

APPROVED

[2022] IEHC 98



THE HIGH COURT
JUDICIAL REVIEW

2021 No. 567 JR

BETWEEN

IMRAN ALI

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS
MINISTER FOR HEALTH
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 7 March 2022

INTRODUCTION

1. This matter comes before the High Court by way of an *inter partes* application for leave to apply for judicial review. The proceedings entail a challenge to the validity of the Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) Regulations 2021 (S.I. No. 168 of 2021). These regulations will be referred to in this judgment as “*the impugned regulations*”. The impugned regulations, which have since expired, purported to restrict outbound travel from the Irish State during the summer of 2021.

NO REDACTION REQUIRED

FACTUAL BACKGROUND

2. These judicial review proceedings seek to challenge the validity of certain restrictions on outbound travel introduced in response to the coronavirus pandemic. The impugned regulations had purported to prohibit a person, whose place of residence is within the State, from travelling to an airport or port for the purpose of leaving the State without reasonable excuse. The impugned regulations do not provide an exhaustive definition of what is meant by “*reasonable excuse*”. Instead, a non-exhaustive list of purposes which comprise a “*reasonable excuse*” for leaving the State is enumerated. These include, relevantly, leaving the State in order to attend to vital family matters (including providing care to vulnerable persons).
3. The Applicant is a Portuguese citizen, and, by extension, enjoys citizenship of the European Union with all its attendant rights. His wife and two sons are still residing in Portugal, but plan to move to Ireland in the future when the Applicant has found suitable accommodation for them. The Applicant has averred on affidavit that he went to Dublin Airport on 19 April 2021 and took a flight to Portugal. The purpose of his trip to Portugal was to assist his wife and two sons in extending their immigration permission to remain in that country. (It seems that the family members may be third country nationals, i.e. not EU citizens). The Applicant had been asked at the airport where he was going by a member of An Garda Síochána. The Applicant explained the purpose of his trip, and, seemingly, showed certain relevant emails to the Garda. The Applicant was permitted to board the flight.

4. The Applicant subsequently received a fixed payment notice dated 6 May 2021. The notice alleged an offence described as “*Movement of Persons Airport/Port*” contrary to section 31A (6)(a) and section 31A(12) of the Health Act 1947. The notice stated that the Applicant could pay a fixed payment of €2,000 within 28 days in which case he would not be prosecuted for the alleged offence.
5. There is a procedure provided for whereby the recipient of a fixed payment notice can appeal against the notice by submitting what is described as a “*cancellation request form*”.
6. The Applicant, with the assistance of a friend with fluent English, submitted such a form. The Applicant was subsequently informed that his appeal against the fixed payment notice had been refused as follows:

“I refer to your application for cancellation of the above Fixed Payment Notice which was issued in accordance with the Health Act 1947 as amended.

Having considered your application for cancellation the Cancelling Authority does not deem the excuse provided as reasonable therefore the application for cancellation has not been successful.

As your appeal has been refused your options now are to pay this notice on or before day 28 from the date of issue of the notice or as is your prerogative should you so decide, leave the notice unpaid and it will automatically proceed to Summons stage when a Court date will be allocated and you can outline your case before the presiding Judge.

I trust this clarifies the position on the matter for you and note that as of today’s date the Notice is on Day 27.”

7. As appears, no reasons are given for the decision not to cancel the notice. The letter of refusal bears the date “*1 July 2021*”, but that would appear to be in error. The letter of refusal seems to have been issued on 1 June 2021. In either event, the refusal appears to have been received *after* the 28 day period for the payment of the fixed payment notice had already expired.

8. The Applicant apprehends that he will now be prosecuted for an alleged offence under the impugned regulations. Counsel for the respondents has confirmed, in oral submission, that an application has been made for a summons, but that same has not yet issued.
9. The Applicant instituted the within proceedings on 21 June 2021. An amended statement of grounds was subsequently filed. By order dated 28 June 2021, the High Court directed, pursuant to Order 84, rule 24, that the leave application be made on notice to the respondents to the proceedings (“*the State respondents*”). The order gave directions as to the date by which any replying affidavit on behalf of the State respondents was to be filed. The order also indicated that an application for a “*telescoped*” hearing, i.e. a rolled-up hearing of the leave and substantive application for judicial review, could be made to the court. In the event, no replying affidavits were filed nor was an application made for a “*telescoped*” hearing.
10. The application for leave ultimately came on for hearing before me on 28 February 2022. Out of deference to the careful written and oral submissions of counsel, I reserved judgment to today’s date.

DISCUSSION

11. The State respondents oppose the application for leave to apply for judicial review primarily on the grounds that the Applicant is obliged to ventilate his arguments before the court of trial (presumably the District Court) prior to having recourse to judicial review proceedings before the High Court. It is said, variously, that the Applicant’s case is “*wholly academic*”; that it is not permissible to seek an “*advisory opinion*” from the High Court by way of judicial

review; and that constitutional law and EU law arguments are “*not exam problem questions*”.

12. The State respondents place much emphasis on the existence of what they characterise as a statutory “*defence*” of “*reasonable excuse*” under the impugned regulations. It is said that, in order for the High Court to be able to assess the substance and credibility of the Applicant’s argument that the impugned regulations are “*insufficiently clear*”, the court needs to have an understanding of how the defence of reasonable excuse “*operates in a real world context*”. On the State respondents’ analysis, this necessitates a criminal trial.
13. With respect, these submissions are premised on a reductionist view of the Applicant’s case. As is apparent from the amended statement of grounds, the Applicant has raised significant issues of law in respect of the entitlement of the legislative and executive branches of government to regulate the rights of EU citizens to exit the Irish State. It is pleaded, *inter alia*, that the impugned regulations unlawfully restrict the constitutional right to travel and the right to free movement enjoyed by an EU citizen under the Treaty on the Functioning of the European Union and under the Citizens Directive (2004/38/EC).
14. The Applicant also alleges that the impugned regulations are disproportionate in that they effectively prohibit persons resident in the Irish State from *leaving* without a reasonable excuse, whereas no such reasonable excuse is required by law to enter the State. It is further pleaded that the impugned regulations have no regard to the levels of transmission of the Covid 19 virus in the area of the European Union to which a person is travelling, nor the area of the State from which they are travelling.

15. The Applicant also makes a specific complaint in relation to the procedures governing the issuance of a fixed payment notice and the appeal process against same. Complaint is made that no reasons were given to the Applicant as to why his appeal was unsuccessful.
16. It is inaccurate, therefore, to attempt to characterise the Applicant's case as being largely confined to the interpretation of the concept of a "*reasonable excuse*" for the purposes of the impugned regulations. The case is much broader and challenges the very basis upon which the impugned regulations purport to restrict the right to travel. The grounds alleging that the wording of the restriction is "*insufficiently clear*" to enable the consequences of travelling to be foreseen are but one aspect of the case.
17. The judgment of the Supreme Court in *Osmanovic v. Director of Public Prosecutions* [2006] IESC 50; [2006] 3 I.R. 504 is authority for the proposition that a person facing criminal charges has sufficient standing to challenge the constitutionality of the substantive provisions at issue, and that it is not premature to pursue such a challenge prior to a criminal prosecution.
18. It is incorrect, therefore, to suggest that the Applicant must submit to a criminal trial before he is entitled to pursue a challenge to the validity of the very legislation pursuant to which he is to be prosecuted. The Applicant is entitled to have his challenge determined first. The contrary position put forward on behalf of the State respondents is premised, in part at least, on a failure to distinguish between (i) proceedings which seek a declaration as to the interpretation of criminal legislation; and (ii) those which seek to challenge the validity of that legislation. The judgment of the Supreme Court in *C.C. v. Ireland (No. 1)* [2006] 4 I.R. 1, upon which the State respondents place so much emphasis, falls

into the first category. The present proceedings fall into the latter. Many of the other cases cited by the State respondents are concerned with alternative remedies in judicial review proceedings *simpliciter*, and not with challenges to the validity of legislation.

19. As noted by the Court of Appeal in *Habte v. Minister for Justice and Equality* [2020] IECA 22 (at paragraph 127), the jeopardy of a criminal trial presents a particularly pressing prejudice. The judgment goes on to observe that within the cases there may be a valid differentiation between challenges to the provision on foot of which the plaintiff or applicant is prosecuted, and challenges to evidential provisions around the prosecution; and that there may be potential distinctions between proceedings in which an established factual matrix is necessary before a challenge can be properly adjudicated upon, and those in which it is not.
20. The present proceedings involve a full frontal attack upon the substance of the impugned regulations, rather than merely a challenge to any procedural or evidential rule. Moreover, it is not necessary to await any finding of fact by the District Court. The factual matrix against which the challenge is made is not in dispute. The Applicant has explained, on affidavit, that the purpose of his trip to Portugal was to assist his wife and two sons in extending their immigration permission to remain in that country. Indeed, it appears that this explanation was given, on request, to a member of An Garda Síochána at the airport.
21. The State respondents did not avail of the opportunity afforded to them to file an affidavit in reply to the leave application. It is to be inferred from (i) the refusal of the appeal against the fixed payment notice; and (ii) the fact that an application has now been made for the issuance of a summons, that the State respondents do not accept that the purpose of the trip to Portugal entails a

“*reasonable excuse*”. The State respondents thus take a narrow view of what is meant by a “*reasonable excuse*”, and, presumably, intend to attempt to stand over this strict interpretation at the full hearing of these judicial review proceedings. The compass of the dispute between the parties thus centres on the legal issues, rather than on any factual controversy which requires to be triaged by the District Court.

22. For completeness, it should be recorded that the reliance which the State respondents seek to place on the judgment in *Kennedy v. Director of Public Prosecutions* [2007] IEHC 3 is misplaced. This judgment represents an outlier, and has been commented upon as follows in *Kelly: the Irish Constitution* (Hogan, Whyte, Kenny and Walsh; fifth edition; Bloomsbury Professional) at §6.2.196:

“However, several cases have struck discordant notes. In *Kennedy v DPP* a civil servant challenged an evidential presumption in s 4 of the Prevention of Corruption (Amendment) Act 2001. MacMenamin J in the High Court held that the claim was premature, because the evidential presumption might not have been relied upon; and the judge would have to rule on the interpretation of the words ‘deemed’ and ‘unless contrary is proven’ in the section. The Court was thus ‘invited to deliver judgment on a hypothesis’. The result of this case is questionable; while the High Court was being asked to interpret sections of the Act, this was in the context of seemingly legitimate and weighty challenge to the constitutionality of the section. The *Osmanovic* line of authority would suggest it could perhaps have been allowed.”

* Footnotes omitted.

23. Aside from the question of principle as to the propriety of insisting that a challenger must first submit to a criminal trial, the nature of the challenge here is distinguishable from that in *Kennedy*, being directed to the substance of the restrictions on travel, rather than to any associated procedural or evidential rules.

24. The State respondents have advanced a second line of argument for saying that the application for leave should be refused. Specifically, it was submitted that the pleas in respect of the fixed payment notice are misconceived. With respect, the characterisation of the case actually made by the Applicant is, again, inaccurate. The complaint made is a more specific one relating, in part, to the manner in which his appeal against the fixed payment notice had been addressed and the failure to provide any reasons whatsoever for the refusal of the appeal. More generally, the threshold for arguability has clearly been met in respect of the legislative provisions allowing for a fixed payment notice. The imposition of a fixed penalty of €2,000 is arguably disproportionate to the offence, and of such severity that only a court could impose same.

CONCLUSION AND FORM OF ORDER

25. The Applicant has raised significant issues of law in respect of the entitlement of the legislative and executive branches of government to regulate the rights of EU citizens to exit the Irish State. It is pleaded, *inter alia*, that the impugned regulations unlawfully restrict the constitutional right to travel and the right to free movement enjoyed by an EU citizen under the Treaty on the Functioning of the European Union and under the Citizens Directive (2004/38/EC). The extent to which these rights may be regulated in the public interest by reference to a public health emergency is something which has, as yet, not been fully considered by the Irish Courts. The issue arose tangentially in *Ryanair v. An Taoiseach* [2020] IEHC 461, but did not have to be decided in that case in circumstances where the measure impugned in those proceedings was merely advisory rather than regulatory.

26. The threshold to be met on an application for leave to apply for judicial review is a modest one (*G. v Director of Public Prosecutions* [1994] 1 I.R. 374). This is so even where, as in the circumstances of the present case, the application for leave takes the form of a contested *inter partes* hearing. Notwithstanding that the court has had the benefit of careful argument, it is not finally determining the application for judicial review. It is simply giving effect to what is a safeguard for public authorities which ensures that proceedings against them are subject to a filtering process. It is sufficient to that purpose that a test of “*arguable*” grounds is observed.
27. The precise standard to be met on an application for leave, in terms of the evidential basis for the proceedings, is currently under consideration by the Supreme Court in *O’Doherty v. Minister for Health* [2021] IESCDET 129. This might result in a refinement of this aspect of the test in *G. v Director of Public Prosecutions*. It is not necessary, however, to await the outcome of that appeal for the purpose of this leave application. This is because the factual basis for the present proceedings has been clearly established. I am satisfied, for the reasons outlined at paragraphs 20 and 21 above, that an adequate factual matrix has been established which allows the important issues of law raised to be properly adjudicated upon. I am also satisfied that the within proceedings raise weighty issues of law in relation to the extent to which the Irish State can regulate—by reference to a public health emergency—the right to travel and the right of free movement. To adopt the language of *G. v Director of Public Prosecutions*, the Applicant has demonstrated, on the basis of the facts averred in his grounding affidavit, an arguable case in law for the relief sought in his amended statement of grounds.

28. None of this is to say, of course, that these arguments will necessarily succeed or that it is disproportionate to impose limitations on a person leaving the State by reference to a public health emergency. It is sufficient for the purpose of an application for leave to apply for judicial review to decide that there is an arguable point which should be allowed proceed to the next stage.
29. I will, therefore, make an order granting leave to apply for judicial review pursuant to Order 84, rule 21 of the Rules of the Superior Courts. The stay on any prosecution of the Applicant for the alleged offence under the impugned regulations will be continued. There is no requirement for the Applicant to issue a motion seeking the substantive relief in the proceedings, pending further case management. The standard timetable under Order 84, rule 22 does not apply.
30. I propose to list the proceedings before me, remotely, for case management on Monday, 21 March 2022 at 10.45 am. I will hear the parties on that occasion as to whether the matter should be remitted to plenary hearing pursuant to Order 84, rule 22. I will also hear submissions as to the incidence of the costs of the contested leave application.

Appearances

Conor Power, SC and Michael McNamara for the applicant instructed by BKC Solicitors

Remy Farrell, SC and David Fennelly for the respondents instructed by the Chief State Solicitor

Approved
Gemma S. Mans