THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 164 J.R.]

BETWEEN

G. C.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 4th day of April, 2017

Issues

1. On 4th April, 2016 the applicant herein secured leave to maintain the within judicial review proceedings based upon a Statement of Grounds bearing date 10th March, 2016. In that Statement the relief sought is an order of certiorari quashing the review decision of the respondent communicated to the applicant on or about 10th February, 2016 which review decision upheld the initial removal order and exclusionary period as against the applicant. In addition the applicant seeks a declaration that the single offence which the applicant was convicted of on 10th March, 2015 is of itself insufficient to ground any reasonable belief that the applicant is now or likely to be in the future a serious threat to public policy or security and that the decision of the respondent is disproportionate.

2. Such relief is based upon an assertion that the applicant who is an EU citizen with permanent resident status within this jurisdiction should not be removed and excluded from the jurisdiction for a three year period based on a single offence and conviction in circumstances where a substantial portion of the sentence imposed was suspended. It is asserted that the respondent acted disproportionately in basing the order of removal and exclusion on a sole conviction as this would be insufficient to constitute a threat to public policy or security. The applicant also claims that insufficient weight was attributed to mitigating circumstances and it is asserted that the respondent was imposing an extra judicial sanction on the applicant.

Brief background

3. The applicant is a Romanian citizen born in 1986. In 2006 he left Romania and resided in Italy for approximately three years prior to arriving in Ireland on or about 17th August, 2009. The applicant asserts that he never came to the adverse attention of An Garda Síochána (the applicant has not sworn an affidavit however his solicitor has on 2nd March, 2016 sworn an affidavit and at para. 9 thereof it is stated "the applicant has no other convictions and has never been in trouble with the gardaí or in prison").

4. On 10th March, 2015 the applicant was convicted of an assault which occurred on or about the 9th March, 2014 on or around the North Circular Road in Dublin. The applicant was sentenced to three years and six months in prison with the final two years suspended. In the events the applicant was released from prison on 23rd April, 2016.

5. While the applicant was in prison the respondent wrote a letter bearing date 28th July, 2015 proposing to make a removal order in respect of him and inviting representations which in due course were made in a letter of 13th August, 2015. Notwithstanding the foregoing the respondent notified the applicant of the signing of a removal order bearing date 29th October, 2015. On 8th December, 2015 the applicant made an application for a review of the decision aforesaid and ultimately the initial removal order together with the three year exclusion was upheld by a decision of the 27th January 2016 communicated to the applicant by letter of 10th February, 2016 and it is this decision that is the subject matter of the leave aforesaid.

6. A Statement of Opposition was filed on 24th June, 2016 where the allegations set out in the Statement to Ground the application were denied and it was further denied that the respondent acted disproportionately or that the decision was based on a single conviction but rather on all the relevant factors including the terrifying ordeal for the victim, the assertion by the applicant that he was acting in self defence and his refusal to answer questions in relation to the amount of force he used. Furthermore it is asserted that the applicant in fact came to the attention of An Garda Síochána on 21st August, 2009 in respect of a public order offence. The Statement of Opposition also suggests that discretionary relief should not be available to the applicant.

7. In addition to the foregoing the pleadings have been supplemented by two affidavits of James Doyle a Sergeant in the Garda National Immigration Bureau respectively dated 25th November, 2016 and 14th March, 2017. As a consequence of the foregoing an affidavit of Christine Haselmann, solicitor on behalf of the applicant was also filed on 16th March, 2017.

8. The two affidavits aforesaid of Sergeant Doyle are for the purposes of identifying that although the applicant was released from prison on 23rd April, 2016 he was required to present himself at Garda National Immigration Bureau offices on a number of occasions but failed to do so and in addition he appears to have moved from Rathmines to Fairview at a point when he did not notify An Garda Síochána of same notwithstanding that this was also a requirement of the applicant. The applicant failed to attend on 27th April, 2016, the 9th August, 2016, "next week" as identified in a letter on the applicant's behalf on 16th of August, 2016, on 6th October, 2016 and on 24th January, 2017.

9. The replying affidavit was for the purposes of identifying that the dates conflicted with a number of other obligations of the applicant specifically work related and although his solicitors advised him of the need to comply with the requirement to attend it indicated that "perhaps the applicant had not fully understood the extent of these obligations" and since then it has been impressed upon the applicant that he has an obligation to attend. Furthermore the replying affidavit suggests that the Court cannot refuse relief as a result of his omissions to report to the respondent.

10. Both parties have tendered written submissions.

Submissions

(A) The Applicant

11. The applicant submits that he was convicted of assault only on 10th March, 2015 and pleaded guilty at the earliest opportunity.

He had no previous convictions and two years of the three years six months sentence was suspended. In addition the applicant secured early release from prison. The applicant acknowledges that at sentencing it was submitted that that incident had been provoked by the victim and the applicant reacted disproportionately because of an excess of alcohol. The applicant regretted his actions and acknowledged that same were unacceptable. He submits that they were entirely out of character in particular with no previous convictions. He asserts that the incident of 9th March, 2014 was an isolated event, unlikely to ever be repeated and significantly a substantial portion of the sentence was suspended and he received early release and accordingly on the principle of proportionality it cannot be said that the applicant represents a genuine present and sufficiently serious threat to the Irish public such that it would be contrary to public policy or would endanger public security to allow him to continue to reside in the State. The applicant suggests that this would be a very high bar for the State to achieve and has not reached this bar in the instant circumstances. It is asserted that the respondent was arbitrary in her reasoning and failed to justify the exclusionary period of three years.

12. The applicant refers to Directive 2004/38/EC to the effect that it provides:-

> "Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and should 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 interests of society."

13. The applicant asserts that he is generally a person of good character, has no previous convictions, has not been arrested, charged or convicted of any offence since his release, has been cooperative with An Garda Síochána and in the circumstances the respondent has failed to comply with the principle of proportionality and the decision is tantamount to a further extra judicial sanction by attempting to remove the applicant solely on the basis of his previous conviction.

14. The applicant refers to *Rutili v. Minister of the Interior* [1975] ECR 1219 where it was held that Member States are in principle free to determine the requirements of public policy however this must be interpreted strictly and restrictions cannot be imposed unless an individual's presence or conduct constitutes a genuine and sufficiently serious threat to public policy.

15. The applicant refers to *MV v Minister for Justice* [2016] IEHC 432 where Stewart J. was satisfied that recidivism can constitute a sufficiently serious threat to public policy. The applicant accepts this however suggests that he is at a low risk of reoffending.

16. Further reference is made to Case C-482/01 and Case C-493/01 *Orfanopoulos and Ors and Oliveri v. Land Baden - Württenberg* [2004] ECR I-5257 when it was held that the national authorities must assess on a case by case basis whether the circumstances which gave rise to the expulsion order proved the existence of personal conduct constituting a present threat to the requirements of public policy and this threat must be present as a general rule at the time of expulsion. The case also refers to the principle of effectiveness namely that national rules must not be such as to render virtually impossible or excessively difficult the exercise of rights conferred by community law.

17. The applicant also refers to two judgments of McDermott J. in *Kovalenko & Ors v. The Minister for Justice & Ors* [2014] IEHC 624 and *D.S. v. The Minister for Justice and Equality* [2015] IEHC 643. Both of those cases concerned an offence of rape. In the former judgment McDermott J. refers to *R. v. Bouchereau* [1977] ECR 1999 to the effect that the terms of the Directive require the national authorities to carry out a specific appraisal from the point of view of the interests inherent in protecting the requirements of public policy and the existence of a previous criminal conviction can only be taken into account insofar as the circumstances which gave rise to that conviction or evidence of personal conduct constituting a present threat to the requirements of public policy. Although in general such a threat implies the existence of a propensity to act in the individual in the same way in the future it is possible that past conduct alone may constitute such a threat. Based on this jurisprudence McDermott J. was satisfied that there may be cases in which past conduct alone or in conjunction with other factors may give rise to a threat to public policy or indicate a propensity to act in the same way in the future and felt that the Minister had been entitled to take into account the extremely serious nature of the offence of rape.

18. The applicant asserts that he did not commit an offence as grievous as rape and owned up to his actions and has not sought to justify it.

19. Although the submissions incorporate a complaint that including a period of three years by way of exclusion order was incorporated without explanation, the respondent points to the fact that this is not one of the grounds for which leave was afforded. I have reviewed carefully the Statement of Grounds and the content of Order 84 of the Rules of the Superior Courts. I agree with the respondents submission that condemning the exclusion period or lack of reasoning is not incorporated in the Statement of Grounds.

20. The applicant refers to the Court of Appeal decision of *N.M. v. Minister for Justice, Equality and Law Reform* [2016] IECA 217 which in turn quotes from *Meadows v Minister for Justice & Ors* [2010] 2 IR 701 and from *ISOF & Ors v. Minister for Justice* [2010] IEHC 457 to the effect that disproportionate involves a decision being irrational or unreasonable:- "…unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense" (see the judgment in Meadows, aforesaid, at page 827, para. 449).

21. In this regard the applicant asserts that the applicant's behaviour could not create a present and sufficient threat to public policy so as to warrant a removal and exclusion Order and therefore the decision is disproportionate.

(B) The Respondent

22. By way of counter submissions the respondent argues that on 9th March, 2014 the applicant violently assaulted a woman when he punched and kicked her in the face a number of times. The relevant garda report states that the applicant attempted to blame the victim and states that he was acting in self defence.

23. It is noted that there was a victim impact statement before the Court prior to sentencing where the victim indicated that she had sustained a broken nose a perforated eardrum, ongoing pain, sleep disturbance, breathing difficulties, anxiety, memory loss, a lack of concentration and a propensity to lose her temper since the incident. In addition she did not finish the course she had then been attending.

24. The respondent asserts that in accordance with Article 27 of the relevant Directive the decision was based exclusively on the personal conduct of the individual concerned and the criminal conviction was not in itself the ground for taking such measures. The respondent also refers to the fact that the applicant had come to the attention of the gardaí within a week of arrival in the State and also refers to the fact that when the applicant suggested that he was acting in self defence An Garda Síochána did query as to the

force used by him on the victim however he refused to answer such questions.

25. The respondent also relies on the case law identified by the applicant to support the respondent's position and also refers to Case C-348/96 Calfa [1999] ECR I-00011 where the ECJ held that the existence of a previous criminal conviction can only be taken into account insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.

26. The respondent makes reference to *D.S.* where McDermott J. was satisfied that the nature and seriousness of the criminal conduct and the attitude and subsequent behaviour of the applicant in respect of offences committed may alone or in appropriate circumstances, be considered cumulatively with other factors in respect of public policy when deciding to remove or exclude. The Court identified that there may be cases in which past conduct alone or in conjunction with other factors may give rise to a threat to public policy or indicate a readiness, inclination or disposition amounting to a propensity to act in the same way in the future.

27. The respondent also makes reference to a decision given in *Smolka v. Minister for Justice and Equality* [2016] IEHC 641 which considered the decision of McDermott J. in *P.R. & Ors v. Minister for Justice & Ors* [2015] IEHC 201 and noted that McDermott J. had already endorsed the view that it was for the individual decision maker in the Member State to determine whether the offence committed with or without additional factors constituted serious grounds of public policy. In that case the Court indicated that it was for the respondent to attribute the appropriate weight to the various circumstances to be taken into account in determining whether or not to make a removal order whether with or without an exclusion period.

28. Insofar as the applicant's non attendance with GNIB is concerned the respondent refers to the decision of Humphreys J. in *Mirga & Ors v. Garda National Immigration Bureau & Ors* [2016] IEHC 545 where Humphreys J. did state, as had been stated on several occasions including by the Supreme Court that judicial review is a discretionary remedy. The Court is not required to ignore the appellant's conduct.

Conclusion
29. The impugned decision is dated 27th January, 2016 and was furnished under cover letter of 10th February, 2016. It runs to nine pages. Commencing from page 2 the decision maker does identify the grounds upon which the applicant sought a review which incorporated the asserted mitigating circumstances for which the applicant suggests the respondent did not take into account.

30. From page 5 to page 7 inclusive there is a detailed discussion on "proportionality". It is recorded that both the applicant and the victim were engaged in conversation when the applicant began to get close by attempting to place a hand around her waist and he put his face cheek to cheek. The victim attempted to push him back and it was at that time that the applicant assaulted her and this assault was witnessed by a number of people. The assault involved the applicant punching and kicking the injured party in the face several times. The injured party did use a broken part of a cup to hit the applicant leaving a laceration on his left arm. The applicant walked away however returned and continued with his assault and then left the scene. A third party summoned assistance for the victim.

31. The decision maker went through the various representations made on behalf of the applicant including the fact that he had been drinking heavily on the evening and had been very intoxicated. An Garda Síochána indicated that during the interview the applicant stated that in fact it was the victim who started to assault him. The decision maker indicated that the fact that alcohol played a significant part raises the question as to whether or not the applicant would be a risk to the public in future in the event that he consumes alcohol and the decision maker agreed that the State had a duty to protect its citizens in the interests of the common good.

32. In the events I am satisfied that the decision was not arrived at based upon the conviction only. Further I am satisfied that the decision maker did in fact take into account all of the circumstances of mitigation identified by the applicant and I am satisfied that a proportionate decision was arrived at bearing in mind the nature of the offence and the impact on the victim. I am not satisfied that the decision is either irrational or unreasonable.

33. I am satisfied that it is not for either the applicant or the Court to attribute the appropriate weight to the mitigating circumstances and other matters but rather this is a matter for the decision maker provided the decision is fair and proportionate which I am satisfied it is.

34. Insofar as it is argued that the respondent was imposing an extra judicial sanction this appears to me to be an attack on the Directive itself which I believe is unwarranted and in fact the applicant suggests this complaint is contingent on a finding of the removal and exclusion decision being found to be disproportionate.

35. I am not satisfied that the applicant has adduced sufficient evidence such as to quash the decision communicated by letter of 10th February, 2016 and in those circumstances the issue of the exercise of my discretion based upon the failure of the applicant to attend GNIB does not arise.