Detective Garda Moran then handed over a letter of objection to the proposed marriage from his supervisor, Detective Chief Superintendent O'Driscoll. I will examine presently the terms of that letter and its potential legal significance.

7. Detective Garda Moran then spoke to the applicants and informed them that an objection to the proposed marriage had been lodged by Detective Chief Superintendent O'Driscoll on the grounds that it was a marriage of convenience and that the matter was being investigated by the Garda National Immigration Bureau.

8. Detective Garda Moran then demanded production of Mr. Ads' identity documents and he produced a valid Egyptian passport. He then arrested Mr. Ads pursuant to s. 5(1) of the Immigration Act 1999 ("the 1999 Act") on the grounds that he intended to avoid deportation. Detective Garda Gaine took the details of the seven other persons present, six of whom were Egyptian and one was Syrian. At that point Detective Garda Moran and Detective Garda Gaine left the Registration Office and conveyed Mr. Ads to Cloverhill Prison where he is presently detained. Due to the actions of the Gardai the proposed marriage did not, of course, take place. It is also clear from the affidavits filed on behalf of the respondents that the Gardai were of the further view that the Registrar was, in any event, precluded by s. 58 of the 2004 Act from proceeding with the marriage due to the fact that a letter of objection had been lodged some minutes before the ceremony was due to take place.

9. On 21st January, 2011, an application was made to me ex parte for an injunction. Although the proceedings were in form expressed to be judicial review proceedings, I took the view that as they were directed in essence towards challenging the validity of Mr. Ads' current detention they should, in substance, be treated as an application under Article 40.4.2 of the Constitution. I accordingly directed an inquiry into the legality of that detention. I further directed required that Mr. Ads be produced before me and that the detainer certify in writing the grounds for the detention. In addition to the affidavits sworn by Ms. Izmailovic, the arresting Gardai and Mr. Patrick Power (from the Department of Justice, Equality and Law Reform), Detective

Chief Superintendent O'Driscoll also gave oral evidence at the hearing before me.
The legality of the arrest

10. The first issue which directly arises is whether the arrest was a lawful one. The relevant power of arrest is contained in s. 5(1) of the 1999 Act which provides: "Where an immigration officer or a member of the Garda Síochána, with reasonable cause, suspects that a person against whom a deportation order is in force has failed to comply with any provision of the order or with a requirement in a notice under section 3(3)(b)(ii), he or she may arrest him or her without warrant and detain him or her in a prescribed place."

11. There is no doubt but that the Gardai were in principle entitled to arrest Mr. Ads. He was, after all, a person who had evaded our immigration rules. He had no legal entitlement to be present in the State and he was a person in respect of whom a deportation order was in force. But it is clear that this statutory power of arrest, like all other statutory powers, must be exercised in conformity with basic East Donegal principles (*East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317). This means that these powers must be exercised in a reasonable fashion and for the purposes thereby conferred by law.

12. Without wishing to place any *a priori* constraints on the powers of arresting Gardai, it nonetheless seems to me that the arrest of a person at a registry office just immediately prior to their marriage is one which calls for a high degree of justification. This is especially so when it is clear that one of the motives of the arrest was to ensure that the marriage did not take place. In a free society where the institution of marriage is constitutionally protected (Article 41.3.1), the courts must be especially astute to ensure that agents of the State do not seek to prevent what would otherwise be a lawful marriage, at least without compelling justification.

13. It is, of course, clear that at all material times the Gardaí wished to arrest Mr. Ads because there was a valid deportation order in place. It could not be said that the issue of the evasion of the deportation order was simply a pretext or some form of colourable device for the arrest as happened in *The State (Trimbole) v. Governor of Mountjoy Prison* [1985] I.R. 550. Had, for example, Mr. Ads been arrested under s. 5 of the 1999 Act some date after his failure to present to the Garda National Immigration Bureau in early December, 2010 following a chance encounter on a public street, such an arrest would - in principle, at any rate - have been perfectly lawful.

14. This, however, is not what actually occurred. While it plain is that the Gardaí independently wished to arrest Mr. Ads for evasion of the deportation order, it is equally clear that the principal motive for the arrest of Mr. Ads at that particular time and place was to ensure that the marriage to Ms. Izmailovic did not take place.

15. Thus, when Detective Chief Superintendent O'Driscoll was asked by Ms. Carroll, counsel for the respondents, why his officers did not permit the marriage to be concluded as it was a relatively short ceremony, the following exchange took place:

16. Q. "[Ms. Carroll] Now it's been suggested in Ms. Izmailovic's affidavit at paragraph 14 she says "I state the civil marriage ceremony performed by officers of the notice party is very brief and there is no reason why the respondent could not have waited until after the ceremony" and it has been said by Mr Ó Maolchalain [counsel for the applicants] that it spoiled what should have been a very happy day. Could you not have let the marriage go ahead?..."

17. A. "Well it was I that made the objection and the document was merely served by somebody else, but from my perspective

the problem which exists in relation to marriages which are suspected to being entered only for the purpose of obtaining EU treaty rights is one which has exercised government and one which our Minister or the former Minister for Justice and Law Reform has raised concerns about at an EU level. I'm acutely aware of the serious nature of the problem concerned....I think I'm obliged where I have suspicions that marriages are suspected as being bogus or being entered into solely for the purpose of obtaining EU Treaty rights [to inform] the registrar of marriage and letting the appropriate registrar know that I'm conducting an investigation. It would seem to me that it would be irresponsible for me knowing that an order has issued for somebody to be arrested to be removed from the State and suspecting that that person may be taking particular action to prevent that from taking place by way of entering a marriage which is not in fact a true marriage but one just solely for the purpose of obtaining EU treaty rights not to bring it to the notice of the appropriate registrar that, in fact, I have suspicions that I have and particularly in circumstances where the legislation concerned provides a particular mechanism for doing that under s. 58 (1) of the Civil Registration Act 2004 and you know the efforts that we are making to prevent the abuses that we suspect are taking place would be put at naught if we were not to take appropriate action where we had those suspicions."

18. Mr. Ó Maolchalain subsequently put it to Detective Chief Superintendent O'Driscoll that it would have been possible to permit the marriage "for the few minutes that it would have involved". Detective Chief Superintendent replied: A. "Well, if there is a suspicion that the marriage is being entered into for the purpose of obtaining rights to remain in the State when a person would not otherwise acquire those rights it would seem it would not be a very sensible approach not to enforce the order or not to inform the Registrar of Marriages that we had the suspicions we had. Once we had the suspicions we had, and once we informed the Registrar clearly we fulfilled our obligation in relation to the

deportation order to remove to arrest the person subject of that order and as in all cases we would be informing the officers of the Minister in the Irish Naturalization and Immigration Service of the circumstances surrounding the arrest and the proposed removal and it would be for officers of the Minister to decide in the prevailing circumstances where the person should ultimately be removed from the State taking into account those circumstances."

19. As I read that evidence, it is clear that, as I have already stated, the principal reason for the arrest was to ensure that the marriage did not take place, because this might have permitted Mr. Ads to acquire EU Treaty rights and more particularly the rights of residence conferred by Directive 2004/38/EC. Certainly, it has not been suggested that there were operational reasons why the Gardaí could not have permitted the marriage to take place - even under their general supervision - while then instantly effecting the arrest of Mr. Ads.

20. It is, of course, true that a plurality of motives will not in and of itself serve to invalidate an otherwise lawful arrest: see, *e.g.*, the comments of Walsh J. in *The People (Director of Public Prosecutions) v. Howley* [1989] I.L.R.M. 629 at 634-635. Thus, for example, the mere fact that one of the purposes for which the arrest was undertaken for a purpose which was not legitimate in law will not generally invalidate the arrest if such can be justified for an independent reason which is, in fact, lawful.

21. However, I doubt if the principle in Howley can be applied to a case where the main object of the arrest was to prevent the arrested person exercising a right which, once exercised, would in principle no longer permit his arrest on that basis. Such would be the state of affairs where the applicants lawfully married, so that the non-EU (or non-EEA) national could seek to invoke their EU Treaty rights and associated rights under the 2004 Directive, subject, of course, to compliance with the requirements of the

European Communities (Free Movement of Persons)(No.2) Regulations 2006 ("the 2006 Regulations"). This thus requires us next to consider whether the proposed marriage in the present case would have been a lawful one.
Would the proposed marriage have been valid under Irish law?

22. None of the standard impediments to marriage were present in this case. The parties were of full age and capacity, the requisite statutory notice had been given and the couple were, of course, of opposite gender who had never previously married. The objection, however, here is a different one, namely, that the marriage was a marriage of convenience designed to enable Mr. Ads to circumvent the immigration rules.

23. I do not doubt but that Detective Chief Superintendent had reasonable grounds for suspicion. Ms. Izmailovic gave a specific address at a house in Dublin in advance of her registration for a personal public service number, which address was one which was also given by a number of other persons whose marriages were being investigated by An Garda Síochána. That in itself is certainly a matter which would warrant further investigation. Nor do I doubt for a moment but that the problem of marriages of convenience is a serious one. If citizens of other European Union states are being induced on a systematic basis to come to this State to enter into such marriages of convenience for monetary gain, then the shadow of organised crime, people trafficking and prostitution probably cannot be far behind.

24. These considerations notwithstanding, it is nevertheless clear that so far as Irish law is concerned, the marriage of Ms. Izmailovic and Mr. Ads would nonetheless have been a valid marriage - given that there was no impediment to such a marriage within the meaning of s. 2 of the 2004 Act - even if it had been contracted for the purpose of circumventing the immigration laws. This clearly emerges from the decisions of the

House of Lords in *Vervaeke v. Smith* [1983] A.C. 145 and from that of the Supreme Court in *H v. S*, April 3, 1992.

25. In *Vervaeke* the appellant, a Belgian national, went through a ceremony of marriage with one William George Smith so that she could thereby acquire British nationality and thereby avoid deportation by reason of her numerous convictions for soliciting. Mr. Smith was a down and out who was induced to go through the ceremony for £50 and a ticket to South Africa. Ms. Vervaeke parted company with him at the door of the registry office and she never met him again save in connection with her application for a British passport. While Ormrod J. in the English High Court described the entire episode as "a horrible and sordid story", he nonetheless held that the marriage was a valid one, even though there was no intention to cohabit as a man and wife: "Where a person and a woman consent to marry one another in a formal ceremony, conducted in accordance with the formalities required by law, knowing that it is a marriage ceremony, it is immaterial that they do not intend to live together as man and wife."

26. This view was later approved by the House of Lords in another stage of the proceedings. As it happens, the Belgian Cour d'Appel had purported to grant a decree of nullity in respect of this marriage - precisely because it was a marriage of convenience - but the House of Lords refused to give effect to that Belgian judgment as it was inconsistent with the earlier decision of Ormrod J.. Lord Hailsham L.C. observed ([1983] 1 A.C. 145 at 152): "The fact is that in the English law of marriage there is no room for mental reservations or private arrangements regarding the parties' personal relationships once it is established that the parties are free to marry one another having consented to the achievement of the married state and observed the necessary formalities."

27. A majority of the Supreme Court took a similar view in *H (otherwise S.) v. S.*, April 3, 1992. Here a young Irish lady met up

a young man from another European country on holiday abroad. They had sexual relations towards the end of that holiday. She travelled to see him a year later and sexual relations were resumed in the course of that holiday. A few weeks later she obtained a special employment visa for the United States. She was anxious that he should travel with her, but it was a visa condition that the couple should marry. They agreed to marry on the understanding that they would later divorce once the parties arrived in the United States.

28. They subsequently married a short time later in a registry office in Dublin, even though her parents (with whom they were staying) knew nothing at all about this. There was no wedding celebration and the marriage was never consummated. The husband left Ireland within a few days and it would appear that the parties never met thereafter. The wife commenced nullity proceedings some 15 days after the marriage.

29. A majority of the Supreme Court (Finlay CJ, Hederman and McCarthy JJ.) held that the marriage was a valid one and refused a decree of nullity, even though the principal purpose of the marriage was to facilitate emigration to the United States. As McCarthy J. observed: "The parties are not to be heard to say what to the witnesses and Registrar appeared to be a perfectly valid marriage was subject to a mental reservation agreed between the parties, so as to invalidate an apparently valid ceremony."

30. It is clear, therefore, that the marriage of Ms. Izmailovic and Mr. Ads would have been a valid marriage so far as Irish law is concerned, even if it was a marriage of convenience. The Supreme Court's decision in *H. v. S.* makes it clear that a marriage which was entered into for the purposes of facilitating immigration into a foreign state was still a valid one, even if (as in that case) the parties had no subsequent contact worth speaking of and never lived together as husband and wife. It must equally

follow that a marriage contracted for the purposes of avoiding deportation from this State is nonetheless a valid marriage, assuming that there is no impediment to that marriage within the meaning of s.2 of the 2004 Act.

31. In passing it might be observed that the question of a marriage of convenience probably does not pose the same degree of difficulties for civil law jurisdictions. The Civil Codes of the most of those countries provide for a general prohibition on the abuse of rights in private law as well as public law. It follows, therefore, that in those civilian jurisdictions the exercise of a private right (such as entering into the contract of marriage) for an illegitimate purpose would find no protection in the law of those jurisdictions. A marriage of convenience is therefore generally either void or, at least, ineffective *ab initio* in such civil law jurisdictions.

32. This was the essentially the reason why the Belgian court found that the marriage of Ms. Vervaeke and Mr. Smith (an extract from which is quoted at [1983] A.C. 145 at153) should be annulled: "As the parties delusively indulged in a marriage ceremony without in fact really consenting to a marriag, they behaved against public policy. The disturbance of public order, the protection of what belongs to the essence of a real marriage and of human dignity, exacts that such a sham-marriage be declared invalid."

33. It may also be noted that the Scottish courts – reflecting, perhaps, that civilian tradition in the sphere of private law in Scotland – have held that a marriage of convenience of this kind is invalid: see *Orlandi v. Castelli* (1961) SC 113, a decision quoted with approval by O'Flaherty J. in his dissent in *H. v. S.*

34. Of course, the common law traditionally has never provided for a general abuse of rights doctrine of this nature in the sphere of private law, although one can find principles which somewhat

resemble this in features of the law of nuisance and estoppel and in some general equitable principles, such as the doctrine of fraud on a power, the duties of fiduciaries and the requirements that the litigant seeking equitable relief must act *bona fide* and come within clean hands. It is, of course, open to the Oireachtas to legislate for such a doctrine, whether in the sphere of marriage law or more generally.

35. It is, generally nevertheless, true to say that the common law systems and the civil law systems approach the question of motive in the sphere of private law differently. The common law regards motive as (largely) irrelevant in the sphere of private law, whereas in the civilian tradition, motive is relevant where it results in the manifest abuse of a private right for an illegitimate purpose. This difference of approach helps to explain why a marriage of convenience is nonetheless valid in the common law tradition, whereas such would be regarded as a manifest abuse of rights by civilian lawyers and judges. This, in essence, is also the reason why the British and Belgian courts differed over the validity of the marriage of convenience at issue in *Vervaeke v. Smith*.

36. I would also reject the argument advanced by Ms. Carroll that cases such as *Cirpaci v. Minister for Justice, Equality and Law Reform* [2005] IESC 42 have any relevance in this context. *Cirpaci* was concerned with the question of whether the Minister was obliged to give an entry visa to a foreign national who had married an Irish citizen abroad. The issue in cases such as *Cirpaci* is whether the Minister was obliged to respect the choice of residence made by such a couple, even if this would otherwise frustrate or thwart the proper operation of the immigration rules. This has no relevance whatever to the present case which concerns a quite separate matter, namely, whether the proposed marriage between Ms. Izmailovic and Mrs. Ads would be a valid one. If that marriage took place, then, provided the conditions specified in the 2006 Regulations were satisfied, Mr.

Ads would be entitled to stay here as of right and not simply by reason of a discretionary decision of the Minister.
The objection under section 58 of the Civil Registration Act 2004

37. As we have noted, Chief Superintendent O'Driscoll lodged an objection to the proposed marriage with Cavan Registrar pursuant to s. 58(1) of the Civil Registration Act 2004 ("the 2004 Act") in a letter dated 11th January, 2011. The operative part of the letter is in the following terms:- "I lodge the aforementioned objection because I suspect that the aforementioned planned marriage to be one of convenience, which I suspect Mr. Mahmoud Ads is entering for the sole aim of circumventing the rules on entry and residence of third-country nationals in this state and so to assist him in obtaining permission to reside in Ireland or another EU Member State. An investigation has been undertaken which includes the investigation of suspected criminality associated with a number of marriages involving third-country nationals, who have recently.... entered into this state and also a number of proposed marriages in respect of which an intention to marry has been notified pursuant to the provisions at section 48 of the Civil Registration Act 2004. The proposed marriage of the above mentioned Mr. Mahmoud Ads to a national of an EU Member State is being investigated in the course of the said investigation."

38. The question which thus arises is whether the ground of objection – a suspected marriage of convenience designed to circumvent the immigration rules - actually comes within the scope of s. 58(1) of the 2004 Act. This is of some importance because the respondents maintain that the marriage could not have proceeded in any event by reason of the objection which was lodged under this sub-section at the last minute by Detective Garda Moran on behalf of Detective Chief Superintendent O'Driscoll.

39. Section 58 of the 2004 Act provides:-

"(1) A person may at any time before the solemnisation of a marriage lodge an objection in writing with any Registrar and the objection shall state the reasons for the objection.......

40. If one looked at this sub-section in isolation, one might be forgiven for thinking that the power to object to a proposed marriage was a general and free standing one. But, as we shall shortly see, once the sub-section is read in context with the rest of the section (as it must be), then it emerges from the provisions of s. 58(3) and s. 58(4) that the power to object is, in fact, confined to impediments to marriage in the sense in which that term has been traditionally used and which is reflected in what amounts to a definition of that term in s. 2(2).

41. Section 58(3) and s. 58(4) of the 2004 Act respectively provide:-
"(3) If the registrar who receives an objection under subsection (1) is satisfied that the objection relates to a minor error or misdescription in the relevant notification under section 46 which would not constitute an impediment to the marriage, the registrar shall— (....)
(5) Where an objection is referred to an tArd-Chláraitheoir pursuant to subsection (4), he or she shall make a decision on the objection as soon as practicable."

42. Section 2(2) of the 2004 Act provides that:-
"For the purposes of this Act there is an impediment to a marriage if – (a) the marriage would be void by virtue of the Marriage Act 1835, as amended by the Marriage (Prohibited Degrees of Relationship) Acts 1907 and 1921,
(b) one of the parties to the marriage is, or both are, already married,
(c) one or both, of the parties to the intended marriage will be under the age of 18 years on the date of solemnisation of the intended marriage and an exemption from the application of

section 31(1)(a) of the Family Law Act 1995 in relation to the marriage was not granted under section 33 of that Act,
(d) the marriage would be void by virtue of the Marriage of Lunatics Act 1811, or
(e) both parties are of the same sex."

43. The effect of s. 2(2) is to provide for a definition of what constitutes an impediment to marriage. As we shall now see, s. 58 must be understood by reference to that particular definition.

44. In effect, the scheme of s.58 is such that if the Registrar is satisfied that the objection relates to a "minor error or misdescription in the relevant notification under s. 46 which would not constitute an impediment to the marriage", then the solemnisation of the marriage can proceed with the appropriate correction. Section 46 refers to the notice provisions which all couples intending to marry are required to furnish. If, therefore, the Registrar is satisfied that the objection relates to a minor error in the notification such that, once rectified, there is in fact no impediment to the marriage, then he or she is required to correct the appropriate records (including the notification of the marriage) and allow the marriage to proceed.

45. If, however, the Registrar is satisfied that more than a minor error or misdescription exists in the relevant notification under s. 46 and that "the possibility of the existence of an impediment to the intended marriage concerned needs to be investigated", the matter must be referred to an tArd-Chláraitheoir for consideration and, pending the decision of an tArd-Chláraitheoir, the solemnisation of the marriage will not proceed until the investigation is completed.

46. The important thing here to note, however, is that the objection must relate to an "impediment" to the proposed marriage. This term has always had a well understood meaning in the sphere of family law and the law relating

to marriage: it refers to matters such as capacity, age, marital status and gender and this is reflected in the definition of what constitutes an impediment for this purpose in s. 2(2) of the 2004 Act. There is, for example, an impediment to the marriage of A to B if A is already married, save where that marriage has been annulled or the marriage dissolved by a decree of a court of competent jurisdiction. There is likewise an impediment to the marriage of C to D if the marriage would be within the degrees of affinity prohibited by law.

47. As we have already seen, there was no impediment in this sense to the marriage of Ms. Izmailovic and Mr. Ads. Even if Detective Chief Superintendent O'Driscoll's objection that this was a marriage of convenience were held to be well founded, this would be irrelevant as a matter of law so far as the validity of the proposed marriage was concerned.

48. In any event, as we have already noted, it is important to stress that the power to object contained in s.58 of the 2004 Act is confined to impediments to marriage in the sense just indicated. If it were otherwise, it would mean, for example, that any person could object on any ground at any time right up to the very hour of the wedding and that in those circumstances, save in those cases of minor errors of misdescription, the Registrar would be precluded by the terms of s. 58(4)(a)(iii) from proceeding with the marriage ceremony.

49. But s. 58 does not confer a free standing power of objection by reference, for example, to some supposed mental reservation on the part of the couple, such as that they were only marrying for immigration reasons. If that were the case then, by the same token, well meaning relatives could object to a proposed marriage on the ground, for example, the bride did not really love the groom and that she was only marrying him for financial reasons or because she simply wanted to escape from a difficult home environment.

50. If such a ground of objection were to be admitted, then this would open up a Pandoras's box of mischief and abuse which none could easily close. It would be easy to conjecture circumstances in which, for example, a jilted lover, maddened by jealously, would object on grounds of pure spite to a proposed marriage. But this would probably be as nothing to the volume of objections on the ground of the general unsuitability of the couple for each other which anxious parents and other well-intentioned relatives and friends might be tempted to lodge. If this sort of generalised objection were to be permitted, then, over time, the system of marriage registration envisaged by the 2004 Act might prove unworkable.

51. It should be recalled, of course, that s. 58(4)(a)(iii) provides that, once the objection is lodged and the Registrar is satisfied that it is more than a mere technical error or misdescription, then the marriage cannot be solemnized. No more than the courts, the Registrar - if one may adapt the graphic words of Black J. in *Provincial Bank v. McKeever* [1941] I.R. 471, 485 - "possesses no X-Ray contrivance that can lay bare the workings of the human mind." In practice, therefore, every complaint of this kind would necessitate a potentially complex inquiry into the general circumstances, motives and intentions of the couple, so that the mere lodging of an objection would have the effect of preventing the marriage. Again, such a construction of the section would play into the hands of the mendacious, the busy body and the crank. Thus, for example, the discarded lover, determined on revenge, could wait for the last moment before coolly lodging a letter of objection with the Registrar just as the first of the wedding guests was scheduled to arrive. The potential for abuse would be endless.

52. Nor could it be correct that the marriage of a couple could be thwarted in these circumstances by the lodging of an objection "by any person" at "any time", especially if the effect of this

would be more or less automatically to compel the Registrar to postpone the solemnisation of the marriage. It would mean that, by lodging such a last minute objection, the objector could obtain the equivalent of an injunction preventing the marriage without any notice to the bride and groom to be or without giving them an effective opportunity to be heard on this point in advance of the wedding day. Given the lack of essential procedural safeguards, the constitutionality of such a procedure must be open to question in light of the Supreme Court's decision in *DK v. Crowley* [2002] 2 I.R. 744.

53. When I raised this very possibility in oral argument with Ms. Carroll, she responded by saying that in those circumstances the couple might well be able to sue the objector for damages for breach of constitutional rights. That may well be correct: see, *e.g.*, by analogy the comments of Murray J. in *CK v. JK. (Foreign divorce: estoppel)* [2004] IESC 21, [2004] 1 IR 224 at 252-256. But it requires little imagination to envisage the overwhelming sense of distress and outrage which a couple would feel if the law permitted their wedding day effectively to be destroyed in this fashion at the stroke of a pen. They would find little comfort in the reassurance that they could thereafter sue the objector for damages. After all, the State's primary duty is to respect constitutional rights (Article 40.3.1) and to guard the institution of marriage (Article 41.3.1). The State would have singularly failed in its constitutional duties in this regard if it permitted an open-ended ground of objection to a proposed marriage to be made at the last minute, without the necessary procedural safeguards, especially in circumstances where the lodging of such an objection would inevitably have a suspensive effect so far as the proposed marriage is concerned.

54. For all of these reasons, it is clear that the right to object is confined to the traditional impediments to marriage which are re-stated in s. 2 of the 2004 Act. These are generally matters which are readily ascertainable, such as whether the parties are of full

age or whether the marriage would be within the prohibited degrees. It is true that the question of whether one of the parties to the proposed marriage would have the necessary mental capacity - which would be an impediment to marriage in the light of s. 2(2)(d) of the 2004 Act - might not be a straightforward issue, but even then an objector on this ground is required to furnish a "certificate of a registered medical practitioner supporting the objection": see s. 58(11) of the 2004 Act.

55. Any other conclusion would lead to a far-reaching change in the law of marriage which, in many respects, would be unworkable and intrusive. Given the presumption against unclear changes in the law, it is plain that such a construction of s. 58 would not be warranted in the absence of clear words which compelled this result: see, *e.g.*, the comments of Henchy J. in *Minister for Industry and Commerce v. Hales* [1967] I.R. 50 at 75-77.

56. In short, therefore, Detective Chief Superintendent O'Driscoll's objection that the marriage would be a marriage of convenience would, even if well founded, not be a valid one for the purposes of s.58 of the 2004 Act. It follows that (i) that the proposed marriage would be a valid marriage in Irish law and (ii) that the Registrar had no jurisdiction in the circumstances to refuse to solemnise the marriage.
Free movement rights under European law

57. The 2006 Regulations transpose the provisions of Directive 2004/38/EC ("the 2004 Directive"). The 2004 Directive itself effectively consolidated much of the earlier Community legislation in this area.

58. Subject to certain exceptions which we will presently consider, Article 3 of the 2004 Directive applies to spouses of all Union citizens "who move to or reside in a Member State other than that of which they are a national." Had the marriage between

Ms. Izmailovic and Mr. Ads taken place, then in principle he would also have been entitled to reside in Ireland. In this context, it is clear from the decision of the Court of Justice in *Case C-127/08 Metock* [2008] ECR I-6241 that the fact that Mr. Ads had no legal entitlement to be in the State or that he was the subject of a deportation order would be irrelevant. As the Court made clear in *Metock*: "Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, *irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State*." (italics supplied).

59. If, however, the marriage was a marriage of convenience that would be relevant so far as the 2004 Directive concerned. Article 35 of the 2004 Directive provides that: "Member States may 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. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."

60. The only measures of this kind adopted by this State are to be found in Article 2(1) and Article 24 of the 2006 Regulations. This is of some importance, because it is plain that a Member States cannot rely on a wider power in a Directive if the power in question is not actually provided in the domestic regulations designed to transpose the Directive in question. If it were otherwise, it would mean that such a Directive would have a form of horizontal direct effect: see, *e.g.,* the judgment of the Supreme Court in *Albatross Feeds Ltd. v. Minister for Agriculture and Food* [2006] IESC 52, [2007] 1 IR 221.

61. Article 2(1) provides that the word "spouse" "does not include a party to a marriageof convenience." Article 24 is headed "Cessation of Entitlements" and it provides that:
"(1) Where it is established that a person to whom these Regulations apply has acquired any rights or entitlements under these Regulations by fraudulent means then that person shall immediately cease to enjoy such rights or entitlements.
(2) In these Regulations, "fraudulent means" includes marriages of convenience."

62. It would seem that all decisions relating to residence and entitlement to reside in the State are made by the Minister: see, *e.g.*, Article 4 and Article 5. Article 6(1) permits the spouse of a Union citizen to reside in the State provided that they hold a valid passport and have not become "an unreasonable burden on the social welfare system of the State."

63. Returning to Article 24, while it is not absolutely clear whose task it is to establish that the marriage is a marriage of convenience, it would seem that this task of review falls to be performed by a senior official of the Minister in the manner envisaged by Article 21 of the 2006 Regulations. This would be the interpretation most consistent with the procedural safeguards provisions of Article 31 of the Directive.

64. What is clear, however, is that this State has not asserted the right to prevent the solemnisation of (otherwise valid) marriages which later transpire to be marriages of convenience. Of course, it would be open - again in principle - to the Oireachtas to provide by law that a marriage of convenience was not a valid marriage for the purposes of our own law of marriage or that a marriage of convenience would represent an impediment tomarriage for the purposes of s. 2 of the 2004.

65. What is clear, however, is that as the law stands any review of the marriage to ascertain if it is a marriage of convenience is one

which, having regard to the terms of the 2006 Regulations, can only take place *after* (and not *before*) the fact of solemnisation. This is clear from the actual language of Article 24 of the 2006 Regulations itself, since it provides that where it is established that a person to whom the Regulations apply "*has acquired* any rights or entitlements under these Regulations by fraudulent means" then "that person *shall immediately* cease to enjoy such rights or entitlements." The italicised words thus envisage an administrative review of whether themarriage is a marriage of convenience *after the event*.

66. In this regard, it may be noted that *In re Mbebe* [2008] NIQB 108 Gillen J. quashed a decision of Immigration Officers who had refused to permit a South African national to enter Northern Ireland, even though she held a UK residence card and was married to a Portuguese national who, she alleged, was living and working in the United Kingdom. The immigration officers maintained that this was a marriage of convenience and that the residence card was invalid.

67. Gillen J. first observed that: "It seems to me that *prima facie* therefore [the applicant] has enjoyed the benefit of a right conferred by the Directive and the 2006 Regulations. A Member State of the EC 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."

68. Gillen J. then went on to conclude thus: "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.....
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."

69. I respectfully agree with this analysis, which bears out the conclusion that the review of whether the marriage is a marriage of convenience must, of necessity, take place after the event and must also be hedged in with appropriate procedural safeguards. It follows that, no matter how well intentioned, An Garda Síochána are not empowered to prevent the solemnisation of a marriage on the grounds that they suspect - even with very good reason - that the marriage is one of convenience. Such a marriage would be, in any event, for the reasons stated above, a valid marriage for all purposes other than EU Treaty rights. The question of whether the non-EU (or, as the case may be, a non-EEA spouse) could be deprived of the *prima facie* benefits of the marriage for the purposes of the 2006 Regulations is one which is committed to a senior official of the Minister by Article 21 of the Regulations in the manner envisaged by Article 31 of the Directive.

70. In summary, therefore, I have concluded that:

A.- The principal reason for the arrest was to prevent the marriage so that Mr. Ads could not acquire the benefit of EU Treaty rights under the 2006 Regulations.
B.- The marriage would have been valid as a matter of Irish law even if it were a marriage of convenience.
C. The question of whether the marriage was a marriage of convenience could only have been established by a senior official of the Minister after the fact in accordance with Article 21 of the 2006 Regulations.
D. There was no impediment to the marriage in the sense envisaged by s. 2 of the 2004 Act so that Detective Chief Superintendent O'Driscoll's letter of objection was not a valid objection within the meaning of s. 58(1).
E. The principle in Howley does not extend to a case such as the present one where the principal object of the arrest was to prevent the arrested person exercising a right which, once exercised, would prima facie regularise the position of the person such that he would not be entitled to be arrested on that very ground.

71. In the special circumstances of this case I am therefore constrained to hold that the arrest of Mr. Ads was unlawful. I will therefore direct, pursuant to Article 40.4.2 of the Constitution, that he be released forthwith.

72. I quite appreciate that the decision in this case may present the authorities with very considerable difficulties in this problematic area. But, as I indicated at the hearing, if the law in this area is considered to be unsatisfactory, then it is, of course, in principle open to the Oireachtas and, if needs be, the Union legislature to address these questions. As this decision in its own way illustrates, the problems encountered here are difficult ones and present complex questions of public policy in relation to marriage and immigration. These, however, are ultimately policy questions which only the Oireachtas and, again if needs be, the Union legislature can resolve.