

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 304 J.R.]

BETWEEN

IVAN ZAPOROJAN

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 20th day of April, 2018

1. The applicant is a Moldovan national who entered the State fraudulently in 2004 on the basis of a false Lithuanian identity. He has been in a relationship with his partner, a Ukrainian national, since 2005. She has been here since 2003. She has a child with a previous partner, now deceased, who was born in 1996. That child is currently living in the Ukraine. The applicant and his partner have a child who was born here in 2007. The applicant claims that the child is an Irish citizen but does not seem to have done anything to positively assert such citizenship. The Minister says that the child is not a citizen. The child has been in the Ukraine since 2009.

2. Between December, 2008 and October, 2015, the applicant made fraudulent social welfare claims for jobseekers allowance, which amounted to €30,015.40. It is submitted on behalf of the applicant that he "*committed these offences in the past for reasons of economic need*". Unfortunately, that is not a submission that carries a great deal of weight. Again, somewhat ambitiously, the applicant states in the statement of grounds that he has "*paid a significant sum of taxes*". That does not particularly assist him in contending that there shouldn't be consequences for stealing a large amount of money from other taxpayers. Likewise, the claim made in correspondence on his behalf that the offences were committed "*out of desperation*" is not hugely appealing. The offending behaviour ceased when he was detected, rather than voluntarily.

3. He obtained Romanian citizenship in January, 2016. On 8th March, 2017 he was convicted of six offences in relation to the frauds and was sentenced to three years in prison with eighteen months suspended. On 1st February, 2018 the Minister proposed to make a removal order. On 16th March, 2018, a removal order and exclusion order were issued. The applicant sought a review of those orders and on 13th April a decision was made affirming the orders. The applicant is due for release tomorrow, 21st April, 2018, and it is proposed to remove him for Romania immediately.

Application for injunction

4. I'm dealing in the present judgment not with the substantive claim but with an application for an injunction. That is pursued on his behalf by Ms. Aoife McMahon B.L. I have also heard from Ms. Kilda Mooney B.L. for the respondents.

5. Ms. McMahon sets out four major grounds as to why the applicant has an arguable case: Firstly, that he doesn't represent a genuine, present and sufficiently serious threat affecting the fundamental interests of society, secondly, that the removal order cannot be based solely on previous criminal convictions, thirdly, that the State cannot invoke public policy solely for economic ends and fourthly that there was no consideration of whether the removal would prejudice prospects of rehabilitation as envisaged by the period of suspension. I take it the applicant has an arguable case if for no other reason than that I have already granted leave.

6. Mr. Tom Doyle, in an averment on behalf of the respondents, suggests that there are "*no exceptional circumstances*" to warrant the injunction (para. 11 of his affidavit), but that is not the test. The test as agreed by the parties is set out in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152, *per* Clarke J., as he then was: essentially that there is an arguable case and that the balance of justice favours an injunction.

Okunade factors against an injunction

7. Two major factors particularly stand out here. Firstly, the weight to be attached to the enforcement of the *prima facie* valid orders weighs in favour of permitting the State to proceed to remove the applicant. Secondly, there is the fact that the applicant can pursue the proceedings from outside the State (see para. 8 of the affidavit of Tom Doyle).

Okunade factors for an injunction

8. The applicant and his partner have a ten-year-old Irish-born son who they wish to bring back to Ireland. The son, while born in the State, does not appear to be an Irish citizen and resides with the maternal grandmother in the Ukraine. The partner also has another son, also living in the Ukraine. Given that the children are outside the State, there is a limited amount of disruption involved under that heading.

9. It is claimed that deportation will disrupt the applicant's life with his partner, but he has not been residing with his partner for most of the past 18 months due to having been incarcerated.

10. His partner is unlawfully present in the State, although she has sought permission to remain here as a permitted family member, as a *de facto* partner of a Romanian citizen. This application was refused and a review is in progress. She previously had a work permit, which has expired, and has judicial review proceedings currently in the holding list [2012 No. 592 JR] in that regard. The fact that she is unlawfully present here does somewhat dilute the level of weight to be given to the disruption to her.

11. The removal of the applicant may prejudice his partner's application to review the refusal of her application to be present in the State as the partner of an EU citizen. That is unfortunate but hardly decisive, especially since, as a member of the applicant's household, she must have profited indirectly from the applicant's frauds. Furthermore, the removal of the applicant may well disrupt further attempts to bring the children to Ireland but perhaps the applicant should have thought about that before committing his offences. If he wins his case he can be brought back here and the parties can then make an application to bring the children back.

12. It is claimed that there will be disruption to family members abroad who are being financially supported by the applicant's employment here. This again is unfortunate but hardly decisive. Presumably, those family members abroad have also profited from the applicant's frauds indirectly. There is no strong reason why their interest should be decisive.

13. Then I come to the disruption to the applicant himself, who has been in the State for 14 years, has job offers and stable accommodation with his partner, co-operated with the prosecution and made a full confession, pleaded guilty and expressed remorse. But having said that, all but about 18 months of his presence in the State was unlawful, mainly based on a fraudulent identity. That discounts to some extent the weight to be placed on the disruption to the applicant.

14. The applicant's entitlement to Romanian citizenship was acquired very recently and he has not acquired a right of permanent residence under EU law.

15. As regards his efforts to rehabilitate, there is no evidence of any repayment to date. The applicant has been employed for the past few years so has had quite an opportunity to repay funds but has not, thus far, repaid anything.

16. The claim in correspondence by the solicitor that it was a "*single incidence of criminal behaviour*" does not appear to be an accurate assessment, subject to further argument at the substantive stage. Likewise, the claim that removal is based on the economic interests of the State does not seem to be well-founded either, subject to what may be argued at the substantive stage.

17. Overall, the factors against an injunction as they appear to me at this particular point in time seem weightier than those in favour. If it is determined in due course that the applicant should not have been removed, he can always be brought back. The eleventh-hour nature of the injunction application, first sought on 18th April, three days before the proposed removal, certainly does not assist, although I am not holding that against the applicant in the sense that the review decision was only received very recently.

Order

18. It would have been preferable to hear this application together with the substantive application. However, the State's wish to remove the applicant tomorrow makes this difficult. I consider, on balance, that I should not interfere with the State's proposal in that regard, so I decline to continue the injunction against removal, but will try to give the case as much priority as possible to ensure that if the removal order is held to be invalid, that the applicant can be brought back as soon as possible. I therefore propose to allow a peremptory period until Monday, 30th April for opposition papers, subject to hearing counsel.