THE HIGH COURT
JUDICIAL REVIEW

[2017 No. 1012 J.R.]

BETWEEN

LUKASZ PIOTR KRUPECKI AND J.A.M (A MINOR SUING BY HIS FATHER AND NEXT FRIEND LUKASZ PIOTR KRUPECKI)
APPLICANTS

AND
THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(No. 1)
JUDGMENT of Mr. Justice Richard Humphreys delivered on the 20th day of July, 2018

1. The first-named applicant is a Polish citizen born in 1993. He came to Ireland on 10th February, 2008. A number of other family members live in the State. He entered into a relationship with an Irish citizen and they had a child together, who is the second-named applicant, born on 3rd March, 2018. The relationship broke down but the first-named applicant says that he remains on good terms with the mother and, at least prior to his imprisonment, played an active role in the child's life.

2. The first-named applicant has five convictions, three for assault causing harm and two for public order offences. These date back to 11th November, 2011. On 12th August, 2013 the Department of Justice and Equality informed the first-named applicant that it was proposed to make a removal order against him pursuant to the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015).

3. On 27th October, 2016 the first-named applicant was sentenced to three months' imprisonment with the final six months suspended for assault causing harm and is currently serving that sentence in Castlerea Prison. A removal order and an exclusion order were made on 8th May, 2017. The exclusion order requires the first-named applicant to remain outside the State for a three-year period. The first-named applicant then sought a review of those orders and that was refused on 28th September, 2017.

4. Leave to issue the proceedings was granted on 18th December, 2017. The primary relief sought is *certiorari* of the review decision and of the original removal order and exclusion order. Through oversight, the applicants' lawyers failed to appropriately follow up the perfection of the leave order, a situation that also occurred in *R.B. (Bangladesh) v. Minister for Justice and Equality* [2018] IEHC 336 [2018] 4 JIC 2410 (Unreported, High Court, 24th April, 2018) (under appeal).

5. For some reason not currently apparent to me, there is no record in the High Court system of leave having been granted, although I accept that that is a recording error and I accept the information presented to me that it was so granted. The applicants' solicitors' town agents apparently sought the order simply by calling in to the Central Office, but that is not an adequate procedure: see High Court Practice Direction No. 78 at para. 20(a), which requires applicants' solicitors to email the statement of grounds to the asylum, immigration and citizenship registrar following the grant of leave. It does not appear that any correspondence was issued to the registrar seeking the order and certainly nobody drew it to my attention until the substantive hearing date. While no injunction was granted at the leave stage it seems nothing dramatic turns on the lack of a leave order, but the applicants' lawyers now need to comply with the practice direction so that the leave order can be formally perfected forthwith.

6. I have received helpful submissions from Mr. Michael Lynn S.C. (with Mr. Paul George Gunning B.L.) for the applicants and from Mr. Anthony Moore B.L. for the respondent.

Application to amend
7. The application to amend was unfortunately not formally made until the day of the hearing. It was first signalled to me on 11th June, 2018 when I said that there would need to be an explanation on affidavit. The applicants prepared a draft motion dated 15th June, 2018. I was not actually asked to give liberty to issue it and indeed it was not formally issued so as I say the application was only actually made on the day of the hearing.

8. The first point in relation to which an amendment is sought is an alleged failure to conduct a balancing exercise, as sought in a proposed amended ground 7 relying on the judgment of the CJEU in *Land Baden-Württemberg v. Tsakouridis* Case C-145/09 ECR 2010 I-11979. That judgment at para. 50 refers to para. 95 of the Advocate General's opinion, which states that the expulsion decision "*must state precisely in what way that decision does not prejudice the offender's rehabilitation*". Independently of whether the present case is a suitable vehicle for further discussion of this issue, it is hard not to at least raise the question as to whether there is some conceptual confusion here in the sense that the Advocate General's opinion seems to assume that removal, all other things being equal, would interfere with rehabilitation. It might be more correct to say that, at one level, removal enhances rehabilitation in principle as it visits consequences on offending behaviour. No consequences means no incentive to avoid offending and no incentive to rehabilitate. But in any event, leaving that question mark aside, the point based on the *Tsakouridis* judgment has been in existence since 2010. There was no reason whatsoever why it could not have been included in the case when initiated. The applicants' explanation at para. 5 of the affidavit of Conor O'Dwyer does not go anywhere near meeting the threshold for a satisfactory explanation for the delay in raising the point. Independently of that, the judgment of the Court of Appeal in *Balc v. Minister for Justice and Equality* [2018] IECA 76 (Unreported, Court of Appeal, 7th March, 2018) only applies to those with permanent residence. It is true that the decision in the present case stated at p. 9 of 13 that the applicant "*may*" qualify for permanent residence and applied these standards accordingly but that does not mean that the Minister is precluded from arguing otherwise here.

9. The second the application to amend are the proposed amended grounds 1 and 6 relating new complaints regarding the manner in which the decision is dealt with by reference to the Constitution and the EU Charter on Fundamental Rights. Those points were not relied on before the decision-maker. Mr. Moore submits, and I accept, that to seek judicial review on a point that was not made to the decision-maker is simply gas-lighting of the decision-maker and is an inappropriate procedure. Mr. Lynn submits that he is entitled to seek judicial review relief on these grounds because EU law applies. But EU law applies subject to the principle of national procedural autonomy. It is a fundamental misunderstanding of European law to say that if you wave a blue flag, all bets are off in terms of national procedure. Rephrasing the point as one of "*fundamental rights*" does not solve the problem either. Rights have to be properly asserted. In any event, the point is of no substance whatsoever because the rights being sought to be included in the challenge were in fact considered in substance. So on any of those grounds this could not be an appropriate subject matter for an amendment.

10. For these reasons I would decline to allow the amendment. I now turn to the grounds that are pleaded.

Lack of a final date given by which removal should occur
11. In the light of my judgment in *Mirga v. Minister for Minister for Justice and Equality* [2016] IEHC 545 [2016] 10 JIC 0308 (Unreported, High Court, 3rd October, 2016) Mr. Lynn helpfully says that this point is not being pursued.

Failure to have regard to family rights, children's rights, etc.
12. The decision accepted that there would be a certain level of interference with the applicants' family life. Mr. Lynn submits that that did not address interference with the child's family life but that is implicit. Family life is reciprocal. In any event, the decision must be taken as a whole. The child's best interests were also considered. Mr. Lynn complains that the right of the child to the company of his father was not considered. However, that involved taking fragments of sentences in the decision out of context. The Minister specifically said that best interest "*undoubtedly involves having the care and company of both parents.*" Thus the right was considered in substance. That right is implicit in the entire discussion which refers to contact with the father.

13. Complaint was made regarding the discussion referring to the first named applicant's rights rather than the child's rights, but again this is simply nit-picking about the wording, as is clear when one looks at the decision overall. There were also complaints about a lack of narrative discussion but there is in general no obligation on a decision-maker to engage in narrative discussion of an applicant's points as long as those points are considered (that is, taken into account, even if not narratively), which they were here. Complaint is made about a point referred to in the decision that since the applicant has been in prison, this has impacted on family life. That is, almost self-evidently, a perfectly reasonable observation for the Minister to have made.

14. In the decision the Minister considered the first-named applicant's and the child's rights in substance taking the decision as a whole, even if perhaps on some academic standard the wording could have also equally legitimately been phrased differently. A micro-deconstruction of an administrative decision is not appropriate, a point I made previously in *S.W.I.M.S. (Nigeria) v. Minister for Justice and Equality* [2018] IEHC 257 (Unreported, High Court, 19th April, 2018) (under appeal), where I referred to "*a micro-specific critique of isolated sentences in a lengthy decision combined with a failure to situate that critique within the context of the decision as a whole*", at para. 20(vi).

No reasons given for the exclusion period
15. Here, neither the exclusion order nor the accompanying analysis give reasons for having selected three years as the duration of the exclusion order. Nor indeed has the Minster given such reasons subsequently. Applying the Court of Appeal judgment in *Balc v. Minister for Justice and Equality* [2018] IECA 76 (Unreported, Court of Appeal, 7th March, 2018) at paras. 123 to 127 would mean that reasons should be provided. The issue then arises as to whether a decision such as this, which lacks reasons, should be quashed or whether the challenge under this heading should be adjourned pending the decision-maker being directed to give fresh reasons. Mr. Lynn requested that, if this became an issue in the present case, a short period might be afforded to make further submissions on this heading, an application which I am prepared to consider favourably in the circumstances.

Order
16. For these reasons the order will be:

(i). that the application to amend be dismissed;

(ii). that the proceedings be dismissed, other than relief G2 on ground H3; and

(iii). that those elements of the case be adjourned to Monday 23rd July, 2018 for further submissions.