High Court of Ireland Decisions

Judgment

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[2018] IEHC 269

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. 2)
JUDGMENT of Mr Justice Keane delivered on the 11th May 2018

Introduction

1. This is a challenge to an order made by the Minister for Justice and Equality ('the Minister') on 16 March 2017 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.

The first applicant's exercise of free movement rights
2. The first applicant moved to Ireland in October 2006 and commenced employment here in January 2007. He has since acquired a right of permanent residence in the State under Article 16 of Directive 2004/38/EC ('the Citizens' Rights Directive').

The first applicant's crimes
3. Before Dublin Circuit Criminal Court on 24 January, 30 March and 24 May 2012, the first applicant pleaded guilty to a total of six separate offences of sexual assault, contrary to section 2 of the Criminal Law (Rape) (Amendment) Act, 1990, with one further offence of sexual assault to be taken into account. Those six offences were committed against six different victims on 16 August 2007; 5 February, 10 March and 21 August 2009; 2 November 2010; and 3 May 2011. The further offence taken into consideration was committed against one of those victims between February and May 2010.

4. In each instance, the nature of the sexual assault perpetrated by the first applicant was very similar. Having boarded a passenger bus, he selected a seat beside an unaccompanied woman passenger. He placed the coat he was carrying and his rucksack on his own lap so that they also partly covered the lap of that other passenger. Concealing his hands under his coat and rucksack, he put one hand up the skirt of his victim, touching her on the leg or upper thigh, while using his other hand to masturbate.

5. The first applicant was apprehended at the scene of the final assault on 3 May 2011 because his victim, who had been the subject of a similar assault by him the previous year, had the presence of mind to seek the immediate assistance of the bus driver. Subsequent investigations established the first applicant as the perpetrator of five other similar assaults.

6. On 7 June 2012, the first applicant was sentenced to three years imprisonment in respect of those offences, with the final 16 months suspended on condition that he enter into a bond to keep the peace and be of good behaviour during that period. He was released from prison on 6 September 2013, having served three-quarters of the 20-month custodial portion of that sentence.

The removal order against the first applicant
7. On 28 January 2013, the Minister made a removal order against the first applicant, pursuant to Regulation 20(1)(a)(iv) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 ('the Regulations'). The decision to make that order was upheld on review on 26 March 2013.

8. The applicants brought judicial review proceedings to challenge that review decision. Those proceedings were struck out as part of a compromise whereby the Minister agreed to conduct a fresh review of the decision to make a removal order, taking into consideration additional information furnished on behalf of the first applicant.

9. At the conclusion of that review on the 18 September 2013, the Minister reaffirmed the decision to make the original removal order.

10. The applicants then instituted a second set of judicial review proceedings challenging the lawfulness of the second review decision. In a judgment given on 24 March 2015 (*P.R., J.R. & K.R. v MJE (No. 1)* [2015] IEHC 201), McDermott J rejected several of the arguments upon which that challenge was based but quashed the second review decision on the single specific ground that the close involvement of certain

officials in both the original decision-making process and the subsequent review of that decision gave rise to a reasonable apprehension of bias in the conduct of that review.

11. At the culmination of a further review process on 28 September 2015, the Minister once again reaffirmed the original decision to make a removal order. However, the Minister decided to reduce the originally fixed exclusion period of ten years to one of seven years. The original removal order was replaced by a second removal order to that effect made on that date.

12. The applicants issued a third set of judicial review proceedings, challenging that review. Those proceedings were compromised on terms that included the conduct of a further review by the Minister of the decision to make a removal order.

The decision now under challenge

13. On 14 March 2017, the Minister again upheld the decision to make a removal order against the first applicant for a period of seven years and, on the same date, made an amended order in those terms, pursuant to Regulation 20 of the Regulations. By letter of 16 March 2017, the Minister gave the first applicant the notification in writing required under Regulation 20(3)(b)(ii) of the Regulations of that decision and of the reasons for it. The review decision, dated 14 March 2017, which was included with that letter, runs to 16 pages. The first applicant was informed that he was to present at the Garda National Immigration Bureau on 30 March 2017 so that arrangements could be made for his removal from the State.

The present proceedings

14. By Order made on 4 April 2017, the applicants were given leave to challenge the decision of the Minister to re-affirm the decision to make a removal order against the first applicant. This is the fourth set of judicial review proceedings that the applicants have taken to challenge the lawfulness of the removal of the first applicant from the State.

15. In addition to an order of *certiorari* quashing that decision, the applicants seek the following three separate declarations of right:

> (i) That the removal of the first applicant from the State would be an unlawful interference with the legal rights of the applicants, including the rights of each under EU law;
>
> (ii) that the personal conduct of the first applicant does not represent a genuine, present or sufficiently serious threat affecting one of the fundamental interests of society, such as would justify the restriction of the first applicant's freedom of movement by his exclusion from the State on the grounds of public policy in accordance with the requirements of Article 27.2 of the Citizens' Rights Directive; and
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> (iii) that the Regulations (or, as the applicants argue, the European Communities (Free Movement of Persons) Regulations 2015) are in breach of EU law in failing to properly implement the requirements of Article 30.3 (and, presumably, Article 31) of the Citizens' Rights Directive and of Article 47 of the Charter of Fundamental Rights, in failing to provide the applicant with an independent and impartial tribunal to review the exclusion order against him.

16. The applicants have been given leave to pursue those reliefs on fourteen enumerated grounds. In the written legal submissions filed on their behalf, those grounds have been helpfully grouped under five headings. I propose to address the

applicants' grounds under each of those headings, although – for reasons that will become apparent – in a different order than that in which they were presented.

Unreasonableness or Irrationality

17. In the written submissions filed on their behalf, the applicants describe their first complaint as 'the misapplication by the [Minister] of the [first] applicant's expert evidence.' This is the 'primary ground' upon which the applicants claim an entitlement to an order quashing the Minister's decision to uphold the earlier decision to make a removal order against the first applicant.

18. In their undated amended statement of grounds, the applicants articulate this complaint in the following terms;

> '[E]xpert evidence was submitted by the applicants, by way of a report from Dr. Michael Leibowitz and Dr. Davina Walsh, that the first named applicant represented a "Low" risk of re-offending. This categorisation means that he is no more likely to reoffend than any other person. Yet, despite this, the first named respondent, in her decision which issued on 16th March 2017 ('the contested decision'), and in the face of this expert evidence, stated that the categorisation of "Low" Risk was such that the first named applicant's "*presence in Ireland is a threat to public policy and public safety and warrants his removal from the State*" and that he "*still poses a threat to women resident in the State.*" This finding was wholly irrational, and made in ignorance of the meaning of the expert report. The first named applicant's last offence was in May 2011, almost six years ago; he is now married with a child as part of a solid family unit; has undergone therapy; and does not pose any more risk to society that than the average person. The contested decision is unlawful for the following reasons:
>
> (i) It was based on an irrational finding as set out above.'

19. In the written submissions filed on their behalf, the applicants clarify that the report – and, hence, the expert evidence - to which they refer is a two-page letter of 30 January 2017 to the applicants' solicitors from Drs Leibowitz and Walsh. In that letter, Dr Leibowitz describes himself as a senior forensic psychotherapist, bachelor and master of social science, master of science, and doctor of philosophy in an unspecified discipline or subject. Dr Walsh describes herself as a principal clinical and forensic psychologist, a master of science (psychology and health), a doctor of clinical psychology, a registered clinical psychologist, and an associate fellow of the Psychological Society of Ireland. In each case these qualifications are simply set out as acronyms beneath the relevant signature. The letter is written under the letterhead of a private limited company named Forensic Psychological Services ('FPS').

20. The letter states (in material part):

> 'Level of Risk for Future Sexual Offending
>
> [the first applicant's] level of risk for recidivism was assessed actuarially. This provides an objective estimate of the likelihood of his committing a sexual offence in the future and is based on empirically derived factors associated with sexual offending. Individuals are assigned a level of risk which is High, Moderate-High, Moderate-Low or Low based on their scores on the risk assessment measure used.
>
> The measure employed for the purpose of the present report was the Stable-2007 which evaluates dynamic factors (factors which are amenable to change through lifestyle change and therapeutic intervention). These

include significant social influences, capacity for intimacy, emotional self-regulation, sexual self-regulation, problem solving ability, and compliance with treatment/supervision.

Based on the information provided to the undersigned, [the first applicant's] results on the Stable-2007 yielded a risk for sexual offending within the Low Range. He appears to be living a healthy, pro-social, adaptive life and does not endorse attitudes or beliefs associated with a sexual offending lifestyle.

Further to the best knowledge of the authors, [the first applicant] has not come to the attention of the authorities for any unlawful behaviour since his release from prison.'

21. For the purpose of the present proceedings, Drs Leibowitz and Walsh each swore an affidavit on 30 March 2017 in materially identical terms. Each separately averred as follows:

'3. I beg to refer to the report on the first named applicant which was completed by myself and my colleague…and which is dated 30th January 2017…. In the report, the first named applicant is assessed actuarially for his risk of recidivism. The measure employed was the Stable-2007 method. The applicant was assessed as in the low range of level of risk of re-offending. This is the lowest level of risk attainable and places him at a risk of re-offending no higher than any other individual.

4. I have been shown the decision of [the Minister] dated 14th March 2017 to "re-affirm" the removal order in respect of the first named applicant. In that decision, it is asserted that his "*presence in Ireland is a threat to public policy and public safety and warrants his removal from the State" and that he "still poses a threat to women resident in the State.*" I say respectfully that this assertion has no evidential foundation. As I have stated above, the assessment of the first named applicant in the low range level of risk of re-offending places him at a risk of re-offending which is no higher than any other individual. It is incorrect to conclude that it means, or suggests in any way, that he is a threat to public safety or women resident in the State. On the contrary, he poses no more threat than any other person. He is in the lowest possible social category of risk of offending. I say respectfully that the decision dated 14th March 2017 is manifestly flawed in the assertion it makes in respect of the risk of re-offending."

22. There are a great many difficulties with the applicants' argument on this point, not the least of which is their failure to cite any relevant authority in respect of it, although this issue is by no means *res integra*.

23. In considering the argument, the starting point must be the identification of the general principles applicable to the determination of whether an administrative decision is unreasonable or irrational. As Denham J observed *in Meadows v Minister for Justice* [2010] 2 IR 701 (at 743-744):

'[144] The relevant factors in the general test are as follows:-

(i) in judicial review the decision-making process is reviewed;

(ii) it is not an appeal on the merits;

(iii) the onus of proof rests upon the applicant at all times;

(iv) in considering the test for reasonableness, the basis issue to determine is whether the decision is fundamentally at variance with reason and common sense;

(v) the nature of the decision and the decision maker being reviewed is relevant to the application of the test;

(vi) where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the court should be slow to intervene in the technical area;

(vii) the court should have regard to what Henchy J. in *The State (Keegan) v Stardust Compensation Tribunal* [1986] I.R. 642 referred to as "the implied constitutional limitation of jurisdiction" in decision making which affects rights. Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision.'

24. In the subsequent case of *AMS v Minister for Justice and Equality* [2015] 1 ILRM 170 (at 188-9), Clarke J (Denham CJ, Murray, Hardiman and Dunne JJ concurring) reiterated:

'7.11 …As this court pointed out in *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701; [2011] 2 I.L.R.M. 157, part of the proper role of the courts in judicial review is to assess the proportionality of the exercise of an administrative adjudication power or discretion. As Fennelly J. put it at pp. 827/207 of his judgment:

"This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J."

7.12 Thus the proper approach in this case is to assess whether, having regard to the extent of any interference with the rights or interests of Mr S and his family members, such interference is justified on the basis of the legitimate aims sought to be advanced. Obviously, many decisions taken in the administrative field involve the exercise of a judgment which involves a balancing exercise. In such cases the court, in recognising that the law has conferred on the relevant decision maker the primary power to exercise the relevant adjudicative function, should accord a reasonable margin of appreciation to the views of that decision maker. However, where an applicant discharges the burden of demonstrating that the proportionality judgment of the decision maker was unreasonable in the sense identified by Fennelly J. in *Meadows*,

then the courts must intervene.'

25. Although the applicants do not refer to it, the test articulated in *Meadows* and *AMS* is the one that they must meet in order to obtain the relief that they seek.

26. The first difficulty that they face in attempting to do so is that – in both their statement of grounds and in their written submissions – they have quoted only selectively from the relevant portion of the Minister's decision. They repeatedly juxtapose the statement of Drs Leibowitz and Walsh in their letter of 30 January 2017 that their administration of the Stable-2007 test yielded a risk of re-offending within the low range with the conclusion in the Minister's decision that the first applicant 'is still at risk of re-offending and that he still poses a threat to women resident in the State', as though to imply not only that there was no evidence before the Minister to support her conclusion but also that the only relevant evidence before her tended to contradict it.

27. Indeed, as already quoted above, Drs Leibowitz and Walsh have been prevailed upon to stray beyond the expertise that might be expected of a psychotherapist and psychologist, respectively, to aver in unison not merely that they disagree with the Minister's conclusion but also that it is one that 'has no evidential foundation.' It appears they do so by reference to an assumption or belief on their part that the Minister's conclusion is based solely upon a misinterpretation of the view expressed in their letter of 30 January 2017, rather than upon a weighing and rejection of that view as part of an overall assessment of the evidence.

28. As is clear from the terms of the Minister's 16-page decision, the two-page Leibowitz/Walsh letter of 30 January 2017 formed only one part of the material that was before her when she made her decision. The material most obviously relevant to the Minister's assessment of risk is that described at pages 7-11.

29. Of that material, the transcript of the sentence hearing before the Dublin Circuit Criminal Court in which the nature and extent of the first applicant's criminal conduct, as well as his mitigation, were comprehensively addressed, is of particular relevance.

30. In addition, the material included two earlier FPS reports, each of which was more substantial than the two-page letter of 30 January 2017. The first was an 18-page psychological report, dated 28th March 2012, commissioned by the applicant's solicitors to assist in the first applicant's plea in mitigation before the Dublin Circuit Criminal Court ('the first FPS report'). It contains a 'psychological and risk assessment' of the first applicant in relation to the sexual offences he had committed and the risk of the commission by him of further such offences in the future. The authors of the report were three psychologists employed by FPS, one of whom was Dr Walsh.

31. The second FPS report, which, although undated, appears to have been prepared shortly prior to 21 December 2012, is headed 'Psychotherapy Progress Report' and runs to seven pages. Its authors are Dr Leibowitz and Dr Walsh. It recites that it is to be read in conjunction with the first FPS report.

32. The third FPS report is, of course, the two-page letter of 30 January 2017 already described. It references the second FPS report but not the first one.

33. The Minister's conclusion that the first applicant is still at risk of re-offending and that he still poses a risk to women resident in the State is expressly stated to have been reached, 'having regard to the content of the above-mentioned representations and psychological reports.' It is therefore difficult to understand how either the applicants or Drs Leibowitz and Walsh can imagine that the conclusion is based solely upon the Minister's consideration of the particular risk assessment described in the third FPS

report.

34. In order to put the contents of the three FPS reports in clearer context, I believe it is proper to take judicial notice of the following commentary concerning risk assessment in the management of sex offenders set out in *The Management of Sex Offenders – A Discussion Document* (Department of Justice, January 2009) (at pp. 21-2):

> '4.3.2 Formal risk and needs assessment are needed for many important decisions, including sentencing, intervention planning, sentence management, resettlement planning and supervision and monitoring in the community. It has to be accepted at the outset that no system of risk assessment is perfect. It is simply impossible to predict with 100% certainty how an individual will act in the infinite variety of situations that can present themselves in life. However, risk assessment has come a long way in the last number of years, primarily through the application of scientific research to the very difficult question of predicting the likelihood of future offending, including sexual recidivism. An important development in this process has been the use of research to guide the development of risk assessment instruments that combine both static and dynamic risk factors.
>
> 4.3.3 Static risk factors refer to historical factors (e.g. age at time of offence, criminal history) know to be related to recidivism. However, being historical, they are not amenable to change. Static factors are the most effective and accurate means of categorising offenders into different risk brackets. They contribute significantly to the more efficient distribution of resources, enabling services to be more intensively targeted at those who most require them. Dynamic risk factors are characteristics that can change and when changed, contribute to a corresponding increase or decrease in recidivism risk. Dynamic risk factors can be further sub-divided into stable dynamic factors and acute dynamic factors. Stable dynamic factors are expected to remain unchanged for months or years. Thus, intervention programmes aimed at creating enduring improvements need to target stable dynamic factors (e.g. social competencies, attitudes tolerant of offending, problems with emotional/sexual self-regulation, substance misuse). In contrast, acute dynamic factors, such as alcohol intoxication or negative mood, change rapidly (in days, hours, even minutes). Acute dynamic risk factors are related to the timing of re-offending. However, they may have little relationship to long-term risk potential.
>
> 4.3.4 Studies indicate that empirically validated risk assessment measures have a moderate to high strength of prediction and are significantly more accurate than clinical judgment alone (Hanson, R.K. & Bussiere, M.T., (1998) 'Predicting relapse; a meta analysis of sexual offenders recidivism studies', Journal of Consulting and Clinical Psychology 66, 3 48-362; Hanson R.K. (2000) 'Risk Assessment', Association for the Treatment of Sexual Abusers, Hanson & Mortan-Bourgon, 2004).
>
> "These scales increase our ability to predict re-offending by 20 to 30 percent over change and reliably classify individuals into risk levels to guide treatment programmes." Murphy, W.D. & McGrath, R. (2008) 'Best Practice in Sex Offender Treatment', Prison Service Journal, July 2008, No. 178 1-14'

35. As the Minister noted in her decision, in the first FPS report the first applicant's level

of risk of committing a sexual offence was evaluated using the Static 99 and Stable 2007 actuarial measures. As the report states:

> 'Actuarial measures provide an objective estimate of the likelihood of an individual committing a sexual offence in the future and are valid for one year. The Static-99 considers unchangeable empirical factors found to predict re-offence, such as age, relationship to alleged victim, nature of the offence *etc*. STABLE 2007 considers dynamic predictors of re-offence in sexual offenders. The authors of these scales have indicated that the most accurate estimate of risk is obtained when the results from each measure are combined and interpreted together.'

36. On the Static 99 actuarial scale, the first applicant obtained a score in the Moderate-Low range. While the applicants do not address this aspect of the matter, it would seem that this score, based as it is on historical factors that are not amenable to change, cannot alter. On the Stable 2007 actuarial scale, he obtained a score in the Moderate range. When the Static 99 and Stable 2007 measures were combined the level of risk of future offending by the first applicant was within the Moderate-Low risk range.

37. While the second FPS report makes no reference to the application of any actuarial measure of risk based on either static or dynamic factors, it does conclude with the following clinical (or, as Drs Leibowitz and Walsh describe it, 'non-objective') risk assessment:

> 'A clinical assessment of [the first applicant's] stable marriage, observable affection and attachment displayed by his young daughter to him, strong family supports, pro-social lifestyle and sober habits, would indicate he is at Low risk category of repeat offending.'

38. As already described, the third FPS report does refer to the application of the STABLE-2007 actuarial measure of dynamic risk factors. However, no attempt is made to link or combine the results of that assessment with either the earlier measurement under Static-99 or any other measurement of the static risk factors applicable to the first applicant. Nor is any attempt made to offer an explanation for the failure to do so. Accordingly, it is difficult to accept the implicit, if not explicit, contention advanced on behalf of the applicants that the Minister had been presented with clear or unequivocal evidence that the overall risk of the first applicant re-offending was low.

39. Before leaving this point, there are three observations that must be made about the identical averments of Dr Leibowitz and Dr Walsh - in the separate affidavit each swore on 30 March 2017 - that the STABLE-2007 assessment which led to the first applicant being placed in the low range for dynamic risk factors 'places him at a risk of re-offending which is no higher than any other individual' and establishes that he represents no more threat to public policy and public safety, or to the safety of women resident in the State, 'than any other person.'

40. The first observation is that, in making those averments, each of those deponents entirely fails to explain the basis upon which established and immutable static risk factors – generally accepted as the most effective and accurate means of categorising offenders into different risk brackets - can now be completely disregarded, in favour of purporting to assess risk solely and exclusively by reference to a consideration of dynamic risk factors.

41. The second observation, which is closely linked to the first though separate from it, is that those deponents also entirely fail to explain how they have been able to apply an actuarial tool designed to assess dynamic risk factors for reoffending behaviour (or, in the jargon, recidivation) on the part of convicted sex offenders, to purport to conduct a comparative risk assessment not between the first applicant and other convicted sex offenders but between the first applicant and 'individuals' or 'persons' generally.

42. The third observation is that neither of the problematic assertions just described was included in either the third FPS report or any of the other material placed before the Minister, rendering it impossible, rather than merely extremely difficult, to see how the Minister can be criticised for failing to accept either of them in the decision that she made before the affidavits in which they are contained were sworn.

43. The second difficulty that the applicants face is perhaps the most fundamental. They contend that the Minister's decision plainly and unambiguously flies in the face of fundamental reason and common sense because, in the unusual language in which they couch their argument, the Minister 'misapplied' the first applicant's expert evidence. That submission is misconceived in law. It is not the task of a decision maker to 'apply' expert evidence. Rather, as the authorities make clear, a decision maker must first decide on the relevance and probative effect of any such evidence and, if it is found to meet those criteria, must then decide what weight, if any, to give it.

44. It is clear that the Minister did take into account the contents of the three FPS reports, amongst a wide range of other materials. Thus, the question is whether the weight that the Minister should have attributed to the stable dynamic risk assessment described in the third FPS report was such as to render her overall conclusion that the first applicant is still at risk of reoffending and that he still poses a risk to women resident in the State one that flies in the face of fundamental reason and common sense.

45. The Law Reform Commission *Consultation Paper on Expert Evidence* [LRC CP 52 – 2008] states the relevant principle of law as follows (at para. 2.263):

> 'It is important to note that the court is not obliged to accept or act on expert evidence and can refuse to admit it or reject it if they so wish. The decision-making function of the court must not be usurped by the expert, and it remains at all times the duty of the court to determine the truth of the matter at hand. The evidence of an expert will therefore only be of persuasive, not binding effect, to be taken into account with all the other evidence in the case.'

46. Both the Law Reform Commission Report (at para. 2.264) and McGrath *Evidence*, 2nd edn., (Dublin, 2014) (at p. 417) invoke the formulation of that principle set out in the judgment of Lord President Cooper of the Scottish Court of Session in *Davie v Edinburgh Magistrates* 1953 S.C. 34 (at 40) in the following terms:

> 'Expert witnesses, however skilled and eminent, can give no more than evidence. They cannot usurp the functions of the jury or judge sitting as a jury…The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge or jury.'

47. While the decision maker in this instance was the Minister, rather than a judge or jury, it seems to me that the principle is the same – while the tribunal of fact may give particular weight to, and will generally accept, uncontradicted expert evidence, it is not obliged to do so. Since the decision on risk in this case was ultimately one for the Minister and not Drs Leibowitz and Walsh, it cannot be said that it was irrational or unreasonable simply because the former did not entirely defer to the latter.

48. That leaves only the question of whether it can be said that the particular expert evidence at issue here – the statement by Drs Leibowitz and Walsh that the first applicants results on the Stable-2007 measure in or about January 2017 yielded a level of risk for sexual offending within the low range – is one entitled to such weight in the circumstances of the present case that, although not strictly bound by that expression of scientific opinion, the Minister's conclusion that the first applicant is still at risk of

reoffending and that he still poses a threat to women resident in the State was nonetheless one that, because of that expression of opinion, plainly and unambiguously flies in the face of fundamental reason and common sense.

49. In *AG (Ruddy) v Kenny* (1960) 94 ILTR 185 (at 186), Davitt P noted that the weight to be attributed to expert evidence will depend on the nature of the evidence, the impartiality of the witness and his freedom from bias, the facts on which he bases his opinion, and all the other relevant circumstances. In *Davie v Edinburgh Magistrates*, already cited, Lord President Cooper held that the value and weight to be attached to expert evidence depends, in part, upon '…the authority, experience and qualifications of the expert….'

50. The Law Reform Commission Consultation Paper already cited (at para. 5.176) notes that, at present, there is no set form and structure required for an expert report under Irish law, before going on to observe (at para. 5.177) that:

> 'The majority of expert reports will be very detailed outlining the investigations made, the opinions reached, and setting out any materials used in the making of the expert report, because an expert report that does not contain sufficient detail is unlikely to be admitted as evidence, and even if it is, its shortcomings are likely to be exposed on cross-examination.'

51. In England and Wales, *Practice Direction 35 – Experts and Assessors*, which supplements Part 35 of the Civil Procedure Rules, the equivalent there of our Rules of the Superior Courts, sets out (at para. 3.2) certain requirements concerning the form and contents of an expert's report. Although without a direct equivalent in this jurisdiction, those requirements do provide a useful indicator of the nature and scope of the evidence that a decision maker might reasonably expect to find in the report of a competent expert. Amongst the matters that an expert's report must contain in England and Wales are: details of the expert's qualifications; details of any literature or other material that has been relied on in making the report; a summary of the facts and instructions material to the opinions expressed in the report; clarification of which facts stated in the report are within the expert's own knowledge; the identification of the person or persons who carried out any test used for the report and the qualifications of each such person; where there a range of opinions on matters dealt with, a summary of that range of opinion and the reasons for the expert's own opinion; a statement of any qualification upon the expert's opinion; and a statement that the expert concerned understands his or her duty to the court and has complied with that duty.

52. In this case, it would appear that the Minister was told little about the qualifications of Drs Leibowitz and Walsh and nothing about their experience referable to the tests they had administered and the opinion they were offering. There is nothing in any of the three FPS reports describing the literature relied upon in respect of actuarial risk assessment for sexual re-offending in general, or the reliability or accuracy of the Static-99 or STABLE-2007 measures in particular. The person or persons who administered those tests to the first applicant are not specifically identified, although it may be that the Minister was expected to infer that those tests were administered personally by either Dr Leibowitz or Dr Walsh, or both. No information is provided concerning the training or qualifications that enabled the person or persons who administered either of those tests to do so properly or reliably. No detail is provided of the assessment of each relevant factor in the administration of either test, beyond the declaration of the overall result expressed as the classification of the first applicant in a particular risk bracket. There is no identification of any range of possible opinions, whether resulting from the availability of other tests or other factors, much less is there any identification of the position of the opinion actually expressed within that range or the reasons for it. There is no statement of any qualification upon that opinion, nor is there any statement by Drs

Leibowitz and Walsh that they understand their duty as independent experts (if that is, indeed, the role they have adopted, rather than that of client advocate) and that they have complied with that duty.

53. The limitations that I have just described substantially undermine any argument that the opinion expressed in the third FPS report was entitled to such weight that it was irrational or unreasonable of the Minister not to adopt or endorse it.

54. That argument is further undermined by the acknowledgment in the second FPS report that the first applicant paid for individual psychotherapy with Dr Leibowitz between 23 September 2013 and 6 July 2015, attending at roughly fortnightly or three-weekly intervals during that period, amounting to 27 hours of psychotherapy in total. The third FPS report describes the first applicant as attending further 'supportive' sessions with Dr Leibowitz on three further occasions thereafter - 7 March, 5 July and 18 November 2016 - and attending for a 'review' with his wife and daughter, the second and third applicants on 24 January 2017.

55. The significance of this information is that Dr Leibowitz was providing therapy to the first applicant while at the same time or shortly afterwards acting as an expert witness on the applicants' behalf. As the Law Reform Commission Consultation Paper already cited explains (at pp. 202-3):

> '4.24 It has also been argued that problems may arise where a therapist is treating an individual and at the same time is asked to act as an expert witness in a case involving the individual. This assumption of a dual role could lead to a very real conflict of interest and have negative impact on the therapist-patient relationship, or may adversely affect the way in which the evidence is presented to the court.
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> …
>
> 4.27 Based on the added value that first-hand experience will give to an opinion, any prohibition on treating therapists acting as expert witnesses is clearly undesirable. It is submitted that the correct approach to take in such cases is once again take into account this fact at weight, rather than admissibility stage. The Commission therefore provisionally recommends that there should not be a prohibition on treating therapists acting as expert witnesses.'

56. The Law Reform Commission Report on *Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016) includes a draft *Evidence (Consolidation and Reform) Bill*. The Report addresses the issue just described in the following terms (at pp. 296-7):

> '8.133 It has been argued that problems may arise where a therapist is treating a patient ("a treating therapist") and then is asked to act as an expert witness in a case involving the patient. Doing both could lead to a conflict of interest, damage the therapist-patient relationship and may adversely affect the way in which the evidence is given. The Consultation paper discussed the strains placed on expert witnesses by this.
>
> 8.134 First-hand experience may add value to an opinion so any prohibition on treating therapists acting as expert witnesses is clearly undesirable. The best approach is to have this go to weight rather than admissibility. As one submission received noted, the court would have to be satisfied that the witness had not omitted anything relevant because of their duties in their primary profession. The case law discussed above as to the effect of various types of prior relationships on the status of expert

> evidence [personal interest, financial interest, intellectual interest, and employment relationships] must also be borne in mind.
>
> 8.135 The Commission therefore takes the view that there should not be a prohibition on treating therapists acting as expert witnesses. More broadly, the Commission considers that the draft Evidence Bill should expressly provide that employment, current or prior, or a professional or clinical relationship should not necessarily prevent a person from acting as an expert witness. This reflects the emerging case law to that effect both in this jurisdiction and in England and Wales.
>
> 8.136 The Commission recommends that the draft Evidence Bill should provide that a prior employment or therapeutic relationship should not necessarily prevent a person from acting as an expert witness.'
>
> (emphasis in original)

57. The case law in this jurisdiction to which the Commission was referring in the extract from its Report just quoted was specifically the decision of the Supreme Court (*per* Murphy J, McGuinness and Geoghegan JJ concurring) in *Galvin v Murray* [2001] 2 ILRM 234, in which the issue was whether the status of an engineer as an employee of one of the parties deprived him of the characteristic of independence necessary to qualify as an expert witness. The conclusion of Murphy J for the Supreme Court was (at 239):

> 'The fact that an engineer is employed by one or other of the parties may affect his independence with a consequent reduction in the weight to be attached to his evidence but it could not deprive him of his status as an expert.'

58. Thus, the position of Dr Leibowitz as the first applicant's therapist, while not depriving him of the status of expert to which he might otherwise have been entitled in relation to the expression of opinion in question (depending upon the nature and extent of his qualifications and experience in that regard), must necessarily reduce the weight to be attached to that opinion, further undermining the argument that it was irrational or unreasonable on the part of the Minister not to adopt it.

59. For the reasons I have given, the applicants have failed to establish that the Minister's decision was based on an unreasonable or irrational finding.

60. Before concluding this part of the judgment, there is one further matter I must address. In the course of the hearing of the application before me, Counsel for the applicants sought to hand in to court, and to rely upon, a more recent letter written on behalf of FPS. I was informed that the letter contained certain observations or comments that the persons concerned wished to make in response to the arguments contained in the Minister's written submissions. The Minister objected to the admission into evidence of that letter and I upheld that objection.

61. Then, at the conclusion of the hearing, counsel for the applicants submitted that, if the court was not persuaded by the submission that the Minister had 'misapplied' the relevant statements of those persons in reaching the challenged decision, the court should adjourn the matter to permit the applicants to adduce some further evidence on the point. I refused that application. It is not for either party in any proceeding to submit at the end of a hearing that the trial should only be deemed concluded contingent upon the acceptance of that party's evidence or argument, failing which the matter should be adjourned to permit the party concerned to adduce further evidence or make further arguments, or both.

62. The hearing of the application took place on 9 November 2017. The applicants'

submissions, dated 1 November 2017, were received by the Minister on 2 November 2017. In view of their late delivery, on 6 November 2017, the Minister sought from, and was given leave by, Humphreys J to file his written submissions by close of business on 8 November 2017. However, none of that is material, since it cannot provide a pretext or justification for the introduction of further evidence or argument.

63. The applicants have been aware of the Minister's proposal to make a removal order against the first applicant since the beginning of 2013. The most recent decision of the Minister to do so, which is now under challenge, was made on 14 March 2017. Before that occurred, the first applicant was given every opportunity to lay any and all psychological evidence and reports upon which he wished to rely before the Minister. He did that by furnishing the 18-page FPS psychological report, dated 28th March 2012; the FPS 'Psychotherapy Progress Report', prepared shortly prior to 21 December 2012; and, latterly, the two-page Leibowitz/Walsh letter of 30 January 2017.

64. The applicants were given leave to seek judicial review of the Minister's decision on 4 April 2016. In that context, they filed a number of affidavits, exhibiting a range of documents, in March and April 2017, as they were perfectly entitled to do. Those affidavits include the separate affidavit that Dr Leibowitz and Dr Walsh each swore on 30 March 2017, neither of which was filed until 4 April 2017. The Minister's statement of opposition is dated 24 May 2017. It was filed on 21 June 2017. It is grounded on the affidavit of Tom Doyle, an assistant principal in the Department of Justice and Equality, sworn on 19 June 2017. I must presume that the application was given a date for trial only after each side had confirmed that the exchange of affidavits was complete and that the application was in all other material respects ready for trial.

65. Neither the receipt of the other side's written legal submissions nor the conclusion of the hearing confer an entitlement on either side to adduce further evidence as of right. If it were otherwise, litigation in our courts would simply grind to a halt. While it is possible that exceptional circumstances might arise that would render it necessary in the interests of justice to permit further evidence to be adduced at any stage of proceedings, the applicants did not identify any such circumstance in this case.

Breach of EU law - Chapter VI of the Citizens' Rights Directive

66. In their written and oral submissions, the applicants contend that the Minister's decision breached EU law, in that it failed to comply with the requirements of Article 27.2 and Article 28.2 of the Citizens' Rights Directive. Under Article 27.2, such a decision, as a restriction on the first applicant's free movement and residence rights as a Union citizen, has to be proportionate and based exclusively on his personal conduct, which has to represent a genuine, present and sufficiently serious threat affecting the fundamental interests of society. Previous criminal convictions cannot in themselves constitute a ground for it. Under Article 28. 2, as the first applicant is a Union citizen who has established a permanent right of residence on the territory of Ireland, such a decision can only be made on *serious* grounds of public policy.

67. In short, the applicants contend that the Minister incorrectly applied the EU law requirements: (a) that the personal conduct of the first applicant must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society; (b) that serious grounds of public policy must exist to justify the first applicant's expulsion; and (c) that the expulsion and exclusion measure concerned must be proportionate between the public policy object it seeks to attain and the limitation on the applicants' free movement rights necessary to attain that objective.

68. These arguments have already been traversed in some detail by McDermott J *in P.R., J.R. & K.R. v MJE (No. 1)*, already cited, at paragraphs 29 to 61 of his judgment, albeit that the court was dealing them with an earlier decision of the Minister to exclude

the applicant from the State for a period of 10 years. I am in respectful agreement with his analysis and I adopt it in full for the purpose of the present judgment. In the concluding portion of that analysis, McDermott J stated (at para. 54):

> '54. The court is satisfied that the offences of which the applicant was convicted and sentenced are regarded under Irish law as serious in their nature as indicated by the potential penalty which may be and was imposed. The nature of a sexual assault may differ in its gravity depending on the circumstances in which it was committed. It is clear as a matter of legislative and public policy that young women such as the victims in this case, must be protected from predatory sexual assailants. In this case the sentence imposed was not the only matter considered. The conduct of the applicant over the period of the commission of these offences was also taken into account by the decision maker, including the fact that his criminality would not have been interrupted had he not been apprehended in 2011. His offences commenced the year following his arrival in Ireland and continued over a period of four years. The seriousness of these offences is described in the judgment of the Circuit Criminal Court and the effect on the victims was significant. The court is satisfied that there was ample evidence to justify the conclusion reached by the Minister that the removal was in accordance with the common good, and that his pattern of serious sexual criminal behaviour in the State represented a serious risk to public safety. This series of sexual assaults is covered by the concept of "public policy" and in the court's view, P.R.'s conduct was reasonably capable of giving rise to "serious grounds of public policy" for the purposes of Article 28(2)."

69. And later, (at paras. 59 to 61):

> '59. There was an extensive consideration of the applicants' rights under Article 8 of the European Convention on Human Rights and, in particular, the [first] applicant's right to family life and the likely affect a ten year expulsion would have on the [first] applicant's family. The relevant considerations were taken into account in that regard and the appropriate tests were applied in considering whether the likely effect upon them would be disproportionate.
>
> 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 period of imprisonment within the State. In all, having arrived in the State in 2006, he engaged in criminality between [2007] 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.
>
> 61. It is clear that for four years [the first applicant] 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 [Citizens' Rights Directive] and [the Regulations] require that the [Minister] 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 [Minister] 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 [the first applicant] 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.'

70. Against that background, the applicants argue that the position has now fundamentally altered because of the contents of the two-page Leibowitz/Walsh letter of 30 January 2017, with the result that serious grounds of public policy for the expulsion and exclusion from the State of the first applicant could no longer be said to exist, as the first applicant's personal conduct can no longer be said to represent a genuine, present and sufficiently serious threat affecting the fundamental interests of society. For the reasons I have already given, I do not accept that the letter concerned must be considered as having that effect. While its contents undoubtedly comprise relevant information that the Minister was required to consider, it is clear from the terms of the Minister's decision that she did consider the letter and its contents.

71. The applicants next argue that the Minister's decision was given in breach of the requirements of Article 33.2 of the Citizens' Rights Directive whereby, if an expulsion order issued as a legal consequence of a custodial penalty is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy and shall assess whether there has been any material change in circumstance since the issue of the order.

72. In this case, the relevant first instance expulsion or removal order was made on 28 September 2015. The Minister upheld that decision upon review on 14 March 2017 and, on the same date, made an amended order to the same effect. Each of those orders was based on a contemporaneous assessment of whether the first applicant was then currently and genuinely a threat to the public policy of the State and each was based on a consideration of the first applicant's circumstances at the material time.

73. The applicants seek to rely on a single sentence contained in a letter dated 3 July 2015 from a detective superintendent in the Garda National Immigration Bureau to the Irish Naturalisation and Immigration Service, stating that the circumstances in which the original removal order against the first applicant was issued 'remain the same.' In effect, they contend that this represents an irrational finding by the Minister that nothing had altered in the first applicant's personal circumstances during that period.

74. I cannot accept that contention for three reasons. First, the context in which the words concerned were written makes clear that they were directed towards the first applicant's behaviour and not his personal circumstances. Those words are immediately followed by the sentence: 'He has not been convicted of any offence since the 7th June 2012.'

75. Second, there is no suggestion that, in her review decision of 14 March 2017, the Minister failed to have regard to the first applicant's personal circumstances as they were then in the context of the submissions that had been made to her on the

applicants' behalf in that regard.

76. Third, it would be an error in principle to purport to construe the meaning and terms of the Minister's decision by selectively quoting and relying upon isolated sentences or fragments of sentences within it, and it is a still more fundamental error to purport to do so by selectively quoting and relying upon isolated sentences or fragments of sentences from just part of the material that the Minister considered in reaching that decision.

77. Accordingly, I reject that argument.

78. Further under this head, the applicants argue that the Minister applied the wrong test as a matter of EU law because of a single conclusion, at page 15 of the Minister's 16-page decision, that nothing in the applicant's personal circumstances generally or, more particularly, in his family and economic circumstances or in the nature of his social and cultural integration in the State would make his return to the state of his own nationality 'impossible for him or one of great hardship.' The words just quoted plainly represent a paraphrase of familiar language from the jurisprudence of the European Court of Human Rights on an aspect of the necessary proportionality analysis under Article 8 of the European Convention on Human Rights when considering the deportation of a family member.

79. A consideration of the Minister's 16-page decision in the round establishes that it did engage with the requirements of Articles 27 and 28 of the Citizens' Rights Directive in general and with those of Article 28.1 in particular, whereby:

> 'Before taking an expulsion decision on grounds of public policy…, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.'

80. From a consideration of the nature and contents of the Minister's decision taken as a whole, I am satisfied that it was in the context of that analysis, and not as the application of a different or incorrect test, that the Minister included in her decision a consideration of the requirements of Article 7 of the Charter of Fundamental Rights of the European Union and of Article 8 of the European Convention on Human Rights. I therefore reject that argument.

Breach of fair procedures

81. The applicants contend that the Minister failed to put her adverse findings to the first applicant for his further comments or submissions prior to the issue of her decision and that this was both unfair and a breach of the first applicant's right to be heard and right of defence as fundamental principles of EU law. The applicants rely on the decision of the Court of Justice of the European Union ('CJEU') in Case C-277/11 *M.M. v Minister for Justice*, Judgment of 22 November 2012 EU:C:2012:744 as support for that argument. That was a case involving a certain understanding on the part of the CJEU of the nature and scope of the consecutive procedures then applicable in Ireland for considering applications for refugee status and applications for subsidiary protection, respectively. In its judgment in that case the CJEU found (at paras. 60-61):

> '60. However, with regard to the scope that should be accorded to the requirement to cooperate with an applicant which Article 4(1), second sentence, of Directive 2004/83 imposes on the Member State concerned, the Court cannot accept the proposition, put forward by Mr. M., that the rule requires the national authority responsible for examining an application for subsidiary protection to supply the applicant, before

> adoption of a negative decision on that application and where an application for asylum made by the same person had previously been refused, with the elements on which it intends to base its decision and to seek the applicant's observations in that regard.
>
> 61. A requirement of that kind in no way results from the wording of the provision in question. If the EU legislature had intended to impose on Member States obligation such as those advocated by Mr M., it would certainly have done so expressly.'

82. Prior to the issue of the Minister's review decision of 14 March 2017, the applicants, through their legal representatives, were given - and availed of - several opportunities to submit whatever material, and to make whatever representations, they might wish. I am satisfied that there was no breach of the applicants' entitlement to fair procedures, and nor was there any breach of the right to be heard, inherent in the rights of the defence as a fundamental principle of EU law.

Breach of Article 31.1 of the Citizens' Rights Directive

83. The applicants contend that the availability of judicial review and of the review mechanism constituted by Regulation 21 of the Regulations fail to provide the first applicant with the access to judicial and, where appropriate, administrative redress procedures to appeal against or seek review of the Minister's decision required as a procedural safeguard under Article 31 of the Citizens' Rights Directive.

84. However, in doing so they acknowledge that this argument was rejected by Eagar J in *Balc & Ors v Minister for Justice* [2016] IEHC 47 (Unreported, High Court, 19th January, 2016) and by McDermott J in *P.R., J.R. & K.R. v MJE (No. 1)*, already cited. Conscious that the decision in *Balc* was then under appeal to the Court of Appeal and wishing to preserve their position, the applicants were content to rest on their extensive written submissions to the effect that each of those cases was wrongly decided – a sensible course of action in view of the principles set out in *Irish Trust Bank Ltd v Central Bank of Ireland* [1976-1977] ILRM 50 and *Re Worldport Ireland Ltd* [2005] IEHC 189 (Unreported, High Court (Clarke J), 16th June, 2005).

85. The Court of Appeal has since ruled against the applicants' contention in *Balc & Ors v Minister for Justice* [2018] IECA 76, (Unreported, Court of Appeal (Peart J; Ryan P and Hedigan J concurring), 7th March, 2018).

The Failure to provide reasons for the exclusion period of seven years

86. I have left this head of argument until last, for a reason that will shortly become apparent.

87. It was raised by the applicants in a quite perfunctory way over two short paragraphs in their written submissions. In reliance on the decision of O'Regan J in *Smolka v Minister for Justice* [2016] IEHC 641, (Unreported, High Court, 8th November, 2016), the applicants submit that the Minister's decision is invalid because it fails to give reasons for fixing an exclusion period of seven years.

88. 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 further contend that the reduced seven-year exclusion period imposed under the Minister's review decision 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, had that order been implemented unchallenged at the time when it was made.

89. In response, the Minister points to the finding by McDermott J in *P.R., J.R. & K.R. v*

MJE (No. 1) already cited, at para. 60, already quoted above, that the period of ten years exclusion originally imposed on the first applicant by the Minister was not disproportionate in the circumstances of his case.

90. However, I have decided that I should not rule on this final remaining issue without hearing any further submissions that the parties may wish to make on the decision of the Court of Appeal in *Balc* and, in particular, on that portion of the judgment between paragraphs 123 and 126, inclusive. That decision was handed down after I reserved my judgment in this case.

91. I will hear the parties on the appropriate directions in that regard.