Neutral Citation [2015] IEHC 643

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 773 J.R]

BETWEEN

D.S., R.S. AND M.S.

(AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND

R.S.)

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on 20th day of October, 2015.

1. The applicant seeks leave to apply for judicial review for an order of *certiorari* quashing the decision of the first named respondent (the Minister) made 9th August, 2013 requiring the first named applicant (D.S.) to leave the State, and the affirmation of that decision approved by the Minister on the 15th October, 2013, following an internal review. An order is also sought quashing the Minister's order imposing a five year period of exclusion on D.S. from the date of his removal from the State. Declarations are also sought that the European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. 656/2006) (the Regulations) as amended are *ultra vires* the powers of the Minister and that the respondents have failed to transpose adequately Council Directive 2004/38 (EC) into Irish law. Following an *ex parte* application to the High Court, MacEochaidh J. directed that the application be made on notice to the respondents and that the matter should proceed by way of "telescoped hearing" should the respondents consent. The removal of D.S. was stayed pending the determination of the proceedings. However, in the meantime, following the substantive hearing of these proceedings, the first applicant was surrendered to the Lithuanian government pursuant to the provisions of the European Arrest Warrant Act 2003 on foot of a European Arrest Warrant. The hearing proceeded on a telescoped basis and the respondents filed a draft Intended Notice of Opposition to be relied upon if the Court granted leave to apply for judicial review.

Background

2. The applicant is a convicted criminal. He is a Lithuanian national who arrived in Ireland in 2004. He lived in Galway with his partner, the second named applicant, R.S. and their child, the third named applicant M.S. who was born on the 20th December, 2005.

3. D.S. was convicted of rape contrary to section 4(1) of the Criminal Law (Rape) (Amendment) Act 1990 at the Central Criminal Court on the 12th June, 2009 and was sentenced to six years imprisonment on the 27th July, 2009. The sentence was completed on the 19th August, 2013. A rape under section 4 is defined as:

> "a sexual assault that includes –
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> (a) penetration (however slight) of the anus or mouth by the penis, or
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> (b) penetration (however slight) of the vagina by any object held or manipulated by another person."

The offence is punishable with a maximum sentence of life imprisonment.

4. By letter dated 21st August, 2009 D.S. was informed by the Irish Naturalisation and Immigration Service (INIS) that the Minister proposed to make a Removal Order against him pursuant to regulation 20(1)(a) of the Regulations. The Minister also proposed to make an exclusion order preventing him from re-entering the State for a period of five years from the date of his removal. He was also informed of his entitlement to make representations in accordance with schedule 9 to the Regulations setting out reasons why the order should not be made. The reason for the proposal was D.S.'s conviction and sentence for the Section 4 offence and the Minister's opinion that his conduct was such that "it would be contrary to public policy to permit him to remain in the State". The letter was received by D.S. in prison. Gilmartin and Traynor solicitors replied to the letter indicating that their client wished to continue to reside in the State and enclosed a letter from the applicant's partner. From time to time the solicitors sought an update on the status of the consideration by the Minister of the proposal. Correspondence up to the 13th July, 2010 indicated that the matter was still under consideration.

5. On the 8th August, 2011 MacGuill and Company solicitors wrote on behalf of D.S. and enquired whether a decision had been made in the matter. If a decision had been made they sought its review and an opportunity to make representations. In a letter of 24th May, 2012 it was submitted that a Removal Order should not be made or confirmed because D.S. was the parent of an Irish born child (M.S.) and to separate him from his son would be damaging. By letter dated 14th June, 2012 however, it was indicated to the solicitors that a decision had not yet been made, and they were informed that representations could still be received on his behalf. A request was made that any further representations be made as soon as possible and specifically, that evidence be provided concerning the child M.S. and any role played by D.S. in his life.

6. The solicitors replied enclosing the child's birth certificate and the following information:

> (a) the child's date of birth, the fact that he resided in Ireland since his birth, was attending national school in Galway and was in first class;

(b) the applicant was said to be a committed and supportive father. Prior to imprisonment he resided in Galway with his partner, R.S. the mother of M.S. with the child as a family unit. Mother and child regularly visited him in prison and he intended, following his release, to resume family life and his parenting role in the care and support of his child;

(c) R.S. supported the applicant's submission and indicated that he was a good father. She stated that their permanent home was in Ireland and that the proposed removal of D.S. would prevent him from parenting M.S. and have a significant detrimental effect on the child's welfare and development.

7. These representations were acknowledged by letter dated 22nd July, 2013. The INIS was informed of a pending extradition application concerning D.S. in the High Court (Record Number 2008/131 EXT) in respect of two counts of sexual assault. By letter dated 7th August, 2013 the solicitors requested that a decision not be made on the Removal Order until the extradition proceedings had concluded.

8. On the 13th August, 2013 D.S and his solicitors were informed that a decision had been made pursuant to the provisions of Regulation 20(1)(a)(iv) that he be removed from the State and excluded for ten years from the date of his removal. The decision was based on the fact that D.S. had been convicted of the section 4 rape and sentenced to six years imprisonment. It was concluded that it would be contrary to public policy to permit him to remain in the State. He was informed that in accordance with regulation 21(1) of the Regulations he could seek a review of the decisions.

9. The Removal Order was addressed to D.S. in prison and dated 9th August, 2013. It was made by Mr. Tom Doyle, Assistant Principal on behalf of the Minister. The letter was accompanied by a recommendation compiled by Mr. Enda Gordon of the Removals Order Unit. Mr. MacCraith, an Executive Officer, made a recommendation on the 8th August, 2013 that the Removal Order be made and that D.S. be excluded for ten years and compiled a draft order for the consideration of his superiors. The case was reviewed by Ms. Helen Masterson, a Higher Executive Officer also on the 8th August. Finally, Mr. Doyle considered the papers in the matter including the recommendations, and made the removal and exclusion orders.

10. By letter dated 16th August, 2013, the applicant's solicitor wrote to the first named respondent setting out a number of grounds upon which, it was submitted, that the orders were unlawful. In particular, objection was taken to the proposed exclusion period of ten years. No notice had been given to the applicant of any proposal to exclude him for ten years. It was later suggested that the period of ten years was inserted in error in the consideration and order. However, it is clear that the figure five, was changed by hand to ten, years in the course of the consideration which could only have been done deliberately after some thought was applied to the matter. There is also a specific reference to the fact that the extended exclusion period was advised because of the seriousness of the section 4 offence. The exclusion period was reduced to five years following the review of the decision under regulation 21.

11. Further submissions were made on behalf of the applicant by letters dated 9th and 11th September, 2013.

Recommendation for Removal and Exclusion

12. The recommendation drafted by Mr. Gordon cites the history of events to date. A removal order was sought by the Gardai National Immigration Bureau (GNIB) under Regulation 20 by letter dated 19th August, 2009. It was noted that representations had been received from Gilmartin and Traynor including the letter from R.S. in which she stated that she and D.S. had a son and that they visited him in prison regularly. She hoped to marry him and raise M.S. and any other children they might have in the future in Ireland. The representations from McGuill solicitors dated 24th May, 2012 were also considered. The conviction and sentence of D.S. are then noted and it is stated that "in the Minister's opinion, his conduct was such that it would be contrary to public policy to permit him to remain in the State." Consideration was also given to the effect of the proposed order on the applicant's rights under Article 8 of the European Convention on Human Rights.

13. It was accepted that a decision to remove D.S. would constitute an interference with his right to respect for private life within the meaning of article 8(1) of the Convention. However, it was stated that the proposed interference was in accordance with Irish law under the regulations and the pursuit of a pressing social need and legitimate aim namely "the prevention of disorder and crime". Furthermore, it was concluded that his removal was necessary and proportionate in pursuit of that aim and that there was no less restrictive process available to achieve it.

14. The proportionality of his removal was also considered. It was noted that his employment prospects were poor in the current economic climate in Ireland particularly given his criminal record for a very serious offence. If removed he was free to live anywhere else in the European Union where, it was noted, there were lower unemployment rates. Therefore, it was not believed that his removal would place an intolerable burden upon him.

15. No information was submitted concerning his social and cultural integration in the State but it was concluded that any such bonds which he might have established since his arrival in 2004 had significantly diminished during the period since he fled the State to avoid justice, and while serving a sentence of imprisonment following conviction.

16. Reference was made to his conviction and sentence as follows:

> "The State has a duty to protect its citizens in the interests of the common good whilst An Garda Síochána have informed this department that Mr. D.S. is a convicted criminal having been found guilty of one count of rape contrary to section 4 of the Criminal Law (Amendment) Act 1990. At no point in this Removal Order process, which began in August 2009 with a letter to Mr. S. informing him of the Ministers proposal to make a removal order in respect of him, has Mr. S., his two sets of legal representatives or his partner Ms. S., expressed any remorse on the part of Mr. S. for his rape of a young woman or expressed a determination to rehabilitate himself so as not to commit crime again in this State in the future.
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> In determining the impact that removal from the State would have upon Mr. D.S. it is submitted that if the Removal Order is signed in respect of Mr. D.S., there is no less restrictive process available which would achieve the legitimate aim of the State for the prevention of crime and disorder in the interests of public safety and the common good. Mr. D.S. has, through his serious criminal behaviour, demonstrated a flagrant disregard for the laws of the State, this disregard is further demonstrated by the fact that Mr. S. attempted to evade justice in this State by absconding abroad before his trial for the offence of rape. Mr. S. absconded to the United Kingdom and only returned when he was extradited back on a European Arrest Warrant; he had been arrested in the United Kingdom for a criminal offence and when his DNA was taken by the British authorities, it matched DNA that had been extracted from semen stains found on the hood of the victim that Mr. S. raped (tab. 7). Mr. S. is also on an "Interpol" wanted list as he is being sought by the judicial authorities in his homeland Lithuania in relation to prosecution for charges of sexual assault/rape (tab. 5). Indeed Mr. S.'s is currently the subject of European Arrest Warrant proceedings in this regard (tab. 6).

> These therefore exist as very substantial reasons associated with the common good which require the removal of Mr. D.S. Therefore on the basis of the forgoing I recommend that a Removal Order be made in respect of Mr. D.S."

17. The family life rights of the applicants were also considered under article 8(1). Once again reference was made to the representations by R.S. on behalf of D.S. concerning their past family life and their intended future life together which they hoped would be in Ireland. The recommendation stated:

> "While the above statements are noted there are several points that should be raised. Gilmartin and Traynor have stated that from his arrival in the State in 2004 until Mr. S. was taken into custody, he lived with his long term partner R.S. and they raised their young son together. However on the birth certificate for their son which had been submitted (tab. 8) who was born in December 2005 it clearly states that Mr. S. and Ms. S. were living at separate addresses in Galway and not residing with each other which is more than a year after his claimed arrival in the State. Furthermore before Mr. S was convicted and imprisoned for rape he had been living for an unknown period of time in the United Kingdom before he was arrested and extradited back to Ireland to face trial for rape. MacGuill and Company have stated that the child has been resident (in) Ireland since birth. While we do not know for certain if Ms. S. and her son M.S. accompanied Mr. S. to the United Kingdom while he was on the run conclusions can nonetheless be drawn. If Ms. S. and her son did accompany Mr. S. to the United Kingdom it shows that this family unit has shown itself capable of relocating itself to another location inside the European Union. On the other hand if Mr. S. abandoned his partner and child in the State while he was evading the judicial authorities by fleeing to a foreign country it shows that Mr. S. is prepared to live apart from his family if it is necessary".

18. It is then noted that Ms. R.S. and M.S. would be free to continue to reside in the State and were also free to relocate to Lithuania, or wherever they wished within the European Union. It was therefore concluded that an intolerable burden would not be placed upon family life by their removal. It was also concluded that the making of a Removal Order was proportionate and reasonable having regard to the legitimate aim being pursued namely, the prevention of disorder and crime.

19. In addition the following conclusion and recommendation were made:-

> "In the light of the very serious nature of this case, namely Mr. S.'s serious criminal behaviour, and the threat that he poses to public policy and security it is submitted that the exclusion period should be increased from the initial proposal of five years to a total of ten years from the date of Mr. S.'s removal from the State."

20. By letter dated 16th August, 2013 solicitors on behalf of D.S. submitted to the INIS that the removal and exclusion orders were not made in accordance with law. It was submitted that the imposition of the ten year exclusion period when a five year exclusion had been proposed, indicated bias and that he was being punished for bringing a successful civil action against the State in respect of injuries suffered by him while in custody. A number of the legal issues raised were later pursued in these proceedings. High Court proceedings were threatened. In a letter from Mr. Mac Craith dated 19th August, 2013 the solicitors were informed that any further communication should be with the Gardai National Immigration Bureau (GNIB) who now had charge of the enforcement of the Removal Order. By further letter dated 29th August the solicitors indicated that they wished to enter an appeal on behalf of D.S. pursuant to regulation 21 and to furnish additional evidence. A reply dated 3rd September, 2013 requested that any further representations in support of the review be made within seven days with the particulars set out as required in schedule 11 to the Regulations. Further representations were furnished under cover of letter dated 11th September.

21. In this submission, it is claimed that the tone and substance of the decision were biased and that no fair consideration was given to the social and family bonds that D.S. had within the State. Negative observations concerning his employability, his remorse for the rape committed and repeated reference to his claimed date of entry into the State were also said to indicate a bias towards D.S. It was submitted that no reason whatsoever had been proffered, for the extension of the exclusion period to ten years from the one proposed of five years. D.S. was not asked for submissions in relation to the proposed extension. It was claimed that this was a further indication of bias by the Minister against D.S.

22. Some additional information was furnished in relation to the family circumstances of the applicants. It was said that since first alerted to the intention to make a removal order against him and throughout his period of incarceration D.S.'s bond with R.S. and his son strengthened considerably. Regular visits were made to D.S. in prison by R.S. and M.S. and they remained in contact by telephone and letters during that period. It was noted that M.S. was now 7 ½ years old and had a strong bond with his father. D.S. wished to be involved in his life in the future and both parents believed that M.S. would suffer greatly were D.S. to be removed to Lithuania. R.S. believed that his removal would result in "the end of their family unit". R.S. had lived in Ireland for almost ten years and her brother and mother also resided here. She continued to be employed as a shop assistant in Galway and had completed a course in business, secretarial and office administration. M.S. had commenced school in Galway when he was four and continued to attend. R.S. believed her family life and that of M.S. was firmly established and located in Ireland. She hoped to marry and have further children with D.S. on his release from prison.

23. It was also claimed that D.S. had formed significant cultural and social ties in Ireland having first moved here in 2004 and considers Ireland his home. He worked as a roofer and metalworker in Ireland and while in prison worked in carpentry. He hoped to seek secure employment in those areas upon his release from prison. He also hoped that friends and contacts in Ireland would assist him in securing employment. In addition he had been diagnosed with hepatitis B. He had limited links with his country of origin, Lithuania. His mother, father, sister and adult daughter live in Lithuania but his core family unit R.S. and M.S. live in Ireland. He believes it would be very difficult to obtain employment in Lithuania where the employment situation is bleak and he has no contacts.

24. At this stage his solicitors indicated that he wished to place on record that he was "very remorseful for the crime he committed". He accepted that he seriously damaged the life of the victim and his own life. He was very sorry for what he had done and instructed that he had no intention of committing any further crimes in Ireland. His sole focus was to return and live with his family in Galway.

25. By letter dated the 30th September, 2013 Mr. MacCraith informed the solicitors that further information had been furnished to the Minister that D.S. had been convicted of a number of additional offences whilst in the State namely:-

> (1) An offence of theft contrary to section 4 of the Criminal Justice (Theft and Fraud) Offences Act 2001 committed on 27th November, 2004, the outcome of which is not indicated (though this conviction was later accepted by D.S.).
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> (2) Two road traffic offences committed on the 12th December, 2004 including a charge of driving without insurance in respect of which a disqualification order from driving for one year was imposed together with a fine of €750. The conviction was recorded on the 21st February, 2005.

(3) A series of road traffic offences committed on the 6th June, 2005 and dealt with on the 23rd and 26th October, 2006 resulting in the imposition of a further disqualification from driving of one year and fines. These included offences of driving without insurance, driving at an excess speed in a built-up area and an offence contrary to section 49(4) and (6)(a) of the Road Traffic Act 1961 as amended.

(4) A conviction on 26th February, 2007 for failure to display a tax disc in respect of which a small fine was imposed.

In reply the solicitors submitted that these offences were minor and dealt with in the District Court and that any decision to remove or exclude D.S. based upon them would be unreasonable. Further submissions were invited by Mr. MacCraith on 8th October, 2013. On the 10th October, it was again submitted that these offences were of no relevance to the decision. It was accepted that the convictions were recorded against him but it was also indicated that he was remorseful for these offences and undertook once again to abide by the law and be of good behaviour in Ireland.

The Review Decision

26. By letter dated 16th October, 2013 Mr. MacCraith informed D.S., then at Cloverhill Prison, Dublin that following a review of his case in accordance with regulation 21 a decision had been made to affirm the Removal Order which would now incorporate an exclusion period of five years from the date of the removal. A copy of the decision was enclosed in which it was stated that "your conduct is such that it would be contrary to serious grounds of public policy to permit you to remain in the State".

27. The Removal Order was affirmed by Ms. Maura Hynes, Principal Officer on the 15th October, 2013 having reviewed the file and all the papers in the case. In the course of the review Mr. MacCraith considered the matters raised and recommended, on grounds of serious public policy, that the Removal Order with the reduced exclusion period of five years be made under regulation 20(1)(a). Ms. Helen Masterson, Higher Executive Officer, on the same date, also reviewed and considered the papers. She stated that the case had been considered under article 8 of the European Convention of Human Rights and found that the decision was not disproportionate to the legitimate aim being pursued. Therefore she recommended that the Removal Order for the reduced period should be affirmed by Ms. Hynes.

28. It should be noted that Ms. Masterson also reviewed the file at the time of the making of the original decision and at that time recommended that D.S. be removed and excluded for a period of ten years. Mr. MacCraith was also involved in that decision and made a similar recommendation which contained the handwritten amendment of the five year exclusion proposed to ten years and was accompanied by a draft order to that effect.

29. Objection is taken in these proceedings to the involvement of Mr. MacCraith and Ms. Masterson in the Review Process which is intended to be independent. Ms. Hynes states in her affidavit that "in accordance with regulation 21(3) the review was determined by her having considered the materials in the case, and that she reaffirmed the removal order." She considered all the documentation provided and such recommendations as were made. She states that neither Mr. MacCraith nor Ms. Masterson made any decision on the review as they did not have the authorisation pursuant to the regulations to do so. The regulation provides that the review decision must be made by a different officer at a higher grade than the officer who made the initial decision. She states that she was a Principal Officer at a higher grade to the officer, Mr. Doyle, who made the original recommendation, who was an Assistant Principal. She states that she determined the matter in an independent manner having considered all of the materials in the case. It is significant that she emphasises that the reasons for her decision were "those set out in the eleven page Review Document upon which she wrote Removal Order affirmed M. Hynes PO, 15/10/2013". She states that she determined that D.S. represented an "ongoing threat" to public policy "as set out in the decision itself for the reasons outlined therein".

30. The representations made on behalf of the applicants before and after the making of the Removal Order were considered during the review. The further convictions referred to earlier were also considered as were particulars furnished under schedule 11 to the Regulations. The matters raised concerning the first applicant's social and cultural integration in the State, his family and their hopes for the future, and details concerning his son and D.S.'s health were also considered. References were also made to the family unit's connections to Lithuania and those that now exist in Ireland.

31. The right of D.S. to a private life and the applicants' rights to family life under article 8 of The European Convention on Human Rights were once again considered. The determination accepts that the decision to remove D.S. will constitute an interference with his right to private life but repeats that it is in accordance with law under article 20 of the Regulations and the pursuit of a pressing social need for the "prevention of disorder and crime". The issue of the proportionality of the removal was also considered, and in that regard weight was given to the District Court convictions. The nature of D.S.'s criminal behaviour and in particular, the details of the section 4 rape of which he was convicted were set out:-

> "The victim was grabbed from behind and knocked to the ground by Mr. S. When initially arrested Mr. S. denied any knowledge of the crime or the area. He was rearrested in January 2007 and again denied the offence. He was charged with the attack but failed to appear for his trial and fled to the United Kingdom to evade justice, he only returned to Ireland when extradited back on foot of a European Arrest Warrant. He was then convicted and sentenced to six years in prison. It is clear therefore while the serious crime was committed on one night in November 2005 Mr. S. continued to deny the attack and to attempt to escape punishment for it for nearly four years afterwards, only changing his plea to guilty after his extradition back to Ireland and faced with DNA evidence linking him to the attack. These actions which resulted in his victim being diagnosed with post-traumatic stress disorder, show the contempt he holds for the laws of this State and the people residing in the State. … Mr. S. has, through his serious criminal behaviour as well as his committing a number of other offences which began shortly after his arrival in the State and continued until he fled to the United Kingdom, demonstrated a flagrant disregard for the laws of this State. As stated above, this disregard was further demonstrated by the fact that Mr. S. attempted to evade justice in this State by absconding abroad before his trial. He only returned when he was extradited back on a European Arrest Warrant. He had been arrested in the United Kingdom for a criminal offence and his DNA was taken by the British. This matched DNA that had been extracted from semen stains found on the hood of the victim that Mr. S. raped. It should be noted that Mr. S. is also on an Interpol wanted list and he is being sought by the judicial authorities in his homeland in Lithuania in relation to offences of sexual assault/rape in Lithuania. Indeed Mr. S. is currently the subject of a European Arrest Warrant proceeding in this regards (tab. 6). It is clear that Mr. S. is a person who has come to the adverse attention of the police forces of at least three EU Member States.
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> These therefore exist as very substantial reasons associated with the common good and very serious grounds of public policy which require the removal of Mr. S. Mr. S. has demonstrated through his criminal behaviour over a very long period of time that he represents an ongoing risk to public policy and security and on this basis his removal is necessary."

32. The consideration also reviews the family ties relied upon in the appeal. M.S. was born in December 2005 and his birth certificate indicates that both parents were living apart during 2004/2005. It is clear that Mr. S. was residing in London after he fled from Ireland to avoid prosecution. It was not suggested that R.S. or M.S. resided with him in the United Kingdom during that time or what level of contact was maintained between them. The same observations concerning the degree of involvement of R.S. in the life of M.S. during the course of his imprisonment are made on the review as were made in the initial decision. It is acknowledged that D.S.'s removal from the State may cause disruption to his family life but the conclusion was reached that this consequence was proportionate and would not impose an intolerable burden upon Mr. S. and his family. It arose because of his pattern of criminal behaviour and "the ongoing threat that Mr. S. poses to public policy".

33. It is then stated that the imposition of a ten year exclusion period was "an error" in that the period was "inadvertently" increased to ten years. A reduced period of five years as first proposed in the letter of 21st August, 2009 was recommended. Having considered the decision and recommendation made at first instance, I am not satisfied that the period of ten years imposed could be regarded as an inadvertent decision. It is clear that the proposal of a five year exclusion period was made in the original letter and that because of the serious nature of the offence, it was determined that the period should be increased to ten years. This is clear from the body of the decision and the handwritten amendment of five years to ten years which appears in the recommendation.

34. The Court also notes that the document relied upon for the details of the section 4 rape, set out in the body of the decision, is a "press report" as confirmed by a letter from INIS dated 18th October, 2013. The information upon which the decision was based does not appear to derive from a garda report of the offence, or the court proceedings, or a transcript of the court proceedings. However, it is not claimed that the account set out in the press report or the review is factually inaccurate. Nevertheless, it appears to the Court that in considering non-minor offences the Minister ought, where possible, to be furnished with either a Garda summary of what is said to have taken place in court and the details of the offence of which a person has been convicted or a transcript of the proceedings, together with any victim impact report that may have been relied upon or other matters advanced by way of mitigation (including claims of remorse). However, this aspect of the matter is not central to the courts decision in this case.

An Independent Review?

35. It is submitted that the removal and exclusion order is tainted by objective bias and should be quashed because the two officers responsible for recommending the orders also processed the internal review on the 15th October, 2013. As already noted the original orders were made by Mr. Doyle following recommendations made by Mr. MacCraith and Ms. Masterson who were also clearly involved in the internal review and made further recommendations in that regard. It is submitted that this is a breach of the principle *nemo iudex in causa sua*. It is also submitted that the involvement of these two officials breached Regulation 21(3) of the 2006 Regulations in that the first named respondent failed to carry out a review in accordance with the terms of the regulations. In the alternative it is argued that the Regulations fail to transpose Article 31 of Council Directive 2004/58/EC concerning the provision of an independent review process into Irish law.

36. Regulation 21(3) provides:-

> "A review under this Regulation of a decision under paragraph (1) shall be carried out by an officer of the Minister who –
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> (a) is not the person who made the decision, and
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> (b) is of a grade senior to the grade of the person who made the decision."

Regulation 21(4) provides:-

> The officer determining the review may –
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> (a) confirm the decision the subject of the review on the same or other grounds having regard to the information provided for the review or substitute his or her decision for the decision the subject of the review, or
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> (b) set aside the decision and substitute his or her determination for the decision."

The right to internal review recognises the obligation to provide procedural safeguards whereby a person may appeal against a removal or exclusion order which allows for an examination of the facts and circumstances on which the proposed measure is based under Article 31 of the Directive.

37. While it is correct to say that the review decision was made by Ms. Hynes, a Principal Officer who is a grade higher than Mr. Doyle, an Assistant Principal, who made the decision at first instance, and technically complies with Regulation 21(3)(a) and (b), nevertheless, it is clear that each of them relied substantially upon the material compiled and the recommendations made by Mr. MacCraith and Ms. Masterson. That is the reality and dynamic of the decision-making process in these cases.

38. I am satisfied that it is the purpose and intention of Article 31 of the Directive that the review of the removal and exclusion order must be independent of the decision-maker and those who contributed assessments and determinations relied upon by the nominated decision-maker at first instance. It is important that the regulations be interpreted in accordance with constitutional justice and be free of any suggestion of "objective bias". In this regard, the Court is concerned that the same two officials who made strong negative recommendations against D.S. are involved in making further recommendations on review. Furthermore, the initial recommendations made by Mr. MacCraith and Ms. Masterson recommended that D.S. be excluded for ten years rather than the five originally proposed on the basis of the seriousness of the offence committed. This was acted upon by Mr. Doyle. The Court is satisfied having regard to the content of the original recommendation and the hand- written amendment from five to ten years in the body of the recommendation, that this was not done through inadvertence but because of strongly held views. Though the period of exclusion was reduced to five years on review, an attempt was made to suggest that this was a simple administrative error. This is clearly not so. This illustrates, at the very least, the difficulties caused by directing the same officials to consider the papers and produce recommendations in the course of a review, who have carried out exactly the same role in respect of the first decision. Counsel on behalf of the applicant goes further and submits that the involvement of the same two officials in the review gives rise to an issue of "objective bias".

39. In delivering the judgment of the Supreme Court in *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40 Fennelly J. considered the test applicable in cases of alleged "objective bias":-

> "18. The test for deciding whether objective bias exists in the case of any adjudication has been repeated in slightly different terms in many cases over many years. …

19. Denham J. described the test authoritatively in her judgment in *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412. At p. 441, she stated:-

> "… it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person."

20. The hypothetical reasonable person is an independent observer, who is not over sensitive, and who has knowledge of the facts. He would know both those which tended in favor and against the possible apprehension of a risk of bias …

21. The test of objective bias is expressed in general terms. Its application demands an appreciation of all the circumstances of the individual case, followed by a particularly careful exercise of the faculty of judgment…"

40. In somewhat different circumstances in *Prendiville v. Medical Council* [2008] 3 I.R. 122 Kelly J. held that it was objectionable that members of a Fitness to Practice Committee sat as members of the Medical Council to consider their own report on the conduct of the applicants. The involvement of those members involved a breach of the nemo iudex in causa sua rule. It was not permissible for a decision-maker exercising judicial or *quasi* judicial functions to sit with an appellate or confirming body to hear an appeal or confirmation against their own decision. In that case twenty-two members of the Medical Council who considered the issue against the applicant included five members who constituted a Fitness to Practice Committee which made the findings against him. On the appeal they would be deciding whether or not to confirm their own findings. Kelly J. stated:

> "123. Whether considering the Fitness to Practice Committee report on the question of liability or sanction it was in my view wrong that members of the Fitness to Practice Committee should have participated in the work of the Council on that occasion. The involvement involved a breach of the *nemo iudex in causa sua* rule.
>
> 124. That rule is of fundamental importance in bodies exercising judicial and *quasi* judicial roles. It was in my view objectionable that members of the Fitness to Practice Committee should have sat as members of the Council to consider their own report on the conduct of the applicants. Gone are the days when it was considered permissible that a decision maker exercising judicial or *quasi* judicial functions should sit with an appellate or confirming body to hear an appeal or confirmation against his own decision. It was not unusual for that to occur, even in the judicial sphere, in the nineteenth century. However, s. 24 of the Courts of Justice Act 1924 prohibits a judge who heard a case from sitting as a member of the court of appeal when the case over which he presided is being considered. That statutory prohibition is no more than a statement of what is now considered to be a practical application of one of the two rules of natural justice.
>
> 125. A good example of the application of this rule is to be found in the case of *R. (Snaith) v. Ulster Polytechnic* [1981] N.I. 28 where the applicant's dismissal was quashed because the members of the committee who had taken the initial decision to dismiss sat with the governors of the college when the appeal was heard."

41. Though in this case the two officials who were involved at both levels in making recommendations did not sit as part of a formal decision-making body, it is clear that their recommendations were heavily relied upon by the decision-makers at both levels. Their role was not simply to compile information but to form an opinion as to what should be done in the instant case on the basis of the facts and their consideration of the submissions made on behalf of the first named applicant. I am satisfied that this is contrary to the spirit and intention of the regulations which requires an independent process of review. The Court is satisfied that the involvement of Mr. MacCraith and Ms. Masterson in the appellate review process gives rise to a reasonable apprehension of bias in the making of the review decision insofar as a reasonable person might consider that the first named applicant's case and opportunity for a fair hearing was compromised in the circumstances (see *Dublin Well Woman Centre Ltd. v. Ireland* [1985] ILRM 418, *O'Neill v. Irish Hereford Breed Society Ltd.* [1992] 1 I.R. 431, *Prendiville (supra), Kovalenko and others v. The Minister for Justice and Equality and others* [2014] IEHC 624 and *P. R. and others v. Minister for Justice and Equality, Attorney General and Ireland* [2015] IEHC 201).

42. I am satisfied that this conclusion is in accordance with the first named applicant's right to fair procedures under Article 40.3 of the Constitution in accordance with which the regulations must be interpreted. I am therefore satisfied that the decision is fundamentally flawed on this basis and must be set aside.

43. I am not satisfied that the applicants have established that the decision either at the first instance or on review was fundamentally flawed by reason of "subjective bias". The assertion that the decision makers at either level were influenced by a successful outcome of High Court Civil Proceedings brought against the prison authorities whilst he was undergoing a sentence of imprisonment is not supported by any credible evidence.

Public Policy

44. The applicants contend that the decision to remove the first named applicant from the State is unlawful because it is based solely on his rape conviction. It is submitted that, contrary to the provisions of the 2006 Regulations and the Council Directive, the removal and exclusion orders were made for the general purpose of the prevention of crime and not because it was determined that there was sufficient evidence that D.S. was likely to engage in personal conduct which represented a genuine, present and sufficiently serious threat affecting the fundamental interests of society; rather it was a conclusion based without evidence, on his propensity to act in the same way in the future.

45. Directive 2004/38/EC regulates the entitlement of every citizen of the European Union to move and reside freely within the territories of the Member States subject to various conditions laid down in accordance with Part 2 of the Treaty on the Functioning of the European Union (TFEU). The Directive stipulates the conditions governing the exercise of free movement and residence of European Union citizens and their family members within the territory of the Member States. It regulates and restricts the basis upon which citizens may be removed and excluded from the Member States. In particular, it protects a citizen of a Member State who has committed a criminal offence in the host member state from arbitrary removal and exclusion.

46. Article 27(1) of the Directive provides that Member States may restrict the freedom of movement and residence of Union citizens, irrespective of nationality "on grounds of public policy, public security or public health". Article 27(2) provides:-

> "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."

47. Article 28 deals with "protection against expulsion" and provides:-

> "1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host member state and the extent of his/her links with the country of origin.
>
> 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) are a minor …"

Article 16 of the Directive provides that a Union citizen who has resided legally for a continuous period of five years in a host Member State shall have the right of permanent residence there. The CJEU in *Onuekwere v. Secretary of State for the Home Department (Case-378-12)* held that a period of imprisonment could not qualify as "legal residence" and might not, therefore, be taken into account in the calculation of the period of five years required for the purpose of acquiring the right under Article 16. A citizen's status as a permanent resident or as a person who has been resident for ten years in the host Member State is relevant to the principles applicable to the restriction of his/her freedom of movement and residence in the host Member States if convicted of criminal offences. A person holding permanent residence under Article 28(2) may not be expelled "except on serious grounds of public policy or public security". If a Union citizen is resident in the State for the previous ten years, an expulsion decision may only be taken against him/her, if based "on imperative grounds of public security, as defined by Member States". The applicant was not entitled to the enhanced consideration available under Articles 28(2) or (3). Therefore, in the instant case the first named respondent had to be satisfied that the orders should be made "on grounds of public policy, public security or public health": These grounds need not be "serious" (Article 28(2)) or "imperative" (Article 28(3)).

48. Regulation 20(1)(a)(iv) provides that the Minister may by order require a person to leave the State within a time specified when:-

> "...in the opinion of the Minister, the conduct or activity of the person is such that it would be contrary to public policy … to permit the person to remain in the State."

Regulation 20(c) provides that the Minister may impose an exclusion period on the person concerned in a Removal Order during which he/she shall not re-enter or seek to re-enter the State. Regulation 20(1)(d) provides that the Minister shall not:-

> "except on grounds of public order, public security or public health make a removal order in respect of a person to whom these Regulations apply solely on the basis that the person concerned has served a custodial sentence."

Regulation 20(3)(a) provides that in determining whether to make a removal order and whether to impose an exclusion period in respect of a person, the Minister shall take account of:-

> (i) the age of the person;
>
> (ii) the duration of residence in the State of the person;
>
> (iii) the family and economic circumstances of the person;
>
> (iv) the nature of the person's social and cultural integration within the State, if any;
>
> (v) the state of health of the person;
>
> (vi) the extent of the person's links with his/her country of origin."

The distinction drawn in the Directive between those who are permanently resident in the State and those who are ten years resident in the State and others is replicated in Regulation 20(6). Regulation 23 provides that the Minister may exclude a person under the Regulations if she considers it "necessary in the interest of … public policy".

49. It is clear from the consideration of the first named applicant's file at first instance and in the course of the review that the fact that he was convicted of a section 4 rape substantially influenced the decision to make the removal and expulsion orders. It is also clear from the recommendations drafted prior to the making of the orders that aspects of the applicant's conduct also influenced the decision-makers, including his failure to acknowledge his guilt, his decision to abscond to avoid his trial, his failure to apologise to his victim or to express remorse for the offence committed. It is clear that the information concerning additional criminal offences which he committed (albeit of a minor nature) also influenced the decision-maker on review.

50. It is undoubtedly the case that a section 4 rape is regarded as an extremely serious offence under Irish criminal law (see *The People (Director of Public Prosecution) v. Tiernan* [1988] I.R. 250).

51. In *Regina v. Pierre Bouchereau* [1977] ECR 1999, the CJEU considered the wording of Article 3(2) of Directive 64/221/EEC that previous criminal convictions should not "in themselves" constitute grounds for the taking of measures based on public policy or public security unless by their nature they constitute evidence of a manifest, present or further propensity to act in a manner contrary to public policy or public security. The Court held:-

> "26. According to the terms of the order referring the case to the Court, (the referred) question seeks to discover whether, as the defendant maintained before the National Court, "previous criminal convictions are solely relevant insofar as they manifest a present or further intention to act in a manner contrary to public policy or public security" or, on the other hand, whether, as counsel for the prosecution sought to argue, although the "Court cannot make a recommendation for deportation on grounds of public policy based on the fact alone of a previous conviction (it) is entitled to take into account the past conduct of the defendant which resulted in the previous conviction".
>
> 27. The terms of Article 3(2) … which states that "previous criminal convictions shall not in themselves constitute grounds for the taking of such measures" must be understood as requiring the National Authorities to carry out a specific appraisal from the point of view of the interest inherent in protecting the requirements of public policy, which does not necessary coincide with the appraisals which formed the basis of the criminal convictions.
>
> 28. The existence of a previous criminal conviction can, therefore, only be taken into account insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.
>
> 29. Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy.
>
> 30. It is for the authorities and, where appropriate, for the National Courts, to consider that question in each individual case in the light of the particular legal position of persons subject to community law and of the fundamental nature of the principles of the free movement of persons."

52. I am satisfied that the Minister was entitled to rely upon the serious criminal behaviour of the defendant as evidenced by the details of the offence provided and the sentence of six years imprisonment imposed, as conduct which, of itself, might constitute a threat to the requirements of public policy. It is not permissible to remove a Union citizen simply because he/she has been convicted of a criminal offence. It must be demonstrated that the removal is necessary "either because public policy has been seriously effected by the offence committed, or because it is to be feared that the person concerned would repeat the anti-social acts in question." (see *Bonsignore v. Stadt Koln,* case 64/74 [1975] ECR 00297). It is clear, therefore, that the nature and seriousness of the criminal conduct and the attitude and subsequent behaviour of the applicant in respect of offences committed may alone or, in appropriate circumstances, be considered cumulatively with other facts in respect of "public policy" when deciding to remove or exclude an offender (see *Kovalenko and P.R.* cited above). If the concept of public policy is relied upon by the Minister, the existence, in addition to the "perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society" must be established (see *Case C – 348/96 Calfa [1999] ECR 1-11 paragraph 24*). There may be cases in which past conduct alone or in conjunction with other factors may give rise to a threat to public policy or indicate a readiness, inclination or disposition amounting to a propensity to act in the same way in the future.

53. In this case the Minister was entitled to take into account the extremely serious nature of the offence as a factor which in itself constituted a serious threat to public policy. In particular, it is clearly appropriate for the Minister in assessing the reality of that threat to take into account the surrounding circumstances of the offence, the attitude of the convict to it, any absence of remorse, and attempts to avoid justice by absconding while awaiting trial. It would be contrary to common sense if the Minister could not to take into account the convict's attitude to the serious offence committed in assessing an ongoing threat to public policy. The Minister is further entitled to consider the commission of other offences by the Union citizen as part of that process. The Minister is entitled to consider whether "public policy has been seriously affected by the offence(s) committed" (in the sense discussed in *Bonsignore*). I am satisfied, therefore, that the nature and seriousness of the criminal conduct and the attitude and subsequent behaviour of the applicant in respect of the offence(s) committed may be considered alone, or, in appropriate circumstances, cumulatively with other facts under the heading of "public policy" when deciding to remove or exclude an offender. (see *Kovalenko* paragraph 44-56).

54. It is clear that all relevant matters which the Regulations and the Directive require to be considered were taken into account. In particular, the Court is not satisfied that the first named respondent considered the matter solely by reference to the fact that the first applicant had been convicted of a serious offence and served a custodial sentence. His attitude to the s. 4 offence and his victim, further convictions and the consequences that might flow from his removal from the State were taken into account. I am therefore satisfied that there was no legal error in the approach adopted by the officials or the Minister in assessing the threat to public policy posed by D.S. apart from the issue concerning objective bias.

Best Interests of the Child

55. It is submitted that the rights of M.S. as a child and in particular, his best interests were not properly considered. It is clear that there was an extensive consideration of the Article 8 rights to private and family life vested in the applicants.

56. However, it is submitted that the best interests of the child should have been taken into account as a "primary consideration" by the Minister in deciding whether to remove or exclude the applicant because the child's best interests lay in his father being permitted to remain the State. The applicants rely upon Article 24(2) of the Charter of Fundamental Rights which states:-

> "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

57. I am satisfied that the child's best interests were treated in accordance with the provisions of Article 8 of The European Convention on Human Rights (Article 7 of the Charter) and that the applicants' family rights were considered. It is clear that all submissions made on behalf of the child's interests were considered and were to the forefront of the decision-makers' deliberations. The decision-maker must carry out a careful review under Article 8 of the best interests of the child and an assessment which accords them appropriate weight in the circumstances of the case. (see *Dos Santos and others v. The Minister for Justice and Equality* [2014] IEHC 559 at paragraphs 278). I am satisfied that this was done.

58. In the light of the foregoing it is unnecessary to consider this matter further or the balance of the grounds advanced alleging that the decision was irrational, unreasonable or disproportionate.

Conclusion

59. I am satisfied that the decision ought to be quashed for the reasons set out above. I have considered whether the court ought to exercise its discretion whether to refuse relief having regard to the absence of subjective bias and other conclusions reached against

the applicants. I do not consider that this is an appropriate case in which to do so because of the fundamentally flawed procedure adopted in the review process.