THE COURT OF APPEAL

Judicial Review

Neutral Citation Number: [2019] IECA 219
[318/2017]

Irvine J.
Whelan J.
Kennedy J.

BETWEEN/

C.

APPELLANT

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of the Court delivered on the 24th day of July 2019 by Ms. Justice Máire Whelan

1. This is an appeal against the judgment of Ms. Justice O'Regan delivered in the High Court on 4th April, 2017 and the order consequent on same perfected 15th June, 2017, refusing an application by way of judicial review for an order of *certiorari* quashing a decision made by the respondent on 10th February, 2016, upholding a removal order and exclusionary period of three years in respect of the appellant imposed on 29th October, 2015.

2. The issues for decision on this appeal can be summarised as follows: -

(i) Whether the trial judge determined that she had no jurisdiction to consider the principle of proportionality in the current application in respect of the review decision made by the respondent and, if so, whether this constituted an error in law.

(ii) Whether the trial judge was correct in finding that the said review decision was proportionate.

(iii) Whether the trial judge erred in law and in fact by failing to consider all the mitigating circumstances relating to the appellant.

(iv) Whether the trial judge erred in law and in fact by failing to consider the appellant's submissions that the review decision was additionally defective due to the lack of reasons provided for the imposition of a 3 year exclusionary period in line with the recent decision of *MS v. Minister for Justice* [2016] I.E.H.C. 762, which had been decided in the interim.

(v) Whether the trial judge erred in law and in fact by misdirecting herself in commenting that the appellant's submission that the respondent was imposing an extra judicial sanction appeared "*to be an attack on the Directive itself* [2004/38/EC]" rather than on the respondent's application of it.

Relevant background facts

3. The appellant is a Romanian national who has resided in Ireland since August, 2009, having lived in Italy for three years prior to that and who gained 'permanent residence' status in 2014. On the 10th March, 2015, the appellant was convicted of assault causing harm (with theft also taken into consideration) which occurred on 9th March, 2014, when the appellant violently assaulted a woman on the North Circular Road, Dublin when he punched and kicked her in the face a number of times. The Garda report stated that he initially sought to blame the victim and contended that he acted in self-defence.

4. In a victim impact statement adduced prior to sentencing, the injured party 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. A sentence of three years and six months imprisonment was imposed with the final two years suspended. Prior to this, the appellant had no criminal convictions in the State, although he had come to the attention of Gardaí in relation to a public order offence on 21st August, 2009.

5. By letter dated the 28th July, 2015, the Irish Naturalisation and Immigration Service (INIS) wrote to the appellant notifying him that the respondent proposed making a removal order against him under Regulation 20(1)(a)(iv) of the of the European Communities (Free Movement of Persons) (No.2) Regulations 2006 ("the Regulations"), including an exclusion from the State for a period of 3 years and invited his submissions. This letter indicated that an attached Garda Report dated the 15th September, 2015, which outlined the circumstances of the appellant's conviction, would be taken into consideration in reaching a decision. The appellant, who was in Mountjoy Prison serving the aforesaid sentence at that time, instructed his solicitors to write a letter dated 13th August, 2015, which made representations as to why the proposed orders should not be made.

6. Notwithstanding the appellant's representations, a removal order was made by the respondent on the 29th October, 2015. The appellant was notified of the making of the said order (and the 3 year exclusion period), and the reasons for same, i.e. that the appellant's conduct meant that his presence in the State posed "a risk to public policy".

7. By letter dated 8th December, 2015, the appellant sought a review of the respondent's decision to make the orders and submitted

further representations for why the orders ought to be quashed. On the 10th February, 2016, the respondent communicated to the appellant that the orders had been upheld.

8. The judicial review application was heard before O'Regan J. on 23rd March, 2017, and judgment was delivered on 4th April, 2017, whereby the appellant's relief was refused, with costs awarded to the respondent. On foot of the removal order, the appellant was removed from the State on 1st July, 2017. The appellant appeals that decision on the grounds as considered below.

Submissions of the parties

(i) Assessment of Proportionality

(a) Appellant

9. The appellant refers to para. 33 of the High Court judgment wherein the trial judge states that: -

> "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."

10. The appellant contends that this approach constitutes an error in law and is a determination by the trial judge that it was not for the Court to assess proportionality in respect of the review decision undertaken by the respondent under the Regulations.

11. The appellant refers to Directive 2004/38/EC which 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."* (emphasis added)

12. The appellant refers to the decisions of *N.M. v. Minister for Justice, Equality and Law Reform* [2016] I.E.C.A. 217 and *ISOF v Minister for Justice, Equality and Law Reform (No 2)*, [2010] I.E.H.C. 457 to the effect that a court can assess the proportionality of administrative decisions affecting fundamental rights and that the court may "further examine the conclusions reached and ensure that they follow from the decision-maker's premises. The court can further quash for material error of fact" (*per* Hogan J. at para. 53 of *N.M*); in order to assess proportionality, the court makes "reference to the evidence, information and documentation available to or procurable by the decision maker at the time..." (*per* Cooke J. at para. 10 of ISOF). The appellant asserts that the current application is of such a kind, being one from which no appeal lies to any independent body and which involves the EU right to free movement.

13. The appellant further submits that an assessment of the proportionality of the review decision of the respondent necessitated an assessment by the trial judge of the mitigating factors and the weight that ought to have been attached to these factors by the respondent. It was asserted that the fact that these factors were referred to by the respondent in the decision does not necessarily mean that the proportionality requirement was complied with. The appellant submits that it was not open to the trial judge to consider the proportionality of the decision by looking at the negative factors only.

(b) Respondent

14. The respondent submits that para. 33 of the High Court judgment did not constitute a finding by the trial judge that it was "not for the Court to determine proportionality" but rather it correctly states a well-established principle of judicial review, that it is not for the appellant or the Court to attribute the appropriate weight to the mitigating circumstances and other matters and also expressly recognises the principle of proportionality. The respondent states that authority for this proposition is found in *G.K. v Minister for Justice & Ors* [2002] 2 I.R. 418, *Olakunori v Minister for Justice* [2016] I.E.H.C. 473, *M.E. v Refugee Appeals Tribunal* [2008] I.E.H.C. 192 and *Smolka v Minister for Justice and Equality* [2016] I.E.H.C. 641.

15. The respondent accepts that a review decision of a removal order may be subjected to a proportionality assessment by a court and states that the High Court did conduct such an assessment, quoting para. 32 of the judgment where the trial judge stated that: -

> "…I am satisfied that the decision was not arrived at based upon 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."

16. In reply to the appellant's contention that the trial judge should not have only considered the negative factors in carrying out a proportionality assessment, the respondent submits that this demonstrates a recognition on the part of the appellant that a proportionality assessment was carried out by the trial judge.

(ii) Mitigating factors

(a) Appellant

17. The appellant asserts that the mitigating factors the trial judge ought to have considered in her proportionality assessment include: the appellant's lack of previous convictions, the fact that has not been arrested, charged or convicted of any offence since his release from prison, his low risk of recidivism, his cooperation with the Gardaí and his early guilty plea, his expression of remorse, his offer of compensation to the victim which was accepted, the fact that 2 years of his sentence was suspended and that he has now served his sentence in accordance with the law. He also asserts that his early release demonstrates that he is considered to be at a low-risk of reoffending.

(b) Respondent

18. The respondent submits that the mitigating factors advanced by the appellant were considered by the trial judge, being set out

at paras. 11-13 of the judgment and that it was clear that the High Court had determined that the respondent had considered all the appellant's representations, including the mitigating factors, in finding that a proportionate decision had been reached by the respondent.

(iii) Proportionality of review decision

(a) Appellant

19. The appellant submits that the trial judge erred in finding that the review decision was proportionate, pointing to the mitigating factors listed above, the nature of the offence (assault), his status as an EU national with permanent residence and contends that he is generally a person of good character who made a grave mistake while intoxicated. He asserts that his behaviour does not justify the removal and exclusion order, not constituting conduct that represents a sufficiently serious threat to society such that it would be contrary to public policy or would endanger public security to allow him to remain in the State and exercise his right to free movement.

20. The appellant refers to *Rutili v. Minister of the Interior* [1975] E.C.R. 1219 where it was held that while Member States are, in principle, free to determine the requirements of public policy, 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".

21. The appellant refers to *MV v. Minister for Justice* [2016] I.E.H.C. 432 and accepts that recidivism can constitute a sufficiently serious threat to public policy but reasserts that he is at a low risk of recidivism.

22. The appellant further refers to *Case C-482/01* and Case *C-493/01 Orfanopoulos and Ors and Oliveri v. Land Baden - Württenberg* [2004] E.C.R. I-5257 where the CJEU stated that national authorities "must assess on a case-by-case basis whether the measure or the circumstances which gave rise to that expulsion order prove the existence of personal conduct constituting a present threat to the requirements of public policy" and that, as a general rule, such a "present threat" must exist at the time of expulsion. The case also refers to the principle of effectiveness, stating that domestic legal rules must not make it impossible or excessively difficult to enforce rights derived from EU law. The CJEU further states that EU nationals are entitled not to be subject to expulsion save in extreme cases provided pursuant to Directive 64/221 and that national courts, in reviewing the lawfulness of an expulsion order, must be able to consider factual circumstances occurring after the removal order was made which may demonstrate a cessation or substantial diminution in the risk that an individual's conduct poses to public policy.

23. The appellant submits that as his offence was an isolated incident, his removal and expulsion is not in line with Directive 2004/38/EC which provides that "previous criminal convictions shall not in themselves constitute grounds for taking such measures…"

24. The appellant submits that the trial judge may have given too much weight to the facts of the assault and asserts that a single offence of this nature should not, 2 years later, be considered to make the appellant a present threat to the requirements of public policy.

25. The appellant refers to two judgments of McDermott J., *Kovalenko v. The Minster for Justice and Equality* [2014] I.E.H.C. 624 (which in turn considered the dicta of the CJEU in *R. v. Bouchereau* [1977] E.C.R. 1999) and *D.S. v. The Minister for Justice and Equality* [2015] I.E.H.C. 643, both of which concerned an offence of rape, to the effect that while a risk of recidivism may be a relevant or even central consideration, an offence may be sufficiently serious in and of itself to warrant the removal of an individual. The appellant submits that his sole offence does not give rise to a presumption of recidivism, nor is it an offence as grievous as rape to be considered to be sufficiently serious in itself to warrant his removal.

(b) Respondent

26. The respondent submits that full consideration was given to all material facts in the review decision in finding that that the appellant committed a serious assault warranting his removal from the State, having regard to the relevant Garda report in which the violence of the attack was detailed, with the victim having been punched and kicked in the face several time and sustaining a broken nose along with cuts and bruises. It was also highlighted that the appellant attempted to blame the victim, stating that he was acting in self-defence and submitted alcohol was a mitigating factor. The respondent asserts that the review decision assessed the impact that the orders would have on the family and private life of the appellant; under the heading 'Private Life' the respondent accepts that while there will be an interference with the private life of the appellant it is "necessary for the prevention of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" and that no other less restrictive measures would achieve this aim.

27. The respondent submits that the removal order was in line with Article 27(2) of Directive 2004/38/EC, which does not preclude a Member State from considering the circumstances surrounding a conviction in the context of deciding whether to impose a removal order and that in the current case, it was the totality of facts, including those which gave rise to the appellant's conviction and his conduct during the investigation, which led to the decision to remove him from the State.

28. The respondent refers to *Bouchereau* [1977] E.C.R. 1999 and *Re Donatella Calfa* (Case C-348/96) to support the position that it is permissible for the respondent to take into account the circumstances giving rise to the appellant's conviction as evidence of his personal conduct in assessing whether he represents a threat to the requirements of public policy.

29. The respondent further refers to D.S. where McDermott J. found that the respondent was entitled to take into account the serious nature of the offence to find that it constituted a threat to public policy as well as the surrounding circumstances of the offence (the violence of the assault) and the attitude of the appellant and absence of remorse and was also satisfied that the respondent had not: -

> "considered the matter solely by reference to the fact that the first appellant had been convicted of a serious offence and served a custodial sentence. His attitude to the s. 4 offence and his victim, further convictions and the consequences that might flow from his removal from the State were taken into account".

30. The respondent also refers to the decision given in *Smolka* wherein O'Regan J. stated 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.

(iv) Want of reasons for exclusionary period

(a) Appellant

31. The appellant submits that the trial judge erred in determining that the appellant was not entitled to assert that the decision by the respondent was defective for want of reasons for the exclusionary period.

32. At para. 19 of the High Court judgment it is stated: -

> "Although the submissions incorporate a complaint that including a period of three years by way of an 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 respondent's submission that condemning the exclusions period or lack of reasoning is not incorporated in the Statement of Grounds."

33. The appellant states that while the issue of the respondent's failure to give reasons for the exclusion period was not expressly pleaded in the Statement of Grounds, it came within the ambit of Ground F(1) of their Statements of Grounds on proportionality and was properly before the High Court.

34. The appellant submits that the Court of Appeal decision in *Balc v. Minister for Justice* [2018] I.E.C.A. 76 applies to the current application, wherein Peart J. held that the respondent must provide reasons for the imposition of an exclusion order as well as the reasons for the period of exclusion imposed.

35. The appellant refers to the decision of *Mallak v. Minister for Justice* [2012] 3 I.R. 297 wherein the Supreme Court summarised the obligation on the respondent to give adequate reasons as follows: -

> "In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

36. The appellant further refers to *MS v. Minister for Justice and Equality* [2016] I.E.H.C. 763, in which O'Regan J. found that a decision made by the respondent to uphold a removal order was invalid as a result of the respondent's failure to give reasons why it was imposing an exclusionary period of three years and also refers to *Voivod v. Minister for Justice* [2018] I.E.H.C. 647 in which Barrett J. found that the exclusionary period aspect of the respondent's decision should be quashed due to the lack of reasons provided for the imposition of the exclusion period.

37. The appellant submits that the respondent breached his right to fair procedures and the principles of constitutional justice by failing to give reasons for its decision, in particular the reasons for the necessity of the appellant's removal as well as the reasons for the imposition of a three year exclusionary period and the upholding of same on review, as well as what legitimate aims of the State these decisions were made in pursuance of, and also what grounds of public policy had been threatened. The appellant contends that the trial judge failed to take into account the lack of reasoning in determining that the appellant was precluded from including the submissions above regarding this failure.

(b) Respondent

38. The respondent submits that the appellant is, and was in the High Court, precluded in this appeal from challenging the exclusion period imposed. It is contended that the appellant made no complaint as to the reasoning for the exclusion period in his proceedings before the High Court.

39. Notwithstanding this submission, the respondent contends that *Balc* can be distinguished from the current application as in same, there was an extant issue between the parties, with the Court of Appeal stating that the trial judge in *Balc*, "expressed no conclusion in relation to the failure to provide any rationale in the decision to exclude Mr. Balc" whereas in the current proceedings, the appellant did not seek or obtain leave from the High Court to pursue this specific line of argument and the trial judge clearly reached a conclusion that the argument was not contained in the Statement of Grounds.

40. The respondent submits, in the alternative, that if this Court finds that the trial judge erred in this regard, only the expulsion element of the review decision should be remitted to the respondent for reconsideration; as per the approach of Barrett J. in *Vovoid*.

(v) Attack on the Directive

(a) Appellant

41. The appellant does not accept the determination by the trial judge that his submissions were an attack on the Directive itself, contending that his primary submission was that "as the removal order was made on foot of the Directive and involved an issue of EU law, that decision was required to be made in light of the EU law principle of proportionality".

(b) Respondent

42. The respondent submits that the trial judge's comments on the appellant's submission appearing to the Court to be an attack on the Directive were *obiter dicta* and that the trial judge did not misdirect herself.

Discussion

43. In light of the authorities, it must be borne in mind that the function of this Court on appeal is primarily directed to an assessment of the validity of the approach adopted by the trial judge to the aspects of the respondent's decision which the appellant sought to impugn. I am satisfied that there was ample evidence before her which entitled her to reach the conclusion that the relevant material

had been adequately assessed by the respondent and that the respondent appropriately weighed its decision and same was justified with particular regard to the principles of proportionality.

44. The High Court judgment cannot be fairly characterised as making a determination that a review decision in such an application could not be subjected to a proportionality assessment by a court. The judge explicitly engaged in a proportionality analysis whilst having due regard to the well-established principle that in administrative decisions the weight to be attached to various factors is quintessentially a matter for the decision maker (*Olakunori (A Minor) v. Minister for Justice and Equality* [2016] I.E.H.C. 473).

45. Similarly, the appellant's submission that the trial judge did not adequately consider the mitigating factors in its assessment of the respondent's decision is untenable.

At para. 11 the trial judge states that: -

> "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 trial judge continues at para. 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…"

46. The trial judge considered all relevant factors, including the mitigating factors submitted by the appellant, in finding that the review decision was proportionate. While the appellant may be aggrieved with the balance struck by the respondent, it is insufficient to claim that a decision lacks proportionality on the basis that greater weight ought to have been given to some factors and less to others – there must be an identifiable consideration that was either relied on by the decision maker and was demonstrably wrong or else was material and was overlooked in the process of making the decision.

47. In *ISOF v. Minister for Justice, Equality and Law Reform* (No 2), [2010] I.E.H.C. 457 Cooke J. at para. 10 reiterated his interpretation of *Meadows*: -

> "Where the challenge to the decision is based upon the assertion that it has the effect of intruding disproportionately upon the fundamental rights of those affected by it, it is the duty of the court to assess whether the applicant demonstrates that it is disproportionate in the sense of being irrational or unreasonable according to the *Keegan/O'Keeffe* test. It does so by reference to the evidence, information and documentation available to or procurable by the decision maker at the time..."

Conclusions

48. There was evidence before the High Court on which the judge was entitled to rely which demonstrated that the decision of the respondent was not solely based on the conviction of the appellant but on his personal conduct considered in its totality. Where, as in this case, an applicant fails to discharge the burden of demonstrating that the proportionality judgment of the decision maker was unreasonable in the sense identified in *Meadows*, then the courts ought not intervene. The High Court judge considered the reasons given by the respondent for the decision in question assessing whether that decision involved an assessment of proportionality. The trial judge was entitled on the evidence to find that in the review decision, the respondent had considered and recognised that the proposed orders would interfere with the private life of the appellant and also considered whether the appellant would face hardship if returned to Romania. It was concluded that he would not. The offence of the appellant was not a trivial one – the respondent was entitled to have regard to the circumstances of the assault, including the fact that the appellant had been intoxicated – to find that the appellant's conduct constituted a genuine and serious present risk to public policy in the State at the time the removal order was made. In substance, the determination of the High Court judge was that the decisions of the respondent were well within the margin of appreciation conferred on the Minister and, thus, reasonable in the judicial review sense of that term. The approach of the trial judge was valid and no grounds have been established which would undermine her conclusions.

49. The trial judge was correct in considering that the arguments sought to be advanced on the basis of the lack of reasons provided for the imposition of the expulsion order of three years were not properly before the Court as they are not raised in the Statement of Grounds. In judicial review proceedings, Statements of Grounds exist to narrow and focus the issues before the Court in relation to the processes by which the decision has been made. If the appellant wished to challenge the expulsion, then same should have been clearly particularised in their Statement of Grounds.

50. The submissions in relation to the trial judge's comments that the appellant's submission appeared to be an attack on the Directive itself are merely *obiter* and not material to the review decision or these proceedings.

51. Accordingly, in light of the above, I would dismiss the appeal and refuse the reliefs sought.