Neutral Citation: [2017] IEHC 186

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 281 J.R.]

BETWEEN

ROBERT GRACKOVS

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on 24th day of March, 2017.

1. The applicant in these proceedings seeks, *inter alia*, an order of *certiorari* to quash the first-named respondent's decision of 15th April, 2014, to make a removal order against him pursuant to the European Communities (Free Movement of Persons) Regulations 2006 and 2008.

Background

2. The applicant is a Latvian national. He arrived in this State in December, 2002 upon a work permit, which was subsequently renewed. Between 2002 and 2004, he was employed by a food processing plant. In 2004, he found employment with a recruitment service, where he worked for twelve months. He was then employed by a different recruitment service and worked in the construction industry until 2007. He has one dependent son, who was born in Ireland in October, 2005 and from whom he has been estranged for two years as of the time of hearing. The applicant was in a relationship with the child's mother until late 2006. The applicant maintains that he has little emotional connection with Latvia, having only visited for a total of six weeks during the thirteen years he had resided in Ireland, at the time of hearing.

3. The applicant has struggled with addiction whilst living in the State. He first began using heroin in or around 2007, when he was living in a hostel in the City Centre. He took up residence there because his lack of employment made it impossible to pay rent as it fell due. From 2007 onwards, the applicant came to the adverse attention of Gardai on a significant number of occasions.

4. On 16th July, 2013, the first-named respondent issued a notice to the applicant, informing him of an intention to make a removal order against him, pursuant to regulation 20(1)(a)(iv) of the 2006 and 2008 Regulations. The first-named respondent noted that the applicant had frequently come to the attention of Gardaí since 2007 and had been convicted of a number of offences in the criminal courts, including drug possession, theft and road traffic offences.

5. By correspondence dated 6th August, 2013, the applicant made submissions against the issuance of a removal order, pursuant to Schedule 9 of the above Regulations. On 12th August, 2013, the applicant made supplemental submissions in relation to his work permit and his employment record within the State. On 20th November, 2013, the applicant wrote to the first-named respondent, seeking clarification regarding his status within the State at that time. On 6th January, 2014, the first-named respondent replied to the applicant by letter stating that his case remained under consideration in accordance with Regulation 20(1)(a)(iv).

6. On 6th February, 2014, the applicant wrote to the first-named respondent again, wherein he noted that some six months had elapsed since the proposal for a removal order was made. The applicant requested further clarification regarding the removal order. The applicant further maintained that such a delay, unexplained as it was, constituted a breach of his constitutional rights and Article 41 of the Charter of Fundamental Rights and Freedoms. By correspondence dated 10th February, 2014, the first-named respondent wrote to the applicant, stating that the applicant's case still remained under consideration pursuant to regulation 20(1)(a)(iv).

7. Further correspondence issued between the applicant and the first-named respondent. On 27th February, 2014, the first-named respondent wrote to the applicant in regard to a conviction for an offence that had not been included in the original proposal. That being the case, the first-named respondent invited further final submissions within seven working days. By correspondence dated 14th April, 2014, the applicant submitted a contract of employment that he had secured with the Community Addiction Programme (CAP Limited), which was part of a drug rehabilitation FÁS community employment scheme. The applicant also noted that nine months had passed since he had first been notified of the proposal. The applicant stated that he was severely prejudiced due to this delay and requested that his case be finalised within ten working days. Failing this, the applicant would pursue the appropriate relief before this Honorable Court.

8. By letter dated 15th April, 2014, the first-named respondent informed the applicant that a removal order would be issued against him, pursuant to regulation 20 (1)(a)(iv) of the Regulations. This same letter further outlines the logic behind the decision to issue a removal order against the applicant, which reflected the same logic outlined in the proposal to issue the removal order. The letter lists the date of each court appearance made by the applicant, the date and nature of the charge and the sentence imposed where a conviction was secured. The decision to proceed with the removal order stated that it had "*been concluded that* [the applicant's] *conduct is such that it would be contrary to serious grounds of public policy to permit* [him] *to remain in the State*". A period of five years' exclusion, running from the date of removal, was also being imposed in accordance with Regulation 20(1)(c) of the Regulations.

Reliefs sought

9. The following reliefs are sought by the applicant in these proceedings:-

a. an order of *certiorari* quashing a decision of the first named respondent's dated 15th April, 2014, to make a removal order in respect of the applicant;

b. a declaration that the State has failed to comply with its obligation to transpose Article 27(2) of Council Directive 2004/38/EC adequately or at all;

c. a further declaration that the 2006 and 2008 regulations are incompatible with Article 27(2) and/or Article 31(2) of Council Directive 2004/38/EC; and

d. an injunction, if required, restraining the first named respondent, his servants or agents from taking any steps to remove the applicant pending determination of proceedings.

Applicant's submissions
10. The applicant submitted that, under Article 27 (2) of EU Council Directive 2004/38/EC, the issue of expulsion is conditional on the requirement that the personal conduct of the person concerned represents a genuine, present threat affecting one of the fundamental interests of society or the host member state. The applicant argues that, by relying exclusively upon previous criminal convictions in making a removal order against the applicant, the first-named respondent has acted ultra vires and/or in breach of the Directive and/or Regulation 20 of the Regulations.

11. The applicant argues that Regulation 20(1)(d) of the Regulations allows the first-named respondent to make a removal order on grounds that the person concerned served a custodial sentence and public policy is therefore at issue. It is submitted that this is incompatible with the State's obligations under Article 27(2) of the Directive.

12. The applicant also maintains that the first-named respondent acted ultra vires by making the decision to issue a removal order against the applicant before concluding that the applicant's personal conduct represented a genuine, present threat affecting one of the fundamental interests of society or of the host Member State.

13. Further, the applicant argues that, in failing to identify the fundamental interest of society which necessitated the making of a removal order against the applicant, the first-named respondent acted ultra vires, irrationally, disproportionately and/or in breach of Council Directive 2004/38/EC and/or Regulation 20 of the aforementioned Regulations.

14. The applicant maintains that, in failing to expressly impose a requirement that the first-named respondent assess whether the applicant's personal conduct represents a genuine, present and sufficiently serious threat that affects one of the fundamental interests of society before making a removal order, the State has failed in its obligation to properly transpose Article 27(2) of Council Directive 2004/38/EC.

15. According to the applicant, in deciding to issue a removal order against the applicant, the first-named respondent has failed to assess the applicant's previous convictions within the context of the potential penalties and the actual sentences imposed. Furthermore, the applicant maintains that the first-named respondent ought to have fully considered his degree of involvement in the criminal activity and/or whether the manner in which the criminal acts were committed indicated that he was a serious threat to society. The applicant argues that, by failing to take account of such matters, the first-named respondent acted in a manner that was in breach of natural justice and fair procedures and/or was irrational.

16. The applicant also argues that, bearing in mind that there was a nine month delay between the first-named respondent first issuing his proposal to make a removal order and notification of the decision to affirm that proposal, the first-named respondent acted irrationally when suggesting that the applicant represented a present threat to a fundamental interest affecting society.

17. Further allegations of unreasonable/disproportionate/ultra vires activity, breaches of fair procedures and/or breaches of natural & constitutional justice are outlined by the applicant. It is also alleged that the decision represents a breach of the applicant's rights under the European Convention on Human Rights (ECHR) and/or Bunreacht na hEireann.

18. In offering the applicant the opportunity to seek an internal review of the decision to remove him from the State, it is submitted that the first-named respondent does not offer the applicant any protection from removal, as he is required to present himself to the GNIB for the purposes of removal regardless of the fact that a review has been sought. In light of this, the applicant maintains that the respondents have failed to transpose Article 27(2) of Council Directive 2004/38/EC properly or at all, with such a matter being determinable only by the Superior Courts of Ireland or by the Court of Justice of the European Union. According to the applicant, the current review procedure offered is not an effective remedy in accordance with EU law.

Respondents' submissions
19. The respondents submit that these proceedings are premature because the applicant has not availed of the review procedure outlined in Regulation 21 of the 2006 Regulations. The respondents deny that the review procedure is inadequate and that the State has failed to transpose Council Directive 2004/38/EC correctly.

20. Regarding the alleged nine month delay, the respondents deny that such a period was excessive. The first-named respondent maintained that the delay (some eight months, in their estimation) was interspersed with invitations to the applicant to make submissions in support of his case. Such a request was made by the first-named respondent by letter dated 27th February, 2014, which was not responded to by the applicant at that time. Further communication followed between the first-named respondent and the applicant's legal team, which informed the applicant that his case was presently under consideration.

21. The respondents argue that the onus rests upon the applicant to proffer evidence of prejudice due to perceived delay on the first-named respondent's part and that he has failed to do. The respondents also point out that the applicant was permitted to reside in the State pending the conclusion of the decision-making process.

22. The respondents submit that the first-named respondent did consider the offences with which the applicant had been charged and/or convicted in deciding to issue the removal order. Along with the list of the applicant's previous charges/convictions, the first-named respondent also had recourse to the fact that he had come to the attention of the Gardaí on a number of occasions. Combining these two elements (i.e. the list of previous charges/convictions and the frequent attraction of the Gardaí's attention), the first-named respondent formed the view that the applicant's pattern of behaviour indicated a propensity for criminal activity.

23. The respondents deny any claim made by the applicant that he was not fully informed of the reasoning behind the impugned decision, as the applicant was made aware of the list of previous convictions, charges and court appearances that contributed to the removal order being finalised against him. In particular, the applicant was informed of the reasons for his proposed removal in a letter dated 16th July, 2013, which stated that he had "*come to the attention of an Garda Síochána and been convicted before the Courts with regard to incidents pertaining to Theft, Searches, Drugs, Property, Burglary and Traffic incidents*". The applicant was also informed by the first-named respondent that "*In the Minister's opinion your conduct is such that it would be contrary to public policy to permit you to remain in the State*."

24. The applicant's legal advisors were also informed by a letter from the first-named respondent dated 27th February, 2014, which included details of a further offence and conviction that had not been included in the original letter of 16th July, 2013. Further representations were sought from the applicant by the first-named respondent. However, none were forthcoming in relation to this

particular offence.

25. The respondents submit that the decision to remove and exclude the applicant from the State has a rational basis established in the applicant's criminal convictions, his propensity for criminal activity and its adverse effect on other individuals, and on the State itself.

26. The respondents also submit that the first-named respondent's decision to remove and exclude the applicant from the State was and is justified on the grounds of public policy and was proportionate & justified to achieve a legitimate aim of the State. In particular, it was pleaded that the decision was proportionate because a key aim of the State is the prevention of disorder and crime in the interests of public safety and the common good.

Decision

27. The applicant seeks two primary reliefs in these proceedings: an order of certiorari to quash the first-named respondent's decision of the 15th April, 2014, to make a removal order against him pursuant to the European Communities (Free Movement of Persons) Regulations 2006 & 2008 and a declaration by way of an application for judicial review that the respondent has failed to comply with its obligations to transpose Article 27 (2) of Council Directive 2004/38/EC in a proper manner. He also seeks a declaration by way of an application for judicial review that the European Communities (Free Movement of Persons) Regulations 2006 and 2008 are incompatible with Article 27(2) and or Article 31(2) of Council Directive 2004/38/EC. A substantial part of legal argument in the written and oral submissions was taken up by the transposition arguments (referable to the grant of the declaratory relief mentioned above).

28. Two sets of written legal submissions were filed by the applicant. The second set of submissions was handed in on a resumed hearing date, in the middle of the respondents' reply to the applicant's original submissions. The lateness of delivery and the respondents' objections to them were over-ridden in part because the court had already been furnished with and read the second set of submissions by the time said objections were brought to the Court's attention. In any event, the Court found the second set of submissions to be of assistance in understanding the applicant's case as it evolved, as the applicants' arguments were succinctly argued and encapsulated therein.

29. The basis on which leave was granted in this matter and the nature of these proceedings (essentially a judicial review of a Ministerial decision) are important and should not be lost sight of. In that regard, the process through which the impugned decision was arrived at is of central relevance to the decision this Court must make. It seems to me that the grounds as pleaded in the statement of grounds and upon which leave was granted essentially support an application for *certiorari.*

30. With regard to the decision under challenge in these proceedings, a letter issued on 16th July, 2013, from the Repatriation Section of the Removal Orders Unit in the Irish Naturalisation and Immigration Services (INIS). That letter stated, inter alia:-

> *"This Department notes that you've come to the attention of An Garda Síochána and been convicted before the courts with regard to incidents pertaining to theft, searches, drugs, property, burglary and traffic incidents."*

31. Over the next five pages, the letter lists out the occasions on which the applicant came to the attention of the relevant authorities. The first of these was a court appearance on 23rd June, 2006 and the last was an incident on 25th March, 2013. A total of 51 incidences of criminal behaviour were itemised. The letter then continued:-

> *"In the Minister's opinion, your conduct is such that it would be contrary to public policy to permit you to remain in the State."*

32. Correspondence ensued between officials and the applicant's legal representatives, including the filing of submissions. Ultimately, on 15th April, 2014, a proposed removal order in respect of the applicant was issued. That letter from the Irish Naturalisation and Immigration Services stated at para. 2:-

> *"I now wish to inform you that a removal order in accordance with Regulations 20(1)(a)(iv) of the European Communities, (Free Movement of Persons), Regulations 2008 has now been signed in respect of you (copy enclosed) because you have come to the attention of An Garda Síochána and the courts as follows…"*

33. The letter then proceeds over the next five pages to repeat and recite the matters outlined in the initial proposal letter. The letter then continues:-

> *"The department also notes that you, Mr. Grackovs has been arrested on numerous occasions. It has been concluded that your conduct is such that it would be contrary to serious grounds of public policy to permit you to remain in the State."*

34. The formal letter advising of the decision to make a removal order was accompanied by an examination and analysis of the file prepared by an official from the Removal Orders Unit recommending that a removal order be made in respect of the applicant, including an exclusion period of five years. This recommendation was then considered and subsequently approved by two senior officials within the unit and an official on behalf of the Minister. The analysis, which commences on p. 68 of the booklet of pleadings, is very detailed & extensive and sets out the background, including a recital of the numerous occasions & charges upon which the applicant appeared in court and the relevant sentence was imposed. The analysis considered the duration of the applicant's residence in the State. It states that the applicant first came to the attention of An Garda Síochána on 31st October, 2005, and has adversely come to their attention on a recurring basis since then. The family and economic circumstances of the applicant were considered, as were the nature of his social and cultural integration in the State, his state of health and the extent of his links with his country of origin. The provisions under s. 5 of the Refugee Act 1996 (as amended) and prohibition of refoulement were also considered and it was noted that no such claim was being advanced on behalf of Mr. Grackovs in respect of the proposed removal order. The applicant's rights pursuant to Article 8 of the European Convention on Human Rights were also considered, including his private life.

35. The analysis concluded that the proposed interference in this case was in accordance with Irish law, in that "*Article 20 of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 specifically provides for the making of a removal order. Further, that the making of a removal order pursues a pressing need and a legitimate aim – i.e. the prevention of disorder and crime. Thirdly, that the proposed removal was necessary in a democratic society in pursuit of a pressing social need and proportionate to the legitimate aim being pursued within the meaning of Article 8(2)(ii) i.e. the proposed interference is necessary for the prevention of disorder or crime. Mr. Grackovs has been given an individual assessment and has been afforded due process in all respects. There is no less restrictive process available which would achieve the pressing social need in this case: the prevention of disorder and crime.*"

36. The analysis then went on to consider the proportionality of the proposed removal order and concluded that it must be noted, inter alia, that the "*Garda National Immigration Bureau (GNIB) are of the view that Mr. Grackovs' pattern of criminal behaviour to date demonstrates that he is a genuine and sufficient threat to the social order and fundamental interest of Irish society and as such they have made two separate applications to the Department to have a removal order made in respect of him*". The decision further notes that "*Mr. Grackovs criminal behaviour demonstrates a flagrant disregard for the laws of the State and suggests that he will have a high propensity to re-offend. It also underlines the view that Mr. Grackovs presence in Ireland is contrary to public policy and is a disturbance to social order in the State*." The section then concludes:-

> *"these therefore exist as substantial reasons associated with the common good and serious grounds of public policy which require the removal of Mr. Grackovs from the State. Therefore on the basis of the foregoing, I recommend that a removal order be made in respect of Mr. Grackvos…Mr. Grackvos has been given an individual assessment and due process in all respects and his rights under Article 8 to respect for his private life have been considered. Factors relating to the rights of the State have also been considered, including the prevention of disorder and crime in the interest of public safety and the common good in light of Mr. Grackovs' criminal conduct in the State. Mr. Grackovs has, through his repeated pattern of criminal behaviour over a long number of years, shown himself to be a threat to public policy in the State. It is therefore submitted that the making of a removal order is proportionate and reasonable to the legitimate aim being pursued, and is required on serious ground of public policy."*

37. It seems to me that, notwithstanding that the impugned decision and the accompanying documentation is very detailed and engages in an elaborate analysis in relation to the background of the applicant and his behaviour within the State, it is fundamentally flawed because the decision maker failed to address the first question that ought to have been addressed: the basis of the applicant's right, if any, to reside in the State. The language and terminology is interspersed with "grounds of public policy" and "serious grounds of public policy". The phrases seem to be used on an alternating basis within the decision. As was clearly stated in MacEochaidh J.'s decision in *Sandu v. Minister for Justice and Equality* [2015] IEHC 683, the decision maker must first and foremost establish the basis on which the applicant resided in Ireland. If the applicant resided in this jurisdiction for a period amounting to less than five years in duration, the provisions of Article 7 apply. If the applicant had resided in this jurisdiction for a period exceeding five years, in accordance with Article 7, then the applicant was entitled to a permanent right of residence that could only be interfered with on serious grounds of public policy. It is common case that the ten year period requiring imperative grounds to warrant interference has not been reached in this case. So the crucial question, which the decision maker failed to determine before commencing an overall deliberation in this matter was whether or not the applicant had resided in this jurisdiction for the required five year period of residency that would entitle him to a right of permanent residence immune to all interference, except on serious grounds of public policy.

38. In my view, the failure to address this fundamental issue is sufficient to warrant the granting of an order of *certiorari* to quash the decision in that respect. I will hear further from Counsel as to what form the appropriate order shall take.

39. With regard to the transposition argument, there are a number of provisions to consider. Art. 288 of The Treaty on the Functioning of the European Union provides as follows:-

> *"To exercise the Union's competences the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states. A Directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice and formal methods."*

40. Directive 2004/38/EC (the Citizenship Directive) provides at recital three thereof:-

> *"Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instrument dealing separately with workers, self-employed persons as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens."*

41. Recital 29 provides:-

> *"This Directive should not affect more favourable national provisions".*

42. Article 7 of the Citizenship Directive provides as follows under the "Right of Residence for more than three months" heading:-

> *"All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*
>
> *(a) are workers or self-employed persons in the host Member State; or*
>
> *(b) have sufficient resources for themselves and their family members…"*

43. Article 27, under the "General Principles" heading, provides as follows:-

> *"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.*
>
> *2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.*
>
> *The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."*

The second part of Article 27(2) was a new provision and effectively reflected the jurisprudence established by *Bouchereau* (Case 30-77) [1977] E.C.R. 1999 and the subsequent case law set out in the written submissions.

44. Article 28, provides as follows at subpara. (2), under the "*Protection Against Expulsion*" heading:-

> *"2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.*
>
> *3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:*
>
> *(a) have resided in the host Member State for the previous ten years; or*
>
> *(b) …."*

45. The right of permanent residence in the Union is provided for in Article 16, which states:-

> *"(1) Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III."*

46. In *M.V. (Lithuania) v. Minister for Justice and Equality, Ireland and the Attorney General* [2016] IEHC 432, the applicant sought a declaration that the Council Directive 2004/38/EC had not been properly transposed by Regulation 20(1)(a)(iv) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008. The Court rejected that argument in *M.V*. In *M.V.,* the Court highlighted the conclusions of Advocates General Warner and Stix-Hackl on this issue, which were set out in *Bouchereau* (supra) and *Orfanopoulos* (Cases 482-01 and 493-01) [2004] ECR 5257 respectively. In exploring the ECJ's judgment in *Rutili* (Case 36-75) [1975] E.C.R. 1219, they concluded that the proper test to determine whether an EU citizen could be prevented from entering a Member State was whether or not their presence/conduct constituted a genuine and sufficiently serious threat to a requirement of public policy. Such considerations include a history of repeated recidivism on the part of the citizen in question and an exclusion order could be warranted on that basis. Recidivist tendencies are evident in Mr. Grackovs' background and are referred to extensively in the impugned decision currently before the Court.

47. It is clear that the Directive envisages that all Union citizens have a right to reside in a host Member State for a period of up to three months. Thereafter, continued residence is subject to the provisions set out in Article 7(1). Once a period of five years has elapsed and the Union citizen's residence in the host Member State has been in continuous compliance with the provisions of Article 7(1) for those five years, an enhanced protection applies; namely that the expulsion of that Union citizen from the host Member State can only be achieved where the authorities are satisfied that there are serious grounds for doing do that are in the interests of public policy or public security. An even greater enhanced protection exists in respect of a Union citizen who resided in a host Member State for a period in excess of ten years. In such cases, there must be imperative grounds established under public security before the Union citizen can be expelled from a host Member State.

48. In *Van Duyn v. Home Office* C-41/74, the ECJ makes it clear that the Treaty provisions are directly effective and that Union citizens are entitled to rely on the provisions of same. It has also been made clear that the provisions of Article 3 are directly effective. It seems to me that, in line with the provisions outlined above, the provisions of the Citizenship Directive 2004/38/ECC are effective, fundamental principles. I am also of the view that European law is applicable in situations such as this and that the applicant is entitled to invoke it. Insofar as there is any alleged ambiguity between the Regulations, particularly Regulation 20(1), this Court is entitled and obliged to apply the Regulations in accordance with Union law. It would only be in circumstances where the Court found it impossible to interpret and/or apply the Regulation and/or Directive that any question of a declaration of incapability might arise.

49. While a large part of the oral argument and written submissions was taken up with the transposition arguments, it seems to me that, when one looks at the factual background and the basis upon which the decision was arrived at, one could not describe or characterise this application as turning on the grant of declaratory relief. The Court has had regard to the fact that the Commission has not seen fit to take any action against Ireland in respect of the transposition of the Directive. There is an obligation on Member States to communicate the transposition of a Directive to the Commission. It would appear that this obligation has been complied with in this case and that no subsequent action was taken by the Commission. Thus, I am not satisfied that any argument arises in relation to the correct transposition of the Directive and I would reject that ground.

50. With regard to the transposition arguments above; I have set out why, in my view, there is no basis for the grant of such declaratory relief. It is, in any event, unnecessary to definitively determine that matter, as the grant of certiorari is sufficient. However, for the sake of completeness, as already indicated, if the grant of declaratory relief was necessary to determine the issues in the case, I would refuse same.