Neutral Citation: [2014] IEHC 624

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 612 J.R.]

BETWEEN

JANA KOVALENKO, DENISS KOVALENKO AND DANIEL KOVALENKO (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, JANA KOVALENKO)

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 12th day of December, 2014

1. The second named applicant is a Latvian national, and on 26th June, 2006, was convicted of rape contrary to s. 48 of the Offences Against the Person Act 1861, and s. 2 of the Criminal Law (Rape) Act 1981, as amended by s. 21 of the Criminal Law (Rape) Amendment Act 1990, and sentenced to a period of imprisonment of seven years. On the same date he was convicted of rape contrary to s. 4 of the Criminal Law (Rape) Amendment Act 1990, and was sentenced to a concurrent term of seven years imprisonment. He was released from prison on or about 30th May, 2011.

2. The second applicant had been living in the State since December, 2003. On 19th August, 2005, he married the first named applicant, who arrived in Ireland on 1st April, 2004. Since then the couple lived together in Ireland until the second applicant's removal from the state on 18th June, 2013. They have one child, the third named applicant, born in Ireland on 19th February, 2006. The applicants are citizens of the European Union.

3. Following his release from prison, the second named applicant returned to live with his wife and child. During the course of his imprisonment, he maintained his family relationships and was visited regularly by his wife and child in prison. The third named applicant was four months old when the second applicant commenced his sentence.

4. By letter dated 9th January, 2013, the applicant was informed of a proposal to issue a removal order in accordance with powers vested in the first named respondent (the Minister) by Regulation 20(1)(a)(iv) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008. The application for removal was made by Detective Inspector Philip Ryan to the Repatriation Section of the Irish National and Immigration Service (INIS) on 19th November, 2012. It noted the applicant's convictions and sentence and the fact that he is subject to the provisions of the Sex Offenders Act 2001, for an indefinite period. It also noted that he worked for 52 weeks in 2005 and 18 weeks in 2006, before sentence and subsequently received jobseekers allowance from 9th June, 2011, following his release, to the date of the application. No details of the circumstances of the offence were set out in the application, nor are any included in the consideration which led to the recommendation for his removal and exclusion.

5. The letter of 9th January also refers to the fact that on 24th March, 2004, the second applicant was arrested for a sexual offence and conveyed to Galway Garda Station, and his convictions for sexual offences in respect of which he was sentenced to seven years imprisonment. It informed him 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. The Minister was proposing to place an exclusion period on him preventing him from entering the State for a period of ten years from the date of his removal. He was invited to make written representations to the Minister within fifteen days, indicating the reasons as to why a removal order and exclusion period should not be made and applied against him.

6. On 24th January, 2013, the second applicant's solicitors made a submission on his behalf to the Minister. It set out his personal details. He was born in Latvia on 18th November, 1980, and was 32 years old. He was a stonemason and worked successfully in the building industry in Ireland. However, following his release from prison he had been unsuccessful in obtaining employment. He was in receipt of social welfare payments since his release.

7. It was submitted to the Minister that the second applicant's criminal conduct should not result in his making the removal order, notwithstanding the serious nature of the conviction, because he was not an habitual offender and had not been engaged in other criminal activity. Furthermore, he had been ordered to engage with the Probation and Welfare Services since his release and to contact An Garda Síochána and provide them with details of his whereabouts. It was submitted that he had been compliant in that regard.

8. It was also submitted that his family life had been established in the state, that he had a loving relationship with his wife and child and was intimately involved in his child's parenting and upbringing. It was said that his obligations as a parent and husband necessitated his presence in the state, that his child had a right to the society of both parents and that his extended family resided in Galway; this included his parents who resided next door and his brother. Therefore, the following factors were said to be relevant in considering the proportionality of the decision to be made:-

> "(i) The events for which he was imprisoned arose out of a single incident;
>
> (ii) The applicant has not come to the adverse attention of An Garda Síochána since his release;
>
> (iii) The removal of the applicant would have the inevitable effect of sundering the family ties between him and the mother of his child and his son as the intention of the child's mother is to remain in the state."

Furthermore, the Minister was informed that the third named applicant had been enrolled at a local primary school and was registered with a local general practitioner. A letter from the first named respondent was also included.

9. By letter dated 8th May, 2013, the second applicant was informed that a removal order had been signed by the Minister. A copy of the order was enclosed. The order required him to leave the state not later than 10th June, 2013, and excluded him from re-entering or seeking re-entry to the state prior to a period of ten years from the date of his removal. In the letter he was also informed that though previously entitled to live, work and reside in Ireland, that entitlement had been withdrawn and that he could be arrested and detained without further notice for the purpose of ensuring his removal from the state in accordance with the order. He was also informed in accordance with Regulation 21(1) that he could seek a review of the decision.

The Reasons for the Removal Order

10. A consideration of the applicant's case under Schedule 9 of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 dated 3rd May, 2013, was carried out prior to the making of the order by Mr. Aidan Fitzpatrick (Executive Officer). This recommended the removal of the second named applicant to Latvia and an exclusion period of ten years to the Minister. The consideration recites the facts set out above and summarises the representations and submissions made on his behalf accurately. It noted that no issue arose concerning the prohibition of refoulement under s. 5 of the Refugee Act 1996 (as amended). It considered the second applicant's rights to respect for private and family life under Article 8 of the European Convention on Human Rights. It was accepted that his removal would constitute an interference with his right to respect for private life, but it was noted that the removal was in accordance with Irish law under Regulation 20, and pursued a pressing need and legitimate aim of the State in the prevention of disorder and crime. The question of whether his removal was necessary in a democratic society, in pursuit of a pressing social need and proportionate to the legitimate aim being pursued within the meaning of Article 8(2) was also considered. It was stated that his case had been given an individual assessment and due process in all respects, and that there was no less restrictive process available which would achieve these objectives:-

> "In considering the impact removal from the state would have upon (the second named applicant) it is submitted that if allowed to remain in Ireland, (his) prospects of obtaining employment would be poor in the current economic climate, particularly given his criminal record for a serious offence in this State. (He) would be free to choose to reside in whichever Member State he wished if removed from this State. This Department also notes that according to An Garda Síochána (Tab 1), An Garda Síochána have informed this section that (he) last worked in 2006 and is currently unemployed and therefore removal from Ireland would not place an intolerable burden upon him."

It was also stated that factors relating to the rights of the state had also been considered as follows:-

> "(He) has been convicted of rape for which he received a seven year custodial sentence in…prison and therefore even though it was a single incident it does not detract from the seriousness of the offence, as does the fact that he has not come to the attention of An Garda Síochána since his release. It must be noted that no sign of remorse, expression of guilt or regret from (him) has been submitted by letter or any other way despite his conviction. Allowing (him) to remain in the state would represent a serious risk to public policy and security in light of his conviction for the rape of a female in this State and (his)…removal would protect the citizens and residents of this State."

It was stated that the second named applicant had "through his criminal activity demonstrated a flagrant disregard for the law". The above were referred to as substantial reasons associated with the common good which required his removal from the State.

11. The second applicant's right to family life was also considered including the representations made concerning the presence of his immediate and extended family within the state. There is a presumption that family life is not established between an adult child and his surviving parents or other siblings unless something more than "normal emotional ties" exist, which he had not demonstrated.

12. The officials also considered the second applicant's relationship with his immediate family and the letter of support submitted by his wife in which she outlined the family's circumstances. She remained loyal to him and continued their relationship while he was in prison and visited him with their son regularly. Following his release, he returned home and they started to live a full family life. Their son was then seven years old and attending first class in school. They wished to remain in Ireland in order to advance their son's education and future. They emphasised the close relationship which existed between father and son and that separation would be a "big shock" for the child. It was noted that, notwithstanding her express wish to remain in the state with their son, it was open to the first applicant and her son to leave the state and go to Latvia or another member state with her husband, thereby preserving the family unit and their relationship. It was considered that the child was of "an adaptable age if his mother decided to relocate with him" and also that no effort was being made to remove either mother or child from the state. It was not accepted that the decision to remove the second applicant would constitute an interference with the family's right to respect for family life under Article 8 of the Convention. Furthermore, it was concluded that the reasons for this interference based upon his convictions for serious offences in the state were in accordance with Article 8(2). It was not accepted that any of the circumstances outlined, and in particular his family and economic circumstances and the nature of his social and cultural integration in the state, made his return to Latvia impossible for him or one of great hardship. It was, therefore, concluded that the removal order was proportionate and reasonable to the legitimate aim being pursued.

13. Mr. Fitzpatrick made his recommendation on 3rd May, 2013, which was then approved by Ms. Helen Masterson, Higher Executive Officer, on the same date and submitted to Mr. Tom G. Doyle, Assistant Principal, who considered and made the order on behalf of the Minister on 8th May.

The Review

14. The second applicant applied for a review of the removal order through his solicitors on 13th June, 2013, in a fifteen page representation in accordance with Schedule 11 of the European Communities (Free Movement of Persons) (No.2) Regulations 2006. The facts relied upon were the same as those set out in the earlier representations made prior to the making of the order. Some additional evidence was included. The Minister was informed that the second applicant served with distinction with NATO forces in both Kosovo and former Yugoslavia for which he was awarded the NATO medal. He had fluent command of English and was a person of good health. The facts that his extended family now resided in Ireland and that he did not have any significant family ties in Latvia were also emphasised. He was living in Ireland for nine years at the time and his links with his country of origin had diminished.

15. It was submitted that it was extraordinary that the Minister should consider making a removal order because of a single conviction. It was stated that the second named applicant was "aware of the serious nature of his crime but is cooperating fully with probation supervision and he is determined to fully rehabilitate himself. His sole conviction was nine years ago and he has not reoffended in any way since". In respect of the proportionality of the decision, it was repeated that he was aware of the seriousness of the offence "which was very out of character and which was his only offence in either this jurisdiction or in his home country of

Latvia. He is determined to make a fresh start and provide a good living for his wife and child in Ireland. He is complying fully with supervision from the probation services". It was emphasised that his wife and child would suffer greatly if he were removed from the State. It was also submitted that his conduct was not such as could on any "objective basis" represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or be justified on the more exacting basis of serious grounds of public policy or public security.

16. The provisions of Directive 2004/38 were relied upon as was the case law of the CJEU, including *Bonsignore v. Stadt Koln* [1975] E.C.R. 297 (Case 67/74), *Rutili v. Ministre de L'Interieur* [1975] E.C.R. 1219 (Case 36/75), *Adoui & Cornuaille v. Belgium* [1982] E.C.R. 1665 (Cases 115 and 116/81), and *Nazli v. Stadt Nurnburg* [2000] E.C.R. 1-297 (Case 340/97) concerning removal orders, the case law in respect of Article 8 of the European Convention on Human Rights and the equivalent Article 7 of the Charter of Fundamental Rights of the European Union.

17. Following a review under Article 21 of the European Communities (Free Movement of Persons) Regulations 2006 and 2008, a decision was made that the removal order should be affirmed by Ms. Maura Hynes, Principal Officer. This followed the preparation of an "additional consideration" under the Regulations which was carried out by Mr. Oilibhéar MacCraith, Executive Officer, Removals Order Unit, on 17th June, 2003, and Ms. Helen Masterson, Higher Executive Officer on the same date. Ms. Hynes read and considered all the papers in the case and reaffirmed the refusal order also on 17th.

18. The additional consideration reviewed the representations made by the second applicant's solicitors and accurately recorded the points made on his behalf quoting extensively from relevant parts of the representations submitted. It considered the effect of the second applicant's removal from the state upon his rights to respect for private and family life within the meaning of Article 8(1) of the Convention. Though it was accepted that his removal would constitute an interference with his right to respect for private life, it was also noted that this would be in accordance with law and, in particular, Regulation 20. It pursued a pressing social need and a legitimate state aim of preventing disorder and crime. His removal was considered to be necessary in a democratic society in pursuit of that social need and proportionate to the legitimate aim being pursued within the meaning of Article 8(2), and that there was no less restrictive process available which would achieve them.

19. The proportionality of the decision was considered in detail. His convictions and sentence were noted, as was the fact that he was subject to the provisions of the Sex Offenders Act 2001, for an indefinite period. His employment prospects were thought to be poor in the current economic climate, particularly given his criminal record for a very serious offence. He was free to move to any other member state if he were removed from the state, many of which had lower unemployment rates than Ireland. Since he was currently unemployed, removal would not place an intolerable burden upon him in that regard.

20. A number of matters were considered which were not brought to the second applicant's attention during the course of the process. It was stated:-

> "During (his) imprisonment in the State for the crime of rape he came to the adverse attention of the Irish Prison Service in relation to incidents of threatening an officer, refusing work, unauthorised article, fighting, prohibited article, PA in cell (PA equals prohibited article) and abusing an officer. These totalled eight incidents and occurred over a sustained period of time from 2007 through to 2010 (Tab 6)."

As will become clear, the second applicant takes issue with this finding which was made without any notice to him of the material relied upon and in the absence of an opportunity to make any representations concerning these matters before an adverse finding was made against him, which clearly contributed to the making of the removal order and his exclusion for ten years.

21. The additional consideration once again addressed the points (i) to (iii) which were made in the original submissions quoted above. It also considered the further submission that a removal order may not except on serious grounds of public policy or public security be made in respect of a person to whom the Regulations apply where the person has an entitlement to reside permanently in the state, and that the second named applicant had not committed any serious crimes in his home country. It stated:-

> "With reference to the above points (the second applicant) has been convicted of rape for which he received a seven year custodial sentence…and therefore even though it was a single incident it does not detract from the seriousness of the offence and the threat this nature of offence poses to the citizens and residents of this State, nor does the fact that he has not come to the attention of An Garda Síochána since his release while under three year probation supervision and presumably under threat of being returned to prison if he does not comply with any probation conditions imposed upon him. It must be noted that no sign of remorse or expression of regret from (the applicant) has been submitted by (him) or his legal representatives by letter or any other way during the current removal proceedings despite his conviction for a very serious crime. McInerney Solicitors have stated that (he) has resided in the State for nine years and therefore qualifies for permanent residency in the State, however, in 2006 (he) was sentenced to seven years in prison for the crime of rape (and) released in 2011. Time being spent in incarceration is not considered when calculating does a person qualify for permanent residency (Communication from the Commission to the European Parliament and the Council COM (2009) 313). Allowing (him) to remain in the State would represent a serious risk to public policy and security in light of his conviction for the rape of a female in this State and (his) removal…would serve (to) protect the citizens and residents of this State."

22. The second applicant's cultural bonds with the state were also considered. It was noted that he had a fluent command of the English language which would benefit him should he decide to reside in another member state, given the widespread use of English throughout the European Union. In addition, it was concluded that any social or cultural bonds which he may have established in Irish society prior to his incarceration would necessarily have been diminished by his years in prison. It was reiterated that it was necessary for the prevention of crime and disorder and the interests of public safety and the common good and because he had demonstrated a flagrant disregard for the laws of the state, that a removal order should be made and that he should be excluded for ten years.

23. It was accepted that the decision to remove the second applicant would constitute an interference with his and his family's right to respect for family life under Article 8. However, it was determined that the reasons for this interference were justified and necessary in accordance with Article 8(2) because of his very serious criminal behaviour and the ongoing threat which, as a result, his continued presence in the state posed to public policy and security. It was concluded, therefore, that the making of the removal order was proportionate and reasonable having regard to the legitimate aims being pursued by the state.

Citizenship

24. Part II of the Treaty on the Functioning of the European Union (TFEU) deals with "Non-Discrimination and Citizenship of the

Union". Article 18 prohibits any discrimination on grounds of nationality. Article 20 provides:-

> "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:
>
> (a) the right to move and reside freely within the territory of the Member States;
>
> …
>
> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

25. Article 21 provides that:-

> "1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect…"

Directive 2004/38/EC

26. The Recitals preceding the provisions of Directive 2004/38/EC note (*inter alia*) that citizenship of the Union confers on every citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the measures adopted to give effect to the Treaty. The other principles included are:-

> "(a) the enjoyment of permanent residence by Union citizens who have chosen to settle long term in a host member state strengthens the feeling of Union citizenship and is a key element to promoting social cohesion which is one of the fundamental objectives of the Union.
>
> (b) expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host member states. The scope for such measures should therefore be limited in accordance with the principles of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host member state, their age, state of health, family and economic situation and the links with their country of origin. (Recital 23):
>
> (c) the greater the degree of integration of Union citizens and their family members in the host member state, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host member state, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family in accordance with the United Nations Convention on the Rights of the Child of 20th November, 1989;
>
> (d) procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their families in the event of their being denied leave to enter or reside in another member state as well as uphold the principle that any action taken by the authorities must be properly justified.
>
> (e) judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another member state."

27. The Directive lays down the conditions governing the exercise of the free movement and residence of Union citizens and their family members within the territory of the Member State. Its provisions regulate and restrict the basis upon which European Union citizens may be removed and excluded from a Member State. This includes protection for a citizen of a Member State who has committed a criminal offence in the host Member State. A convicted European Union citizen has an enhanced status and protection compared to that of a convicted criminal from a non-European Union country who is subject to a wider discretion to deport to his home country under s. 3 of the Immigration Act 1999 (see *People (DPP) v. Alexiou* [2003] 3 I.R. 513).

28. The provisions of the Directive relevant to this case are contained in Chapter VI in Articles 27 – 33 inclusive. Article 27(1) 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.
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> 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."

29. 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 C – 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. The length of residence and one's status as a permanent resident or a person who has been resident for ten years in the host member state is relevant to the principles applicable to the restriction of freedom of movement and residence of Union citizens in the host member state, their expulsion and exclusion. If the second applicant, as originally claimed, had the right of permanent residence under Article 28(2), the state could not make an expulsion decision against him "except on serious grounds of public policy or public security". If resident in the state for the previous ten years, an expulsion decision might only be taken against a Union citizen if based "on imperative grounds of public security, as defined by Member States": neither of these apply to the applicant. The basis of any removal or exclusion of the second applicant from the State must, therefore, be on grounds of public policy or public security as set out in Article 27(1) and (2) as applied and considered under Article 28(1). In this case, the relevant ground relied upon was "public policy".

30. Article 30 provides for the notification of decisions. Article 30(1) provides that a person shall be notified in writing of any decision taken under Article 27(1) in such a way that they are able to comprehend its contents and its implications. Article 30(2) provides that the person shall be informed "precisely and in full of the public policy…grounds on which the decision taken in their case is based, unless this is contrary to the interests of state security". Article 30(3) provides that the notification:-

"shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and where applicable the time allowed for the person to leave the territory of the member state. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification."

31. Procedural safeguards are addressed in Article 31 as follows:-

"1. The persons concerned shall have access to judicial and where appropriate, administrative redress procedures in the host member state to appeal against or seek review of any decision taken against them on the grounds of public policy…

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken…

(3) The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28…"

32. Article 32 provides that persons excluded on grounds of public policy may submit an application for lifting of the exclusion order after a reasonable period depending on the circumstances and in any event "after three years from enforcement of the final exclusion order which has been validly adopted in accordance with community law" by putting forward arguments to establish there has been a material change in the circumstances which justify the decision ordering their exclusion.

European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. No. 656 of 2006)

33. The above Regulations were made for the purpose of giving effect to Directive 2004/38/EC in Ireland. Many of the Regulations mirror the provisions of the Directive. Regulation 20(1)(a)(iv) provides that the Minister may by order require a person to leave the state within the time specified in the order 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."

Regulation 20 also provides at subpara (c) that the Minister may impose an exclusion period on the person concerned in a removal order during which the person 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."

34. Regulation 20(2) provides the procedure for notification of the Minister's proposal to make a removal order which must include a statement that the person concerned may make representations as set out in Schedule 9 to the Regulations within fifteen working days of the sending to him of the notification, and if a period of exclusion is proposed, the proposed duration of the exclusion. It is clear that these formalities were complied with in this case.

35. 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 with the state, if any;

(v) the state of health of the person; and

(vi) the extent of the person's links with her or her country of origin."

It is clear that in respect of the removal order each of these matters was considered and was further considered in the review of that order in this case.

36. Regulation 20(3)(b), (c), (d) and (e) contain various provisions and procedures for the making of the removal order and the notification required to be given of same. In addition, they contain provisions empowering the Minister to require a person, the subject of a removal order, to do a number of things preparatory for his or her removal from the state. Regulation 4(a) provides that:-

> "A person to whom a notice under paragraph (3)(b)(ii) has been issued (notifying them in writing of the removal order decision) may without further notice be arrested and detained under warrant of an immigration officer or member of An Garda Síochána in any of the places listed in Schedule 10 in the custody of the officer of member of An Garda Síochána for the time being in charge of that place for the purpose of ensuring his or her departure from the state in accordance with the removal order concerned."

A person may only be detained until such time as he or she is removed from the state in compliance with the removal order concerned.

37. The distinction drawn in the Directive concerning the basis upon which those who are permanently resident in the state and those who are ten years resident in the state and others may be expelled, is replicated in Regulation 20(6).

38. Regulation 21 provides the process for a review of decisions concerning a person's entitlement to be allowed to enter or reside in the state. A request for review must be in the form set out and contain the particulars required in Schedule 11 to the Regulations. This was complied with in this case. Regulation 21 also provides:-

> "(3) A review under this Regulation of a decision under paragraph (1) shall be carried out by an officer of the Minister who –
>
> (a) is not the person who made the decision, and
>
> (b) is of a grade senior to the grade of the person who made the decision.
>
> (4) The officer determining the review may –
>
> (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
>
> (b) set aside the decision and substitute his or her determination for the decision."

39. Exclusion orders are dealt with under Regulation 23 which empowers the Minister if she considers it "necessary in the interests of…public policy, by order (to) exclude a person to whom these Regulations apply from the State".

The Challenge

40. Leave to apply for judicial review of the review of removal and exclusion orders was granted (McDermott J. 7th August, 2013) to seek an order of *certiorari* quashing the Minister's decision affirming the orders on the grounds that the actions of the respondent, her servants or agents violated the applicant's rights under Articles 27, 28, 30 and 31 of Directive 2004/38 EC, and the provisions of the European Communities (Free Movement of Persons)(No. 2) Regulations 2006, and constituted a violation of the applicant's rights under the Charter of Fundamental Rights of the European Union, and in particular, Article 47 thereof. The affirmation of these orders was challenged on the grounds that the decision was based solely on a previous conviction of the second named applicant "arising out of a single incident". Leave was also granted on the grounds that the Minister failed to consider or determine whether the personal conduct of the second named applicant represented a genuine present and sufficiently serious threat affecting one of the fundamental interests of society prior to making the removal and exclusion orders or the review decisions and/or that the Minister erred in law and fact in determining that his removal and exclusion was necessary in order to prevent disorder and crime. Leave was also granted on the ground that the Minister erred in law and fact in determining that:-

> (i) allowing the second named applicant to remain in the State would represent a serious risk to public policy and security in light of his conviction for rape;
>
> (ii) his removal would serve to protect citizens and residents of the State;
>
> (iii) any social or cultural bonds that he may have built up in Irish society prior to his incarceration would necessarily have been diminished because he was imprisoned;
>
> (iv) there was no less restrictive process available which would achieve the legitimate aim of the prevention of crime and disorder, the interests of public safety and the common good, and
>
> (v) the nature of his social and cultural integration in the State would not make his return to Latvia, or whichever EU State in which he might choose to reside, impossible for the second named applicant or one of great hardship.

A further ground complains that the Minister failed or neglected to consider or take into account or give adequate weight to the fact that the Director of Public Prosecutions did not appeal the term of imprisonment imposed upon the second named applicant; that he had been of good behaviour since his release; that he remained subject to the provisions of the Sex Offenders At 2001; that he enjoyed the love and support his family; that his extended family resided in the State, and that he had not come to police attention since his release.

41. Leave was also granted on three grounds referable to material in the possession of the Minister in respect of the second named

applicant's record as a prisoner during his sentence. This material was not disclosed to the second named applicant or his legal advisers and he was not given any opportunity to respond or make submissions in relation to it. It was not referred to in the original decision of the Minister to make the order. It is contended that as a matter of fair procedures, the second named applicant should have been furnished with a copy of the material and accorded an opportunity to consider it and obtain legal advice in relation to it with a view to making further representations in support of the request for the review.

42. Three further grounds deal with the manner in which the review was conducted. The applicant's request for review was received by the Minister on 14th June 2013, and a recommendation was made by an Executive Officer on 17th June 2013, recommending the affirmation of the removal and exclusion orders. This was reviewed by a Higher Executive Officer, Ms. Helen Masterson, on the same date. Ms. Maura Hynes, Principal Officer, then considered the file and the two recommendations made by Ms. Masterson and Mr. MacCraith and affirmed the removal order and exclusion, also on 17th June. It is claimed that the circumstances and the timescale within which the decision was made was so short that it could not have been taken or perceived to have been taken following full and proper consideration of the rights of each of the applicants. It is also contended that the procedures followed by the Minister and the second named respondent, the Commissioner of An Garda Síochána, which resulted in the review decision and the peremptory removal of the second named applicant from the State were in breach of the requirement of fair procedures and constitutional justice.

43. Leave was also granted on a number of other grounds which claimed that the Minister erred in fact in determining that the second named applicant was not entitled to permanent residence in the State under Article 16 of the Directive and Regulation 12 of the Regulations. Furthermore, it was claimed that the Minister erred in law in excluding time spent by the second named applicant in the State whilst in prison following sentence for commission of a criminal offence, in calculating the period of five years residence in the State under Article 16 and that, consequently, the Minister acted *ultra vires* in determining that the second named applicant was not entitled to permanent residence in the State. Based on that contention, a further ground was advanced that due to the failure to accord the status of permanent resident to the second named applicant in the review, the incorrect test was applied when considering his removal or exclusion from the State, in that the Minister ought to have considered whether there were "serious grounds of pubic policy or public security" which justified the making of those orders. For reasons already stated, these grounds are entirely misconceived as the CJEU has determined that a period of imprisonment following conviction should be excluded from any calculation of the 5-year period required under Article 16.

Removal and Exclusion on the Grounds of 'Public Policy'

44. Regulation 20(1)(a)(iv) provides that the Minister may require a person to leave the State where, in her opinion, it would be contrary to public policy to permit him or her to remain in the State. Without prejudice to that power, 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 solely on the basis that the person concerned has served a custodial sentence. It is clear that the conviction of the applicant and the fact that he was sentenced to a period of seven years imprisonment on counts of rape and s. 4 rape, weighed heavily with the decision maker in this case. It is also clear that the decision is substantially based on the applicant's conduct in committing these offences and his subsequent failure to acknowledge his guilt, apologise to the victim and express his remorse for the offences which he committed.

45. In Irish law, the offences of rape and s. 4 rape carry the potential for a maximum sentence of life imprisonment. They are regarded as amongst the most serious offences in the criminal calendar. As a matter of national policy, the seriousness of the offences has been determined by the Legislature. The Supreme Court, in *The People (Director of Public Prosecutions) v. Tiernan* [1988] I.R. 250, considered the nature of these offences and how they must be regarded by any court called upon to impose sentence following conviction. Finlay C.J. stated:

> "The crime of rape must always be viewed as one of the most serious offences contained in our criminal law even when committed without violence beyond that constituting the act of rape itself. In *Attorney General v. Conroy* [1965] I.R. 411 this Court stated that the nature of the offence was such as to render unconstitutional any statutory provision which could permit it ever to be regarded as a minor offence.
>
> The act of forcible rape not only causes bodily harm but is also inevitably followed by emotional, psychological and psychiatric damage to the victim which can often be of long term, and sometimes of lifelong duration.
>
> In addition to those damaging consequences, rape can distort the victim's approach to her own sexuality. In many instances, rape can also impose upon the victim a deeply distressing fear of sexually transmitted disease and the possibility of a pregnancy and of a birth, whose innocent issue could inspire a distress and even a loathing utterly alien to motherhood.
>
> Rape is a gross attack upon the human dignity and the bodily integrity of a woman and a violation of her human and constitutional rights. As such it must attract very severe legal sanctions.
>
> All these features, which I mention in summary and not as an attempted comprehensive account of the character of rape, apply even when it is committed without any aggravating circumstance. They are of such a nature as to make the appropriate sentence for any such rape a substantial immediate period of detention or imprisonment.
>
> Whilst in every criminal case a judge must impose a sentence which in his opinion meets the particular circumstances of the case and of the accused person before him, it is not easy to imagine the circumstance which would justify departure from a substantial immediate custodial sentence for rape and I can only express the view that they would probably be wholly exceptional." (At p. 253)

46. The second applicant contends that the Minister acted unlawfully in making a removal order based on the applicant's single conviction. In particular, it is submitted that the applicant was aware of the serious nature of his crime and was cooperating fully with his probation supervision and determined to fully rehabilitate himself. It was an offence which was out of character and which was his only offence either in Ireland or in Latvia. His rehabilitation was said to be continuing and he had reintegrated in society and resumed his family relationship with his wife and child.

47. It is submitted that in respect of public policy, the Minister could not consider the conduct of the applicant in committing the offence and the fact that he had been sentenced to imprisonment as the main or sole ground on which to make the order. It is clear from the policy underlying the offences of rape and s. 4 rape and the severe penalties that apply to those convicted of sexual offences in Ireland, not only that the conduct leading to such offences is to be condemned and punished, but that it is a matter of public policy that women and girls be protected from such vicious assaults. This is confirmed by the consistent characterisation of rape as a very serious offence as exemplified by the ruling in *Tiernan's* case. It is also clear from the continuing efforts made by the Oireachtas to improve the protections available to citizens of either sex from sexual assault, rape and aggravated sexual assault. The

ongoing societal concern in respect of persons convicted or rape and the importance of vigilance in respect of their future conduct and whereabouts is exemplified by the enactment of the Sex Offenders Act 2001, which applies to the second applicant as a sexual offender for an indefinite period, and under which he must report his place of residence to An Garda Síochána at all times.

48. In *Regina v. Pierre Bouchereau* [1977] ECR 1999, the question was posed for the CJEU as to whether the wording of Article 3(2) of Directive No. 64/221/EEC, namely, that previous criminal convictions should not "in themselves" constitute grounds for the taking of measures based on public policy or public security means that previous criminal convictions are solely relevant insofar as they manifest a present or future propensity to act in a manner contrary to public policy or public security. The court stated:

> "26. According to the terms of the order referring the case to the court, that question seeks to discover whether , as the defendant maintained before the national court, 'previous criminal convictions are solely relevant in so far as they manifest a present or future 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) of the directive, 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 interests inherent in protecting the requirements of public policy, which does not necessarily coincide with the appraisals which formed the basis of the criminal conviction.
>
> 28. The existence of a previous criminal conviction can, therefore, only be taken into account 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. 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 principle of the free movement of persons."

49. The court is, therefore, satisfied that the Minister was entitled to rely upon the egregious criminal conduct of the defendant evidenced by the sentence of seven years imprisonment imposed, as conduct which, of itself, might constitute a threat to the requirements of public policy. However, it was not the only factor considered by the Minister.

50. It should also be noted that in *Bouchereau*, the court reiterated the principle emphasised in *Van Duyn v. Home Office* [1974] ECR 1337 at p. 1350, that the concept of public policy, when used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community. However, it added:

> "34. Nevertheless, it is stated in the same judgment that the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the treaty and the provisions adopted for its implementation."

The Court added that recourse by a national authority to the concept of public policy presupposes 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". I am, therefore, satisfied that the commission of these two offences by the second named applicant is within the scope of public policy contemplated by these decisions and is clearly based on the personal conduct of the individual concerned. Furthermore, the Minister's decision is not simply based on the fact of a criminal conviction and sentence. The Minister acknowledged that it was a single incident but concluded that this did not detract from the seriousness of the offence and the threat the nature of these offences poses to the citizens and residents of the State.

51. It was also clear from the decision in *Bonsignore v. Stadt Koln*, Case 64/74 [1975] ECR 00297, that an order adopted on grounds of public policy to remove or exclude a European Union citizen may not be justified on grounds which are extraneous to the individual case, and may not be ordered for the purpose of deterring other non-nationals or if it is an order of a "general preventive nature".

52. The conduct considered by the Minister was not limited to the second named applicant's conviction and sentence for the two offences. It also considered his conduct following those offences and his attitude towards them. This feature of the case was also emphasised in submissions to the Minister and to the court on behalf of the second named applicant. It was contended that the Minister failed to have any or any proper regard to the rehabilitation of the second named applicant following the commission of the offence, that it was a single offence and that he had not come to the attention of the gardaí following its commission. He was successfully engaging with the Probation Service. It was submitted, in accordance with the case law, that the personal conduct of an individual "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" as provided in Article 28(2) of the Directive.

53. The Court is satisfied that the Minister considered the submissions as set out in the extracts from the additional consideration quoted earlier in this judgment. In particular, it was found in the additional consideration that the second applicant had given no sign of remorse or expression of regret for the offences which he committed in the removal proceedings. He merely stated that he was "aware of the seriousness of his crime and has cooperated fully with probation supervision and he is determined to fully rehabilitate himself".

54. In *Bonsignore*, a young man unintentionally killed his younger brother with a gun for which he did not possess a firearms permit. He was convicted and fined for an offence against the Firearms Act. The Court directed that no punishment should be imposed for having caused death by negligence on the grounds that being young and inexperienced, he was deeply affected by his brother's death which his carelessness had caused. Advocate General Mayras observed in his Opinion that restrictions on free movement then applicable under Article 48 of the Treaty on grounds of public policy and public security must be strictly construed, and stated that:

> "Apart from minor infringements, offences which are the result of negligence, and even certain violent crimes committed in a particular psychological context, are not in general likely to constitute such a serious threat to public policy and public security that the deportation of the offender appears to be the necessary solution. According to the very terms of Article 3(2) of the Directive, the conviction obtained was not in itself sufficient at law to provide grounds for deportation . . .
>
> To deport a worker who is a national of a Member State is to deny his right to reside and be employed in the territory of the host State. It is an extremely serious measure, having grave consequences which can only be justified on grounds related to personal conduct alone, as evidenced by the offence committed. Arguing a *contrario*, the Directive therefore obliges the Member States not to take account of factors extraneous to his personal conduct.
>
> In my opinion, therefore, it is not permissible for a Community worker, even when convicted of a criminal offence, to be made into a 'scapegoat' in order to deter other aliens from acting in the same way. In fact, the Directive requires that the offence against national public policy, inasmuch as it is the consequence of personal conduct, be such that the deportation is necessary, either because public policy has been seriously affected by the offence committed, or because it is to be feared that the person concerned would repeat the antisocial acts in question."

55. The question of rehabilitation is directed towards the second limb of that proposed test. Essentially, the second applicant contends that insufficient regard was had to the indicators that he did not have the potential to act contrary to public policy because of his post-release behaviour, resumption of life with his family and other matters advanced.

56. In *Land Baden-Wurttenberg v. Panagiotis Tsakouridis*, Case C-145/09 [2010] ECR 1-11979, the CJEU considered the expulsion of a Union citizen following the completion of his sentence for drug offences. It confirmed that contravention of national laws on the misuse of drugs could constitute a threat to "public policy". The Court held that a Member State may, in the interests of public policy, 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 Court concluded that it followed that drug dealing as part of an organised group is also covered by that concept for the purposes of Article 28(2). The Advocate General, in that case, said as follows:

> "74. In my view, there is a real difference between a person who buys drugs for his personal consumption, acting contrary to public policy in that way, and a person who participates in a trafficking network, with all the attendant dangers for the physical safety of the population.
>
> 75. The same applies in other spheres such as, for example, child pornography. Although when a person looks at paedophile photographs on the Internet, public policy is unquestionably undermined, a higher threshold is crossed when he participates in the paedophile ring which produced those photographs."

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 the offences committed may alone or, in appropriate circumstances be considered cumulatively with other factors under the heading of "public policy" when deciding to remove or exclude an offender.

57. It is well established that when considering the expulsion of a European citizen criminal account must be taken by the host member state of the person's fundamental rights, including the protection of family life as guaranteed by Article 8 of the European Convention on Human Rights (Article 7 of the Charter of Fundamental Rights). The decision must be proportionate and in assessing the proportionality of the decision to the legitimate aim pursued, namely the protection of public policy, account must be taken particularly, of the nature and seriousness of the offences committed, the length of residence in the host state, family circumstances and the seriousness of the difficulties which his wife and child may face in his (and in this case her) country of origin. The provisions of the Directive do not preclude the expulsion of a national of another member state who has been convicted and sentenced, and who "on the one hand, constitutes a present threat to the requirements of public policy and, on the other hand, has resided for many years in the host member state and can plead family circumstances against that expulsion, provided that the assessment made on a case by case basis by the national authorities of where the fair balance lies between the legitimate interests at issue is made in compliance with the general principles of community law and, in particular, by taking proper account of respect for fundamental rights, such as the protection of family life" (*Orfanopoulos & Oliveri v. Land Baden-Wurttemberg* (Cases C-482/01 and C-493/01 [2004] E.C.R. 1-5257 and *Land Baden-Wurttemberg v. Tsakouridis* (cited above)). All the above factors were considered in the review. They were the subject of specific submissions in accordance with the form set out in the Schedule to the Regulations, and the decision maker was obliged to consider them.

58. The function of this Court on judicial review is not to consider the merits of the review but whether the review was conducted in accordance with the substantive and procedural law as set out in the Directive and the statutory Regulations, and as provided for in the case law of the CJEU and the European Court of Human Rights. A challenge made to findings in respect of whether the applicant would represent a serious risk to public policy concerning his social and cultural bonds or the weight given to his claim of good behaviour since release and his family relationships, are matters to be considered and were considered by the Minister on the review. All these factors were balanced in the additional consideration carried out and ultimately considered by the decision maker. The proportionality of the expulsion was also considered and apart from two matters to which I will return, the court is satisfied that the correct legal principles were applied in the review process.

59. However, it is submitted that regard was not had to the provisions of Article 27(2) in that the "personal conduct of the individual…must represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society". In particular, it is said that since the second applicant's rehabilitation is underway in that he had not committed any offences since his release from prison in 2011, and the convictions related to one incident in his life, there was no likelihood of reoffending and he could not be regarded as representing a genuine present or sufficiently serious threat. This submission fails to take account of the overall assessment which the decision maker is obliged to make and made in this case. Particular emphasis was placed in the additional consideration on the nature of the offence, the absence of post conduct remorse or apology, and the significant and important matters of public policy in the case of a European citizen who had committed such serious offences. As appears from the summary of the additional consideration set out above, all relevant submissions were considered and given appropriate weight. The court does not accept these grounds of challenge to the decision.

Procedural Fairness

60. The applicant relies on three grounds related to the consideration on the review of material concerning "Offences against Prison Discipline" which was referred to in the body of the additional consideration quoted above. This material was contained in Tab 6 attached to the consideration. While no express adverse conclusion is stated in relation to this material, it is clear that it was taken into account and implicitly to the prejudice of the applicant. Offences against prison discipline under the Prison Rules 2007 vary in their nature and seriousness and attract penalties proportionate to both. The material does not appear to have formed part of the

initial consideration and consequently did not form part of any of the submissions made on the second applicant's behalf in respect of the review. He was not given any notice that this material was in the possession of or would be relied upon by the officials considering the recommendation for his removal. It is submitted that as a matter of fair procedures he should have received notice of any prison documents or file to be considered by the Minister and given an opportunity to make submissions in relation to matters arising therein, which were clearly thought to be relevant to the consideration of his case. In response the Minister claimed that the second applicant knew that his conduct post-conviction would be reviewed as evidenced by his own submissions in respect of his good conduct following release, and that he cooperated with the Probation Service. That is undoubtedly true, but the court has to have regard to the fact that this was new material which reflected badly on the applicant. It had assumed a significance in the case which it had not been accorded previously. (See *N. v. Refugee Applications Commissioner* (Unreported, High Court, White J., 23rd July, 2003) and *M. v. Refugee Applications Commissioner* (Unreported, High Court, Clarke J., 10th May, 2005) *I. v. Refugee Appeals Tribunal* [2005] IEHC 220, and *O. v. Refugee Appeals Tribunal* [2006] IEHC 113). The court is satisfied that in this case the Minister had an obligation to disclose to the second applicant the material which had been obtained from the Irish Prison Service and that it was intended to consider same in the conduct of the review. The second applicant was thereby deprived of an opportunity to make any submissions or offer any explanation in relation to these matters which were relied upon to this detriment. I am satisfied that this was a breach of fair procedures and that the order is fundamentally flawed for that reason.

The Review Decision Maker

61. Three grounds are advanced in respect of the suggested inadequacy of the procedures followed on the review and the shortness of time within which the decision was taken. A request for review was dated 13th and received 14th June by the Minister. A recommendation was made by an executive officer on 17th June, approved by the higher executive officer on the same day and thereafter, approved by the principal officer, again on the same date. It is submitted that the circumstances and timescale within which the recommendations were made and the decision to affirm the order was so short that it could not be taken or perceived to have been taken with the full and proper consideration of the rights of each of the applicants. Apart from the assertion contained in the grounds, there is no evidence to support the proposition that the officials concerned were incapable of dealing with this decision within one or two days. I am not satisfied that there is any merit in these grounds.

62. Articles 30 and 31 of the Directive provide for an appropriate appeal structure against a removal or exclusion order. Regulation 21 of the 2006 Regulations provides for such an appeal by way of review. The review must be carried out by an officer of the Minister who is not the person who made the decision, and is of a grade senior to the grade of the person who made the decision. That officer may confirm the decision, the subject of the review, on the same or other grounds having regard to the information provided, or substitute his or her decision for the decision, the subject of the review. It is submitted that because Ms. Helen Masterson, Higher Executive Officer, made a recommendation on the initial application following its consideration by an executive officer, that she should not have been involved in the review procedure in which she effectively carried out the same review role.

63. In the review procedure Ms. Masterson recommended that the removal order be upheld following the review application, and having considered the review submissions. The memorandum of that decision was drawn up by Mr. Olibhéar Mac Craith (Executive Officer). These two recommendations and the extensive memorandum concerning the additional consideration in relation to the review were submitted to Ms. Maura Hynes, Principal Officer, who made the decision to affirm the original order. It is submitted that since this is an appeal procedure under Article 31 of the Directive and that the decision made on the review is in large measure based on the recommendations contained in the memorandum submitted, together with the accompanying file, it is unfair that the same official should be involved in a review of matters in respect of which she had previously made a recommendation. I am satisfied that this is so. The second applicant was entitled to an independent review by way of an appeal in respect of the decision taken against him on the grounds of public policy which allowed for an examination of the facts and circumstances of his case upon which the proposed measure was based. The process is one which required a review of the proportionality of the decision. The Regulation clearly provides that a separate decision maker who is senior to the officer who took the appeal decision, shall make the decision on review. The spirit and intention of that Regulation and of the appeal process is that it should be independent of the initial decision maker.

64. The Minister contends that the involvement of the same officer in making a recommendation to uphold an order which she had recommended in the first place, is merely peripheral to the decision making process. Her superior made the decision. However, the dynamic of the process is that the recommendations made by the executive officer and the higher executive officer are submitted with the memorandum to the decision maker on the review. The Minister has set in place a review process calculated to be independent of the first decision maker which involves two officials, an executive officer and a higher executive officer who make recommendations as to what the outcome of the review should be. At the very least Ms. Masterson was affirming her own recommendation, but she was also contributing in a very significant way to the ultimate decision made, in recommending that the initial order which had been made, at least partly, on her recommendation, should stand. It is difficult to see how her involvement could be regarded as peripheral to the decision making process in those circumstances. There is no allegation of bias made against the official, nor has any leave been granted on that ground. She was carrying out the job she was directed to do. However, her participation gives rise to a reasonable suspicion of bias in the making of the removal order insofar as "a reasonable person (may) apprehend that his chances of a fair and independent hearing in the circumstances would be compromised". (See *Dublin Well Woman Centre Ltd v. Ireland* [1985] ILRM 418 and *O'Neill v. Irish Hereford Breed Society Ltd* [1992] 1 I.R. 431, and *Prendeville v. Medical Council* [2008] 3 I.R. 122.). I am, therefore, satisfied that the higher executive officer's participation in making recommendations at both levels, in the circumstances of this case, is contrary to fair procedures and the spirit and intention of the Regulations governing the review, and vitiated the decision.

65. Further submissions were made to the court in respect of the detention of the applicant on 17th/18th June, 2013, prior to his removal from the state. The court received affidavits from the second applicant and gardaí involved in his detention and removal which give rise to a number of conflicts of fact which it is unnecessary to resolve and could not be resolved without cross examination of the respective deponents.

Conclusion

66. For the reasons set out above, the court will quash the decision of 17th June, 2013, affirming the removal order and exclusion order made against the second applicant. As a result, that review remains to be concluded.