THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 132 J.R.]

BETWEEN

IVAN SEREDYCH, JOVITA KALPOKIENE-SEREDYCH, ANDRII SEREDYCH (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND JOVITA KALPOKIENE-SEREDYCH) AND MARKO SEREDYCH (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND JOVITA KALPOKIENE-SEREDYCH)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 22nd day of March, 2018

1. The first named applicant is a national of the Ukraine, born in 1973. He arrived in Ireland in May, 2001 and was granted residency as the father of an Irish citizen child born to the first named applicant and his first wife in 2001. In the same year he committed certain road traffic offences, including driving without insurance, for which was convicted in July, 2002. He was granted permission to reside in the State on 27th April, 2005. He commenced work as a taxi driver in 2006. In that year he divorced his first wife, and in the same year or the following year he met and began cohabitation with the second named applicant, who was a Lithuanian citizen and is now a naturalised Irish citizen since 2014. She had three children from a previous relationship.

2. In June, 2012 the first named applicant committed the offence of sexual assault while in the course of acting as a taxi driver. The circumstances are described in the judgment of Birmingham J. at paras. 3 to 7 of his judgment in the criminal appeal (*D.P.P. v. Seredych* [2016] IECA 415 (Unreported, Court of Appeal, 3rd November, 2016)), as follows:

> *"3. On 9th/10th June 2012 the complainant who was living in Cavan at the time was in Dublin. When she was socialising in Dublin she travelled in order to attend a 21st birthday party which was taking place in Clontarf Castle. After the events there a number of those who were at the party made their way to the city centre and in particular to the Temple Bar area in the early hours of the morning perhaps around 3 am she became separated from her friends, it might be said that she has always acknowledged that she had consumed alcohol on the occasion at a number of different locations. She had said 'I wasn't too bad, I wasn't falling around the place like, I can quite remember what happened, I can quite remembered what happened, the events that happened so I wasn't very drunk'.*
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> *4. Separated from her friends, the injured party decided to walk to McDonalds in O'Connell Street, where she hoped that she might meet up with some of them. She made her way across the Millennium Bridge and walked in the direction of O'Connell Street, she was feeling 'vulnerable', that is her word, and was visibly upset and was crying. At one stage at least she was shouting for her friends.*
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> *5. On the North Quays a taxi pulled over. The driver told her to stop crying and he offered to take her home. She told him that she was going to Donaghmede and she got into the car, sitting in the front passenger seat. According to the complainant very shortly into the journey, he put his hand on her thigh. She remonstrated with him in Polish thinking that that was his nationality and that Polish was his language. In fact the taxi driver was Ukrainian. The injured party had some colloquial Polish as a Polish lodger had stayed with her family or with friends at some stage. He asked her had she a boyfriend, while all the time keeping his hands on her thigh. He then proceeded to move his hand further up under her underwear and touched her on the vagina. The injured party at the time was wearing a short gold party dress.*
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> *6. According to the complainant, when the taxi reached the seafront road in Clontarf, the driver pulled into a car park and he asked her if she would like to kiss. At this stage the complainant took out her phone and took down his name and badge numbers from the identification documents which were on the dashboard of the taxi while pretending to be engaged in texting a friend. The driver drove out of the car park and she directed him to drop her in Raheny where she knew that there was a garda station.*
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> *7. Again according to the complainant on the way there, he kept touching her vagina before exposing his penis taking her hand and placing it on his penis. She pulled her hand away and then when they arrived in the vicinity of Raheny garda station, she got out of the car and the driver did not make a request for payment."*

3. In July, 2015 the first and second named applicants had their first child. On 23rd September, 2015 the couple married. In November, 2015 the first named applicant was convicted of the offence of sexual assault, after contesting his guilt at the trial by attacking the accuracy of the evidence of the complainant, which of course he is entitled to do. Following the conviction, he was sentenced to three years' imprisonment.

4. On 8th June, 2016 the first named applicant's latest permission to be in the State expired. On 28th July, 2016 the first and second named applicants had their second child. The first named applicant applied for renewal of his permission to remain and on 14th July, 2016 the Minister indicated an intention not to renew the permission and invited submissions. On 8th August, 2016 the first named applicant submitted a document which is relied on on his behalf which concludes "*with your permission dear sir or madame I want to say that I am really sorry for this situation*". Reliance is implausibly placed on this as an expression of remorse but it rather seems to me to be a somewhat self-pitying statement that he is merely sorry for the situation. It does not even remotely reach the foothills of amounting to remorse for his offending behaviour, especially situated in the context of having contested his guilt at all stages up to and including an appeal against conviction, as he is entitled to do.

5. On 28th August, 2016, representations were made on behalf of the first named applicant and on 5th September, 2016, a proposal to deport was issued by the Minister. On 16th September, 2016 representations were made as to why a deportation order should not be made. On 3rd November, 2016, the Court of Appeal handed down a decision rejecting his appeal against conviction. A deportation order was made on 8th February, 2018.

6. Leave to issue the present proceedings challenging that deportation order was granted by Barrett J. on 15th February, 2018. On 16th February, 2018 the first named applicant was released from custody.

7. I have heard helpful submissions from Mr. Michael Lynn S.C. (with Mr. Anthony Lowry B.L.) for the applicants and from Ms. Siobhán Stack S.C. (with Mr. John P. Gallagher B.L.) for the respondent.

Was there lawful consideration of the constitutional rights of the applicants?
8. Mr. Lynn relies on the Court of Appeal decision in *Gorry v. Minister for Justice and Equality* [2017] IECA 282 (Unreported, Court of Appeal, 27th October, 2017) where the Minister failed to identify the constitutional rights involved and erred by assimilating the constitutional obligations with those under art. 8 of the ECHR, as applied by the European Convention on Human Rights Act 2003. However, in the present case the Minister did identify the constitutional rights involved, so that point does not arise. Given that those rights are identified, it cannot be said that there is an unlawful assimilation of the issues. Indeed, as Denham J., as she then was, said in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25 [2008] 3 I.R. 795 at 823: "*These rights overlap to some extent and may be considered together with the constitutional rights*." That statement does not seem to have been specifically drawn to the attention of the Court of Appeal in *Gorry*, but sheds further light on the fact that there does not need to be an absolute watertight separation between consideration of the different strands of family rights involved. The analysis notes that neither the constitutional nor the Convention rights are absolute, and that is an example of what I mean by a lack of a need for a watertight separation, because it is clear that that point made by the Minister is correct both as to constitutional and Convention rights and as such is unimpeachable (see *A.O. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1).

9. A further point was hinted at that the decision was invalid because it did not deal with the Constitution first and the ECHR second. Mr. Lynn's formal submission, however, was that as the points were allegedly improperly assimilated this issue did not particularly arise. Hogan J. in *Gorry* seemed to draw the principle that the Constitution should be dealt with first from *Carmody v. Ireland* [2009] IESC 71 [2010] 1 I.R. 635 that a declaration of incompatibility does not arise until after consideration of constitutional rights. That is so not because of an overarching peremptory requirement that the Constitution must always be considered in any and every context before the ECHR, but because *Carmody* was dealing with an interpretation of a particular statutory provision, s. 5(1) of the European Convention on Human Rights Act 2003, which requires that a declaration of incompatibility can only be made "*where no other legal remedy is adequate and available*". That presupposes that constitutional relief is not available, which in turn means that such relief must be considered first. That precise point does not arise here in the sense that no declaration of incompatibility is sought, but Hogan J. put it slightly more broadly at para. 8 in *Gorry*: "*where (as here) litigants make a claim that their constitutional rights have been infringed, it is this claim which should be considered first by the Minister and it is only in the event that the constitutional claim should fail that the Convention issue should then be considered. Any other approach takes from the primacy of the Constitution as the fundamental law of the State and the principal repository of the protection of fundamental rights in this jurisdiction*."

10. No doubt decision-makers will seek to follow these strictures, but I do not read Gorry as automatically meaning that if the order in which the points are taken does not comport with this paragraph, the decision is automatically invalid irrespective of the content of that decision. A number of factors came together in *Gorry* to warrant the orders made, and it seems to me that in the absence of such other factors here, it is not necessary to read *Gorry* as meaning that judicial review reliefs must be granted against an otherwise correct decision of the executive branch if the lawful and valid content of a decision was not laid out in a particular order or sequence dictated by the judicial branch. I certainly do not read *Gorry* as requiring such an approach.

11. The fundamental point is that the Minister does not have to write a legal essay, complete some form of legal bingo or tick off key phrases. The issue is whether the substance of the rights are considered and whether the decision is lawful (see *T.A. (Nigeria) v. Minister for Justice and Equality* [2018] 1 JIC 1607 [2018] IEHC 98 (Unreported, High Court, 16th January, 2018)). That approach is consistent with the Supreme Court decision in *Oguekwe*, including Denham J.'s reference to the lack of a need for a "*micro specific format*" (at p. 819). Also relevant is *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593 at p. 600, where Costello J. held that the decision was not invalid because "*the Minister himself did not take down the Constitution … before reaching a decision*". The same approach was taken in *B.I.S. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 398 (Unreported, High Court, 30th November, 2007) at p. 17 onwards, where Dunne J. cites *Pok Sun Shum* with approval and notes that it was followed by Ryan J., as he then was, in *P.F. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 26th January, 2005). She went on to say at p. 21: "*It is not necessary for the Minister to spell out specifically that he has considered the impact of the making of an order in circumstances where on the stated facts it must be abundantly clear that there would be an impact*." It seems to me no illegality has been demonstrated under this heading.

Was the balancing process proportionate and in accordance with constitutional rights in the *Meadows* sense and/or with art. 8 of the ECHR?
12. Complaint was made as to the content of the proportionality analysis and the lack of regard to various factors submitted by the applicants, including but not limited to country of origin information and the risk of destitution in view of what is alleged to be a humanitarian crisis in Ukraine. The submission is made that the conflict in the Ukraine is not resolved, but there is no necessity for the Minister to be satisfied that the conflict has resolved.

13. The submission is made that the Minister has failed to put sufficient weight on the best interests of the children, contrary to art. 8 of the ECHR and art. 20 of the TFEU. In relation to that point, and the other points made under this heading, that the weight to be attributed to the various factors is primarily a matter for the decision-maker unless some illegality has been demonstrated, which is not the case here.

14. Mr. Lynn submits that because a deportation of a sex offender in what he says are similar circumstances was held to be contrary to art. 8 in *Omojudi v. the United Kingdom* (Application no. 1820/08, European Court of Human Rights, 24th November, 2009), this applicant must also succeed. It seems to me that that submission misunderstands the civil law approach that applies in Strasbourg. The European Court of Human Rights does not operate on the same strict *stare decisis* approach as common law countries. As submitted by the respondents in written submissions at para. 59, European Court of Human Rights judgments "*tend to be fact specific*" apart from instances of what are referred to in Strasbourg jurisprudence as "*well established case law*" (or "WECL" in Strasbourg parlance). In the context of the present question, the focus of the well-established caselaw is in cases such as *Üner v. the Netherlands* (Application no. 4641/99, European Court of Human Rights, 18th October, 2006), which is referred to by the Minister. It is not the case, as the applicant seems to think, that every outlying high-water mark case from Strasbourg must always be taken as a minimum benchmark on which any future applicant, however unmeritorious, can build.

15. Other cases where criminal offending behaviour were held to be of significance or a legitimate factor in the immigration decision-making process include *Boujlifa v. France* [2003] 30 EHRR 419 (Application nos. 122/1996/741/940, European Court of Human Rights, 21st October, 1997), *Üner v. the Netherlands* (Application no. 4641/99, European Court of Human Rights, 18th October, 2006), *Krasniqi v. Austria* (Application no. 41697/12, European Court of Human Rights, 25th April, 2017) (see also *P.I. v. Oberbürgermeisterin*

der Stadt Remscheid Case C-348/09, EU:C:2012:300). In the present case, the Minister considered the key factors and was aware of all the circumstances, including those not expressly mentioned in the discussion. No unlawfulness has been made out.

***Zambrano* objection**
16. A point is taken pursuant to the decision in Case C-34/09 *Ruiz Zambrano*, but there is no evidence that the mother is going to move to the Ukraine. Thus the complaint made has no factual basis. Indeed, Mr. Lynn accepted that the wife will probably not move and that it is not practicable to do so. Therefore, it seems to me that the complaint is totally abstract and thus not a basis on which the decision can be challenged. Such a move is not going to happen anyway, so even if there is an infirmity in the discussion that is entirely irrelevant, but no such infirmity has been made out because it has not been established that there are any insurmountable obstacles to relocation should the mother so decide. Admittedly, it will not be particularly convenient for her, but that is a very different thing to there being any insurmountable obstacle.

Alleged flawed consideration under arts. 20 and 21 of the TFEU
17. Mr. Lynn complains that there is no reference in the decision to rights stemming from arts. 20 and 21 of the TFEU, and that the Minister failed to consider the correct test of a genuine, present and sufficiently serious threat to the fundamental interests of the society. The Minister's answer is as follows:

> (i). The first named applicant has not established as a matter of fact that the second named applicant was present in the State on the basis of art. 21 of the TFEU at relevant times. She did not apply for an EUTR residence card, and thus, like the applicant in *Adedoja v. Minister for Justice, Equality and Law Reform* [2010] IEHC 406 (Unreported, High Court, 10th November, 2010) at para. 19 *per* Cooke J., the applicant "*failed to take the formal steps necessary to exercise that entitlement*". But even assuming for the sake of argument that such formal steps were not necessary, the second named applicant has not in fact formally established in evidence her Treaty status.
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> (ii). More fundamentally, these points were not made to the Minster by way of submission in advance of the decision. Had they been so made, they would presumably have been dealt with (see my decision in *Jahangir v. Minister for Justice and Equality* [2018] 2 JIC 0102 [2018] IEHC 37 (Unreported, High Court, 1st February, 2018)). It is simply a form of gaslighting the decision-maker to make points to the court that were not made in advance of the decision itself and that could, if they had been so made, been dealt with at that point by the statutory decision-maker. An applicant is simply not entitled to proceed in that manner.
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> (iii). In any event the higher level of scrutiny of a deportation decision on serious grounds of public policy does not apply to the initial period of marriage. Article 28(2) of directive 2004/38/EC of the European Parliament and of the Council 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 only applies if the union national has had the right of permanent residence.

18. I consider these objections are well-founded and that the applicant is not entitled to make this point, not having raised it with the Minister, but if I am wrong about that and the applicants are entitled to make the point, it fails for those reasons.

Order
19. Accordingly the order will be that the proceedings be dismissed.

Postscript
20. Following delivery of the foregoing judgment, Mr. Lynn applied for me to deal with a further point that he contended was not included in the decision. As I indicated in *Walsh v. Walsh* (No. 1) [2017] IEHC 181 [2017] 2 JIC 0207 (Unreported, High Court, 2nd February), paras. 15-16, the parties are entitled and indeed required to make such an application to the court if they feel that anything has been omitted and the course taken by Mr. Lynn was entirely the appropriate one. The point that he said was not addressed was an allegation that the Minister failed to consider and apply art. 24(3) of the EU Charter of Fundamental Rights in circumstances where the analysis refers only to art. 24(2). Mr. Lynn relies on Joined Cases C 356/11 and C 357/11, *O. & S. v. Maahanmuuttovirasto & Maahanmuuttovirasto v. L*. (CJEU, 6th December, 2012).

21. This point was not identified in the list of questions set out in written legal submissions on behalf of the applicant, which is intended to act as an issue paper for the court, as required by practice direction HC 73 para. 15: "*The applicant's written legal submissions shall contain the following sections: A. List of legal questions/issues. Any legal question or issue required to be determined by the court shall be succinctly stated in a numbered list on the first page and presented in the form of an issue paper set out in this section*."

22. Two points in relation to this specific submission are notable. Firstly, it was not specifically made to the Minister. Mr. Lynn relied on a letter of 26th May, 2016 that referred to art. 8 of the ECHR but not this provision. Secondly, art. 24(3) of the Charter is not specifically referred to in the pleadings. Ground 7 refers to art. 24 in general terms, without particularising either this specific issue or any issue in relation to subpara. (3). Para. 6(a) of the Practice Direction draws the attention of applicants to "*Order 84 rule 20(3), which provides that it shall not be sufficient for an applicant to give as any grounds of relief or interim relief an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.*" It seems to me that on either or both of these grounds, but particularly the first, the applicant cannot raise this point. However, if I am wrong about that, the decision acknowledges that the deportation of the first named applicant will constitute an interference with the right to private and family life (see p. 13). That in itself implicitly involves a recognition that there will be a rupture of the family. So we are back to the lack of a necessity for a box-ticking exercise given that the substance of the point was considered. Furthermore, the decision does not in itself contravene art. 24(3). Contact can be maintained in one shape or form notwithstanding the deportation of the first named applicant. So I am rejecting the additional point also.