

THE HIGH COURT

2018 No. 34 JR

Between:

SILVIU VOIVOD

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 19th November, 2018.

1. Mr Voivod is a Romanian national resident in Ireland. When he arrived in Ireland is unclear: his solicitors, acting on instructions, have indicated that Mr Voivod arrived in 2012; the Gardaí believe he first arrived in 2014. He was certainly here on 12.10.2014, when he was at the Dandelion Bar and Nightclub in Dublin. There he committed a violent assault on a college student working on the premises. On 19.10.2016, Mr Voivod was convicted at Dublin Circuit Criminal Court of assault causing harm and sentenced to 3 years' imprisonment, with 18 months suspended. By letter dated 17.04.2017, the Department of Justice, etc. wrote to Mr Voivod, indicating that the Minister proposed to make removal/exclusion orders in respect of him and detailing the applicable process. The interchange of correspondence that followed is outlined in the 'Summary Chronology' later below. The decision-making process was comprehensive. It involved, *inter alia*, Department staff identifying the factual matrix by reference to which the Minister proposed to make his decisions, inviting Mr Voivod to make representations as to same, inviting him to make such other representations as he wished and referring, in the decisions, to the representations received and other factors considered relevant. The Department's initial decisions were communicated by letters dated 08.12.2017, indicating that (a) a removal order (under reg.20(1)(b) of the EC (Free Movement of Persons) Regulations 2015, and (b) an exclusion order (under reg.23(1) of those Regulations) had been made in respect of Mr Voivod, pursuant to which he would be removed from Ireland and prevented from re-entering for 3 years, the letters stating, *inter alia*:

"The State has a duty to protect its citizens in the interest of the common good....Mr Voivod's actions which led to his conviction underlines the view that his presence in Ireland is contrary to public policy and...a disturbance to the social order in the State....Mr Voivod represents a serious threat to public policy and on this basis removal and exclusion from the State is justified. Mr Voivod has been given an individual assessment and due process in all respects and his rights under Article 7 of the [CFREU]...and Article 8 of the ECHR to respect for private life have been considered. Factors relating to the rights of the State have also been considered, including the prevention of disorder and crime in the interests of public policy and the common good in light of Mr Voivod's criminal conduct in the State....[I]f the Removal Order and...Exclusion Order are signed in respect of Mr Voivod, there is no less restrictive process...which would achieve the legitimate aim of the State".

2. By letter of 21.12.2017, Mr Voivod's solicitors sought an intra-departmental review of the decisions to remove and exclude Mr Voivod. By letters of 11.01.2018, Mr Voivod and his solicitors were advised that a decision had been taken to affirm the orders. It is clear that the reviewer had regard in particular to the serious and violent nature of Mr Voivod's attack which was found to demonstrate a "propensity for violence", the reviewer noting:

"It is noted that this incident involved physical violence, and would have been a terrifying ordeal for Mr Voivod's victim, who was glassed in the face and his two front teeth...knocked out, he has been left with scars....His medical treatment cost in excess of €5,000....It is considered that it shows Mr Voivod has a propensity to violence....Having regard to the evidence...I am of the view that Mr Voivod has committed a very serious assault which shows that his presence in Ireland is a threat to public policy and public safety and warrants his removal from the State....I am in agreement with the original investigating officer and deciding officer....I am satisfied that the original decision in Mr Voivod's case was proportionate and reasonable to the legitimate aim being pursued".

3. Mr Voivod seeks the following principal reliefs: "(i) An order of certiorari quashing the decision of the first named respondent...dated 11th January, 2018...(ii) An order of certiorari quashing the removal order with an exclusion period...dated 8th December 2017". (These reliefs are not rightly worded. There was an initial removal order and an initial exclusion order. Then there was the reviewer's decision to affirm same. There was no "removal order with an exclusion period". It is desirable that reliefs sought be framed accurately. However, the respondents can never have been in doubt as to what end the within application sought). The grounds of objection are identified as follows in the statement of grounds:

"1. They are based on a single conviction which is prohibited by Article 20(7) of the European Communities (Free Movement of Persons) Regulations 2015.

2. They are based on the sole fact of one criminal act which occurred on 12th October 2014, and are not based on any, or any fair or reasonable assessment of whether the applicant now 'represent[s] a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society', and...thereby fail to comply with Articles 27 and 33 of Directive 2004/38/EC.

3. The applicant has committed one offence and...has not re-offended since. By reason of the foregoing, the applicant did not, and does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and, consequently, the decisions and the removal order, are unlawful...

4. The first-named respondent his servants or agents failed to provide any, or any valid, explanation as to how the applicant could constitute a threat to one of the fundamental interests of society in the State where he has only one conviction against him, and has not offended before or since.

5. The first-named respondent his servants or agents failed to apply the correct legal tests and principles as required by European Union law, and/or failed to provide any reasoned assessment of the correct legal tests and principles in the context of the particular facts of the applicant's case.

6. *The removal, together with a three-year exclusion period, constitutes a disproportionate interference with the applicant's right of residence in the State, and with his family's rights of residence in the State, including their right to respect for their private and family lives, under European Union and domestic law.*

7. *No reasons were given, or proportionality assessment carried out, in respect of the three year exclusion period, thereby rendering it unlawful.*

8. *The first named respondent his servant or agents failed to carry out any, or any adequate, assessment or reasoned analysis of the written submissions made on behalf of the applicant by his solicitors, and acted in breach of the applicant's right to fair procedures."*

4. Point 8 was not really touched on in the submissions before the court. However, given the various aspects of the decision-making process considered hereafter, as well as the court's observations above as to the comprehensive process which preceded the making of the impugned decisions, the court does not see any merit in the notion that there was not "any, or any adequate, assessment or reasoned analysis of the written submissions made on behalf of the applicant...[or any] breach of the applicant's right to fair procedures".

5. **Single Conviction Point.** Article 27(2) of the Citizens' Rights Directive (Directive 2004/38/EC) (the 'CRD'), provides that "*Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and...be based exclusively on the personal conduct of the individual...Previous criminal convictions shall not in themselves constitute grounds for taking such measures*". Consistent with Art.27(2), reg.20(1) of the 2015 Regulations provides, *inter alia*, that "*The Minister...may make an order ('removal order') in respect of a person to whom Regulation 3(1) applies, where, in the opinion of the Minister...(b) the person represents a danger for public policy or public security by reason of the fact that his or her personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*". Regulation 20(7) of the 2015 Regulations further provides: "*A previous criminal conviction shall not in itself constitute a ground for the making of a removal order*". [Emphases added]. The court does not see any breach of the quoted requirements. It is Mr Voivod's conduct that has led to the removal/exclusion orders. All matters required to be considered by the Minister, pursuant to Articles 27 and 28 were considered prior to the orders being made. There are due analyses of the Art.8 ECHR and Art.7 CFREU dimensions of Mr Voivod's application. (E.g., Mr Voivod's right to respect for his family life is discussed, his family life circumstances and the rights of his Irish child are noted; as is the length of Mr Voivod's incarceration and the fact that his removal and exclusion would not cause major disruption in the daily lives of his child or the child's mother or place an intolerable burden on them). There is consideration of the fact that Mr Voivod was convicted of one offence. So the court is confronted with a decision which: meets the need for proportionality, shows, *inter alia*, a consideration of factors that might mitigate *against* curbing Mr Voivod's free movement; considers submissions made; and concludes that Mr Voivod's conduct was such as to make it in the interests of public safety, common good, and prevention of a disturbance in the social order that he be removed and excluded from Ireland.

6. The court does not accept that *Kovalenko v. Minister for Justice* [2014] IEHC 624, because it refers to certain failures additional to the conduct underpinning Mr Kovalenko's convictions, supports the proposition that the Minister may not base his decision regarding an ongoing threat solely on a person's conduct in committing an offence. It just happens that in *Kovalenko* there were further failures; it happens here that there were not. It is clear too from the CJEU's decision in *R. v. Bouchereau* (Case 30/77), para.29 that "*Although, in general, a finding that such a threat [a present threat to the requirements of public policy] 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*". It is for the Minister as decision-maker to decide whether conduct (even solely past conduct) can constitute an ongoing threat; the fact that, e.g., Mr Voivod has not re-offended, does not mean the Minister cannot lawfully conclude that Mr Voivod continues to pose a serious threat to public policy and should be removed and excluded from Ireland.

7. **Rehabilitation.** Mr Voivod complains that there has been a breach of the principles identified by the CJEU in Case C-145/09 *Tsakouridis* as regards rehabilitation prospects in the host country (with related implications for proportionality). Mr Voivod cannot now raise this criticism as he made no representation to this effect to the Department. As is clear from, e.g., *ISOF v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457, *Jahangir v. Minister for Justice and Equality* [2018] IEHC 37 and *Lingurar v Minister for Justice and Equality* [2018] IEHC 96, the context for judicial review applications begins with the submissions made to the decision-maker. A court in such applications is engaged in a re-view, not a first view. (That said, the court notes in any event that the impugned decisions consider Mr Voivod's cultural/social integration and touch upon the suspended portion of his sentence, while the review decision touches on Mr Voivod's desire to resume employment and good behaviour in prison, all matters relevant to rehabilitation).

8. **Duration of Exclusion Period.** The sole respect in which the impugned decisions are legally frail is that they contain no reasoning as to the duration of the exclusion period settled upon. The Court of Appeal in *Balc v. Minister for Justice and Equality* [2018] IECA 76, paras.123-27, was clear as to the need for reasoning to be provided in this regard. Counsel for the respondents has referred to *Krupecki and anor v. The Minister for Justice and Equality* [2018] IEHC 505, para.8, where it is indicated that the decision of the Court of Appeal in *Balc* "*only applies to those with permanent residence*". Even if that is correct, that does not get around what is described in *Krupecki and anor v. The Minister for Justice and Equality (No. 2)* [2018] IEHC 538, para.9, as "*the general administrative law need for reasons independently of...statute*". Here there has been a failure to offer any reason as to why an exclusion period of 3 years was settled upon. That being so, the court, bound as it is by *Balc*, will: quash solely that part of the exclusion order of 08.12.2017, as affirmed by the decision of 11.01.2018, concerning the duration of the exclusion order; and remit solely this aspect of matters to the Minister for consideration.

– Summary Chronology –

12.10.14. Mr Voivod commits violent assault on a college student at the Dandelion Bar and Nightclub.

19.10.16. Mr Voivod convicted at Dublin Circuit Criminal Court of assault causing harm and sentenced to 3 years' imprisonment, with 18 months suspended.

20.04.17. Department letter to Mr Voivod indicating that Minister proposes to make removal and exclusion order, identifying applicable process and inviting submissions.

28.04.17. Department letter to Mr Voivod including newspaper account of sentencing hearing and inviting observations re. same. (The court admits to surprise that the article was deployed as it was. Newspaper articles are deliberately written in an arresting style and newspaper writers/editors may approach matters from a particular political standpoint. Reliance on

the dispassionately collected details in the book of evidence and, if necessary, the digital audio recording (DAR) of court proceedings seems preferable. The court does not consider that reliance on the newspaper article represents a legal flaw in the decision-making process. But it does seem to the court that there is a more desirable way of proceeding).

05.05.17. E-mail from Mr Voivod's solicitors indicating removal would be contested and that instructions were awaited.

08.05.17. Department letter grants more time for submissions.

09.05.17. Mr Voivod's solicitors make written submissions in respect of Mr Voivod.

15.05.17. Letter of acknowledgement from Department.

19.05.17. Mr Voivod's solicitors, by email, seek "*fresh decision*", though decision-making process not yet completed.

23.05.17. Department letter clarifies how decision-making process is proceeding. This letter includes, *inter alia*, an acknowledgement that the reference to "*offences*" (plural) in the letter of 20th April was a clerical error. Letter seeks further representations re. Mr Voivod's family life and integration in Ireland.

12.06.17. E-mail from Mr Voivod's solicitor indicates that Mr Voivod cannot speak to his living arrangements in Ireland following his arrival, and indicating that Department of Social Protection and Revenue Commissioners will have details of Mr Voivod's work history. (The court admits to surprise that a person invited to make observations by a Departmental decision-maker would tell that decision-maker to go speak with other officers of government. It was for Mr Voivod to 'put the best foot forward' when making submissions, not for the decision-maker to go rooting around within government to see what she could find out about Mr Voivod). The email also asserts that the Department's account of the offending behaviour is "*wholly inaccurate*" but offers no further detail.

14.06.17. Department letter explains process underway and seeks further evidence of Mr Voivod's family life.

20.06.17. Mr Voivod's solicitor, by email, seeks time to take further instructions.

04.07.17. Mr Voivod's solicitor, by email, *inter alia*, advises that he is taking further instructions and asks that the Department take up a copy of the DAR. (There was and is no requirement that the Minister consider the DAR before proceeding to his decisions. The Minister had provided the facts on which he proposed to rely and invited observations re. same. Moreover, Mr Voivod and those legal advisors who attended the sentencing hearing were perfectly placed to know/advise what happened at same. If the DAR was wanted by them, Mr Voivod's solicitors could have made application for same to the Circuit Judge).

10.07.17. Department replies to e-mail of 04.07.2017.

11.07.17. Mr Voivod's solicitors, by email, provide certain documentation in support of Mr Voivod's character.

20.07.17. Department indicates it will now proceed to consider making removal and exclusion orders.

27.07.17. Mr Voivod's solicitors ask on what information it is proposed to make the decisions and again ask that the Department take up a copy of the DAR.

17.08.17. Letter issues from Department again identifying the basis on which the Department is proceeding.

24.08.17. Mr Voivod's solicitors send email indicating that the Garda letter and newspaper report are "*inaccurate and incomplete in many material respects*" but no further detail is provided.

28.08.17. Department letter allows 10 more days for further representations re. any perceived deficiencies in Garda letter or newspaper report.

04.09.17. Mr Voivod's solicitors seek confirmation that it is Mr Voivod's conviction and the Garda letter and newspaper report that are being relied upon.

14.09.17. Department letter issues indicating basis on which decisions will be made.

24.10.17. Mr Voivod's solicitors make representations concerning Mr Voivod's good behaviour in prison.

02.11.17. Department letter indicates that the submissions made on 24.10.2017 will be taken into account.

08.12.17. Department letter indicates decision to make removal/exclusion orders.

21.12.17. Mr Voivod's solicitor seeks intra-Departmental review of the decision of 08.12.2017.

11.01.18. Department letters indicate decision to affirm removal and exclusion orders.

15.01.18. Ex parte application made to commence judicial review proceedings.