THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 766 JR]

BETWEEN

IGOR MAVLANOUS

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 10th July 2019

Introduction
1. A preliminary issue arises in these proceedings, which concern a challenge to a decision made by the Minister for Justice and Equality ('the Minister') on 9 September 2016, affirming a removal order, made on 15 March 2013, against the applicant, a Latvian national and, hence, European Union citizen, imposing upon him an exclusion period of ten years, under Reg. 20 of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 ('the 2006 Regulations'). For ease of reference, I will refer to the decision of 9 September 2016 as 'the review decision.'

2. The preliminary issue is whether these proceedings should be dismissed as an abuse of process because of the applicant's lack of candour, *male fides* and gross misconduct in bringing and initially maintaining them on the basis of a deliberate deceit that he admitted only after it had been incontrovertibly established.

The applicant's exercise of free movement rights
3. The applicant was born in 1968. He claims to have entered the State in 2004, commencing employment here in September of that year. If his evidence can be relied upon, he later acquired a right of permanent residence in Ireland under Article 16 of Directive 2004/38/EC ('the Citizens' Rights Directive'). The applicant's marriage to a Latvian national was registered in Latvia on 7 July 2007. The couple have an Irish citizen daughter, born in 2010.

The applicant's criminal conduct
4. The applicant came to the attention of An Garda Síochána on 26 March 2008 when a sexual offence complaint was made against him.

5. The criminal complaint was as follows. On 25 March 2008, a number of persons were socialising at a house in Dublin. The complainant, a 21-year-old woman, went upstairs to use the bathroom. The applicant followed her into the bathroom and orally raped her there. The applicant made a voluntary statement under caution on 26 March 2008, denying any sexual contact with the complainant. The applicant was arrested and detained for questioning on 19 October 2009, during which detention a DNA sample was obtained from him. Forensic testing disclosed that the applicant's DNA profile matched that of semen found on the complainant's clothing and on various items taken from the bathroom in which the rape occurred. The applicant was questioned further on 18 February 2010.

6. On 21 March 2011, the applicant entered a plea of guilty before the Central Criminal Court to the rape of the complainant, contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990. On 25 July 2011, he was sentenced to a term of imprisonment of six years, three years of which were suspended.

The removal order against the first applicant
7. On 23 April 2012, through the Irish Naturalisation and Immigration Service ('INIS'), the Minister wrote to the applicant to inform him of the Minister's proposal to make a removal order against him, under the power to do so conferred by Reg. 20(1)(a) of the 2006 Regulations where '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.' The conduct identified was the rape that the applicant committed on 25 March 2008, as evidenced by his conviction and sentence for that offence in 2011. The letter went on to inform the applicant that the Minister was also proposing to impose upon him a period of exclusion from the State of ten years, in accordance with Reg. 20(1)(c) of the 2006 Regulations.

8. Through his solicitor, the applicant made representations against that proposal on 9 and 20 July 2012. The INIS acknowledged receipt of those representations on 2 August 2012, before requesting the provision of a letter of authority for those solicitors to act on the applicant's behalf and whatever further evidence the applicant wished to provide on his application in general and on his family life, if any, within the State, in particular. The applicant's solicitors did not provide a letter of authority from the applicant, nor any further submissions on the applicant's behalf.

9. Having considered the representations that had been furnished, the Minister nonetheless made a removal order against the applicant on 15 March 2013, incorporating an exclusion period of ten years. That order was based upon a four-page 'examination of file' report and recommendation, made by an officer of the Minister on the same date. A copy of the order and the examination-of-file on which it was based were furnished to the applicant in prison, by letter dated 19 March 2013.

The first removal of the applicant
10. The applicant was removed from the State, pursuant to the removal order, on 16 October 2013, the day of his release from prison.

The application for review
11. The applicant re-entered the State in breach of the removal and exclusion order. He has averred that he did so in October 2014 and that he lived with his wife and daughter here.

12. On 18 January 2016, the applicant wrote to the Minister, through the INIS, to request a review of the decision to make that

order, providing an address in Dublin but not otherwise acknowledging that he was in ongoing breach of the removal order. The applicant's wife wrote a letter to the INIS the following day in support of the applicant, assuming the letter is authentic.

13. The INIS acknowledged receipt of the applicant's request for a review by letter dated 27 January 2016, pointing out that he was in breach of the removal and exclusion order against him, and asking him to inform it of the date on which he had re-entered the State. The applicant replied, by letter dated 2 February 2016, that he had done so in October 2014, although that assertion has never been corroborated.

14. Through a Legal Aid Board Law Centre, the applicant made further representations in support of his review application, enclosing supporting documentation, on 3 March 2016. Under cover of a letter dated 10 May 2016, the INIS furnished those solicitors with a copy of a Garda report on the applicant's crime, dated 9 December 2009.

The decision under challenge
15. On 9 September 2016, the Minister affirmed the decision to make a removal order against the applicant, incorporating an exclusion period of ten years, based upon a further fifteen-page examination-of-file report and recommendation of the same date.

16. By letter of 12 September 2016, the Minister gave the applicant the notification of the review decision and of the reasons for it in writing that is required under Regulation 20(3)(b)(ii) of the Regulations. The applicant was informed that he was to present at the Garda National Immigration Bureau ('GNIB') on 22 September 2016, so that arrangements could be made for his removal from the State.

The second removal of the applicant
17. The applicant was removed from the State a second time on 29 September 2016.

The present proceedings
18. On 24 October 2016, the applicant applied for leave to seek judicial review of the review decision. That application was based upon a statement of grounds, dated 7 October 2016, supported by a 'verifying affidavit', not of the applicant but of the applicant's solicitor, sworn on the same date.

19. By Order made on 6 February 2017, Humphreys J granted the applicant leave to seek an order of *certiorari* quashing the review decision.

20. Counsel for the applicant acknowledges that the single or 'net' issue upon which the challenge to the review decision will turn, if permitted to proceed, is whether the conclusion that the applicant is not a person entitled to 'permanent residence' in the State under Reg. 12 of the 2006 Regulations, transposing the requirements of Art. 16 of the Citizens' Rights Directive, is correct.

21. The Minister's statement of opposition is dated 14 July 2017 and was filed the following day. It is grounded on an affidavit of Tom Doyle, an assistant principal officer in the Minister's department, sworn on 4 October 2017.

The applicant's deceit
22. In his 'verifying affidavit' sworn on 7 October 2016, the applicant's solicitor averred that he was making it on behalf of the applicant in circumstances where the applicant was then detained in prison. There is no reason to believe that the applicant was in prison on 7 October 2016.

23. In the verifying affidavit that he swore in support of the Minister's statement of opposition on 12 July 2017, Mr Doyle averred:

> 'It has now come to the attention of the [Minister] that the applicant has returned once more to the State and was present in the State from at least 16 May, 2017. The applicant therefore has breached the removal and exclusion order for a second time.'

24. The applicant then swore a verifying affidavit on 7 August 2017. It purported to verify the accuracy of the facts set out in the statement of grounds. In that affidavit, the applicant averred:

> 'I beg to refer to the affidavit of Tom Doyle sworn on behalf of the [Minister] on 12 July 2017. I continue to reside in Latvia since my removal from the State in September 2016. My family has continued to reside in Ireland. I have not re-entered the State since my removal in September 2016. I await an explanation from the respondent as to why it is believed that I re-entered the State and was present in the State from at least 16 May 2017. I was not present in the State in May 2017 and have not been in Ireland since 9 September 2016.'

25. It is not now in controversy that those sworn statements were calculated lies.

26. On 1 November 2017, Detective Sergeant James Doyle of the GNIB swore an affidavit on behalf of the Minister. In it, he averred in relevant part:

> '4. ... [O]n 22nd September 2016 members of the GNIB following on inquiries intended to visit a warehouse facility in the City of Dublin. On route to the site the members identified the [applicant] who was driving a forklift truck on Beech Road, Western Industrial Park, Dublin 12. The [a]pplicant was present in the State in breach of the removal order and exclusion order previously made.
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> 5. The [a]pplicant was arrested and detained and was subsequently removed to Latvia once again on the 29th September 2016.
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> 6. I further say that despite the existence of the removal [o]rder and an exclusion [o]rder, and despite having been removed from the State to Latvia on two occasions, it appears that the [a]pplicant once again entered the State and was present in the State on 16th March 2016. At that time, the [a]pplicant attempted to apply for a PPSN (personal public service number) from the Department of Social Protection under a false name. He completed and signed an application form in the name Igors Grigorjevs [...], and also produced a Latvian identity card in the name of Igors Grigorjevs [...]. His portrait was also captured by facial recognition software.... I am satisfied from enquiries carried out by me together with an examination of the facial recognition photograph taken on 16/03/2016 and the photograph contained on the identity card, that Igors Grigorjevs and Igor Mavlanous are one and the same person.'

27. The applicant swore a further affidavit on 20 December 2017. In that affidavit, he averred, in material part:

> 'I beg to refer to the [a]ffidavit of D/S Doyle and, in particular, paragraph 6 thereof. Shortly after my removal from the State in September 2016, I re-entered it. My wife was very sick. At present she is on [d]isability [a]llowance. My daughter was absolutely stressed. She did not want to go to school. And I had to appear in Ireland to calm everybody down and support them.'

28. The applicant has adduced no evidence to corroborate his averments concerning the medical condition of his wife, or the psychological condition of his daughter.

29. In his second affidavit, the applicant went on to apologise to the court for his impatience and lack of faith in the legal process. But it is the applicant's dishonesty and deceitfulness that are in issue, not his impetuosity or distrust of the process. And at the most fundamental level, the key issue is that of the integrity of the legal process.

Analysis

30. In approaching the issue of deliberate deceit as abuse of process, I derive considerable guidance from the decision of the Supreme Court (Murray J; Hardiman, O'Donnell, Clarke and MacMenamin JJ concurring) in *Sivsivadze v Minister for Justice* [2016] 2 IR 403.

31. The four appellants in that case were a married couple, both nationals of Georgia, and their two minor children. The refugee status applications of both parents had been refused; the mother had been granted humanitarian leave to remain, the father had been served with a deportation order under s. 3(1) of the Immigration Act 1999, as amended ('the Act of 1999'). The appellants brought an application for judicial review, seeking, among other reliefs, declarations that s. 3(1) of the Act of 1999 was unconstitutional and that it was in breach of Ireland's obligations under the European Convention on Human Rights, as well as a declaration that the deportation order revocation power conferred on the Minister by s. 3(11) of the Act of 1999 was an unconstitutional delegation of legislative power to the Minister by the Oireachtas. The High Court directed a plenary hearing on the constitutional issues, at the conclusion of which the proceedings were dismissed.

32. The father had demonstrated what the High Court described as an egregious lack of candour and *male fides* throughout the period of his unlawful residence in the State, only finally admitting his true identity under cross-examination in the course of an earlier inquiry into the lawfulness of his detention under Art. 40.4.1° of the Constitution.

33. More significantly, a direction that the mother file a further affidavit to explain a discrepancy concerning her age that emerged during the hearing of the Supreme Court appeal led to her admission that the story which she had relied upon in the asylum process and in various proceedings before the courts was, in the words of Murray J, a concoction and a tissue of lies. That, in turn, led to a submission on behalf of the Minister that the appeal should be dismissed as an abuse of process.

34. In addressing that submission, Murray J stated (at 418):

> '[26] I think the matter can be dealt with fairly succinctly. First of all, to state the obvious, the appellants could not pursue or obtain any relief based on facts that are now exposed as being false. Secondly, if these were judicial review proceedings *simpliciter*, in which the appellants sought the discretionary remedy of judicial review in respect of a discrete decision affecting them, there are ample grounds upon which the court could consider dismissing an appeal in such matters on the grounds of the egregious abuse of process of the courts in this case.
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> [27] However, this appeal concerns the constitutionality of s. 3(1) and s. 3(11) generally and does not involve the judicial review of discrete decisions.'

35. Having determined that, objectively, the appellants in that case were adversely affected by the operation of s. 3 of the Act of 1999 by virtue of the effect of the deportation order against the father on the life of the family as a whole, Murray J identified the significant value that the Constitution attaches to a right of appeal in a case involving a challenge to the constitutionality of a statute as, at the very least, a factor to be taken into account in determining whether to dismiss an appeal on discretionary grounds because of an abuse of process.

36. Murray J then continued:

> '[29] … Account must also be had to the interests of the children which are of paramount importance, although I would not go so far as to say that sole fact that a blameless minor has been included as one of the plaintiffs or applicants in a case would prevent a court exercising its discretion to dismiss an appeal on the grounds of abuse of process, particularly in judicial review proceedings.'

37. Murray J concluded:

> '[30] In all the circumstances, I am satisfied that this appeal should not be dismissed *in limine* on the grounds of the egregious abuse of process on the part of the [mother] and [father] given that what is in issue is their claim to a right to family life under the Constitution and the European Convention on Human Rights when, objectively, is it not disputed that they have been adversely affected, although, of course, the State claims, for entirely constitutional and legitimate purposes.
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> [31] Moreover, I think the court must have regard to Article 42A of the Constitution (the 31st Amendment) which provides, *inter alia*:-
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> > "1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."
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> This is an obligation placed on the branches of government, described as organs of State in Article 6 of the Constitution, including the judicial branch of government. In the circumstances, I am satisfied that this appeal should not be dismissed by reason of the abuse of process by two of the appellants, having regard to the objective constitutional interests involved, including those of the minor children, and the fact that it involves a challenge to the constitutionality of a provision of an Act of the Oireachtas.'

38. Applying those principles to the facts of this case, I conclude as follows.

39. First, these are judicial review proceedings *simpliciter*, in which the applicant sought the discretionary remedy of judicial review of a discrete decision affecting him, and in which the applicant's calculated decision to lie on oath in pursuit of that remedy has provided ample grounds to dismiss the proceedings because of the egregious abuse of the judicial process that the applicant's conduct represents.

40. Second, there is no countervailing constitutional interest, comparable to the right of appeal to the Supreme Court in a case involving a challenge to the constitutionality of a statute, at issue in this case.

41. Third, while the interests of a child, such as the applicant's daughter, are of paramount importance, there is very little evidence, as distinct from assertion, before the court concerning the best interests of that child in this case. Unlike the position in *Sivsavadze*, the child is not an applicant in these proceedings in her own right; nor is the child's mother. There is no sworn evidence from the mother or from any independent expert concerning the circumstances of the family, in general, or the best interests of the applicant's daughter, in particular. The credibility of the applicant's averments in that regard, as well as the authenticity or reliability of the documents exhibited on his behalf, have been called into question by his established willingness to deceive his own legal representatives, the Minister and the Court. In that regard, I would borrow and apply the following words of MacMenamin J in *A.G.A.O. v Minister for Finance* [2007] 2 IR 492 (at 507): 'In the absence of objective evidence, the court is not prepared to accept mere assertion.' The court must first protect the integrity of its own process, if it is to operate effectively to protect other fundamental values such as proper regard for the best interests of the child.

42. Finally, for the same reason, I cannot be satisfied concerning the effect, if any, on the right to family life under the Constitution and the European Convention on human rights that the dismissal of the applicant's proceedings may have. In addition, I cannot gauge the relevance, if any, of the provisions of Arts. 32 and 33 of the Citizens' Right Directive (on lifting an exclusion order and assessing individual circumstances when enforcing an exclusion order more than two years after it was issued, respectively) to the circumstances of this case, as those are matters that have yet to be addressed.

43. An obvious point of distinction between *Sivsavadze* and the present case is that the right most directly in issue in these proceedings is that of free movement of the applicant as a Union citizen, which finds its source in Art. 21(1) of the Treaty on the Functioning of the European Union ('TFEU'). That, in turn, raises the issue of whether there is anything in European Union law that would preclude or inhibit the dismissal of these proceedings as an abuse of process on the ground of the applicant's deliberately deceitful evidence. I am satisfied that there is not. As the European Court of Justice explained in Case C-286/06 *Impact v Minister for Agriculture and Food & Ors* ECLI:EU:C:2008:223; [2008] ECR I-2483 (at paras. 44-46):

> '44 The Court has consistently held that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law (see, in particular, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 13; Case C 312/93 *Peterbroeck* [1995] ECR I 4599, paragraph 12; *Unibet*, paragraph 39; and Joined Cases C 222/05 to C 225/05 *van der Weerd and Others* [2007] ECR I 4233, paragraph 28).
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> 45 The Member States, however, are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph 17; Case C 446/93 SEIM [1996] ECR I 73, paragraph 32; and Case C 54/96 *Dorsch Consult* [1997] ECR I 4961, paragraph 40).
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> 46 On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, in particular, *Rewe-Zentralfinanz* and *Rewe-Zentral*, paragraph 5; *Comet*, paragraphs 13 to 16; *Peterbroeck*, paragraph 12; *Unibet*, paragraph 43; and *van der Weerd and Others*, paragraph 28).'

44. The abuse of process principles that I have identified are those that govern judicial review proceedings generally, and a requirement to refrain from deliberate deceit in giving sworn evidence to the court does not render the exercise of European Union law rights practically impossible or excessively difficult. Thus, under the principle of national procedural autonomy, the position is governed by the applicable procedural law of the State.

45. Finally, I do not accept the argument, made as part of the very able submission on behalf of the applicant by Ms Boyle S.C., that the potential exposure of the applicant to other sanctions, available for other purposes, militates against the dismissal of these proceedings. Insofar as the applicant may have committed an offence contrary to the 2006 Regulations or, perhaps, the European Communities (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations'), that is a matter of the State's immigration law and criminal law. Insofar as the applicant may have committed an offence of perjury, that also is a matter of the State's criminal law. It is the responsibility of the appropriate authority in each instance to investigate and, if necessary, prosecute those offences. It is the obligation of this court to exercise its inherent jurisdiction to dismiss proceedings as an abuse of process, whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law.

Conclusion

46. Weighing all of the considerations I have just described in the balance, I conclude that the proceedings should be dismissed as an abuse of process and I will make that order.