THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 803 JR]

BETWEEN

J.B.

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND,

AND

THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice Keane delivered on the 28th June 2019

Introduction

1. This is a challenge to a decision made by the Minister for Justice and Equality ('the Minister') on 4 October 2016, affirming a removal order, made on 17 December 2014, against the applicant, a Polish national and, hence, European Union citizen, imposing upon him an exclusion period of five years, under Reg. 20 of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 ('the 2006 Regulations'). For ease of reference, I will refer to the decision of 4 October 2016 as 'the review decision.'

2. While the review decision was made after the revocation of the 2006 Regulations by European Union (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations'), which came into operation on 1 February 2016, the applicant sought that review, through his solicitors, on 2 January 2015, and, under the transitional provision of Reg. 31(28) of the 2015 Regulations, the review provisions of Reg. 21 of the 2006 Regulations continue to apply in those circumstances.

3. The 2006 Regulations, and the 2015 Regulations which succeeded them, were each made under the powers conferred on the Minister under s. 3 of the European Communities Act 1972 for the purpose of giving effect to Directive 2004/38/EC ('the Citizens' Rights Directive').

The applicant's criminal conduct

4. The applicant was born in 1981. He came to Ireland in 2005 but returned to Poland in 2006, shortly after he came to the attention of An Garda Síochána on 6 August 2006 when a sexual offence complaint was made against him.

5. The criminal complaint was as follows. On 5 August 2006 a number of Polish nationals were socialising at a house in Dublin. In the early hours of 6 August 2006, the female injured party went to sleep on a couch in the front sitting room, while the others remained in the kitchen at the rear of the house. She awoke to find that her jeans and underwear had been removed and that the applicant was on top of her. The injured party became alarmed and the applicant stopped what he was doing. The injured party called out to her boyfriend, who was still in the kitchen. The injured party and her boyfriend left the house shortly afterwards and contacted the Gardaí. The applicant was promptly arrested and detained for questioning. He was then released, pending the preparation of an investigation file for the Director of Public Prosecutions. A short time later, he returned to Poland.

6. In 2012, a European Arrest Warrant issued against him. He returned to Ireland voluntarily in September 2012. On 5 December 2013, he appeared before the Central Criminal Court charged with two offences arising out of that incident; rape, contrary to common law, and sexual assault, contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990. The jury acquitted him of rape, convicting him instead of sexual assault. On 18 December 2013, the applicant was sentenced to two years imprisonment to run from the 26 November 2013, with the last six months suspended. He was due for release on 8 January 2015.

7. In imposing that sentence, the Court acknowledged that the applicant had been otherwise a person of good character (that is to say, a person without other recorded convictions), both before and after the commission of that crime.

The removal order against the first applicant

8. On 6 February 2014, through the Irish Naturalisation and Immigration Service ('INIS'), the Minister wrote to the applicant to inform him of the Minister's proposal to make a removal order against him, under the power to do so conferred by Reg. 20(1)(a)(iv) of the 2006 Regulations where 'in the opinion of the Minister, the conduct or activity of the person is such that it would be contrary to public policy or it would endanger public security or public health to permit the person to remain in the State.' The conduct identified was the sexual assault that the applicant committed on 6 August 2006, as evidenced by his conviction and sentence for that offence in 2013. The letter went on to inform the applicant that the Minister was also proposing to impose a period of exclusion from the State of five years upon him, in accordance with Reg. 20(1)(c) of the 2006 Regulations.

9. Through his solicitor, the applicant made representations against that proposal on 26 February and 8 July 2014.

10. Having considered those representations, the Minister nonetheless made a removal order against the applicant on 18 December 2014. That order was based upon a five page 'examination of file' report and recommendation, made by an officer of the Minister on the same date.

11. On 2 January 2015, through his solicitor, the applicant requested a review of the decision to make that order, making further representations in support of that review on 20 January 2015.

12. On 20 April 2015, the decision to make a removal order against the applicant, incorporating an exclusion period of five years, was affirmed, based upon a further ten page 'examination of file' report and recommendation of the same date.

13. The applicant brought judicial review proceedings to challenge that decision on 7 May 2015. Those proceedings were listed for hearing on 21 January 2016, but were compromised on terms that included the withdrawal of that decision and the consideration of further representations by the applicant in the context of a further review.

The decision now under challenge
14. At the conclusion of that review on 4 October 2016, the Minister reaffirmed the decision to make the original removal order, incorporating an exclusion period of five years. That is the review decision now under challenge.

15. By letter of 5 October 2016, the Minister gave the applicant the notification of that decision and of the reasons for it in writing that is required under Regulation 20(3)(b)(ii) of the Regulations. The review decision is based upon an eleven page 'examination of file' report and recommendation, made by an officer of the Minister on 30 September 2016. The first applicant was informed that he was to present at the Garda National Immigration Bureau on 8 November 2016, so that arrangements could be made for his removal from the State.

The present proceedings
16. The application was initially based upon a statement of grounds filed on 20 October 2016, supported by an affidavit of the applicant sworn on the same date. The applicant's solicitor swore a short affidavit on 24 October 2016, to exhibit the copy of the review decision that he received on the applicant's behalf.

17. By Order made on 6 February 2017, the applicant was given leave to challenge the review decision by seeking the following principal orders:

> (i) An order of *certiorari* quashing the review decision.
>
> (ii) A declaration that the 2006 Regulations or the 2015 Regulations, or both, are in breach of European Union law in failing to implement the Citizens' Rights Directive correctly by failing to provide the applicant with a right of appeal that is full, independent and compliant with [Art. 31] of that Directive and Art. 47 of the Charter of Fundamental Rights of the European Union ('CFREU').

18. The applicant filed an amended statement of grounds on 10 February 2017, to reflect the terms of the decision on his application for leave.

19. The Minister's statement of opposition is dated 5 October 2017 and was filed the following day. It is grounded on an affidavit of Tom Doyle, an assistant principal officer in the Minister's department, sworn on 4 October 2017.

20. I propose to address the application for each of the reliefs that the applicant has been given leave to seek separately and in reverse order.

Article 31 of the Citizens' Rights Directive
21. The applicant contends that the availability of judicial review and of the review mechanism constituted by Regulation 21 of the 2006 Regulations fails to provide him with the access to judicial and administrative redress procedures that is required as a procedural safeguard under Article 31 of the Citizens' Rights Directive.

22. However, in doing so he acknowledges that this argument was rejected by Eagar J in *Balc & Ors v Minister for Justice* [2016] IEHC 47 (Unreported, High Court, 19th January, 2016) and by McDermott J in *P.R., J.R. & K.R. v MJE (No. 1)* [2015] IEHC 201, (Unreported, High Court, 24th March, 2015). Conscious that the decision in *Balc* was then under appeal to the Court of Appeal and wishing to preserve his position, the applicant was content to rest on his extensive written submissions to the effect that each of those cases was wrongly decided – a sensible course of action in view of the principles set out in *Irish Trust Bank Ltd v Central Bank of Ireland* [1976-1977] ILRM 50 and *Re Worldport Ireland Ltd* [2005] IEHC 189 (Unreported, High Court (Clarke J), 16th June, 2005).

23. Although I do not rely on it for the purpose of this judgment, I note that the Court of Appeal has since ruled against the applicant's contention in *Balc & Ors v Minister for Justice* [2018] IECA 76, (Unreported, Court of Appeal (Peart J; Ryan P and Hedigan J concurring), 7th March, 2018).

24. Accordingly, I reject the argument that the State has failed to properly transpose or implement the procedural safeguards of Art. 31 of the Citizens' Rights Directive or that the State is in breach of the requirements of Art. 47 of the CFREU in that respect. The applicant is not entitled to the declaration that he seeks.

Some relevant legal principles
25. Article 27(1) of the Citizens' Rights Directive permits the restriction of the freedom of movement and residence of Union citizens and their family members on grounds including that of public policy. Under Art. 27(2), such a decision, as a restriction on those rights, has to be proportionate and based exclusively on personal conduct, which has to represent a genuine, present and sufficiently serious threat affecting the fundamental interests of society. The justification for the decision must not be isolated from the particulars of the case or rely on general prevention. Previous criminal convictions cannot in themselves constitute a ground for the decision.

26. Under Art. 28(1), the host Member State must take account of considerations such as how long the individual concerned has resided on its territory, his age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his links with his country of origin.

27. In Case C-30/77 *R v Bouchereau* [1977] ECR 1999, the ECJ found: (at para. 28) that the existence of a previous criminal conviction can 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; (at para. 29) that, 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; and (at para. 35) that recourse by a national authority to the concept of public policy presupposes, in any event, 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.

28. The duration of the relevant person's residence in the host Member State is a particularly significant factor under the general scheme of the Citizens' Rights Directive. Article 28(2) provides that an expulsion decision cannot be taken against a Union citizen or the family member of a Union citizen who has the right of permanent residence on its territory, except on *serious grounds of public policy or public security*; and Art. 28(3) stipulates that an expulsion decision may not be taken against a Union citizen who has

resided in the host Member State for the previous ten years unless it is based on *imperative grounds of public security.*

29. The applicant in this case had no such enhanced protection in respect of the review decision. He was susceptible to removal on public policy grounds that did not have to be serious.

30. Nor can it be overlooked that the applicant was lawfully imprisoned in the State between, I am given to understand, December 2013 and January 2015. Under Art. 16(1) of the Citizens' Rights Directive, the condition for the acquisition of the right of permanent residence by a Union citizen is legal residence for a continuous period of five years in the host Member State. As the European Court of Justice ('ECJ') confirmed in Case C-378/12 *Onuekwere v Secretary of State for the Home Department* ECLI:EU:C:2014:13, in the closely connected circumstance of a family member of a Union citizen claiming a right of residence under Art. 16(2) of the Directive, the imposition of a prison sentence by a national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law, with the result that the taking into account of periods of imprisonment for the purpose of the acquisition of the permanent right of residence under Art. 16 of the Citizens' Rights Directive would be clearly contrary to the aim pursued by that directive in establishing that right of residence.

31. Hence, any such period of imprisonment cannot be taken into consideration in the context of the acquisition of the right to permanent residence and, moreover, interrupts the five years' continuity of residence necessary to acquire that right. It follows that, when the review decision was made, the applicant had less than two years continuous residence in the State towards the calculation of the five-year continuous residence period necessary to acquire the right to permanent residence in the State.

The lawfulness of the review decision

32. In his amended statement of grounds, the applicant enumerated ten reasons for his assertion that the review decision was unlawful. In the written submissions filed in support of his application, those ten reasons were sensibly condensed into six, although, in my view, it is practical to address them under fewer broad headings. Unfortunately, the welcome introduction of a greater level of concision in the expression of the grounds that the applicant had been given leave to raise was immediately offset by the attempted introduction of a new ground upon which leave to seek judicial review had not been granted.

i. propensity

33. The applicant submits that there was no evidence upon which to base the finding that he has a propensity to reoffend and, what is more, that the finding runs counter to certain comments of the trial judge who sentenced him. I do not accept that submission.

34. The applicant had no criminal convictions prior to the incident on 6 August 2006 that led to his conviction for sexual assault and has incurred no further criminal convictions since then. But it is criminal conduct, and not criminal conviction, that establishes propensity. In the difficult field of risk assessment, it is a fundamental principle that static factors such as past behaviour are the best predictor of future conduct. As a general proposition, a person who has committed a sexual offence has a propensity to commit such offences. As Eagar J observed in *Balc v Minister for Justice* [2016] IEHC 47, (Unreported, High Court, 19th January, 2016) (at para. 120): 'This Court is aware of the propensity of sex offenders to repeat offences.'

35. The Minister is entitled to rely upon the serious criminal behaviour of the applicant as evinced by the details of the offence provided and the sentence imposed, as conduct which, of itself, might constitute a threat to the requirements of public policy; *DS v Minister for Justice and Equality & Ors* [2015] IEHC 643, (Unreported, High Court, 20th October, 2015) (at paras. 52-3). A person convicted of sexual assault is liable to imprisonment for a term not exceeding ten years; s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as substituted by s. 37 of the Sex Offenders Act 2001. As McDermott J explained in *P.R. & Ors v Minister for Justice & Ors (No. 1),* already cited, (at para. 42):

> 'There is a high level of concern in society that persons of both sexes be protected from sexual assailants, as evidenced by the number of statutes enacted in Ireland over the last thirty years with a view to modernising the law in this area and strengthening the protections available to victims of sexual crime.'

36. And, later (at para. 54):

> 'The nature of a sexual assault may differ in its gravity depending on the circumstances in which it was committed. It is clear as a matter of legislative and public policy that young women such as the victims in this case, must be protected from predatory sexual assailants.'

37. In his grounding affidavit, the applicant purports to quote the following passage from the remarks made by McCarthy J in imposing sentence upon him:

> 'I go so far as to say such information as has been put before me indicates that he is generally a person of good character and that, since that time, he has – he has manifested good character, apart from this offence. I am also prepared in the light of the material that is before me to accept that this is an offence which is out of character and that these, of course, are important factors in any sentencing process.'

38. The applicant argues that these comments are inconsistent with his having a propensity to commit sexual offences. There are two fundamental problems with that argument. The first is procedural. If the applicant wishes to rely on the sentencing remarks made by McCarthy J in the Central Criminal Court, then the appropriate way to do that is to produce and exhibit the full transcript of the sentence hearing. To permit an applicant to purport to quote from a decision of that, or any, court without first producing a copy of the transcript of it (or the written judgment, or an agreed not of the judgment or ruling, as the case may be) would set an undesirable, if not disastrous, precedent – as the applicant's legal representatives must surely be aware. The applicant's failure to exhibit the transcript also means that I cannot know what material was, and was not, before McCarthy J.

39. The second problem is substantive. In my judgment, it simply does not follow that, in accepting that a convicted person has been otherwise of good character, both before and after a particular offence, the sentencing court is purporting to assess that person's propensity to engage in future criminal conduct. The consideration of prior or subsequent criminal conduct as an element in sentencing for a particular crime is not, and does not purport to be, the same thing as an assessment of future risk. Hence, even if a transcript had been produced confirming the comments ascribed to McCarthy J and, in particular, the use of the phrase 'out of character', I could not accept that as a meaningful risk assessment, establishing the absence of any propensity on the applicant's part to commit future sexual offences, because I do not accept that it would have been intended in that way, if it was indeed said.

ii. sexual assault or rape

40. As a separate head of challenge to the review decision, the applicant alleges that a passage in it wrongly mischaracterised his criminal conduct as that of rape, rather than sexual assault. In my judgment, that is a misreading of the relevant passage from the review decision which states:

> 'Crimes of a sexual nature are grievous offences against the person and are at the upper end of the scale of criminal behaviour. In [*Kovalenko & Ors. v Minister for Justice and Equality & Ors* [2014] IEHC 624, (Unreported, High Court (McDermott J), 12th December, 2014)] the court found that the commission of rape was sufficiently serious to justify the invocation of the notion of "public policy". The court held that [(at para. 47)]: "*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*."'

41. I am quite satisfied from a reading of the review decision as a whole, in which the applicant's conviction for sexual assault is reiterated numerous times, that in the passage just quoted the decision maker is simply and properly acknowledging the rape offences at issue in *Kovalenko* before highlighting the identification by McDermott J in that case of the public policy underlying the State's approach to serious sexual offences generally.

42. In seeking to bolster his contention that the review decision wrongly concludes that he committed rape, the applicant advances an unimpressive and, indeed, unedifying argument about the nature of his conviction and the contents of the Garda Report, dated 16 January 2015, which informed the Minister's proposal to make a removal order against him.

43. Although the applicant does not acknowledge this, under s. 8 of the Criminal Law (Rape) (Amendment) Act 1990, a verdict of sexual assault is available as an alternative verdict to rape. The applicant avers that, as the Garda report points out, the complainant's account of his assault upon her was one of rape, before going on to aver, discreditably in my view, that the said account was 'rejected by the trial jury in my case.' It is perfectly plain that the jury accepted the complainant's evidence that the applicant removed her jeans and underwear and climbed on top of her while she was asleep. It seems reasonable to infer that that is why the applicant was convicted of sexual assault. The difference between sexual assault and rape in those circumstances turns on whether penetration actually occurred. That the jury, correctly as a matter of law, gave the applicant the benefit of the doubt in those circumstances, convicting him of the lesser (though still serious) offence, is hardly a rejection of the complainant's account, and is certainly not in any sense a vindication of the applicant's position. While the review decision acknowledges the terms of the complaint recorded in the Garda report, it evinces no misunderstanding concerning the verdict of the jury and, hence, concerning the nature and extent of the criminal conduct engaged in by the applicant.

44. Accordingly, I reject this ground of challenge to the review decision.

iii. the applicant's return to Poland

45. The applicant complains that the Minister drew an unfair and erroneous inference in the review decision concerning the circumstances of his return to Poland shortly after he committed a sexual assault in 2006, by concluding that they raise a serious question concerning whether he would have voluntarily returned to the State to face prosecution for that offence in 2012, had he not been made the subject of a European Arrest Warrant.

46. The unsworn and uncorroborated account of those events that the applicant placed before the Minister was that, having entered the State and commenced employment in 2005, he returned to Poland shortly after the sexual assault in 2006 to complete his studies there and not to avoid the consequences of his actions. He remained in Poland for the next six years, until – voluntarily he insists – he returned to Ireland after a European Arrest Warrant issued against him in 2012. In support of that account, the applicant exhibits a single email that he sent to the Office of the Director of Public Prosecutions on 31 July 2007, enquiring if there was any necessity for him to return to the State to authorise the continued retention of samples that had been taken from him or if he could authorise it in writing from Poland, which the applicant contends is evidence that he was not seeking to evade justice.

47. I am satisfied that, whether the applicant agrees with it or not, the relevant inference was one that it was perfectly open to the Minister to draw.

iv. proportionality and the test applied

48. The applicant submits that the review decision fails the test of proportionality and that, in making it, the Minister applied the wrong test.

49. Article 27 and 28 of the Citizens' Rights Directive deal with the general principles governing the permissible restriction of the right of freedom of movement and residence of Union citizens and their family members and the required protection against the expulsion of such persons from the host Member State, respectively

50. Those provisions were transposed at the material time by Reg. 20 of the 2006 Regulations. Reg. 20(1) provides, in material part:

> '(a) [...] the Minister may by order require a person to whom these Regulations apply to leave the State within the time specified in the order where—
>
> ...
>
> (iv) in the opinion of the Minister, the conduct or activity of the person in such that it would be contrary to public policy or it would endanger public security or public health to permit the person to remain in the State.'

51. Regulation 20(3)(a) states:

> '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 –
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> (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 persons links with his or her country of origin.

52. As many commentators have pointed out, the requirement of proportionality in Art. 27(2) and the factors to be taken into account under Art. 28(1) before taking an expulsion decision on grounds of public policy or public security are strongly and, I would venture, deliberately reminiscent of those incumbent upon a state required to consider the right to respect for family life under Art. 8 of the European Convention on Human Rights, as identified by the European Court of Human Rights in numerous cases such as *Boultif v Switzerland* [2001] ECHR 54273/00.

53. Nonetheless, the applicant argues that the Minister applied the wrong test as a matter of EU law because of the conclusion, at page 10 of the 11-page review decision, that nothing in the applicant's personal circumstances generally or, more particularly, in his family and economic circumstances or in the nature of his social and cultural integration in the State would make his return to the state of his own nationality 'impossible for him or one of great hardship.' The words just quoted plainly represent a paraphrase of familiar language from the jurisprudence of the European Court of Human Rights on an aspect of the necessary proportionality analysis under Article 8 of the European Convention on Human Rights ('ECHR') when considering the deportation of a family member.

54. It must not be forgotten that, under Art. 51 of the CFREU, its provisions are addressed to the Member States when they are implementing Union law, such as the Citizens' Rights Directive, and that, under Art. 52(3) of the same instrument, in so far as it contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down in the ECHR.

55. A consideration of the Minister's 11-page review decision in the round establishes that it did engage with the requirements of Articles 27 and 28 of the Citizens' Rights Directive in general and with those of Article 28(1) in particular.

56. From a consideration of the nature and contents of the Minister's decision taken as a whole, I am satisfied that it was in the context of that analysis, and not as the application of a different or incorrect test, that the review decision included a consideration of the requirements of Article 7 of the Charter of Fundamental Rights of the European Union and of Article 8 of the European Convention on Human Rights. I therefore reject the argument that the Minister applied the wrong test or that the Minister failed to properly apply the necessary proportionality assessment under Art. 27(2) of the Citizens' Rights Directive.

v. failure to provide reasons for the exclusion period of five years

57. In a single short paragraph in his written submissions, the applicant invokes the decision of O'Regan J in *Smolka v Minister for Justice* [2016] IEHC 641, (Unreported, High Court, 8th November, 2016) to assert that the Minister's decision is invalid because it fails to give reasons for fixing an exclusion period of five years as a proportionate measure in all of the circumstances of the applicant's case.

58. The first difficulty with that ground of challenge to the review decision is that the applicant did not seek, or obtain, leave to raise it. The closest that the existing single ground of asserted unlawfulness of the review decision comes to asserting that the Minister failed to give reasons for fixing that exclusion period is when it asserts, at sub-paragraph (ix), that the 'removal and a five year exclusion period constitutes (*sic*) a disproportionate interference with the applicant's right of residence in the State and his family's right of residence in the State....' But that is an assertion that the result of the Minister's proportionality assessment was incorrect and, hence, unlawful. It is not an assertion or argument that the Minister failed to give reasons for that result. In sub-paragraph (x) of the single ground upon which *certiorari* is sought, the applicant argues that the Minister failed to carry out any reasoned analysis of the written representations made on his behalf by his legal representatives. But there was no suggestion, much less any evidence, at the hearing before me that those legal representatives made any submission or representation on the duration of the proposed exclusion period, as distinct from the lawfulness of the proposed removal order to which their representations appear to have been specifically and exclusively addressed.

59. The requirement to clearly identify each ground upon which judicial review is sought and, where the scope of any such ground is overbroad or unclear, the arguments to be advanced in support of it was explained by Murray CJ in A.*P. v Director of Public Prosecutions* [2011] 1 IR 729 (at 732-3) in the following way:

> '[4] Judicial review constitutes a significant proportion of the cases which come before the High Court and before this Court on appeal. A party seeking relief by way of judicial review is required to apply to the High Court for leave to bring those proceedings and can only be granted such leave on specified grounds when certain criteria, required by law, are met. In most cases the applicant must demonstrate that he or she has an arguable case in respect of any particular ground for relief and there are also statutory provisions setting a somewhat higher threshold for certain specified classes of cases.
>
> [5] In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review set out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought.
>
> [6] It is not uncommon in many such applications that some grounds, and in particular the ultimate ground, upon which leave is sought are expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea, and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted particularly when such a ground is invariably accompanied by a list of more specific grounds.
>
> [7] Moreover, if, in the course of the hearing of an application for leave it emerges that a ground or relief sought can or ought to be stated with greater clarity and precision then it is desirable that the order of the High Court granting leave, if leave is granted, specify the ground or relief in such terms.
>
> [8] There has also been a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge in those of the applicant which in reality either go well beyond the scope of a particular ground or

grounds upon which the leave was granted or simply raise new grounds.

[9] The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant should seek an order permitting any extended or new ground to be argued. This would avoid ambiguity if not confusion in an appeal as to the grounds that were before the High Court. The respondents, if they object to any matter being argued at such a hearing because it goes beyond the scope of the grounds on which leave was granted, should raise the matter and make their objection clear. Although it did not arise in this particular case, it is also unsatisfactory for objections of this nature to be raised by the respondents at the appeal stage when no objection had been expressly raised at the trial or there is controversy as to whether this was the case.

[10] In short it is incumbent on the parties to judicial review to assist the High Court, and consequentially this Court on appeal, by ensuring that grounds for judicial review are stated clearly and precisely and that any additional grounds, subsequent to leave being granted, are raised only after an appropriate order has been applied for and obtained.'

60. O'Donnell J (nem. diss.) in *Keegan v Garda Síochána Ombudsman Commission* [2015] IESC 68, (Unreported, Supreme Court (O'Donnell, McKechnie, Clarke, MacMenamin and Laffoy JJ), 30th July, 2015) (at para. 42):

'It is not merely a procedural complaint that the ground upon which the case was decided was not one upon which leave was sought or indeed granted nor was there an appropriate amendment. The purpose of pleadings is to define the issues between the parties, so that each party should know what matters are in issue so as to marshal their evidence on it, and so that the Court may limit evidence to matters which are only relevant to those issues between the parties, and so discovery and other intrusive interlocutory procedures are limited to those matters truly in issue between the parties. This is particularly important in judicial review, which is a powerful weapon of review of administrative action. But administrative action is intended to be taken in the public interest, and the commencement of judicial review proceedings may have a chilling effect on that activity, until the issue is resolved one way or another. Because of the impact of such proceedings, it is necessary to obtain leave of the court before commencing proceedings. It is important therefore that the precise issues in respect of which leave is obtained should be known with clarity from the outset. This also contributes to efficiency so that judicial review is a speedy remedy.'

61. Thus, I conclude that the Minister's objection to the introduction of a 'no reasons' argument in the applicant's written and oral submissions that he had not applied for, and had not been granted, leave to raise as a ground of challenge to the review decision is a well-founded one and I am satisfied that it would be inappropriate to consider that argument.

Conclusion
62. The application for judicial review is refused.