THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 287JR]

BETWEEN

P. R.,

J.R.

AND K.R.

(a minor suing by her father and next friend, P.R.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND,

AND

THE ATTORNEY GENERAL

RESPONDENTS

(No. 3)

JUDGMENT of Mr Justice Keane delivered on the 31st July 2019

Introduction

1. In *P.R. & Ors. v Minister for Justice and Equality & Ors (No. 2)* [2018] IEHC 269, (Unreported, High Court, 11 May 2018), I ruled against the applicants' challenge to an order made by the Minister for Justice and Equality ('the Minister') on 14 March 2017 upon review, excluding the first applicant, who is a Polish national and hence a European Union citizen, from the State for a period of seven years. The second applicant is the wife of the first applicant and is also a Polish national and EU citizen. They married on 22 October 2011. The third applicant is the couple's daughter, born in the State on 25 March 2012.

2. The review and order concerned were made pursuant to the provisions of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 ('the 2006 Regulations'), under the transitional provision of Reg. 31(28) of the European Communities (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations'). Both the 2006 and 2015 Regulations were made in exercise of the powers conferred on the Minister for Justice and Equality under s. 3 of the European Communities Act 1972 for the purpose of giving effect to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 ('the Citizens' Rights Directive').

3. In delivering that judgment, I left over one ground of challenge for further argument. That remaining ground is whether the Minister's decision fails to give reasons for fixing an exclusion period of seven years and, if so, whether that failure makes it invalid and requires it to be quashed.

4. The applicants had raised that ground in a perfunctory way over two short paragraphs in their written legal submissions, relying on the decision of O'Regan J in *Smolka v Minister for Justice* [2016] IEHC 641, (Unreported, High Court, 8 November 2016), now cited sub nom. *M.S. v Minister for Justice and Equality* [2016] IEHC 762 (Unreported, High Court (O'Regan J), 8 November 2016). They did so as following terms:

> '55. The exclusion order is defective due to the absence of any reasons explaining how its duration came to be assessed: see *Smolka v Minister for Justice and Equality*.
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> 56. Notably, despite the [first applicant's] rehabilitation, the effect of the order is to prohibit his return to Ireland at a date later than when the removal order was first made in January 2013. This is irrational.'

5. After the hearing of the application but before judgment was handed down, the Court of Appeal considered a similar point in *Balc & Ors v Minister for Justice* [2018] IECA 76, (Unreported, Court of Appeal (Peart J; Ryan P and Hedigan J concurring), 7 March 2018) (at paras. 123-126), albeit without express reference to the decision in *Smolka* (now *M.S.*).

6. For that reason, I invited the parties to make any further written and oral submissions they might wish on the decision in *Balc* as it affects that ground of challenge to the decision in this case. The parties made further written and oral submissions and I reserved judgment once again.

The exclusion period of seven years in the review decision

7. The original removal order, made on behalf of the Minister on 28 January 2013, imposed an exclusion period of ten years on the first applicant. The applicants thus contend that the reduced seven-year exclusion period imposed under the Minister's review decision and order of 14 March 2017 demonstrates the irrationality of that decision because, if permitted to stand, it will not expire until after the exclusion period under the original removal order would have expired (in March 2024, as opposed to January 2023), had that order been implemented unchallenged at the time when it was made. More fundamentally, the applicants argue that the removal order is invalid because no reasons were provided for an exclusion period of seven years, rather than any other exclusion period.

The decision in *M.S.* (formerly *Smolka*)

8. The review that led to the review decision and order of 14 March 2017 was conducted under Reg. 21 of the 2006 Regulations. Regulation 21 states in material part:

> '(1) A person to whom these Regulations apply may seek a review of any decision concerning the person's entitlement to

be allowed to enter or reside in the State.

...

(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 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.'

9. In *M.S.,* O'Regan J summarised as follows the relevant arguments on the failure to give reasons for the exclusion period fixed:

'15. The respondent argues that by looking at the decision of 27th April, 2016 in its totality it is clear as to the grounds why a removal order is made and as to why an exclusion order for a period of three years has been incorporated.

16. On the other hand the applicant suggests that it is not at all apparent from the decision of 27th April, 2016 why the exclusion period of three years has been incorporated. In this regard, for example the applicant points to the fact that the initial decision of November, 2015 incorporated an exclusion period of five years and this was reduced in the decision of 27th April, 2016, to a period of three years. It is asserted by the applicant that the basis for the reduction is not evident.

17. The respondent counters that the applicant is effectively complaining of a benefit which he received by virtue of the review decision and also points to the fact that the initial removal order of November, 2015 is not the subject matter of the within judicial review application.

18. In my view, the applicant is not so much complaining as to the benefit he received but rather is suggesting that by way of support for his argument that there is no reason contained in the review decision of 24th April, 2016 concerning the exclusion period. Same has varied from five years to three years notwithstanding that no additional documentation or information was available as between the original removal order of November, 2015 and the review decision of 27th April, 2016.'

10. O'Regan J resolved that argument in the following way:

'38. The reasons why the removal order is being made and, if the order incorporates an exclusion period, the reasons why the relevant exclusion period is being imposed, must be stated or be apparent. In this regard I am satisfied that under the heading of "Proportionality" within the decision of 27th April, 2016, the basis and/or justification for making the removal order is apparent.

39. I am satisfied that there is nothing in the order of 27th April, 2016 which identifies or affords reasons for the inclusion of a period of three years' exclusion as opposed to any other period nor indeed is there any discussion within the order to identify why a reduced period of three years is more appropriate than the earlier period of five years which was included in the original order of November, 2015.

40. I am not satisfied therefore that the order of 27th April, 2016 was reasoned insofar as it incorporates an exclusion period of three years and for this reason the Court will quash the order of 27th April, 2016 and as a result the review decision remains to be concluded.'

11. There is no suggestion in the judgment in M.S. that the express terms of Reg. 21 were opened to the Court. It seems to me that the regulation requires the person conducting the review to give the matter fresh and independent consideration. Where that person substitutes his or her decision or determination for the decision the subject of the review, I have no doubt that he or she is required to provide reasons for it, but I do not accept that it is either necessary or appropriate for the review decision to include any discussion or explanation of the reason or reasons why it is at variance with the original one, should that be the case. To that extent, the term 'review' used in Reg. 21 provides an incomplete – and, perhaps, to that extent misleading – description of the process it describes. Quite plainly, the decision maker on review can consider new information or evidence and, whether or not that happens, can substitute his or her own decision for that of the first instance decision maker. The exercise is much closer to a completely new hearing than to a narrow appellate review. The implied requirement to give reasons for a *de novo* determination does not include a requirement to discuss or explain the extent to which that determination differs from the one made at first instance. For those reasons, I conclude that the decision in *M.S.* was reached *per incuriam*.

12. It follows that I can find no irrationality in the imposition of a seven-year exclusion period in the Minister's review decision and order of 14 March 2017 (expiring in March 2024), as distinct from the ten-year exclusion period in the original removal order (expiring in January 2023), since the review decision is required to be quite independent of, rather than in any way predicated upon, the original one. That decision must stand or fall entirely on its own merits and does not depend, for its validity, on the extent to which it is, or is not, consonant with the decision it replaces.

The decision in *Balc*

13. In *Balc*, the Court of Appeal (per Peart J; Ryan P and Hedigan J concurring) addressed a similar issue in the following way:

'123 The trial judge expressed no conclusion in relation to the failure to provide any rationale in the decision to exclude Mr Balc for a period of five years from the date of removal. Article 20(1)(c) of the Regulations provides:

> "(c) The Minister 'may impose an exclusion period on the person concerned in a removal order and that person shall not re-enter or seek to re-enter the State during the validity of that period."

> 124 The length of any such exclusion period is at the discretion of the Minister. Where that is the case the Minister must provide reasons for the decision made. The person affected to such a significant degree is entitled to know why he is excluded for a period of five years, rather than for some lesser period. Indeed, it is not necessary to include an exclusion period at all. It is but an option available in addition to making the removal order. The person is entitled to know why an exclusion order was considered necessary. If he does not know the reasons for these decisions it is impossible for him to challenge their legality.

> 125 The Minister has referred to the Minister's discretion, and has also pointed to the provisions of Article 20(8) of the Regulations which provides:

> "(8) The Minister may, of his or her own volition or on application made by the person concerned after he or she has complied with a removal order, by order amend or revoke such an order."

> 126 It is submitted, in the light of this provision, that it remains open to Mr Balc to put before the Minister any new information which he claims would justify the modification of the exclusion period. I do not consider that this is an answer to the complaint that no reasons have been provided for the decision to exclude him for a period of five years. Regardless of his entitlement to seek an amendment or revocation of the removal order, in my view he is entitled to know the reasons why it was made in the first place, and the reasons for its duration.'

14. The decision in *Balc* is binding on this Court. It has never been in controversy that, while the Minister has a discretion to make an exclusion order and to fix the exclusion period, reasons must be provided for those decisions.

15. The questions that I must consider, therefore, are: first, the precise nature and scope of the reasons required to be given in light of the decision of the Court of Appeal in *Balc*; and second, the extent to which that requirement was, or was not, complied with in the particular circumstances of this case.

Reasons for exclusion and for a period of exclusion.

16. Regulation 20(1)(a)(iv) of the 2006 Regulations empowers the Minister by order to require a person to whom the regulations apply 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.

17. As Art. 27 of the Citizens Rights Directive stipulates, the only reason upon which the expulsion of an individual on public policy grounds may be based is that the personal conduct of that individual represents a genuine and present threat affecting one of the fundamental interests of society that is sufficiently serious to warrant that step.

18. Regulation 20(c) of the 2006 Regulations provides that the Minister may impose an exclusion period on the person concerned in a removal order and, where that occurs, that person shall not re-enter or seek to re-enter the State during the validity of the period.

19. It is thus possible, as the Court of Appeal pointed out in *Balc*, for a removal order to be made without an exclusion period. The manner in which the 2015 Regulations have been drafted, treating 'removal orders' (at Arts. 20-22) and 'exclusion orders' (at Art. 23) as though they were entirely independent of one another, heightens the impression that this is a practical option.

20. In reality, while a removal order without an exclusion period (or accompanying 'exclusion order' under the 2015 Regulations) might have some limited theoretical value in the case of a third country national family member of a Union citizen, due to the entry visa requirements that a Member State is permitted to impose on such a person under Art. 5 of the Citizens Rights Directive (and which were then imposed here under Reg. 5(3) of the 2006 Regulations and are now imposed under Reg. 8(8)(a) of the 2015 Regulations), it would have no obvious practical value in the case of a Union citizen, since the obligation to leave the State under Reg. 20(1)(a)(iv) does not entail any prohibition on immediate re-entry in the absence of an exclusion period. One might well ask, what would be the point of such an order? Even in the situation of a third country national family member, the existence of the Common Travel Area renders the theoretical public policy benefit of such an order difficult to obtain in practice because of the difficulty of enforcing visa controls across a soft border.

21. In the United Kingdom, the equivalent transposing measure is now the Immigration (European Economic Area) Regulations 2016. Regulation 23(6)(b) of those regulations provides that a Union citizen or a family member of a Union citizen may be removed if the Secretary of State has decided that the person's removal is justified on grounds of public policy. Regulation 23(8) provides:

> 'A decision under paragraph (6)(b) must state that upon execution of any deportation order arising from that decision, the person against whom the order was made is prohibited from entering the United Kingdom –
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> (a) until the order is revoked; or
>
> (b) for the period specified in the order.'

Moreover, regulation 23(9) states:

> 'A decision taken under paragraph 6(b)...has the effect of terminating any right to reside otherwise enjoyed by the individual concerned.'

22. The distinct, though broadly analogous, deportation power of the Minister under s. 3(3) of the Immigration Act 1999, as amended, requires the specified non-national to leave, and to remain thereafter, out of the State, theoretically for good, though in practice subject to the power of the Minister, under s. 3(11) of that Act to amend or revoke any such order, allowing the principle of proportionality to be applied to any interference with constitutional family rights or the right to respect for family life under Art. 8 of the European Convention on Human Rights that such an order might represent; see, for example, *Sivsivadze v Minister for Justice* [2016] 2 IR 403.

23. Article 32 of the Citizens' Rights Directive is headed 'Duration of exclusion orders' but is not directed towards the calibration of the duration of prospective exclusion periods. Rather, it provides that persons excluded on public policy grounds may submit an application to have the exclusion lifted after a reasonable period, depending on the circumstances, and can do so after three years has elapsed from the enforcement of the exclusion order, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion. As the Court of Appeal noted in *Balc*, the requirements of Art. 32 were transposed at the material time by Reg. 20(8) of the 2006 Regulations, which permitted the Minister to amend or revoke a removal order. Under Reg. 23(9) of the 2015 Regulations, the Minister is permitted to revoke an exclusion order or to reduce the exclusion period concerned.

24. Thus, while the Citizens Rights Directive implies a framework of exclusion for an open-ended period after expulsion, subject to the possible revocation of that expulsion, it has been transposed by the creation of a framework of optional exclusion for a fixed period after expulsion, also subject to the possible revocation of that expulsion. Nonetheless, applying the principle of consistent interpretation or indirect effect, it is easier to construe the exclusion period provision of Reg. 20(c) of the 2006 Regulations as a component part of the machinery the regulations provide for ensuring compliance with the proportionality requirements of Art. 27(2) of the Citizens' Rights Directive than it is to construe the imposition of a particular exclusion period (or separate exclusion order) as a form of sanction, beyond the public policy measure of expulsion or removal, that requires its own free-standing and separate rationale, distinct from that provided by the overall assessment of proportionality between the measure taken under the public policy concerned and the personal conduct, personal circumstances and personal rights of the person concerned.

***Balc* and the present case distinguished**

25. In *Balc*, before addressing the issue of reasons for the exclusion period in that case, the Court of Appeal had already concluded that the decision to make a removal order failed to meet the proportionality requirement under Art. 31(3) of the Citizens' Rights Directive because the decision failed to properly weigh or consider the effect of Mr Balc's removal on his prospects for rehabilitation.

26. The Court of Appeal based its conclusion on the decision of the European Court of Justice ('ECJ') in Case C-145/09 *Land Baden-Württemberg v Tsakouridis* ECLI:EU:C:2010:708 (at para. 50):

> 'In the application of Directive 2004/38, a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made (see, inter alia, Joined Cases C 482/01 and C 493/01 *Orfanopoulos and Oliveri* [2004] ECR I 5257, paragraphs 77 to 79), by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and, if appropriate, the risk of reoffending (see, to that effect, inter alia, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 29), on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which, as the Advocate General observes in point 95 of his Opinion, is not only in his interest but also in that of the European Union in general.'

27. In point 95 of his Opinion (ECLI:EU:C:2010:322), Advocate General Bot had stated:

> 'In my view, when that authority takes an expulsion decision against a Union citizen following the enforcement of the criminal sanction imposed, it must state precisely in what way that decision does not prejudice the offender's rehabilitation. Such a step, which relates to the individualisation of the sanction of which it is an extension, seems to me to be the only way of upholding the interests of the individual concerned as much as the interests of the Union in general. Even if he is expelled from a Member State and prohibited from returning, when released the offender will be able, as a Union citizen, to exercise his freedom of movement in the other Member States. It is therefore in the general interests that the conditions of his release should be such as to dissuade him from committing crimes and, in any event not risk pushing him back into offending.'

28. The Court of Appeal gleaned assistance from the approach adopted by the England and Wales Court of Appeal in *R (on the application of Essa) v Upper Tribunal (Immigration & Asylum Chamber)* [2012] EWCA Civ. 1718. In his judgment (Toulson and Aiken LJJ concurring), Kay LJ commented as follows (at para. 8) on the passage already quoted from the Opinion of Advocate General Bot in *Tsakouridis*:

> 'This emphasis on "the general interests" and "the interests of the Union in general" is mediated through the proportionality test which "takes on a special significance which requires the competent authority to take account of factors showing that the decision adopted is such as to prevent the risk of reoffending" (paragraph AG94).'

29. Of course, despite the views expressed by the late, highly esteemed Advocate General Bot, which may have lost something in translation, no decision of a competent authority under the Citizens' Rights Directive can prevent the risk of re-offending. But there can be no doubt that, in conducting its proportionality analysis, the competent authority must have regard as a factor to the probable effect of its decision on the risk of recidivism.

30. Commenting on the reference in the passage already quoted from the judgment of the ECJ in *Tsakouridis* to the need to balance the threat to public policy represented by the personal conduct concerned and the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, as 'not only in his interest but also in that of the European Union in general', Kay LJ observed:

> 'Thus there is a European dimension which widens consideration beyond the expelling Member State and those of the foreign criminal.'

31. As Peart J noted for the Court of Appeal in *Balc*, Kay LJ endorsed the following analysis of Lang J in the decision then under appeal:

> '...[T]he judgment...in *Tsakouridis* establishes that the decision-maker, in applying regulation 21 of the EEA Regulations, must consider whether a decision to deport may prejudice the prospects of rehabilitation from offending in the host country, and weigh that risk in the balance when assessing proportionality under regulation 21(5)(a). In most cases, this will necessarily entail a comparison with the prospects of rehabilitation in the host country...'

32. In *Balc* (at para. 121), the Court of Appeal concluded that there was nothing in the consideration of the review decision in that case to indicate that a balancing exercise of that type was carried out. That was so in circumstances where the final eighteen months of the three-year sentence for sexual assault that Mr Balc received were suspended on conditions that included: participation

in a sex offenders programme while in custody; a period of twelve-months' probation after release; engagement in offence focussed work with his probation officer; and participation in an alcohol treatment programme under the supervision of the Probation Service. Thus, a cogent argument had been made that the proposed removal of Mr Balc from the State for a period of five years upon his release was a direct interference with the rehabilitative object of the sentencing judge.

33. No such issue arose in this case. Instead, the applicants' principal argument was that the Minister's decision was unreasonable or irrational because it failed to acknowledge that the applicant was already fully rehabilitated; a proposition that the Minister had rejected on a basis that I found to be reasonable and rational. Hence, no argument was advanced concerning the prospects of the first applicant's rehabilitation outside the State, compared to his prospects of rehabilitation within it. And while the applicants did argue that the Minister's decision failed to comply with the requirement of proportionality, they did not do so on the basis of any failure to properly consider the question of rehabilitation.

34. In their supplemental written submissions on the 'reasons' issue, the applicants have attempted to shift their ground by arguing, as a new or previously unspecified ground, that the review decision is infirm because it is not possible to know the extent to which the Minister's had regard to the European Union interest in the social rehabilitation of the first applicant.

35. 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 730 (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.
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> [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.
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> [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.
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> [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.
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> [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.
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> [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.
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> [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.'

36. 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 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.'

37. In this case, there can be no doubt that the particular 'legal issue' identified in the applicants' written submissions involves the attempted introduction of a new ground or, at the very least, a new argument that goes well beyond the scope of those that informed the particular, albeit very general, grounds upon which leave to seek judicial review was sought and granted. That is because that newly identified ground or argument arises self-evidently as an attempt to bring the applicants' claims within the scope of the decision of the Court of Appeal in *Balc*. For the reasons I have already given, I do not believe that can be done because of the different facts of this case. But equally, I am satisfied that to permit that argument to be made would fly in the face of the principles clearly identified by Murray CJ in A.P. and O'Donnell J in *Keegan*. The purpose of those principles is to ensure, in so far as may be possible, the essential fairness and justice of the judicial review process.

Proportionality and reasons

38. The review decision in this case runs to sixteen pages. It contains: a chronology of the removal and exclusion order process; a description of the conduct of the first applicant said to represent a serious threat to the public policy of the State, comprising the six sexual assaults of which he was convicted, and a seventh sexual assault that was taken into consideration by the court; the personal details of the first applicant; a summary of the representations made on the first applicant's behalf by his legal representatives and of the statements and psychological reports that they relied upon; a summary of the considerations required to be taken into account under Art. 28(1) of the Citizens' Rights Directive; a consideration of the prohibition on *refoulment*; a consideration of the applicants' right to respect for private and family life under Art. 7 of the Charter of Fundamental Rights of the European Union and Art. 8 of the European Convention on Human Rights, addressing amongst others, the issue of proportionality; a consideration of the Rights of the State ; a conclusion on the balance of rights, and a recommendation of removal with exclusion for a period of seven years.

39. More specifically, the Minister's review decision states (at p. 12):

> '...[T]here is no less restrictive process available which would achieve the legitimate aim of the State for the prevention of crime and disorder in the interest of public safety and the common good. [P.R.] has demonstrated a flagrant disregard for the laws and has committed a significant number of sexual offences in this State over a prolonged period of time, 2007-2011, suggesting a propensity to reoffend and his removal and exclusion would protect the citizens and residents of this State.
>
> These therefore exist as substantial reasons associated with the common good and serious grounds of public policy which require the removal and exclusion of [P.R.] from the State. I am satisfied that the original decision in [P.R.'s] case was proportionate and reasonable to the legitimate aim being pursued which is the prevention of crime and disorder in the interest of public safety and the common good. Therefore, on the basis of the foregoing, I recommend that the [r]emoval [o]rder made in respect of [P.R.] be upheld, incorporating a reduced exclusion period of 7 years.'

40. I am satisfied that the reason that the Minister imposed an exclusion period of seven years on the first applicant under Reg. 20(1)(c) of the 2006 Regulations is that the Minister considered it a measure proportionate to the genuine, present and sufficiently serious threat affecting one of the fundamental interests of society that the personal conduct of the first applicant represents. As McDermott J observed in *P.R. & Ors v Minister for Justice and Equality & Ors (No. 1),* [2015] IEHC 201, (Unreported, High Court, 24 March 2015) (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.'

41. And as Faherty J concluded in *Lukasz v Minister for Justice and Equality & Ors* [2017] IEHC 619, (Unreported, High Court, 21 July 2017) (at para. 85):

> 'A Member State is entitled to consider that it is in its fundamental policy interest to take effective measures to remove a present and genuine threat to the social order that recidivist criminal behaviour represents.'

42. In *P.R. (No. 1),* McDermott J considered the present applicants' challenge to an earlier review decision of the Minister of 18 September 2013 to make a removal order against the first applicant with an exclusion period of ten years, before concluding in relevant part (at paras. 60-61):

> '60. The period of ten years exclusion is not, in the court's view, disproportionate when viewed in the context of the conclusions reached in respect of P.R.'s length of residence in the state, the period over which the offences were committed, and the fact that he then served a sentence of imprisonment within the state. In all, having arrived in the state in 2006, he engaged in criminality between 2006 and 2011 and served a custodial sentence between 7th June, 2012, and 6th September, 2013. There was nothing irrational, unreasonable or disproportionate in imposing an exclusion period of ten years, particularly when it is open to the applicant to apply to the respondent to revoke the removal order after a period of three years in accordance with Article 32(1) of the Directive.
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> 61. It is clear that for four years P.R. engaged in a pattern of serious sexual offending and exhibited a propensity over that period to commit similar offences which was only interrupted upon his detection and arrest. There was clear evidence that he had a disposition, an inclination or readiness amounting to a propensity to assault young unaccompanied women, randomly selecting his victims in a frightening way. The Directive and Regulations require that the respondent consider whether that pattern of behaviour is such that it demonstrated a present propensity to commit such offences. A decision maker is entitled to take account of the assessment of that risk as moderate to low, together with the description of his distorted belief system, his hostile attitude to women, his tendency to attribute responsibility to his victims, the fact that he did not consider touching the victims to be inappropriate and had distorted beliefs in relation to his offending behaviour and the other factors to which reference has already been made. The court is satisfied having regard to all of the evidence considered, the careful assessment made by the respondent of the nature of the offending, and the other factors considered in the review, that it was open to the decision maker to reach an informed, reasonable, rational and proportionate decision that P.R. should be removed from the state and excluded for a period of ten years on the basis of the existence of serious grounds of public policy for so doing.'

43. I would make all of the same observations, *mutatis mutandis*, in respect of the seven-year exclusion period proposed in the subsequent review decision in the same case that is the subject of the present challenge.

44. Thus, in my judgment, the crucial point of distinction between the circumstances of this case and those of *Balc*, is the conclusion of the Court of Appeal in the latter that proportionality had not been properly assessed because Mr Balc's prospects for rehabilitation had not been properly considered. I read the comments of Peart J at paragraph 124 of the Court of Appeal judgment concerning the Minister's failure to provide reasons for an exclusion period of five years, rather than for some lesser period, as flowing specifically and exclusively from that conclusion.

45. There is no mathematical formula that can be applied to the calibration of an exclusion period whereby it can be said that one of, say, seven years is correct and one of six years or eight years incorrect.

46. It is useful to consider sentencing law and practice as a form of loose analogy. While the purposes of punishment consequent upon criminal conviction may be different from those of measures restricting the free movement of Union citizens on grounds of public

policy, it is well established that the principle of proportionality is central to both. In respect of the former, O'Malley, *Sentencing Law and Practice,* 2nd ed. (2006) states (at 5.01): 'The most fundamental principle of sentencing so far developed by the Irish courts is that a sentence must be proportionate to the gravity of the offence and the personal circumstances of the offender.'

47. And yet it could never be correct to say, shorn of any context, that a particular sentence is bad because no reasons were given for not imposing a greater or lesser sentence instead. The sentence imposed on the first applicant in this case illustrates the point. The first applicant quite properly exhibited a transcript of the sentence hearing for the purpose of these proceedings. The sentence decision of the Circuit Court Judge runs to a little over one page of that transcript, culminating in the imposition of a three-year term of imprisonment with the last sixteen months suspended. Of course, it is true that the term of imprisonment imposed could have been longer or shorter, as could the portion of the sentence that was suspended. But it would be quite extraordinary to suggest that the sentence is bad for failing to give reasons why that was not so. All that was required was the provision of reasons for the conclusion that the sentence imposed was proportionate to the gravity of the offences and the personal circumstances of the offender. I cannot see that the relevant exercise in respect of the imposition of an exclusion period as part of a removal order is in any way different in principle.

Conclusion
48. I am satisfied that review decision does not fail to provide reasons for the exclusion period of seven years in the removal order against the first applicant.

49. As that was the last remaining ground of challenge to the Minister's decision, these proceedings are dismissed.