

THE HIGH COURT

2018 No. 304 JR

IVAN ZAPOROJAN

Applicant

- and -

THE CHIEF SUPERINTENDENT OF THE GARDA NATIONAL IMMIGRATION BUREAU and THE MINISTER FOR JUSTICE AND
EQUALITY

Respondents

JUDGMENT of Mr Justice Max Barrett delivered on 27th November, 2018.

1. In 2004, Mr Zaporozhan, then a non-EU national, entered Ireland using false identity documents. From December 2008 to October 2015, he made false welfare claims of over €30,000. In January 2016, he acquired Romanian nationality. In March 2017, he was convicted of 6 deception offences and custody of a false instrument and sentenced to 3 years' imprisonment with 18 months suspended. On 16.03.2018, the Minister issued removal and exclusion orders against him. On 13.04.2018 the Minister affirmed these orders (the 'Impugned Decision'). Mr Zaporozhan seeks, *inter alia*, a quashing of the Impugned Decision.

2. **Free Movement.** When it comes to free movement of EU nationals the court recalls, *inter alia*: (1) the Court of Justice's observations (a) in Case C-430/10 *Gaydarov*, para.32, that restrictions of that freedom "*must be interpreted strictly*", (b) in Case C-348/09 *PI*, para.30, construing Art.27(2) of the Citizens' Rights Directive (Directive 2004/38/EC) (the 'CRD'), that expulsion "*is conditional on the...personal conduct of the individual...represent[ing] a genuine, present threat affecting one of the fundamental interests of society or of the host Member State, which implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future*"; and (2) the constraints applicable under the CRD when it comes to restricting free movement on grounds of public policy/security/health.

3. **Serious Threat/Propensity.** Article 27(2)/CRD provides, *inter alia*, that the impugned "*personal conduct of the individual...must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*". In this regard, Mr Zaporozhan claims, regarding his welfare fraud, that he was but guilty of one continuous criminal activity. But, as referenced in the Impugned Decision (p.7), he is guilty of multiple instances of (prolonged) welfare fraud which only ended when he was caught. Mr Zaporozhan disputes that he has a propensity to criminality but, as referenced in the Impugned Decision (p.9), the Minister's view, open to him to take, was that Mr Zaporozhan's history "*raises the question...whether Mr Zaporozhan is...law-abiding and a positive member of Irish society*", and that Mr Zaporozhan "*has shown...no respect for...law and...is willing to subsidise his...lifestyle through fraud and deception*" (thereby occasioning a perturbation of social order). Mr Zaporozhan contends that the underlying reason for his past criminal behaviour (which he claims was his need for false documents to enter Ireland) no longer exists as he is now an EU national. This ignores his protracted history of welfare fraud, a key focus of the Impugned Decision. Any fair reading of the Impugned Decision shows that the Minister grounded it essentially on: (i) Mr Zaporozhan's protracted history of welfare fraud; (ii) the fact that this fraud only ceased when Mr Zaporozhan was caught; (iii) Mr Zaporozhan's unlawful entry into Ireland (his only lawfully being here once he became an EU national); and (iv) the nature/severity of the offences of which he was convicted (though not solely the convictions in themselves) (items (i)-(iv) are referred to hereafter as the 'Grounding Reasons'). Given the foregoing, the court sees no legal issue presenting as regards the Impugned Decision by reference to the above-quoted portion of Art.27(2)/CRD.

4. **Convictions and Conduct.** Article 27(2)/CRD also provides, *inter alia*, that "*Measures taken on grounds of public policy or...security shall...be based exclusively on the personal conduct of the individual...Previous criminal convictions shall not in themselves constitute grounds for taking such measures*". Regulation 20(1) of the EC (Free Movement of Persons) Regulations 2015 provides, *inter alia*, that "*The Minister...may make an order ('removal order')...where, in the opinion of the Minister...(b) the person represents a danger for public policy or...security by reason of the fact that his...personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*". Regulation 20(7) provides: "*A previous criminal conviction shall not in itself constitute a ground for...making...a removal order*". There is no breach of the quoted requirements. The Impugned Decision is clear that the Grounding Reasons are the basis for same. It is for the Minister, as decision-maker, to decide whether conduct (even solely past conduct; see Case 30/77 *R. v. Bouchereau*, para.29) can constitute an ongoing threat; there is nothing wrong in his decision in this regard from an administrative law perspective.

5. **Economic Ends.** Art.27(1)/CRD provides that restrictions on free movement and residence of EU citizens on grounds of public policy/security/health cannot be invoked to serve "*economic ends*", e.g., to protect a national economy/labour market. Mr Zaporozhan contends the Minister has breached Art.27(1) as the Impugned Decision arises ultimately from welfare fraud. But Mr Zaporozhan was convicted, *inter alia*, of welfare fraud; and the Impugned Decision is not directed to some economic end; it rests on the Grounding Reasons.

6. **Proportionality.** Article 27(2)/CRD, provides, *inter alia*, that "*Measures taken on grounds of public policy or...security shall comply with the principle of proportionality*". For the Minister, this requirement means that Ireland's interests must be weighed proportionately against an applicant's interests/rights. When it comes to proportionality, Mr Zaporozhan's starting-assertion is that the State interest being protected by the Minister is the public finances. But the Minister has not adopted the Impugned Decision to protect those finances; the Grounding Reasons underpin it. The court sees no issue as to proportionality presenting in the Impugned Decision, the Grounding Reasons or the associated decision-making process.

7. **Various Factors.** Mr Zaporozhan identifies the factors listed in the below table as factors to which the Minister ought properly to have had regard; the court indicates parts of the Impugned Decision where such factors have been duly considered in conformity with law.

Factors	Consideration in Impugned Decision
Ties with State	See pp.9 and 10.
Right to respect for family life	Family life (on facts then known to Minister) is considered at pp.10-11. Additional family information furnished as part of the within application cannot be considered by the court as it was not before the decision-maker.
Responsibilities to family abroad	Considered at p.11, as part of the "Family Life" considerations.

Post-imprisonment employment	See p.9.
Sentence suspension to facilitate rehabilitation	This is a false factor: there is nothing in the Circuit Court records now in evidence to suggest the suspension of sentence was to do with rehabilitation.

8. **Period of Exclusion Order.** The decision in *Balc v. Minister for Justice and Equality* [2018] IECA 76, paras.123-27, indicates the need for reasoning as to duration of an exclusion period. The Impugned Decision (p.10) explains that in light of Mr Zaporozhan's false entry into Ireland in 2004, his history of fraud, and his convictions, "*an exclusion period of 5 years...is required*". Although the Court of Appeal, in *Balc*, states, at para.124, that "*The person affected...is entitled to know why he is excluded for a period of five years, rather than...some lesser period*", this does not mean that the Minister, having explained why he has elected for, e.g., a 5-year exclusion period, needs also expressly to identify why he did not impose, e.g., a 3-year period. Here the Minister elected for 5 years because, for the reasons given, he considers that to be the appropriate exclusionary period; it follows that he did not consider a shorter/longer period more appropriate. That meets the requirements of *Balc*. Could the Minister have provided more reasons? He could: it is always possible to say more; and in the event that the Minister were ever to impose an ostensibly dubious exclusion period, brevity in the reasons offered by him for imposing same could conceivably ground a successful challenge. But nothing of the type presents here: Mr Zaporozhan has been told why the Minister considers a 5-year period appropriate; he therefore knows that the Minister considers a lesser/greater period is not (or is not as) appropriate; and there is no legal deficiency presenting as regards the period settled upon. In passing, the court notes that three reasons pervade case-law as to why reasons are required for an administrative law decision, including a decision as to the period of an exclusion order, viz. that (i) the subject of a decision understands what has been decided, (ii) the subject can bring an informed challenge to same, if s/he desires, and (iii) a court can undertake an informed review. Here, none of these objectives is impeded and all are satisfied.

9. **Fettering of Discretion.** It is contended that the Minister improperly fettered his discretion by operating some fixed policy. There is no evidence to support this contention.

10. **Notice.** Article 30/CRD provides, inter alia: "*1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.....3. The notification shall specify...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...shall be not less than one month from the date of notification.*" (Article 27(1) provides, inter alia, that "*Member States may restrict...freedom of movement and residence of Union citizens...on grounds of public policy...security or...health.*") Mr Zaporozhan notes that the Impugned Decision issued on 13.04.2018 and he was removed 8 days later. He contends that this was in breach of Art.30/CRD as he ought to have been given a fresh one-month notification. This line of contention was previously rejected by the court in *P.R. v. Minister for Justice and Equality & ors* [2015] IEHC 201, para.73, by which decision this Court is bound.

11. For the above reasons, all of the reliefs sought by Mr Zaporozhan are respectfully refused.