THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 819 J.R.]

BETWEEN

MARIAN LINGURAR

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 8th day of February, 2018

1. The applicant is a Romanian national who entered the State in 2002. Numerous members of his family reside here, including his mother, wife and two children. He first came to the attention of Gardaí on 17th November, 2006, and has amassed a total of fourteen convictions in the State. Among the offences committed include handling items stolen from graves of babies, children and young people who died in tragic circumstances. In relation to that matter His Honour Judge Rory McCabe said this had been a "*mean, nasty and upsetting series of thefts*", before imposing a three year sentence.

2. On 25th September, 2011, Mr. John Kenny, proprietor of Kenny's Bar in Co. Galway, was tied up in his own pub and beaten in that restrained state so severely that he died of blunt force trauma to his body. His body was discovered by his wife and daughter the day after the murder, lying face down in the pub. The State's case was that the applicant was part of a group of people who set about robbing Mr. Kenny, and that the applicant drove three other people from Galway to the public house and back again. The applicant and his son were arrested for murder but no admissions were made. He was charged with manslaughter and received bail, which he complied with for a time but then left the jurisdiction. He was arrested in France on a European arrest warrant and was returned compulsorily to Ireland. He was duly tried, but shortly after the trial began the D.P.P. withdrew the manslaughter charge and accepted a plea of guilty of withholding information.

3. On 30th April, 2015, he was sentenced to four years imprisonment. On 30th March, 2017, the Minister proposed to make a removal order and an exclusion order against the applicant following representations. Those orders were made on 12th July, 2017. A review was sought, but on 4th October, 2017, the decisions were affirmed. The applicant now seeks judicial review in respect of that affirmation decision.

4. The day before this case was originally due to be heard, Baker J. decided in *Sweeney v. Ireland* [2017] IEHC 702 (Unreported, 23rd November, 2017) that s. 9(1)(b) of the Offences Against the State (Amendment) Act 1998 was unconstitutional.

5. I have received submissions from Mr. Paul O'Shea B.L. (with Mr. Colman FitzGerald S.C.) for the applicant and Ms. Siobhán Stack S.C. (with Ms. Grace Mulherin B.L.) for the respondent.

6. Mr. O'Shea summarised his case under four headings:

> (i). Firstly, that there was unfair consideration of unproven allegations and that conduct attributed to the applicant was such that he was not convicted of.
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> (ii). Secondly, there was no proper assessment of the best interest of the child under the Constitution, European Convention on Human Rights and the EU Charter of Fundamental Rights, and that under EU law the entitlement to consideration of best interests is "*an absolute right*".
>
> (iii). Thirdly, that he was not provided with an effective remedy and that to that extent the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548/2015) are incompatible with the directive.
>
> (iv). And fourthly, that the Minister is not entitled to rely on the offence of withholding information in executing the removal and exclusion orders because that offence is unconstitutional.

Allegation of unfair consideration of unproven allegations

7. Mr. O'Shea complains that the applicant is "*innocent*" in connection with the death of Mr. Kenny and that there was no finding by a court that the applicant was involved in Mr. Kenny's death. The decision-maker on review notes the conviction for withholding information rather than manslaughter, and notes the submission that he was treated as having a role far higher than that to which he pleaded guilty. The Minister concludes that "*the seriousness of Mr. Lingurar's involvement in the injured party's death was reflected in the prison sentence he received*". This is a totally reasonable finding. The offence to which the applicant pleaded guilty in the circumstances clearly placed him as having an "*involvement in the robbery (that) led to the murder of an innocent victim*", as it is put in the decision. The decision-maker does not specifically go beyond the clear finding of an "*involvement*", which is totally justified in the circumstances given the plea to withholding information. Such a plea implies that the applicant was in possession of information regarding the murder, which he wrongfully withheld.

8. A subsidiary point is made that the decision-maker treated the applicant as if he was guilty of theft rather than of handling stolen property. There is no substance whatsoever to that point. The applicant has convictions for both theft and handling stolen property. The decision quotes a newspaper report regarding the conviction for handling stolen goods so it cannot be said that the Minister misunderstood the factual situation in relation to those offences. No injustice was done to the applicant in the manner in which his offending was described. Nor is handling stolen property to be regarded as merely a minor matter compared to theft proper.

Alleged failure to give proper consideration to the best interests of the child

9. Mr. O'Shea says there was no meaningful consideration of the best interests of the child and claims that this is contrary to the

Constitution, the ECHR and the EU Charter, in particular art. 24(2) of the latter instrument. However, he accepts that no submissions whatsoever were made on best interests at the review stage. The context for judicial review must begin with the actual submission made to the decision-maker (see *I.S.O.F. v. Minster for Justice, Equality and Law Reform* [2010] IEHC 457 (Unreported, Cooke J., 17th December, 2010)). Thus, the point made fails *in limine* and is a pure *post hoc* reconstruction. Mr. O'Shea claims that there is an obligation to consider points not made to the Minister. There is no such obligation.

10. Mr. O'Shea originally argued that the first submissions referred to the best interests of the child. Unfortunately that is not the case, as he now accepts. Those submissions referred to arts. 24 and 47 of the Charter by reference to art. 24(3) in particular, in respect of a right to maintain a personal relationship and direct contact with both parents; rather than the child's best interests. There is no express reference to art. 47(2) which relates to such best interests.

11. Mr. O'Shea claims that best interests are an absolute right. That is a totally misconceived submission. The best interests of the child are a major consideration but can be outweighed by other factors, as here (see also *Üner v. The Netherlands* (Application no. 46410/99, European Court of Human Rights, 18 October 2006). Mr. O'Shea makes the equally misconceived point that art. 24(3) of the Charter needs to be subject to an expressed statutory limitation, failing which it must be regarded as absolute under art. 52(1) of the Charter. That is just not how law works, either for Irish or European purposes. If and to the extent that the decision amounts to a limitation on the rights of the child for the purposes of art. 24(3) of the Charter, then that decision is "*provided for by law"* for the purposes of art. 52(1) because it is made under the legal framework of the State.

12. The decision notes that the Department did not receive any representations from members of the family: see p. 11 of the analysis, which says that his criminal behaviour raises the question of the stability of his day to day family life and his suitability as a parental guardian. That seems to be a legitimate point in the context. It says at p. 12 that no further information is provided in relation to the son. It goes on to say that the relationship could be maintained with the family even with an exclusion order, and also that the wife could relocate to Romania. That again is a valid option. It is her decision whether to relocate or not.

13. The decision-maker also says that it cannot be said that the family are financially dependent on the applicant. Again, that seems a reasonable point given the incarceration of the applicant. It says there is no alternative, less restrictive process which would achieve the pressing social need in the case. Again, that seems to me to be a totally reasonable finding. The disproportionality argument is of no substance whatsoever.

14. Insofar as the point is made regarding the child's rights under the Constitution or the ECHR, the Minister's view clearly was that any family rights were outweighed by the "*pressing social need*" to remove and exclude the applicant. That is clearly a lawful finding. The weighing of factors is a matter for the decision-maker (see *P.R. v. Minister for Justice and Equality* [2015] IEHC 201 (Unreported, High Court, McDermott J., 24th March, 2015), *Smolka v. Minister for Justice and Equality* [2016] IEHC 641 (Unreported, O'Regan J., 8th November, 2016), *D.S. v. Minister for Justice and Equality* [2015] IEHC 643 (Unreported, McDermott J., 20th October, 2015) *G.C. v. Minister for Justice and Equality* [2017] IEHC 215 (Unreported, O'Regan J., 4th April, 2017)). It is clear that there is an entitlement to hold that a threat to public policy outweighs family rights (see *Kovalenko v. Minister for Justice and Equality* [2014] IEHC 624 (Unreported, McDermott J., 12th December, 2014) para. 58).

Alleged lack of an effective remedy

15. The review of a removal and exclusion order is a complete *ex nunc* examination of fact and law, which is the gold standard as set out in art. 46(3) of the recast Procedures Directive (Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection), which does not apply to Ireland (see *N.O. v. Minister for Justice and Equality* [2016] IEHC 735 (Unreported, O'Regan J., 24th November, 2016). Such a procedure unquestionably constitutes an effective remedy (see also *Balc v. Minister for Justice and Equality (No. 1)* [2016] IEHC 47 (Unreported, High Court, 19th January, 2016)). The availability of judicial review puts this beyond doubt (see *N.M. (DRC) v Minister for Justice* [2016] IECA 217 [2016] 2 I.L.R.M. 369). The applicant's attempt to reargue this point (already the subject of adverse decided caselaw) was wholly unconvincing.

16. Mr. O'Shea claims that the applicant is entitled to an order that his removal is unlawful, and that a decision cancelling the removal and exclusion orders, which would be available on review, would be insufficient. That is, I am afraid, an absurd argument because if the order is set aside on review the applicant's presence in the State is as lawful or unlawful as it was prior to the removal and exclusion order being made. But even if, in some wholly imaginary parallel universe, an effective remedy under EU law required an affirmative declaration of lawfulness following the cancellation of the decision complained of so as to put him in a better position than he was before the decision was made, he can get that from the High Court. The fact that the High Court does not substitute its own findings of fact for those of a decision-maker in a *certiorari* or *mandamus* context does not (on fairly rudimentary principles) prevent the court from granting a declaration if required to do so by EU law. Mr. O'Shea sought to rely on judgment Nr. 1/2014 of 16th January, 2014 of the Belgian Constitutional Court. However, para. B(6)(2) of this judgment makes it clear that review by the Council of Aliens in that case was not a full *ex nunc* review, so there is no analogy whatsoever with the present case. Review of a removal or exclusion order is completely effective as a remedy.

17. After the best part of a decade of litigation on the extent of an effective remedy in subsidiary protection, this case seems to be an attempt to get some sort of equally endless litigation underway on the right to an effective remedy against removal orders. There is simply no stateable point whatsoever here. Review of such orders is a full review and gives the applicant anything he could want. The point being made is beyond specious.

Alleged lack of entitlement to rely on the conviction for withholding information

18. The applicant pleaded guilty to withholding information prior to the declaration of unconstitutionality in relation to that offence. Therefore the conviction stands (see *A. v. Governor of Cloverhill Prison* [2005] IEHC 483 [2008] 1 I.R. 43). Thus, the Minister is entitled to rely on it.

Order

19. The action will therefore be dismissed.