**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2019 No. 11 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, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**(No. 3)**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 15th day of March, 2019**

1. This is the third set of judicial review proceedings seeking to challenge the first-named applicant's removal and exclusion from the State, which was ordered almost two years ago. The first-named applicant is a citizen of Poland who has committed criminal offences during his period of residence in the State. By reason of those offences, he was made the subject of removal and exclusion orders, dated 8th May, 2017. He sought a review of those orders under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015), reg. 25. The review decision issued on 26th September, 2017, affirming the orders. Those review decisions were then challenged in the applicants' first judicial review proceedings [2017 No. 1012 J.R.]. In *Krupecki v. Minister for Justice and Equality (No. 1)* [2018] IEHC 505 [2018] 7 JIC 2007 (Unreported, High Court, 20th July, 2018), I dismissed the challenge to the removal order but found that there had been a lack of reasons for the exclusion order. The applicant asked for an opportunity to make submissions as to whether the order should be quashed or whether further reasons should be directed, and I held a separate hearing on that issue. In *Krupecki v. Minister for Justice and Equality (No. 2)* [2018] IEHC 538 [2018] 10 JIC 0112 (Unreported, High Court, 1st October, 2018) I made an order directing the Minister to give reasons for the three-year exclusion period set out in the exclusion order and adjourned the balance of the proceedings pending the furnishing of those reasons. Reasons were provided by letter dated 27th July, 2018, and the applicants sought and were granted an amendment to the proceedings to challenge the adequacy of those reasons. The proceedings were then adjourned to 1st October, 2018.

2. In the meantime, on 28th September, 2018, the Minister issued a purported review decision under reg. 25 of the 2015 regulations, which examined the applicant's up-to-date situation in the State. The applicants then decided, having regard to the review decision, to discontinue the first set of judicial review proceedings, which were then formally dismissed on 1st October, 2018 (by order amended under the slip rule on 12th November, 2018), with costs to the applicant up to the 20th July, 2018 and no order for costs thereafter, apart from the costs incurred on the mention date of 1st October, 2018 itself, which were ordered to the applicants. The applicants then brought a second set of judicial review proceedings [2018 No. 952 J.R.] challenging the review decision of 28th September, 2018. On the hearing date of those proceedings, 21st December, 2018, the Minister did not contest the relief of *certiorari* and I granted that order, together with costs, to the applicants.

3. The applicants have since then sought a further review by the Minister having regard to what they say is the first-named applicant's up-to-date position, particularly in regard to his rehabilitation and family life, and in the absence of any further decision by the Minister in that regard, have issued the present proceedings. Leave was sought on 14th January, 2019, the substantive reliefs being:

> (i). A declaration that the applicants are entitled to have the exclusion order the subject of an up to date review under regs. 25 or 23(9) of the 2015 regulations prior to the first-named applicant's removal from the State.
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> (ii). An order of mandamus requiring such a review.
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> (iii). An injunction.
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> (iv). A declaration that the first-named applicant has a legitimate expectation of such a further review.
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> (v). If necessary, an order of certiorari quashing the review decision of 28th September, 2017 (although that doesn't arise because the purported review decision has already been quashed).
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> (vi). If the applicants cannot obtain an up to date review of the exclusion order prior to the first-named applicant exclusion, a declaration that the respondents have unlawfully interfered with the applicants' EU law rights.

4. The leave application was adjourned to 21st January, 2019, on which date I granted leave. The respondents, on the return date of 28th January, 2019, sought one week to file opposition papers and gave an undertaking that the first-named applicant would not be removed pending the next mention date. Further time was subsequently sought and opposition papers were ultimately delivered on 15th February, 2019. On 25th February, 2019, a hearing date was fixed. I have received helpful submissions from Mr. Michael Lynn S.C. (with Mr. Paul George Gunning B.L.) for the applicants and from Ms. Siobhán Stack S.C. (with Mr. Anthony Moore B.L.) for the respondents.

**Application for amendment**

5. On the day of the hearing, Mr. Lynn applied for an amendment of the statement of grounds to challenge the validity of reg. 20(11) of the European Communities (Free Movement of Persons) Regulations 2015, by reference to EU law. Allowing such an amendment on the date of the hearing would totally impede that hearing, as it would require an amended statement of opposition and further instructions. Furthermore, this was a point that was there all along even if the applicants' legal advisers had not thought about it prior to their attention being drawn to it by para. 3 of the statement of opposition of 15th February, 2019. I indicated, when refusing the amendment during the course of the hearing, that it would not be appropriate to allow such an amendment at this late stage given the nature of the point being made. Things might be different if the applicants were seeking a purely legalistic adjustment of the statement of grounds and if the statement of opposition could be construed as adequately covering the point sought to be raised. That concept could not apply to a challenge to the validity of a provision of primary or secondary legislation which would, as I mention above, totally impede the hearing. Under those circumstances, the balance of justice was against allowing the amendment

and in addition, there did not seem to be an adequate explanation as to why the amendment had not been sought at an earlier stage.

**Alleged duty to reconsider the exclusion order**
6. The applicants in written legal submissions have set out a number of legal questions which they say arise on the proceedings, the first of which is "*Whether the first named respondent must carry out a review pursuant to Regulations 25, or 23, of the European Communities (Free Movement of Persons) Regulations 2015 of the Exclusion Order made against the first named applicant on 8th May 2017 and affirmed on 26th September 2017, prior to his exclusion from the State, which would address issues not previously considered since the passage of one year and five months, e.g. the first named applicant's on-going positive rehabilitation in the State, his legal obligation to comply with the terms of his suspended sentence which are now in force and require his presence in the State, his residence in the State for more than 10 years, and his ongoing relationship with his son (the second named applicant)?".*

7. The short answer to that question is no, for a number of reasons. First of all, as a matter of principle, any second or subsequent review of a removal of decision is not suspensory. The first-named applicant had already had the benefit of one review procedure, which *was* suspensory. There will in every case be some lapse of time between any such original review and an applicant's actual removal from the State. The Minister cannot be required to be stuck in a permanent spin cycle whereby he must continuously reconsider every decision after every new day that passes. That is doubly so where the delay in removing an applicant is due to the operation of the criminal procedure system, occasioned by an applicant's breach of the criminal law of the State, or to the applicant's availing (albeit lawfully) of recourse to the court to challenge an adverse decision. The decision of the CJEU in Joined Cases C-482/01 and 493/01 *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württembergdealt* 29th April, 2004, ECLI:EU:C:2004:262 concerns a different situation where national law precluded consideration of changed circumstances. That is not the case here.

8. Secondly, in this case the applicant asked the court to strike out the first judicial review application. Nobody forced him to do that. That was a judgment and decision on the applicant's part. That involved an abandonment of any challenge to the removal order and exclusion order. It is therefore an abuse of process to challenge the Minister's decision to act on those orders now on grounds that existed originally.

9. Thirdly, the facts specifically relied on in this case, that is the applicant's "*ongoing*" rehabilitation and "*ongoing*" family life, as put in the applicants' own legal submissions, are just continuations of pre-existing matters and were well within the contemplation of the parties on the date that the first judicial review was struck out. There is simply no fundamental change of circumstances on the facts. The point made by Clarke J., as he then was, in *Smith v. Minister for Justice and Equality* [2013] IESC 4 (Unreported, Supreme Court, 1st February, 2013) at para. 5.5.4 applies here: "*there can be little doubt but that permitting persons to make repeated applications for revocation of deportation orders in the absence of significant new materials or circumstances would contribute to such delays and have an adverse effect on the orderly implementation of the Irish immigration system."*

**Allegation that Circuit Court order precludes removal**
10. The applicants' second legal question is "*Whether the first named respondent is prohibited from removing the first named applicant where, by Circuit Court order, the first named applicant is the subject of a prison sentence in the State, the latter part of which is suspended but under which he can be re-detained for six months if he fails to meet the conditions of that order which includes that he place himself under the supervision of the Probation Service in this State, for a period of one year, i.e. until 20th August 2019?".*

11. The applicants cannot make this point in the present proceedings because the point was there from the outset. Therefore a challenge on this ground amounts to a collateral challenge to the original orders (see paras. 57 to 61 of *K.R.A. v. Minister for Justice and Equality (No. 1)* [2016] IEHC 289 [2016] 5 JIC 1214 (Unreported, High Court, 12th May, 2016)).

12. If I am wrong about that, the order of a court in a criminal case does not constrain the Minister in exercising his powers to remove a non-Irish national. That is particularly so where, as on the facts of the present case, the order can be complied with even in the absence of the applicant. The only obligation of the order here is that the first-named applicant should cooperate with the probation service. That is not interfered with by the first-named applicant's removal from the State (see *Perez v. Canada (Minister for Immigration Citizenship),* 2005 FC 1317; *Bagdonas v. Minister for Justice and Equality* [2015] IEHC 657 (Unreported, MacEochaidh J., 20th October, 2015), affirmed *ex tempore* by the Court of Appeal, Birmingham J., 23rd October, 2015).

**Alleged obligation to consider rehabilitation in a particular manner**
13. The applicants' third question is "*In light of the first named applicant's present and on-going rehabilitation in the State since his release from prison, is the first named respondent obliged to assess the effect exclusion will now have at this point in time on his on-going rehabilitation in line with the approach to rehabilitation set down by the Court of Justice in the case of Tsakouridis, Case C-145/09?"*

14. This point unfortunately is a complete abuse of process because on the day of the hearing of the first judicial review the applicants sought an amendment to include this point (history repeats itself obviously). That was refused (see the No. 1 judgment at para. 7 to 10). A somewhat unexpected feature of the applicants' written and indeed oral submissions was that those submissions did not involve any particular acknowledgment of or even reference to that minor difficulty. Independently of that problem, in any event, this point was there from the outset so it cannot be raised after a challenge to the original orders has been disposed of. That would also be an impermissible collateral attack on the original decisions.

**Legitimate expectations**
15. The applicants' fourth question is "*Whether the first named applicant has a legitimate expectation that the first named respondent will review his case pursuant to Regulation 25 of the 2015 Regulations?"*

16. No such legitimate expectation can be recognised. The purported second regulation 25 decision was quashed on *certiorari*. That does not give rise to a legitimate expectation that the Minister will conduct a further process under that provision. Indeed, insofar as the Minister indicated at that time that the decision was made under an incorrect provision of the regulations, such an express statement would in any rational analysis negative any expectation, legitimate or otherwise, that such a mistake would be repeated. In any event, the situation does not engage the law in relation to legitimate expectation (see e.g. *per* Clarke J. as he then was, in *Cromane Seafoods v. Minister for Agriculture* [2016] IESC 6 [2017] 1 I.R. 119) in particular because the basis of the reg. 25 decision being quashed was that that regulation does not now apply, such a review having already been conducted, and consequently no legitimate expectation that a similar mistake would be made by the Minister could arise. Legitimate expectation does not encompass any expectation that something would happen which is contrary to law. That is the basis on which the Minister consented to the order of *certiorari*.

**Whether the 2015 regulations preclude review of the applicant's circumstances prior to his exclusion and if not whether they are invalid**
17. The applicant's fifth question is "*If the 2015 Regulations do not permit a review of the first named applicant's current circumstances, prior to his exclusion, either by the first named respondent or by an independent tribunal or court, whether those Regulations fail to lawfully protect the applicant's rights under European Union law?*"

18. It is not correct to suggest that the 2015 regulations do not permit a review of the first- named applicant's circumstances prior to removal. Review of the removal order and exclusion order is permitted and has already taken place. A further review of the exclusion order is allowed prior to removal under reg. 23(9)(b) which allows the Minister to conduct such a review "*on his or her own initiative, where information indicating a material change in the circumstances that justified the making of the exclusion order comes to his or her attention".* The Minister's position here is that the circumstances urged by the applicant are simply a continuation of pre-existing rehabilitative and family life circumstances and do not amount to a change of sufficient materiality and substance as to require the Minister to undertake a review on his or her own initiative. Thus the premise of the question posed by the applicant is incorrect. Furthermore, in any event, the regulations have been upheld as valid by the Court of Appeal (see *Balc v. Minister for Justice and Equality* [2018] IECA 76 (Unreported, Court of Appeal, 7th March, 2018) at para. 74 to 80)).

**Suggested reference to the CJEU**
19. At paras. 48 to 49 of the applicant's written submissions it is suggested that questions be referred to the CJEU. In view of the status of these proceedings as the latest iteration of multiple repetitive attacks on the decision to require the first-named applicant to leave the State and insofar as major elements of the proceedings constitute an abuse of process and a collateral attack on decisions previously challenged, and in particular having regard to the fact that the applicants' major points do not arise on the facts because no significant change of circumstance has actually been shown, a reference to the CJEU is neither necessary nor appropriate. Indeed, two of the proposed questions were dependent on amendments to the applicants' pleadings which were refused.

**Undertaking**
20. The urgency in the case arises because, pursuant to reg. 20(8) of the 2015 regulations, the removal order becomes unenforceable on 7th May, 2019, absent a further process of ministerial review and examination. The applicants have run down the clock with multiple and, to an extent, abusive proceedings, and on that basis I will release the respondents from their undertaking not to remove the first-named applicant. That approach is compatible with art. 31(2) of the Citizenship Directive 2004/83/EC, which allows "*actual removal from the territory"* in circumstances "*where the expulsion decision is based on a previous judicial decision*". In this case, the original removal order was the subject of proceedings that were dismissed so art. 31(2) applies and there is no EU law right to remain in the State for any further period.

**Order**
21. The order will be:

(i). that the request to refer issues to the Court of Justice of the European Union be refused;

(ii). that the proceedings be dismissed; and

(iii). that the respondents be released from their undertaking not to remove the first-named applicant from the State.

**Postscript – Costs**
22. Having heard counsel in relation to costs, I will award costs to the respondents including reserved costs to be taxed in default of agreement. As the order for costs in relation to the previous judicial review allowed for the costs of two counsel to the applicants, I will have to make the same order for costs to include the costs of solicitors and two counsel on the part of the respondents. The parties can have liberty to apply if necessary if anything further arises having considered the written version of the judgment. I will further direct that the costs awarded to the respondents in these proceedings may be set off against the costs that they are liable to pay to the applicants under the orders made in the first and second judicial review proceedings.

23. Finally, I should note that having afforded Mr. Lynn the opportunity of considering the implications of any possible stay on the costs order in this case in the context of possible ramifications for terms which would preserve the possibility of set-off against the existing costs orders for the benefit of the applicants, Mr. Lynn informed the court that he was not going to apply for a stay on the costs order.