**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2016 No. 194 JR]**

**BETWEEN**

**GRZEGORZ ROLA**

**APPLICANT**

**AND**

**MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Ms. Justice O'Regan delivered on the 8th day of November, 2016**

**Introduction**

1. The within matter came before the Court on 25th October, 2016 by way of application for *certiorari* seeking to quash the review decision of the respondent upholding the initial removal order and reducing the exclusionary period to three years, which decision was communicated to the applicant on or about 10th March, 2016. In addition the applicant seeks an order compelling the respondent to reconsider the review application and further seeks a declaration to the effect that the offence which he was convicted of is insufficient to represent a present and serious threat to public policy or security and therefore the respondent's decision is disproportionate and does not comply with the principles provided by Directive 2004/38/EC.

2. Leave was afforded by MacEochaidh J. on 4th April, 2016 to bring the within application.

3. The application was grounded upon the notice of motion of 11th April, 2016, the undated statement of grounds and the affidavit of the applicant of 30th March, 2016.

4. The respondent is resisting the application based upon a statement of opposition of 8th July, 2016 which in turn is grounded upon an affidavit of Tom Doyle of 19th October, 2016.

**Background**

5. The applicant is a Polish national born on 26th May, 1979 and has resided in Ireland since March, 2006.

6. On 3rd August, 2014 the applicant pleaded guilty in the Circuit Court to an offence in relation to the cultivation of approximately one hundred and twenty marijuana plants, worth approximately €97,000, in his attic. On 7th May, 2015 the applicant was sentenced to three years in prison with a final year being suspended for a period of two years. The respondent wrote to the applicant by letter of 8th July, 2015 indicating that it was proposed that a removal order be made against the applicant on the grounds of public policy. The applicant responded to same by a letter of 26th July, 2015 offering reasons why he (and his co-accused) should not be removed.

7. Although a letter was dispatched by the respondent to the applicant bearing date 30th November, 2015 informing the applicant of a removal order together with an exclusion order for a five year period, ultimately this was not furnished to the applicant (by reason of the fact that he had moved from Loughlan House Detention Centre in Cavan to Castlerea Prison) until in or about 21st January, 2016.

8. Subsequently the applicant secured an order under Article 40 of Bunreacht na hÉireann, 1937, on 4th February, 2016 as by then the applicant was being held on the basis of the removal order only as he had completed his prison sentence by the end of January, 2016.

9. On the cover letter of 2nd February, 2016 the applicant sought a review of the removal order and period of exclusion and, following such a review by the respondent, by order of 27th April, 2016 it was ordered that the applicant be removed from the state and that the exclusionary period would be three years.

**The applicant's general submissions**

10. The grounds upon which the applicant seeks the relief hearing are:

a. The offence with which he was convicted on 3rd August, 2014 is insufficient in itself to ground a present and serious threat to public policy and security.

b. The respondent failed to consider mitigating circumstances of the applicant, in particular the lack of previous convictions, the nature of the offence, the suspended portion of the sentence and the applicant's integration within the State.

c. The respondent discounted all indicators that the offence was a once-off offence, related to cannabis and there was a low risk of reoffending.

d. The respondent's decision is in breach of the European Communities (Free Movement of Persons) Regulations, 2006, as amended, and contrary to the provisions of Article 28 of Directive 2004/38/EC.

e. The exclusion period is arbitrary and without explanation or reason.

**The respondent's general submissions**

11. The respondent resists the applicant's application on the following general grounds:

a. By reason of delay, the applicant is not entitled to challenge any portion of the removal order of 30th November, 2015

but rather is confined to the review removal order.

b. The offence with which the applicant was convicted was sufficient to ground a serious threat to public policy or security.

c. The respondent did consider and attached sufficient weight to all mitigating circumstances.

d. The respondent was not obliged to exhaustively rehearse all representations made and the way to be attributed to any such matter was a matter for the respondent solely.

e. The respondent's decision was within the statutory framework identified by the applicant. Notwithstanding that the applicant was convicted of one offence only nevertheless the respondent was entitled to treat same as sufficient to make a removal and exclusion order on the grounds of public policy.

f. It is denied that the respondent acted arbitrarily.

g. Looked at in totality, sufficient grounds are apparent from the decision of 27th April, 2016.

**Statutory provisions**

12. It is common case between the parties that the applicant is, by reason of the fact that he has been continuously in Ireland since 2006, entitled to permanent residence in the State in accordance with Clause 12 of the European Communities (Free Movement of Persons) No. 2 Regulations, 2006.

13. Clause 19 of the 2006 Regulations aforesaid provides for restrictions on the right of residence on grounds of public policy, public security or public health. The Regulations at Clause 20 provides that the Minister may by order require a person to whom the Regulations apply to leave the State within the time specified in the order *inter alia* on the basis that the conduct or activity of such person would be contrary to public policy. Under Clause 20(1)(c) the Minster may impose an exclusion period on that person and at Clause 20(2)(iii) if the Minister proposes to impose an exclusion period on the period on the person the proposed duration of the exclusion period must be specified. The 2006 Regulations were brought into force following Directive 2004/38/EC and under Article 28(2) thereof it is provided that 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 residents on its territory, except on serious grounds of public policy or public security.

14. It is apparent from the foregoing that in the 2004 Directive the word "expulsion" is used, whereas the 2006 Regulations referred to the making of a "removal" order with the additional entitlement of the Minister to impose an "exclusion" period.

**The need to give reasons**

15. The respondent argues that by looking at the decision of 27th April, 2016 in its totality it is clear as to the grounds why a removal order is made and as to why an exclusion order for a period of three years has been incorporated.

16. On the other hand the applicant suggests that it is not at all apparent from the decision of 27th April, 2016 why the exclusion period of three years has been incorporated. In this regard, for example the applicant points to the fact that the initial decision of November, 2015 incorporated an exclusion period of five years and this was reduced in the decision of 27th April, 2016 to a period of three years. It is asserted by the applicant that the basis for the reduction is not evident.

17. The respondent counters that the applicant is effectively complaining of a benefit which he received by virtue of the review decision and also points to the fact that the initial removal order of November, 2015 is not the subject matter of the within judicial review application.

18. In my view, the applicant is not so much complaining as to the benefit he received but rather is suggesting that by way of support for his argument that there is no reason contained in the review decision of 24th April, 2016 concerning the exclusion period. Same has varied from five years to three years notwithstanding that no additional documentation or information was available as between the original removal order of November, 2015 and the review decision of 27th April, 2016.

19. If one looks at the review decision of 27th April, 2016 it is clear that no additional information or indeed representation was made as to the extent of the exclusion period which might explain the reduction from five years to three years. Indeed the respondent submitted in arguments to the Court that the representations made on behalf of the applicant in or about seeking a review decision did not incorporate any argument concerning the length of the exclusion period.

20. In support of the respondent's argument as to the adequacy of the reasons afforded in the decision of 24th April, 2016 reference is made to Clarke J.'s decision in *EMI Records (Ireland) Ltd v. Data Protection Commissioner* [2013] 2 I.R. 669 at p. 709.

21. At para. 47 of his judgment Clarke J. stated:-

> *"A useful test is whether a reasonable person who has heard the entire of the case, or a person who has read all of the relevant papers, would on hearing or reading the decision or judgment be apprised of the reasons for the decision… Reasons are not to be judged as inadequate on the terms in which they are put but instead are to be assessed by reference to what a reasonable person with full knowledge of the background would conclude by reading the relevant text."*

The Court, in that case, went on to approve the decision of Kelly J. in *Mulholland v. An Bord Pleanála (No. 2)* [2005] IEHC 306 in respect of the purpose for reasons, namely, that they must be sufficient to enable the courts to review the decision and to satisfy the person having recourse to the Tribunal that it has directed its mind adequately to the issue before it.

22. The respondent also relies on the Supreme Court judgment in the case of *F.P. v. Minister for Justice* [2002] 1 I.R. 164 where Hardiman J. stated:-

> *"… the question of the degree to which a decision should be supported by detailed reasons would vary with the nature of the decision itself."*

Hardiman J. made reference to the judgment of Geoghegan J. in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 where the relevant decision under review merely stated that all circumstances had been taken into account in arriving at a decision to refuse to grant permission and in that case Geoghegan J. held that the letter makes it clear that all points made had been taken into account and was sufficient.

23. The applicant counters that the decisions of Geoghegan J. in 1999 and Hardiman J. in 2002 are somewhat outdated now and refers to *Mallak v. Minister for Justice* [2012] 3 I.R. 297 in respect of updated jurisprudence on the need and extent of reasons required.

24. *Mallak* involved an application for a certificate of naturalisation and was refused same by the Minister. An application for judicial review was processed and the matter came before Cooke J. in the High Court who rejected the applicant's contention that the respondent was required to accompany his decision with a statement of reasons on the basis that a decision whether to grant or refuse a certificate of naturalisation was within the respondent's absolute discretion and furthermore, that what the applicant sought was a benefit or privilege to which he had no legal right. On appeal to the Supreme Court, the High Court decision was overturned on the basis that an absolute discretion conferred on the respondent did not imply that he was not obliged to give a reason. The unanimous decision of the Supreme Court was to the effect that the rule of law required all decision makers to act fairly and rationally, meaning that they must not make decisions without reasons. The Supreme Court also held that, notwithstanding that a matter of privilege as opposed to a right was involved, this did not affect a person's right to have his or her application considered in accordance with law or to apply to the courts for redress.

25. Fennelly J. in delivering the judgment commenced with a statement as follows:-

> *"The phenomenon that is the modern law of judicial review, though rooted in history, has witnessed extraordinary development over the past 30 years."*

Fennelly J. went on at para. 65 to indicate that over that period the courts have recognised a significant range of circumstances in which a failure by a decision maker to explain or give reasons for a decision may amount to a ground for quashing it. The judge mentioned a prior decision of Costello J. who attached importance to the presence or absence from the statutory scheme of a right of appeal. In the case before the Supreme Court it was noted that the applicant was effectively invited to reapply. However the Court noted that it was impossible for the applicant to address the Minister's concerns and to make an effective application in the absence of knowing precisely what motivated the Minister to refuse the initial application. Nor was the applicant in a position to ascertain whether or not he had a ground to apply for judicial review and the Court noted,

> *"by extension, it is not possible for the courts effectively to exercise their power of judicial review."*

Fennelly J. went on to consider the updated jurisprudence in the UK and effectively noted that there too the courts were increasingly ready to find that a duty to give reasons exists. Further, at para. 76 it is stated:-

> *"The developing jurisprudence of our own courts provides compelling evidence that, at this point, it must be unusual for a decision maker to be permitted to refuse to give reasons. The reason is obvious. In the absence of any reasons, it is simply not possible for the applicant to make a judgment as to whether he has a ground for applying for a judicial review of the substance of the decision and, for the same reason, for the court to exercise its power. At the very least, the decision maker must be able to justify the refusal. No attempt has been made to do so in the present case and I believe it would be wrong to speculate about cases in which the courts might be persuaded to accept such justification."*

**Behaviour sufficient to ground a present and serious threat to public policy**

26. The applicant argues that the offence involved related to cannabis only, that the applicant was not involved in any wider criminal activity and there was no violence associated with the crime or the totality of the behaviour of the applicant which was considered by the respondent.

27. The respondent refers to the *Calfa* case (Case C-348/96) where, at para. 22 of the preliminary ruling, it was stated that,

> *"a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, in order to maintain public order."*

28. In the subsequent EU decision of *Orfanopoulos* (Case C-482/01), it was stated at para. 67:-

> *"While it is true that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, the public policy exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an expulsion only in so far 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. In the *Tsakouridis* decision (Case C-145/09) the Court indicated at para. 55 of the judgment that it was for the referring court to ascertain, taking into consideration all of the factors mentioned in the judgment, whether the applicant's conduct was covered by serious grounds of public policy or public security within the meaning of Article 28 of the 2004 Directive.

30. The respondent also refers to the case of *P.R. v. Minister for Justice & Ors*. [2015] IEHC 201, being a decision of McDermott J. who in the course of his judgment recognised that serious offences such as dealing in narcotics may be regarded as constituting a basis for justifying special measures against foreign nationals. He also noted that circumstances justifying recourse to the concept of public policy may vary from state to state and from time to time with a result that an area of discretion is afforded to the competent national authority in implementing Treaty Directives. McDermott J. also endorsed the view that it was for the individual decision maker in the member state to determine whether the offence committed with or without factors constituted serious grounds of public policy.

31. The applicant suggests that the within matter can be distinguished from the various facts of the cases cited on behalf of the respondent as mentioned above. The applicant also refers to the EU case of *Bouchereau* [1977] ECR 1999 where, at para. 29, it is stated:-

> *"… 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."*

32. In the case of *Calfa* (Case C-348/96), an Italian citizen was holidaying in Greece and found to be in possession of illicit drugs. She was sentenced to three months in prison and an expulsion order for life was made against her which she subsequently challenged. In the case of *Tsakourdis* the relevant party had a number of sentences for assault and more lately had been convicted on eight counts of illegal dealing in substantial quantities of narcotics as part of an organised group and sentenced to six years and six months' imprisonment. The case of *Orfanopoulos* concerned two individuals, the first of whom had been convicted on nine occasions of offences against narcotics legislation and for committing acts of violence. The second had been a drug addict for several years and had been the subject of criminal sanctions for theft and illegal sale of narcotics on numerous occasions.

33. I am not persuaded by the argument on behalf of the applicant therefore that cannabis "only" brings the drugs status of an individual into a different category than narcotics generally insofar as the relevant legislation is concerned. Nor am I satisfied that acts of violence must accompany any narcotic related offence. In this regard, clearly, there is no evidence in the case of *Calpa* that any violence was involved and presumably the relevant narcotics were not particularly substantial given the three month prison sentence imposed. It was in the *Calpa* judgment that the EU courts first recognised that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals.

**Weight of evidence**
34. The applicant argues that the respondent failed to attribute sufficient weight to the mitigating circumstances in the present case such as remorse, co-operation with An Garda Síochána, a once-off offence only, the charitable activity on the part of the applicant in this State, the fact that the applicant has by and large maintained employment during the course of his residence in the State, no pattern of crime, the guilty plea and the relatively minor nature of the offence – of a potential of a maximum of fourteen years the applicant received a conviction of three years with the final year suspended.

35. In response the respondent argues that the weight to be attributed to evidence is a matter for the decider and this has been confirmed in the case of *G.K. v. Minister for Justice & Ors*. [2002] 2 I.R. 418 and applied in a very recent decision of *Olakunori v. Minister for Justice* [2016] IEHC 473 as well as the intervening case of *M.E. v. Refugee Appeals Tribunal* [2008] IEHC 192.

**Conclusion**
36. I am satisfied that, having regard to the jurisprudence aforesaid, it is for the respondent to attribute the appropriate weight to the various circumstances to be taken into account in determining whether or not to make a removal order, whether with or without an exclusion period.

37. It is available to the respondent to consider the instant behaviour and user of drugs as constituting a danger for society such as to justify special measures against foreign nationals.

38. The reasons why the removal order is being made and, if the order incorporates an exclusion period, the reasons why the relevant exclusion period is being imposed, must be stated or be apparent. In this regard I am satisfied that under the heading of "Proportionality" within the decision of 27th April, 2016, the basis and/or justification for making the removal order is apparent.

39. I am satisfied that there is nothing in the order of 27th April, 2016 which identifies or affords reasons for the inclusion of a period of three years' exclusion as opposed to any other period nor indeed is there any discussion within the order to identify why a reduced period of three years is more appropriate than the earlier period of five years which was included in the original order of November, 2015.

40. I am not satisfied therefore that the review decision of 10th of March, 2016 was reasoned in so far as it incorporates an exclusion period of three years and for this reason the Court will quash so much only of that review decision of the 10th of March, 2016 as includes an exclusion period of three years and as a result the review decision remains to be concluded."