High Court of Ireland Decisions

Judgment

Title:	M.V. (Lithuania) -v- The Minister for Justice and Equality & ors
Neutral Citation:	[2016] IEHC 432
High Court Record Number:	2014 292 JR
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THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 292 J.R.]

BETWEEN

M.V. (Lithuania)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Stewart delivered on 22nd day of July, 2016.

1. The applicant in this case seeks, *inter alia*, an order of *certiorari* by way of application for judicial review quashing the decision of the first-named respondent to make a removal order against him dated 19th March, 2013, and affirmed on 13th May, 2014. These decisions were made pursuant to Regulation 20(1)(a)(iv) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008.

Background

2. The applicant is a Lithuanian national born in 1990, who has been living in this State since 2011. Whilst living in Ireland, he has engaged in criminal behaviour that resulted in several convictions before various courts in 2011 and 2012. The Court also notes that the applicant has been arrested on thirteen separate occasions, dating from 19th August, 2011 to 19th March, 2012. Ten of these arrests related to theft offences. By letter dated 16th May, 2013, the applicant was sent a summary of charges and outcomes of such. The applicant had submitted that the offences and arrests outlined occurred while he was in the throes of drug addiction. According to the Irish Prison Service, the applicant came to be unlawfully at large in February, 2013.

3. On 16th May, 2013, the first-named respondent notified the applicant that a removal order was being considered against his continued presence in the State on grounds of public policy. He was also informed that an exclusion period of three years would be enforced against him. The proposed order was issued pursuant to Regulation 20(1)(a) of the EC (Free Movement of Persons)(No. 2) Regulations 2006 and was sent to the applicant whilst he was a prisoner at the Midlands Prison in Portlaoise.

4. In response to the proposed removal order, the applicant made handwritten representations by letter dated 21st May, 2013, in which he asserted that his siblings and father resided in the State with him and that he had no family left in Lithuania. The applicant submitted that he would have few job opportunities in Lithuania, but that he had been employed in a clothing recycling firm in Ireland.

5. A removal order was made by the first-named respondent and notified to the applicant on 19th March, 2013. The removal order had to be re-served on the applicant on 12th June, 2013, at the address he occupied most recently.

6. The applicant applied through his solicitors by letter dated 10th March, 2014, for a review of this decision. The applicant asserted that none of his crimes were serious and also claimed that he was a "reformed character". The applicant maintained that he no longer associated with the criminal elements that had allegedly been a bad influence on him and that he was in a relationship. A caveat was entered by the respondent that no objective evidence was entered in respect of this contention.

7. By letter dated 29th April, 2014, the first-named respondent wrote to the applicant's solicitors seeking further representations on the circumstances in which the applicant had come to the adverse attention of Gardaí. By letter dated 6th May, 2014, the applicant wrote to the first-named respondent and informed them that he could not make any significant additions to the submissions previously made on those matters. In this same letter, however, the applicant reiterated that he was a "reformed character" and stated that he was "currently serving" a short prison sentence. Furthermore, the applicant contended that he was in an ongoing relationship and that this was having a beneficial influence on him. The applicant underlined that, if he was removed from this State, this steadying influence would be extinguished.

8. By letter dated 14th May, 2014, the applicant was informed by the first-named respondent that the removal order in relation to his case had been affirmed and would be executed. Upon receiving notification of the removal order's affirmation, the applicant

issued these proceedings to challenge the first-named respondent's decision. On 26th May, 2014, leave was granted by MacEochaidh J., which permitted the applicant to seek the reliefs contained in his prepared Statement of Grounds.

The applicant's submissions

9. Counsel for the applicant, Mr. Kenny, B.L., correctly acknowledges that, when the decision was made, the applicant had twenty-six convictions and had served a number of short prison sentences. These convictions were openly acknowledged and analysed by counsel, who did not wish to demean their importance. They comprised of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001, a number of driving offences, fleeing the scene of an accident, possession of prohibited articles and failure to attend court on a specified date.

10. The applicant's arguments come under two main headings; proper transposition of the directive and traditional judicial review principles regarding the rationality of the decision.

Rationality of decision

11. According to applicant's analysis of Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families O.J. L257/13 19/10/1968, the first-named respondent must conclude that the applicant's activities were contrary to public policy, security or health before making a removal order. The applicant argues that basing that decision upon the applicant's previous convictions and criminal activities is irrational, as none of the offences concerned could be characterised as systematic or serious in nature. The applicant asserts that "petty thievery" could not be reasonably regarded as a threat to public policy, security or health.

12. The applicant relies on the European Court of Justice's decision in *Rutili v. Minister for the Interior (Case 36-75)* [1975] ECR 1219 in terms of the fundamental interpretive devices to be applied to derogations of this nature; It is to be construed 1. in the strictest possible sense, and 2. only where the activities of an individual constitute a "*genuine and sufficiently serious threat to public policy"*.

13. The applicant also relies upon the decision of the European Court of Justice in *R v. Boucherou (Case 30-77)* [1977] ECR 1999, in which a preliminary reference was made by the Magistrate's Court sitting in Marlborough Street, London. The applicant places heavy emphasis upon the court's decision in *Boucherou* for the proposition that illegal behaviour on the part of an applicant is, on its own, insufficient unless that illegal behaviour also represents a genuine and serious threat affecting one of the fundamental interests of society.

14. The applicant argues that it is the second component of the test that is absent in his case, i.e. the genuine and serious threat affecting one of the fundamental interests of society. This element is absent in two aspects; a. it is entirely absent from the applicant's behaviour as attested to by the material relied upon by the respondent, and b. even if it were present, it is not identified at any point in the respondent's decision to make a removal order.

15. The joined cases of *Orfanopoulos and Oliveri* (Cases 482-01 and 493-01) [2004] ECR 5257 were also included in the applicant's submissions. In *Orfanopoulos* and *Oliveri,* the ECJ considered whether a persistent petty criminal, who had served a number of custodial sentences and demonstrated recidivist tendencies, could be subject to an exclusion order. The ECJ held that the derogation principles enunciated by the Court in *Rutili* must be subject to an even stricter interpretation when the subject is an EU citizen. The applicant maintains that that decision is directly applicable to his case,

as he is a Lithuanian national. As a result, a particularly restricted understanding of the principles regarding derogation from the Free Movement Directive should be observed in this matter.

16. The applicant also relies on *Orfanopoulos* and *Oliveri* in regard to whether or not a particular set of circumstances could constitute acts contrary to public policy. The ECJ held that the Member State was not entitled to utilise generic concerns. Such concerns must be related directly to the individual's personal conduct. Therefore, it was insufficient to state generally that a person was involved in a criminal activity and not specify further. According the applicant, the State authorities must specify exactly why the person's activities amounted to a serious threat.

17. The applicant argues that the first-named respondent has failed to engage with the specifics of the applicant's convictions. It is submitted that the applicant's behaviour was that of an "incompetent petty criminal". The applicant also submits that an alleged propensity to re-offend on the applicant's part is irrelevant if the offences themselves do not surpass the seriousness threshold required to make a removal order. The applicant submits that the first-named respondent, in reviewing an applicant who had only ever engaged in "petty economic crime", could not have reasonably come to the conclusion that it did and that there was no evidence before the first-named respondent that would have allowed it to reach such a conclusion.

18. An ancillary argument is that the first-named respondent erred in law in failing to give any, or any adequate, weight to the applicant's proof of consistent and reliable employment. The first-named respondent indicated that this was 'commendable'. However, according to the applicant, the first-named respondent unreasonably and irrationally characterises this employment as an attempt to avoid the execution of a removal order against him.

Transposition argument

19. The applicant contends that Regulation 20(1)(d) provides that a removal order shall not be made in respect of a person solely on the basis that the person concerned has served a custodial sentence unless it has first passed the threshold of constituting a threat to public order or security. According to the applicant, the regulation allows the removal of a person based on previous criminal convictions if the proposed removal comes within grounds of public order, public security or public health.

20. Article 27 (2) of Directive 68/360/EEC states in part that "[P]*revious criminal convictions shall not in themselves constitute grounds for taking such measures* [of removal]." The applicant contends that the applicable test under Article 27 (2) of the Directive involves a balance of individual's previous criminal convictions when the first-named respondent is reaching its determination. However, it is submitted that the individual's behaviour must have some additional element before a removal order can lawfully be made.

21. The applicant argues that the test under Regulation 20(1)(a)(iv), when read in conjunction with Regulation 20 (d) of the Regulations, allows the first-named respondent to make a removal order based exclusively on that individual having previously served a custodial sentence. The applicant contends that, in transposing the Directive into domestic law, the requirement for there to be an additional element of public policy or public security grounds was not reproduced.

22. The applicant maintains that the first-named respondent relied exclusively upon the applicant's previous criminal record and Garda National Immigration Bureau's (GNIB) assessment in arriving at an adverse conclusion pursuant to Article 20(1)(a)(iv). The applicant maintains that this is expressly prohibited by the Directive. The applicant

urges the Court, in analysing the applicant's case, to read Regulation 20(1))a)(iv) in light of regulation 20(d).

23. The applicant submits that the actions of the individual must satisfy the four aspects of the definition for a removal order determination to be made in accordance with law and that the test in this jurisdiction only reproduces the first element of this assessment and not the second. The applicant argues that the transposition does not reproduce any of the four aspects of the test stipulated by the Directive.

The respondents' submissions

24. Counsel for the respondents, Mr. Moore, B.L., addresses the applicant's third and fourth grounds of challenge first. The third ground alleges that the applicant does not pose a threat to public policy based on the offences he was convicted for. The fourth ground claims that the first-named respondent failed to give any, or any adequate, weight to his proof of steady employment within this State. The respondent submits, in relation to the third ground, that the applicant has committed a large number of offences and highlights the fact that the applicant has spent time in prison within this State amounting to some 33 months. By highlighting these prison sentences, the respondents submit that the first-named respondent was entitled to make a removal order in relation to the applicant.

25. Counsel for the respondents also relied upon the European Court of Justice's decision in *Bouchereau*. In that case, the applicant was a French national working in the United Kingdom, who had been convicted of drugs offences on two occasions. The question for the ECJ to determine was whether such convictions justified his deportation from the United Kingdom. The applicant in *Bouchereau* argued that his deportation was precluded by Article 48 of the Treaty on the Functioning of the European Union and by Council Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health O.J. 850/64 4.4.64. A question was referred to the ECJ for a preliminary ruling as to whether Article 3(2) of Directive 64/221 accommodated criminal convictions as a demonstration of the propensity to act contrary to public policy or public security.

26. The ECJ answered the above question in *Bouchereau* by stating that the applicant's convictions were relevant only insofar as they were evidence of *"…personal conduct constituting a present threat to the requirements of public policy."* The respondent referred, in particular to para. 29 of the judgment in *Bouchereau*, which states:-

> *"Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy."*

27. The respondents submit that the ECJ decision in *Bouchereau* was re-emphasised in the more recent decision of *Murat Polat v. Stadt Russelsheim (Case 349/06)* [2007] E.C.R. 8167. In *Polat*, the ECJ reiterated that criminal convictions, of themselves, were irrelevant. However, it was open to the referring State to expel him, provided that his behaviour constituted a genuine and sufficiently serious threat to a fundamental interest in society.

28. The respondents submit that the applicant's recidivist tendencies are highly relevant. Furthermore, case-law shows that the aggregated effect of the offences committed by him entitles the first-named respondent to view him as a threat to public policy. In relation to an applicant's stated recidivism, Advocate General Bot stated in *P.I. v Oberburgermeisterin der Stadt Remscheid* (C-348/09) at para. 40:-

> *"At this stage of a general analysis, taking into account the risk of reoffending is not in itself important. What offence does not involve the risk of reoffending? There is no such thing as an offence without risk of reoffending. Also, in the light of the threat to public security, it is rather the very nature of that threat which must be taken into account…The likelihood of reoffending may indeed be taken into account by the court or competent authority, but in order to assess, in addition to, or weighed against, the other conditions or criteria laid down by that directive and the case law of the Court, whether it is actually necessary to order expulsion."*

29. The respondents also rely upon the opinion of Advocate General Stix-Hackl in *Orfanopoulos* and *Oliveri*, who stated at para. 64:-

> *"On the other hand, repeated recidivism could militate in favour of expulsion although it will probably relate more to petty crime."*

30. The respondents submit that the respondent was entitled to make and affirm a removal order in respect of him on the basis of public policy by reference to the criminal behaviour he engaged in during his relatively short time in the State. The affirmation decision noted that the first-named respondent had a duty to protect its citizens in the interests of the common good and referred to some of his previous offences as proof that he was a threat to public policy and safety.

31. The respondents argue that grounds three and four are misconceived because the applicant has mistakenly assumed that his previous convictions are incapable of justifying a removal order under the 2006 Regulations. The respondents submit that this assertion is in direct conflict with prevailing law on the matter and would, in effect, require this Court to transpose its view as to what constituted a threat for that of the first-named respondent's. In this respect, the respondents rely upon the Supreme Court case of *Hussein v. Labour Court* [2015] IESC 58, where it is stated at para. 33:-

> *"It is not open to the High Court in judicial review to make a new finding of fact on the merits in a judicial review case of this nature for the purpose of determining whether the original decision was right or wrong or should be upheld."*

32. In addressing the applicant's argument that EU law has not been properly transposed into domestic law, the respondents submit that Article 27 (2) clearly states that criminal convictions alone will not constitute grounds for making removal orders. The respondents assert that the Court is entitled to presume that the extra elements outlined in the Directive were in the forefront of the first-named respondent's mind when drafting the complementary Regulations.

33. The respondents further submit that it is clear from regulation 20(1)(d) that the first-named respondent is prevented from making a removal order solely on the basis that that person has served a custodial sentence. Any ambiguity identified by the applicant in the wording of Regulation 20(1)(d) of the 2006 Regulations does not afford the applicant *locus standi* to challenge the affirmation of the removal order. This is so, according to the respondents, because the removal order was made on the basis of regulation 20(1)(a)(iv) of the 2006 Regulations.

34. The respondents also dispute ground ten (that the first-named respondent relied exclusively on his previous criminal record in making the order) because this argument overlooks the fact that the applicant's previous convictions formed only part of the analysis. The respondents submit that it was the applicant's recidivist tendencies that led the first-named respondent to conclude that the applicant's presence within the State was contrary to public policy.

35. The respondents also dispute grounds twelve to fourteen because they appear to impugn the affirmation of the removal order on the basis that the 2006 Regulations fail

to transpose the second paragraph of Article 27(2) of the Directive. Article 27(2) states:-

> *"The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."*

36. The respondents refer to well-settled case-law of the Courts of Justice of the European Union, which holds that it is not always necessary to formally enact the provisions of a Directive in domestic law. In this regard, the respondents rely upon the decision in *Commission v. France (Case 233/00)* [2003] ECR I-6625, where it is stated at paragraph 76:-

> *"While it is therefore essential that the legal situation resulting from national implementing measures is sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations, it is none the less the case that, according to the very words of the third paragraph of Article 189 of the Treaty, Member States may choose the form and methods for implementing Directives which best ensure the result to be achieved by the directives, and that provision shows that the transposition of a directive into national law does not necessarily require legislative action in each Member State. The Court has thus repeatedly held that it is not always necessary formally to enact the requirements of a directive in a specific express legal provision, since the general legal context may be sufficient for implementation of a directive, depending on its content."*

37. The respondents rely on this case to make the argument that a verbatim transposition is not required and that regard could be had to the general legal context. At paragraph 80, the ECJ states:-

> *"It follows that the transposition of Article 3 (3) of Directive 90/313 does not require that provision to be enacted in precisely the same words in national law but the general legal context may be sufficient if it actually ensures the full application of that directive in a sufficiently clear and precise manner.*
>
> *81. In particular, as regards a provision such as Article 3 (3) of Directive 90/313, the requirement for specific transposition would be of very little practical use since that provision is drafted in very general terms and sets out rules which are in the nature of general principles common to the legal systems of the Member States…*
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> *84. The Court has thus held that the scope of national laws, regulations or administrative provisions must be accessed in the light of the interpretation given to them by national courts…Similarly, it is appropriate to take into account the interpretation given by those courts to the general principles of law upheld in the national legal system.*
>
> *85. In this instance, the information available to the Court gives no indication that a general legal context such as that relied on by the French Government does not actually ensure the full application of Directive 90/313."*

45. The respondents submit that, if the applicant's argument is viewed in the general legal context of the foregoing decisions, there can be no doubt that the Directive has been transposed into domestic law. The respondents also submit that the applicant has failed to indicate how the general legal context at play is insufficient to ensure full application of the Directive.

Legal analysis

47. Article 27(2) of Parliament Council Directive 2004/38/EC of 29 April, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. L 158/77 30.4.2004 states at Art. 27.2:-

> *"Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall 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. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."*

This Directive, and in particular the wording of this Article, was transposed into domestic law by the Òireachtas. The end result of this process was the 2006 Regulations cited previously in this judgment. However, by way of clarification, Regulation 20(1)(a)(iv) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 can be stated as follows:-

> *"Without prejudice to paragraph (1)(a)(iv), the Minister shall not, except on grounds of public order, public security or public health, make a removal order in respect of a person to whom these Regulations apply solely on the basis that the person concerned has served a custodial sentence."*

48. The applicant places considerable emphasis upon the jurisprudence of the European Court of Justice in a series of cases that deal with the subject matter of this present review. A selection of the most pertinent decisions will suffice for present purposes. *Bouchereau* is a case that can be distinguished from the case currently before the Court because the applicant in that matter had yet to be sentenced for his offence. It appears that the referring Magistrate had deferred sentencing until the deportation issue was clarified by the ECJ. *Bouchereau* was the first reference to the European Court of Justice by an English criminal court. The question referred by the Magistrate Court in London to the ECJ was as follows:-

> *"Whether a recommendation for deportation made by a national court of a Member State to the executive authority of that State (such recommendation being persuasive but not binding on the executive authority) constitutes a "measure" within the meaning of Articles 3 (1) and 3 (2) of EEC Directive 64/221."*

49. In holding that such a procedure did constitute a 'measure', Advocate-General Warner followed the ECJ's ruling in Rutili. The ECJ set out the test to be applied in cases where a Member State seeks to restrict an EU citizen's right to stay and move within that State at para. 28 of that judgment:-

> *"Accordingly, restrictions cannot be imposed on the right of a national of any Member State to enter the territory of another Member State, to stay there and to move within it unless his presence or conduct constitutes a genuine and sufficiently serious threat to public policy."*

50. Advocate-General Warner further highlighted the difficulties in translating the original French version of the decision in *Rutili* into English. This is not a mere academic exercise but, in fact, serves to demonstrate the nuance required by the subject-matter being reviewed. The French translation of the test reproduced above, reads "*'une menace réelle et suffisamment grave pour l'ordre public*". However, the English translation of that clause reads: "*a threat to public policy*". The Advocate-General's preferred to use the formula "*a threat to the requirements of public policy*."

51. Bearing this nuanced approach in mind, the opinion of Advocate-General Stix-Hackl in *Orfanopoulos (supra)* is of relevance. It was stated therein that *"…repeated recidivism could militate in favour of expulsion although it will probably relate more to petty*

crime." It is clear that European Union law allows citizens of the Union to be removed from a Member State on foot of serious criminal behaviour, having regard to the test set out in *Rutili.* It is also significant that a recidivist tendency can be sufficient justification to warrant the affirmation of a proposed removal order from the State. Given the applicant's history, which was extensively laid out in the impugned decision, the respondent's finding of a recidivist tendency is neither irrational, nor without basis.

52. With regard to the alleged irrational consideration of the applicant's employment history, the applicant has resided in the State for five years. Indeed, he had only resided in the State for three years at the time the impugned decision was affirmed. In that time, he has been sentenced to a cumulative 33 months in prison and, according to the Irish Prison Service, became unlawfully at large in February, 2013. The Court finds such a scenario to be incongruous with the notion of "consistent and reliable employment" and sees no reason to invalidate the impugned decision on that basis.

53. The argument posited by the applicant in relation to the transposition of the EU law into a domestic instrument is dealt with by the decision in *Commission v. France* (supra) and the findings of that Court dealing with transposition requirements have already been set out above. I have no hesitance in rejecting that argument.

54. The decisions of McDermott J. in *Kovalenko v. Minister for Justice and Equality* [2014] IEHC 624 and *P.R. v. Minister for Justice* [2015] IEHC 201 are instructive, but distinguishable, from the present case due to the gravity of the offence concerned. In *Kovalenko*, McDermott J. held that the decision to remove the applicant was within the purview of the public policy criteria and was a decision based upon the applicant's personal conduct. At. Para. 27, that Court rightly detailed the principle that:-

> *"…a convicted EU citizen has an enhanced status and protection compared to that of a convicted criminal from a non-European Union country who is subject to a wider discretion to deport to his home country under s. 3 of the Immigration Act 1999 (see People (DPP) v. Alexiou [2003] 3 I.R. 513)."*

55. Nevertheless, the decision in *Kovalenko* was primarily concerned with the fair procedures argument put forward by the applicant. In *P.R.*, McDermott J. quashed the decision to affirm a removal order on the basis that fair procedures were not observed, with particular reference to the independence of the review performed by the respondents. Thus, both these cases can be distinguished even further from this case, as the issue of fair procedures has not been canvassed by the applicant in this case.

Decision

56. I am satisfied that the decision of the respondent was rational, reasoned and sustainable on the basis of the material put before the decision-maker. I therefore refuse the reliefs sought.