Neutral Citation [2016] IEHC 431

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 462 J.R.]

BETWEEN

I.S. (Lithuania)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on 22nd day of July, 2016.

1. This is an application by way of judicial review seeking, *inter alia*, an order of *certiorari* quashing a removal order issued by the first-named respondent against the applicant. The proceedings are moved on the applicant's Notice of Motion dated 31st July, 2015, and grounded upon an affidavit of the same date.

Background

2. The applicant is a Lithuanian national, who was 25 years old at the time the first-named respondent issued a removal order and a five-year exclusion order against him. The applicant arrived in this State in January, 2006 with his parents and two brothers. There appears to be a discrepancy between the applicant's solicitors and the Garda National Immigration Bureau (GNIB) on the precise date of arrival in this State. The order was allegedly made against the applicant due to his criminal behaviour within this State being adjudged "*a genuine and sufficient threat to the social order and the fundamental interests of Irish society*." The first-named respondent notified the applicant of the intention to make a removal order with a five-year exclusion period on 20th May, 2014.

3. The applicant was convicted on 26th October, 2012, in the Circuit Court sitting at Portlaoise for aggravated burglary, contrary to s. 13(1) and (3) of the Criminal Justice (Theft and Fraud) Offences Act, 2001. The Court imposed a six year sentence with the final two years suspended. The applicant maintains that he is entitled to permanent residence under the provisions of Article 16 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. L158 30.4.2004 and Regulation 12 of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006.

4. By letter dated 27th July, 2015, the first-named respondent wrote to the GNIB stating that the applicant's file had been reviewed and that the removal order and subsequent period of exclusion from the State were deemed necessary. This letter signified that the first-named respondent was effectively handing the matter over to officers of the GNIB to execute the order.

5. The applicant also had prior convictions, including unlawful possession of drugs contrary to s. 3 of the Misuse of Drugs Act, 1977 (as amended). On 18th November, 2010, the applicant was convicted for driving without reasonable consideration. The applicant was released from prison on 25th October, 2015. All fines imposed by the sentencing court were paid by the applicant.

6. On 31st July, 2015, MacEochaidh J. granted the applicant leave to apply for judicial review. The application was made on an *ex parte* basis. MacEochaidh J.'s order restrained the first-named respondent from executing the removal order and interfering with the applicant's right to reside in the State up to and including 5th August, 2015. The applicant was also granted short service leave to issue a Notice of Motion specifying the reliefs sought, made returnable for 5th August, 2015.

7. On 6th August, 2015, this Court ordered that the time to make this application be extended and that an originating Notice of Motion be returnable for 12th October, 2015. A Statement of Opposition was sent to the applicant from the respondents dated 27th November, 2015 and grounded upon an affidavit of an official at the GNIB.

Applicant's submissions

8. Mr. Lynn, S.C., along with Mr. Ó Maolchalain, B.L., submit on behalf of the applicant that the respondents' decision was materially flawed due to an error in the review relied upon by the respondent. The applicant states that the error is located at pg. 8 of the decision, in the section that states:-

> *"The outcome of Mr. S's serious criminal conduct in Ireland is the [GNIB] are of the view that he is a genuine and sufficient threat to the social order and fundamental interests of Irish society and as such, they apply to this Department to have a removal order made in respect of him."*

The applicant contends that the GNIB never expressed a view as to whether or not the applicant was a "*genuine and sufficient threat to the social order and fundamental interests of Irish society"* in its communications with the first-named respondent.

9. The applicant contests the respondents' reliance upon the decision in *Kugathas v. Secretary of State for the Home Department* [2003] EWCA Civ 31 as a basis for finding that "*…family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties." With particular reference to Mr.* [S's] *particular situation, I do not find that his circumstances suggest anything more than "normal emotional ties.""* The applicant asserts that the first-named respondent's adoption of the decision in *Kugathas* is an error in law.

10. The applicant further submits that a different test ought to be applied in relation to Directive 2004/38/EC. According to the applicant, this legislation outlines that a Member State may not make an expulsion decision against a Union citizen who possesses the right to permanently reside on its territory, except on "*serious grounds of public policy or public security*". The applicant argues that

the GNIB did not express a view as to whether or not the applicant fell within this category of persons. The applicant asserts that the first-named respondent had regard to irrelevant matters when deciding to issue the removal order, which constitutes a material error of fact.

11. Attention is also drawn to para. 6 of the affidavit of a Principal Officer within the Irish National and Immigration Service, which avers to the situation that:-

> *"…the statement that the [GNIB] held the view the applicant was a "genuine and sufficient threat to the social order and the fundamental interests of our society" was only one of a large number of issues considered by the first respondent before concluding that "therefore exist as substantial reasons associated with the common good and serious grounds of public policy which require the removal of Mr. S from the State"."*

Access to the courts
12. During the applicant's time in custody, he suffered very serious head injuries, for which he is seeking redress in a personal injuries action against the Irish Prison Service. The applicant contends that his pursuit of this action would be severely compromised if he were excluded from the State. The applicant contends that his personal injuries claim will be heard within the period of his exclusion order, as the Personal Injuries Assessment Board (PIAB) has already issued an authorisation in relation to the applicant's case. This ground is termed broadly by the applicant as a denial to his right to access the courts.

13. Further to the applicant's claim that the respondent failed to assess the opinion of the GNIB correctly, there is also an alleged failure to appropriately consider whether the applicant's circumstances signified something more than normal emotional ties to his family, who moved to Ireland with the applicant in 2006.

Family life interference
14. The impugned decision cites the Kugathas decision, in which it was stated that "*…family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal."* The review decision summarised that "… [W]*ith reference to Mr.* [S's] *particular situation, I do not find that his circumstances suggest anything more than 'normal emotional ties'.* This finding was allegedly made without due consideration for the assistance that the applicant would require from family members in order to recover from his personal injuries following his release from prison. The applicant, in effect, contends that the respondents failed to acknowledge the existence of his family life and, in so doing, failed to comply with the requirements of Article 7 of the Charter of Fundamental Rights and Article 8 of the European Convention of Human Rights (ECHR). The removal order is claimed to be void as a result.

15. The applicant has submitted documentation from an employer, which purports to state that the applicant possesses future employment prospects within this State following release from prison. According to Garda records submitted to the Court, the applicant has had a patchy employment history within the State, with nine weeks employment registered for 2011 and 28 weeks for 2012.

Genuine threat to society
16. Another significant ground relied upon by the applicant is the contention that the respondent failed to properly consider whether the applicant represents a "*genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*." The applicant relies, *inter alia*, on the decision of the Court of Justice for the European Union in *Van Duyn v. Home Office (Case 41/74)* [1974] E.C.R. 1337, where it held that assessment of personal conduct was necessary before any measure was taken to restrict the free movement and/or employment of migrant workers.

17. The applicant relies, *inter alia*, upon Article 27(2) of Directive 2004/38 EC, which states:-

> *"Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interest of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."*

The applicant also relies heavily upon Articles 28 and 31 of Directive 2004/38/EC.

18. The applicant broadly submits that his affidavits highlight that he is a reformed character. The applicant contends that these reformations were not fully considered by the respondents and, had they done so, they would surely not have considered him a genuine and sufficiently serious threat to Irish society.

Fair procedures
19. The next ground the applicant relies upon is the perceived inadequacies of the respondents' review process. In this regard, the applicant relies, *inter alia*, upon Article 31 of Directive 2004/38/EC which states:-

> *"The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member Sate to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health…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."*

The applicant submits that he has been denied the opportunity to bring an independent appeal to an appropriate tribunal within the State. The present review procedures adopted by the respondents are allegedly unfit for purpose and in breach of fair procedures because there was no opportunity for the applicant to appear and be heard in person before the reviewing body. The applicant relies upon the decisions in *Efe v. Minister for Justice* [2011] IEHC 214 and *Donegan v. Dublin City Council* [2012] IESC 18 in respect of the inadequacy of the adopted review procedures. In addition, the applicant contends that Article 47 of the Union's Charter is applicable in this case with respect to a fair hearing and the limitations of the judicial review process in proffering new evidence to the reviewing court.

Respondents' submissions
20. Mr. Mulcahy, S.C., along with Ms. Carey, B.L. for the respondents, submit that, if one reads the decision as a whole, it is clear

that the first-named respondent found the applicant to pose a genuine and sufficiently serious threat to the social order of the State. In this respect, the respondents rely upon the decision of Feeney J. in *O.A.A. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 169, where the Court stated at para. 3.4:-

> *"The High Court has on many occasions in relation to judicial reviews concerning the Refugee Appeals Tribunal warned that the court must not fall into the trap of substituting its own view for that of the Tribunal member…The courts must pay due deference and regard to an adjudicator. Part of that is a recognition that it is not the court's function to dissect, parse or disassemble the written decision but rather to look at it in the round."*

The respondents contend that the same legal principles are applicable to the judicial review of a decision to issue a removal order.

21. The respondents also argue that the burden of proof lies squarely with the applicant in proving that the decision-maker did not have regard to certain matters. It is contended that this is a significant hurdle. The respondent underlines that the decision states that "*full consideration has been given to all the facts in this case*."

22. The respondents deny that there was any error of fact or, if there was, that the decision is vitiated due to such an error. The removal order was allegedly justified by the assessment carried out by the GNIB, which summarised the applicant's status within the State as follows:-

> *"…the outcome of Mr. S's serious criminal conduct in Ireland is the Garda National Immigration Bureau are of the view that he is a genuine and sufficient threat to the social order and fundamental interest of Irish society."*

The respondents stress that the GNIB was not the decision-maker in this case and that no retrospective decision-making took place.

23. The respondent places significant emphasis upon the judgment of McDermott J. in *PR, JR and KR v. Minister for Justice and Equality* [2015] IEHC 201, where that Court assessed the standing of previous convictions as a basis for one's removal from the State. Having assessed the relevant EU and domestic case-law, McDermott J. stated at para. 48:-

> *"I am satisfied applying the above principles, that the respondent was entitled to rely upon the nature, extent and duration of P.R.'s criminal behaviour as part of the appraisal of whether he constitutes a serious threat to public policy. It is clear that past conduct alone or in conjunction with other factors may give rise to such a threat, and indicate his readiness, inclination or disposition amounting to propensity to act in the same way in the future."*

24. The respondent disputes the reformed character argument and takes issue with the suggestion that such evidence was placed before the decision-maker in this matter. In this regard, the respondent questions whether the applicant's assertion of being a reformed drug user was a result of a drug rehabilitation course undertaken in prison. Allegedly, no evidence was adduced in support of these assertions.

25. With regard to the applicant's emotional ties to his family and the applicant's assertion that he will be dependent upon his parents following his release from prison, the respondents reiterate their reliance on *Kugathas*, where it was stated that *"…family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties…Such ties might exist if the appellant were dependant on his family."* The respondents submit that the applicant's family's letters do not refer to an upcoming dependency upon them for the applicant's post-release care and rehabilitation. Furthermore, there was no medical evidence submitted to the decision-maker to support the prospect that the applicant required "rehabilitation" following his release from prison.

26. With regard to the applicant's right of access to the courts to pursue his personal injuries action, the respondents argue that there is nothing preventing the applicant from pursuing this litigation from outside the State. In this respect the respondents rely upon the decision in *D.P. v. Governor of the Training Unit* [2001] 1 I.R. 492, where Finnegan J. stated as follows:-

> *"I know of no authority and none has been cited to me for the proposition that a person not otherwise entitled to remain within the State may do so in order to prosecute a civil claim. With great regularity civil claims are prosecuted in this State by persons resident abroad and so special circumstance has been cited to me to suggest that residence abroad would inhibit the prosecution of any legitimate claim which the applicant might wish to bring."*

27. The ground of right to an effective remedy is also contested by the respondents, who assert that this issue was decided by McDermott J. in *P.R.* The respondents dispute that McDermott J.'s comments in relation to this issue were *obiter.* The respondents contend that the applicant has misconstrued Article 30.3 and Article 31 of Directive 2004/38/EC. The Irish procedure is adequate, in that it provides for a full review of the original decision in fact and in law.

28. The respondents rely upon the decision of Eagar J. in *Balc v. Minister for Justice and Equality* [2016] IEHC 47 in rebutting the applicant's argument that the review procedures within the respondent's department are defective. Eagar J. found that the review procedures implemented by the respondent did comply with the administrative review procedure envisaged by Directive 2004/38/EC. In reaching this determination, Eagar J. relied upon the decision of Cooke J. in *El Menkari v. Minister for Justice, Equality and Law Reform* [2011] IEHC 29. In that case, the Court found that Regulation 21 envisaged an administrative review, rather than a judicial review, and further commented upon the duty of an applicant to first exhaust all administrative appeals before embarking upon a judicial review application under Order 84 of the Rules of the Superior Courts, 1986 (as amended).

The impugned decision

29. By letter dated 20th May, 2014, the first-named respondent wrote to the applicant to notify him that a removal order was proposed against him pursuant to Regulation 20(1)(a))iv) of the 2006 and 2008 Regulations. The stated reason for the first-named respondent's decision to issue a removal order was that the applicant had come to the attention of An Garda Síochána. A list of the applicant's previous court appearances were recited in the body of the letter. The first-named respondent was of the opinion that "*your conduct is such that it would be contrary to public policy to permit you to remain in the State.*" Furthermore, pursuant to Regulation 20(1)(c), the first-named respondent decided to place an exclusion period against the applicant from entering this State, commencing upon the date of removal.

Decision

30. The applicant complains that the decision-maker did not adequately consider his family rights pursuant to Article 8 of the ECHR and Article 7 of the EU Charter. In reviewing this argument, this Court is mindful of the decision of the European Court of Human Rights' Grand Chamber in the case of *Maslov v. Austria* [2009] I.N.L.R. 47. In that case, the Court held that a young convict who was

still living with his family had a family life with them within the meaning of Article 8 of the ECHR.

31. At para. 62 of *Maslov*, the Court referred to some of its previous judgments, namely *Bouchelkia v. France* [1997] 25 E.H.R.R. 686, *El Boujaidi v. France* (2000) 30 E.H.R.R. 223 and *Ezzouhdi v. France* (Application No. 47160/99) (Unreported) 13 February 2001, ECHR. It is clear from those judgments that the Court tends to the view young people who has not left the bosom of the family as enjoying enhanced family rights pursuant to Article 8. The Court found that there had been a breach of Article 8 and it was therefore necessary for the Court to engage in a balancing exercise in order to ascertain whether or not the breach was in accordance with the law and necessary in a democratic society.

32. The decision in *El-Boujaidi* is of particular significance to the present proceedings. A permanent exclusion order was made from all French territory due to the applicant's convictions for the consumption and trafficking of heroin from the Netherlands. In challenging the exclusion order on three separate occasions, the applicant pleaded that he had family ties in France (two parents, three sisters and a brother) and that such an exclusion order was a breach of his Article 8 rights. The Court held that the question of family ties must be considered before any exclusion order is made. Enforcement of an exclusion order did amount to an interference with the applicant's Article 8 rights. A determination had to be made as to whether said exclusion was in accordance with law and necessary in a democratic society, pursuant to Article 8 (2).

33. In deciding that the exclusion order was not disproportionate, the Court found that the applicant had not lost all emotional links to his country of origin. His lack of effort to attain French nationality copper-fastened that finding. The decision in *El-Boujaidi* is of interest to this Court. The Court is of the view that it could be said that there is *prima facie* evidence that the applicant has familial ties to Ireland capable of being classified as close. The Court also acknowledges the fact that the applicant sustained very serious head injuries, which would *prima facie* necessitate a degree of dependency upon his family members during his period of recuperation. None of these matters appear to have been addressed in the decision-making process.

34. It seems clear that the decision-maker was aware of the applicant's situation, both in terms of the severity of his injuries and his family structure. However, it is unclear whether the decision-maker accepted that the applicant's Article 8 rights were a live issue at the time the decision to issue a removal order was made. This is a fundamental error in the decision-making process. Based on the decision of the Grand Chamber in *Maslov (supra)*, it was not open to the decision-maker to make any other decision but that the applicant had family rights and ties with his family in Ireland that remained in full effect, except for the period in which he was away from them serving his prison sentence. If the decision-maker had made a clear decision in this regard, they should have gone on to consider whether or not the interference with those rights was in accordance with law and necessary in a democratic society. In addition, the decision-maker was obliged to consider the provisions of the Qualifications Directive and domestic Irish law with regard to the applicant's particular circumstances. This process was not followed by the decision-maker.

35. For this reason alone, the Court finds that the decision should be quashed and the order of *certiorari* should be granted. Counsel for the applicant indicated during the course of submissions that a finding in favour of the applicant on the Article 8 point could indeed dispose of the case. In light of the finding I have just made, I do not propose to rule on the other points raised.