Judgment
Title: Balc & Ors -v- Minister for Justice and Equality
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[2016] IEHC 47

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 121 J.R.]

BETWEEN

TRAIAN BALC, DOINA BALC AND ALINA BALC (A MINOR, SUING THROUGH HER NEXT FRIEND AND MOTHER DOINA BALC)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 19th day of January, 2016

Background

1. The applicants are a family of Romanian and resultantly, EU citizens who are living in Ireland. The first applicant is the husband and father of the third applicant. He is married to the second applicant, who is also the mother of the third applicant. The Minister for Justice and Equality ("the Minister") made a removal order which imposed an exclusion period of five years against the first applicant under Regulation 20 (1) of the European Communities (Free Movement of Persons Regulations) (No. 2) 2006 (S.I. No. 656 of 2006) ("the 2006 Regulations"). The removal order was notified to the applicant and his solicitor by letter dated the 26th February, 2015. The first applicant, through his solicitor, applied for an internal review of the decision by letter dated the 3rd March, 2015. An internal review decision was issued to the first applicant by letter of the 5th March, 2015. The first applicant was in the process of serving a sentence of imprisonment which was due to expire on the 7th March, 2015. However he was released on temporary release pursuant to the Criminal Justice Act 1960 on the 6th March 2015. Upon his release he was arrested and taken to Dublin Airport for deportation.

2. On the same date the first applicant's solicitor, Mr. O'Briain, through counsel made an *ex parte* application for leave to apply by way of application for judicial review seeking an order of *certiorari* quashing the decision of the respondent to make a removal order and other reliefs

which will be set out further. This Court ordered that the Minister be restrained from removing the applicant from the jurisdiction up until initially the 16th March and subsequently to the 27th March, 2015. Leave to seek judicial review was granted to the applicants by order of this Court and they were granted leave to seek an amended statement of grounds. The amended statement grounding the application for judicial review dated 27th March, 2015, sought the following reliefs:

> (a) An order of *certiorari* quashing the decision of the respondent as notified to the first named applicant's solicitor by letter of the 25th February, 2015 to make a removal order pursuant to the European Communities (Free Movement of Persons) Regulations 2006 and 2008 (the Regulations) in respect of the first named applicant and quashing said removal order;
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> (b) an order quashing the decision of the respondent as notified to the first named applicant's solicitor by letter of the 25th February, 2015 to apply pursuant to the Regulations for a five year exclusion period from entering the State in respect of the first named applicant;
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> (c) an order of *certiorari* quashing the decision of the respondent as notified to the first named applicant's solicitor by letter of the 25th February 2015 deeming the first named applicant's removal from the State on foot of the removal order as an urgent matter (and failing to afford him the normal thirty day period prior to any removal);
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> (d) an order pursuant to and/ or having regard to the provision of Regulation 20 (7) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 suspending the removal of the first named applicant from the State pending the outcome of these proceedings;
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> (e) without prejudice to the foregoing, an injunction, including an interim injunction restraining the respondent, his servants or agents from removing the first named applicant from the State (and/ or detaining him following his release from the Midlands Prison for that purpose) pending the outcome of these proceedings and/ or pending further order of this Court;
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> (f) as and if necessary, an injunction requiring the respondent to return the applicant to the State pending the outcome of these proceedings in the event of his removal;
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> (g) A declaration that Regulation 20 (1) (b) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 is incompatible with Article 30 (2) and/ or Article 31 of Directive 2004/38/EC;
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> (h) a declaration that Regulation 20 (4) (a) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 and 2008 is incompatible with Article 30 (3) of Directive 2004/38/EC in that it purports to authorise the arrest and detention of the first named respondent at any time following the making of the removal order, without further notice to him;
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> (i) an order pursuant to the inherent jurisdiction of the Court directing the release from detention of the first named applicant on such terms and conditions as the Court may direct and/or directing his release from detention pursuant to O. 84 r.15 Rules of the Superior Courts.
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> (j) A declaration that the proposed removal of the first named applicant from this State (and/ or without breach of prejudice his exclusion for entry to this

State for a period of five years is in breach of the constitutional rights of the applicant pursuant to Article 40.3 of the Constitution and/ or their right to protection pursuant to Articles 7 and 24 of the Charter of Fundamental Rights and/or is in breach of the respondent's obligation pursuant to s. 3 (1) of the European Convention on Human Rights Act 2003 to perform her functions in a matter compatible with Article 8 of the European Convenction on Human Rights

(k) a declation that the European Communities (Free Movement of Persons) (No. 2) Regulations and the procecures contained therein with respect to a review or an appeal against a deicsion to make a removal and/ or exclusion order and/ or said procedures in combination with the supervisory role of the High Court in exercising judical review do not constitute an effective remedy or adequate procedural safeguards within the terms of Article 30 (3) of Directive 2004/38/EC and Article 47 of the Charter of Fundamental Rights;

(l) A declaration that pursuant to Article 30.3 and Article 31 of the Directive and having regard to Article 47 of the Charter, the first named applicant has an entitlement to a review/ appeal against a removal and exclusion order and decision to an independent court or tribunal capable of making findings of fact and law which court or tribunal is required to have the capacity to reverse the decision at first instance;

(m) without prejudice to (a) and (b) above and as and if necessary, an order of *certiorari* quashing the decision of the respondent as notified to the first named applicant and his solicitor by letter of the 5th March, 2015, to affirm the removal order (incorporating the exclusion period);

(n) as necessary and appropriate an order permitting the applicants having regard to the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 (as amended by s. 34 of the Employment Permits (Amendment) Act 2014) to amend this statement of grounds within the period of twenty eight days from the date of the removal order (26th February, 2015).

3. The following are the grounds upon which the relief is sought:

The decision to make the removal order with the exclusion period/removal order

4. The decision making process giving rise to the decision to make the removal order (with the exclusion period) is in breach of the first named applicant's right to fair procedures and natural and constitutional justice as protected by Article 40.3 of the Constitution. The decision is tainted and coloured by pre-judgement and a failure to approach the decision making process in a fair and balanced manner and with an open mind. The removal order (incorporating the exclusion period) is dated the 26th February, 2015. The analysis of file/ memorandum of consideration on which the purported decision to make the removal order is based is also dated the 26th February, 2015. The decision letter, as sent to the first named applicant's solicitor, is dated the 25th February, 2015. Having regard to the above outlined, the decision making process is defective and tainted as the respondent has reached a decision to make a removal order with an exclusion period (and to deem said removal "urgent") in advance of a full proper and adequate analysis and consideration of the case and circumstances or without prejudice to the foregoing, the decision making process is tainted by the appearance of pre-judgement.

5. The decision letter of the 25th February, with accompanying documentation (analysis of file and removal order) were not given to or served on the first named applicant until the 6th March, 2015, after the decision to make the removal order was affirmed following an internal review conducted by the respondent department. The decision to make the removal order and said removal order are invalid and defective by reason of the failure to comply with Article 20 (3) (b) (ii) of the Regulations and Article 30 (2) of the Directive. Furthermore the first named

applicant had an entitlement pursuant to Regulation 20 (3) (b) (ii) to be notified in writing of the removal and exclusion decision and order in a language that he understands and there has been a failure to comply with this requirement.

6. The decision to make the removal order with exclusion period, as notified to the first named applicant's solicitor by letter of the 25th of February 2015 is unlawful by reason of the failure in the analysis conducted and in the decision making process to properly or adequately apply, in the context of a potential expulsion decision, the appropriate legal tests and criteria which apply to European Union citizens exercising free movement rights pursuant to Directive 2004/38/EC. These legal tests or principles, as set down in Directive 2004/38/EC and the jurisprudence of the Court of Justice of the European Union, limits strictly the restrictions which can be imposed on an EU citizen who is resident in the State with particular reference to the EU citizen, such as the first named applicant herein, who has resided in the relevant Member State for more than five years.

7. The decision of the respondent to make the removal/expulsion order (with exclusion period) as notified by letter of the 25th February is unreasonable and irrational and/ or unjustified and disproportionate. In particular the respondent in the analysis and assessment conducted and in the decision making process failed to have due and proper regard for the status of the first named applicant as an EU citizen who had resided in Ireland for in excess of five years (prior to his imprisonment) having regard to circumstances where the first named applicant had a permanent right of residence in this State, an expulsion decision could only legitimately be made on serious grounds of public policy or public security. In the assessment/ analysis conducted and in the decision making process giving rise to the making of the removal order (with the exclusion period) the respondent failed to adequately or properly consider and appreciate the right to permanent residence of the first named applicant (and the second and third named applicants as EU citizens in the State) and the requirement in these circumstances for there to be serious grounds of public policy or public security to justify an expulsion decision. No serious grounds of public policy or public security exists as required by Article 28 (2) of the Directive such to justify the removal of order decision and negate the protections against exclusion enshrined in EU law and the Directive. Article 28 (2) imposes a high threshold which is not met by the conduct which led, in respect of the first named applicant, to one sentence of three years imprisonment, eighteen months of which was suspended.

8. Without prejudice to the foregoing, the respondent in the assessment and analysis conducted and in the decision making process giving rise to the making of the removal order (with the exclusion period) has failed to support on a rational and cogent basis and with adequate reasons, the serious grounds of public policy or security which justify the making of the removal order (with five year exclusion period).

9. The first named applicant does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society as required by Article 17 (2) of the Directive 2004/38/EC such that the contested decision is unlawful.

10. In the decision making process giving rise to the making of the removal order (with the exclusion period) and decision the respondent has failed to have due or adequate regard for the protection of the fundamental rights of the applicants and in particular the second and third named applicants. Article 28 (1) of the Directive requires that the familial and economic situations and social and cultural integration in the host Member State be properly and adequately considered in the context of a potential expulsion decision. In the decision making process and analysis conducted, there is a lack of proportional and fair assessment of all the relevant circumstances of the applicant family. In particular there has been a failure in the assessment to adequately protect and vindicate the rights and best interests of the third named applicant as protected under Article 24 of the Charter and the rights of the family as protected under Article 7 of the Charter and/or the rights of the family as protected under Article 41 of the Constitution and/or Article 8 of the ECHR (in this respect the decision of the respondent is incompatible with the protection afforded the applicant family pursuant to Article

8 ECHR and is in contravention of s. 3 (1) ECHR Act 2003). Having regard to the above outlined, in the decision making process there has been a manifest failure to properly and fairly or in a balanced manner consider the extremely negative and adverse impact on the third named applicant of the removal of her father from the State on the family and/ or to consider and appreciate that it is clearly untenable and not in the best interests of the third named applicant for her and her mother to potentially relocate from Ireland.

11. There has been a failure in the decision making process to adequately respect and vindicate the rights of the second and third named applicants as EU citizens exercising free movement rights in this territory. The decision to make the removal order in respect of the first named applicant does not comply with the principles of proportionality as contained in Article 27 of the Directive. The principle of free movement is a core and fundamental value of the European Union and encroachment on and removal of this right by way of a removal/expulsion order must be attended by an assessment and analysis which properly balances and considers the right of free movement for the applicant family with serious risk to public policy or public security. The decision making process in the first named applicant's case did not meet this criteria.

12. The decision of the respondent as notified to the first named applicant's solicitor by letter of the 25th February to make the removal order (with exclusion period) and the decision making process and analysis giving rise to that decision fails to have due and proper regard to the directly relevant factors and matters. In particular, there has been a failure in the decision making process to have due regard for the remorse shown by the first named applicant in respect of the crime he committed and/ or to have due and proper regard for the rehabilitation process and element attaching to his conviction and the manner in which he has demonstrated to the satisfaction of the relevant authorities (Probation Service) his commitment and willingness to undertake and complete the rehabilitation programmes set out for him. In any balancing exercise conducted and in order to comply with the principle of proportionality as set out in Article 27 of the Directive, the respondent was required to fully and adequately consider these factors and has failed to do so.

13. Without prejudice to all of the foregoing, the decision to impose a five year exclusion period from entering the State on the first named applicant is unreasonable and irrational and in breach of the principle of proportionality. No adequate and cogent reasons have been put forward to justify the imposition of the exclusion period or without prejudice to justify an exclusion period of this length. In determining to impose a five year exclusion period, the respondent in the assessment conducted, has failed in particular to have due and proper regard as required by the Directive, the Charter and Articles 7 and 24, in particular of it and Article 41 of the Constitution for the impact on the family and the second and third named applicant in particular of the imposition of such an exclusion period.

The deeming of the removal of the first named applicant as "urgent"

14. The respondent's decision as notified by letter of the 25th February, 2015, to deem the first named applicant's removal from the State on foot of the removal order as "urgent" is unreasonable and/ or irrational and fails to respect the principle of proportionality. No adequate or cogent reasons are set out or put forward in the decision such as to justify the removal of the first named applicant from the State on an urgent basis or to distinguish his case as an exceptional one such as to justify the deeming of his removal as both "urgent".

15. A decision to deny the first named applicant a thirty day period before a removal order in respect of him is enforced pursuant to Article 30 (3) of the Directive may only be taken in a duly substantiated case of urgency. The respondent's decision to deem the first named applicant's removal as urgent does not meet this criteria and/or without prejudice to that, the respondent has failed as required by Article 30 (3) to set out on an adequate, appropriate and rational basis the reasons why the removal has been deemed "urgent" and to duly a substantiate the case in that respect.

16. The decision to deem the removal of the first named applicant from the State on foot of the removal order as "urgent" is in breach of fair procedures and natural and constitutional justice. The applicants and their legal representatives were denied an opportunity in advance of this decision being made to consider or address that matter and the respondent proceeded to make a decision deeming the first named applicant's removal as "urgent" without affording the applicant family and their solicitor an opportunity to consider any relevant material and documentation relevant to the said decision. Fair procedures and natural and constitutional justice as protected by Article 40.3 of the Constitution required and demanded such an opportunity be afforded and that the respondent make available any relevant information and material in advance of making a decision deeming the first named applicant's removal as "urgent".

17. The decision to deem the first named applicant's removal from the State as "urgent" and to fail to afford him the normal thirty day period pursuant to Article 30 (3) of the Directive before expulsion would take place is in denial of the first named applicant's right to an effective remedy and amounts to a failure by the respondent to comply with the procedural safeguard requirements of Article 31 of the Directive and is in breach of the principle of good administration as protected by Article 41 of the Charter.

Defective and unlawful review/ appeals procedure

18. The procedure put in place and adopted by the respondent for the review of a decision to make a removal order (with exclusion period) as contained in Regulation 20(1) of the European Communities (Free Movement of Persons) Act 2006 is not in compliance with and does not give effect or proper effect to Article 30(3) and/ or Article 31 of the Directive. The respondent has failed to provide the first named applicant with an effective remedy against the removal order decision by way of a review/ appeal to an independent court or tribunal. An internal review conducted by a higher official within the respondent department does not provide an effective remedy or adequate procedural safeguards within the terms and meaning of the Directive and/or having regard to the provisions of Article 41 (Good Administration) and Article 47 (Effective Remedy) of the Charter.

19. There is no procedure or remedy in place under national law giving proper effect to Articles 30(3) and 31 of Directive 2004/38/EC which provides the first named applicant with an effective remedy to an independent court or tribunal capable of making findings of fact and law and with capacity and jurisdiction to reverse the decision to make the removal order and fails to provide the first named applicant with an appropriate appeal forum to have an oral hearing and submit his defence in person.

20. By failing to provide an independent appellant mechanism as set out above, the Regulations fail to transpose fully and effectively Directive 2004/38/EC, and fail to comply with the Charter of Fundamental Rights, such that the respondent is in breach of duty under EU law.

21. The first named applicant is unlawfully denied his right of appeal as provided for by Article 30 of Directive 2004/38/EC such that his removal from the State would be unlawful.

The affirmation decision

22. The decision to affirm the removal order and decision as notified to the first named applicant and his solicitor by letter of 5th March, 2015, is unlawful and invalid by reason of the defective appeals/ review procedure which is in place in this State. This procedure is not in conformity with or giving effect to the relevant procedural safeguards and provisions against expulsion measures as contained in the EU Directive 2004/38. A decision to affirm a removal order (with exclusion period) conducted in a process which fails to provide adequate procedural safeguards and an independent court or tribunal for the conduct of a hearing is inherently unlawful and invalid.

23. The internal review affirmation decision making process conducted by the respondent was

in breach of fair procedures and natural and constitutional justice and is in infringement of the first named applicant's constitutional rights as protected by Article 40.3 of the Constitution and his right to be heard and the right to good administration, as protected by EU law and Article 41 of the Charter. The respondent in the internal review failed to have regard to relevant information, documentation and material and failed to approach the decision making process with an open mind and/ or to conduct the decision making process in a fair and balanced manner.

24. The internal review affirmation decision making process was conducted in breach of fair procedures and natural justice by reason of the undue and unreasonable haste and speed with which that process was both conducted and concluded. It was not conducted in a manner which properly and adequately allowed for and facilitated a fair and balanced decision making process. The internal review decision making process was tainted, coloured and unduly influenced to the detriment and prejudice of the first named applicant and in breach of fair procedures by reason of the classification of the first named applicant by the respondent as a person whose removal from the State was deemed an urgent matter and the determination of the respondent to effect his removal from the State in an urgent manner as notified in the letter dated 25th February. In this regard, the temporary release of the first named applicant from the Midlands Prison on the 6th March, on the day prior to his due and scheduled date for release and him been met by immigration officers outside the prison following that release and being taken to Dublin Airport to board a flight, was also referred to.

25. The decision to affirm the removal order and decision by way of an internal review carried out by the respondent department as notified by letter of 5th March, 2015, is unlawful by reason of the failure in the analysis conducted underpinning said decision to adequately or properly apply the appropriate legal test and criteria for European Union citizens exercising free movement rights pursuant to Directive 2004/38 in the context of a potential expulsion of an EU resident with more than five years residency from a Member State. The respondent in the affirmation decision making process has failed to have due and proper regard for the first named applicant's status as an EU national exercising free movement rights, who has a permanent right of residence in this State and/ or to appreciate that an expulsion decision in those circumstances can only legitimately be valid where there are serious grounds of public policy or public security to justify same.

26. In the internal review assessment and analysis conducted giving rise to the affirmation decision the respondent has failed to support, on a rational and cogent basis and with adequate reasons, the serious grounds of public policy or security which justify affirming the decision to make the removal order incorporating a five year exclusion period. The decision to affirm the removal order with exclusion period is unreasonable and irrational and/ or unjustified and disproportionate. Furthermore, the internal review affirmation decision does not comply with the principle of proportionality as contained in Article 27 of the Directive and fails to have due and proper regard for the core and fundamental nature of the principle of free movement under EU law.

27. In the internal review affirmation process the respondent failed to have due and adequate regard for the protection of the fundamental rights of the applicant family (as required by Article 28(1) of the Directive) and in particular the second and third named applicants, and failed to conduct a proportionate and fair assessment of all of the relevant circumstances of the applicant family and/ or to have due regard for the best interests of the third named applicant and the extremely negative and adverse impact on her and the family of the removal of the first named applicant from the State.

28. The conclusions reached in the internal review decision making process and analysis are unreasonable and irrational by reason of the failure in the decision making process to have due and proper regard for relevant factors with particular reference to this first named applicant's expression of remorse for his crime, the rehabilitation process and element attaching to his conviction, imprisonment and release/ terms of release and the manner in which he has

demonstrated to the satisfaction of the relevant authorities his commitment and willingness to engage with and complete the rehabilitation program set out for him.

The suspension of removal/injunctive relief
29. Having regard to the provisions of Regulation 20(7) of the European Communities (Free Movements of Persons) Regulations 2006 and 2008 in the circumstances where none of the matters specified in Regulation 20(a), (b) or (c) are applicable and where the first named applicant has made an application for leave to apply for judicial review and has sought in that application a suspension of his removal from the State, his removal from the State should be suspended pending the outcome of these proceedings.

30. In circumstances where the first named applicant is in imminent and immediate danger of removal (and exclusion from the State) and having regard to the interests of justice and balance of justice and convenience and having regard to all the circumstances pertaining, including the fundamental EU law rights at stake for the applicant family and their employment and education circumstances in the State, it is necessary, appropriate and prudent that the respondent be restrained from effecting the removal of the first named applicant from this State or his exclusion from the State pending the outcome of this application amending further order of the Court.

Risk of Detention
31. The immediate arrest and detention of the first named applicant and/or risk of same without notice to him pursuant to Regulation 29(4)(a) of the Regulations is incompatible with article 30(3) of the Directive 2004/38 EC and is unlawful.

Affidavits
32. The affidavit to ground the application for judicial review was sworn by Doina Blac, the wife of Traian Blac, sworn on 5th March, 2015. There was also an affidavit sworn by Alina Blac on the 6th March, 2015 and one by Conor O'Briain, solicitor, also sworn on that same date. The first applicant swore an affidavit on 13th March, 2015. I will refer to these affidavits in due course.

History of the applicants
33. The first applicant, Traian Blac is a Romanian national whose date of birth is the 29th November, 1973. He is married to the second applicant, Doina Blac. The third applicant, Alina Blac is the child of the first and second applicants and at the relevant time was aged seventeen years and was a minor.

34. The applicants migrated to this State as a family unit from Romania and have resided in the State for eight years.

35. On the 3rd June, 2010, a twenty one year old female was locked out of her apartment on the North Circular Road, having left her keys inside. She rang the landlord in an effort to get a separate key to gain access. She waited on the staircase for approximately two hours.

36. Whilst sitting on the stairs, this woman heard an argument from another apartment resulting in a female leaving that apartment. At the time, the applicants were also living on the North Circular Road. A short time later, the first applicant came out from the flat before returning.

37. The first applicant then came out of the flat again and knelt down behind the injured party and started to rub her back before he pulled down the shoulder of her top. She asked the first applicant to stop on a number of occasions. At this stage, the first applicant took his penis from his pants and tried to force the injured party's face towards it. The first applicant then forced the woman's face towards his penis. The first applicant then forced the woman's hand onto his penis. The woman tried to run for the front door but was followed and stopped by the

first applicant.

38. The first applicant then grabbed the woman and tried to force her into flat No. 1, an unoccupied dwelling. The woman struggled with the first applicant. She was screaming for him to stop.

39. The first applicant then placed his hands down inside of the woman's underwear. The woman was able to break free at this stage and made it to the front door. Upon reaching the front door, she met with a girl who was about to enter the house. The matter was reported to An Garda Síochána and the applicant was later arrested.

40. The first applicant was then charged with two counts of sexual assault contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, (as amended by s. 37 of the Sex Offenders Act 2001.)

41. Enclosed in the papers is a report from Detective Inspector Andrew Tallon of the Garda National Immigration Bureau and he notes that the first applicant came to the attention of An Garda Síochána on the 18th August, 2009, in relation to a public order incident. No detail is given about this and this Court will not take any account of this information. There is no suggestion that the first applicant was convicted of a public order incident. Detective Inspector Tallon says that on the 24th January, 2014, the first applicant appeared at the Dublin Circuit Court for the three offences and it is common case that the first applicant pleaded guilty on the day of the trial rather than any previous period. The facts which I have previously mentioned were outlined to Judge Hogan who said that "it was a serious offence with quite a degree of aggression and that the student had no way of getting away".

42. Judge Hogan made an order sentencing the first applicant to a period of three years to date from the 24th January, 2014, but suspended the last eighteen months of the sentence on the basis that the first applicant would (a) keep the peace and be of good behaviour towards all the people of Ireland for a period of four years from the date of his release from serving the sentence; (b) that he would put himself under the supervision of the Probation Service for a period of twelve months on the date of his release from serving this sentence; (c) that under the auspices of the Probation Service, he would undergo an alcohol treatment programme and that he would comply with all the requirements of such an alcohol treatment programme. In the event of his non-compliance with the requirements of the alcohol treatment programme, liberty was granted to the Probation Services to re-enter the matter and further that he would engage in offence focused work with this supervising probation officer; and (d) he would undergo a sex offenders programme deemed suitable whilst in custody and if he did not comply with such a programme while in custody, the accused would serve the full sentence and if on his release he did not comply with such a programme, liberty was granted to re-enter the matter. He could be called on any time within the said period of four years to serve the balance of the sentence imposed but suspended. The learned judge directed that he be placed on the sex offenders register. This is actually not a necessary requirement as by virtue of the entering of a plea to two charges, he automatically became subject to the Sex Offenders Act.

The removal order

43. By letter dated the 19th January, 2015, the repatriation section of the Department of Justice and Equality wrote to the first applicant who was then serving a sentence in the Midlands Prison, Portlaoise, notifying him that the Minister proposed to make a removal order in respect of him under the power given to the Minister by Regulation 20(1)(a)(iv) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008.

44. The letter further stated that the reason for the Minister's proposal was that it has been submitted that his presence in the State was serious risk to public policy (this Court's emphasis).

45. The Department noted that the first applicant appeared before Dublin Circuit Criminal

Court on the 24th January, 2014, charged in respect of the sexual assault and noted that the first applicant pleaded guilty to two counts of sexual assualt.

46. The letter continued:-

> *"In the Minister's opinion, your conduct is such as it will be contrary to public policy to permit you to remain in the State."*

47. The Minister further proposed an exclusion period on him preventing him from entering the State for a period of up to five years from the date of his removal.

48. The correspondence also indicated that he was entitled to make written representations to the Minister within fifteen working days of the sending of the letter from the Department. The correspondence further indicated that if no response was received to this letter within fiftheen working days the Minister would assume that he did not wish to make any representations and that a removal order would be issued accordingly. Also attached was a schedule, called Schedule 9, and it relates to representations with a heading "Representations which may be made to the Minister as to why a removal order should not be made" and it cites Regulation 20 (4) (a) and the document indicates that the following representations to the Minister may be made as to why he should not make a removal order in respect of the person concerned, addressing the following points:

1. Name, address in Ireland
2. Nationality
3. Immigration reference number / Person I.D.
4. PPS Number in Ireland
5. Age
6. Duration of residence in the state
7. Family and economic circumstances
8. Nature of the person's social and cultural/ integration in the State
9. State of health
10. Extent of person's links with his/ her country of origin

49. By letter dated the 28th January, 2015, the Repatriation Unit of the Irish Naturalisation and Immigration Service sent a registered letter to the first applicant in the Midlands Prison enclosing a newspaper report on the proceedings in the Dublin Circuit Court on the 24th January, 2014. This correspondence noted that the following news report would be considered in the making of a decision in his case and if he wanted to provide any observations in relation to the news article to forward them for the attention of the Repatriation Unit within seven working days.

50. Conor O'Briain, solicitor for the applicant, wrote to the Repatriation Unit of the Irish Naturalisation and Immigration Service advising that he was instructed to represent the first named applicant and enclosed a letter of authority in that regard and requesting a copy of the letter from the Repatriation Unit to the first named applicant of the 28th January 2015.

51. By letter dated the 9th February, 2015 Mr. O'Briain made representations on behalf of the

applicant in response to the proposal letter of the 19th January. With that letter (which I will outline later) Mr. O'Briain enclosed a significant number of supporting documents including a letter from the third named applicant and confirmation that she participated in a range of community and educational activities and that she has a considerable level of commendable achievement both in terms of her education and extra-curricular activities to reflect that she is completely integrated and deeply rooted in Irish society. Also enclosed with Mr. O'Briain's letter was a body of documentation relating to the third named applicant's schooling. The second-named applicant also submitted a letter in support of the representation. She outlined her employment in which she is engaged in the State in relation to her own integration in Irish society.

Letter from Conor O'Briain, 9th February, 2015

52. Mr. O'Briain wrote to the Removal Orders Unit on the 9th February, 2015 in respect of the notification letter dated the 19th January, 2015 notifying the first named applicant of the Minister's proposal to make a removal order in respect of him. Mr. O'Briain made these points:

> 1. The first named applicant has a right of permanent residence in the State on the basis that he has resided legally for a continuous period of five years in the host member state.
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> 2. Article 28 (2) of the Directive 2004/38/EC states that the host Member State may not make an expulsion decision against Union citizens except on serious grounds of public policy or public security.
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> 3. The proposal to make a removal order in respect of the first named applicant was based on the Minister's opinion that it would be contrary to public policy to permit him to remain in the State. The Minister had not invoked in her letter "*serious grounds of public policy*"- the minimum basis required for a decision to expel a Union citizen who has a right of permanent residence. The Minister's opinion forming the basis for the proposal to make the removal order cannot lawfully ground any subsequent decision to make a removal order. He also referred to the nature of social and cultural integration into the State, mainly by Doina and Alina Balc, the second and third named applicants.
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> 4. The applicant is aged forty-one and has resided in the State for almost eight years. He has no previous convictions in the State, save for the offence for which he pleaded guilty and that he was due for release on the 7th March, 2015.
>
> 5. A removal of the applicant would serve to frustrate the Circuit Court's order and that such a course of action by the Executive power of the State would be inimicable to the public policy consideration of respect for the decisions of the Court. The offence, though utterly reprehensible and acknowledged by the applicant as such, is not part of a pattern of offending on his part.

53. By letter dated the 11th February, 2015, the Repatriation Unit wrote to Mr. O'Briain enclosing the application for a removal order which was sent by a Detective Inspector, Andrew Tallon, and a newspaper article previously referred to.

54. By letter dated the 18th February, 2015, the Repatriation Unit wrote to Mr. O'Briain indicating that the contents of the various representations had been noted and that the applicant's case would now be processed with a full consideration of the material submitted.

55. By letter dated the 25th February, 2015, which was sent by registered post to the Midlands Prison and which the applicant did not appear to receive until the 6th March, the day he was released from prison. However a copy of this letter was sent to Mr. O'Briain, his solicitor.

56. This correspondence refers to the earlier letter from the Removal Section dated the 19th January, 2015, notifying the applicant that the Minister proposed to make a removal order in respect of him under the powers given to the Minister by Regulation 20 (1) (a) (iv) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008.

57. The correspondence confirmed that the removal order had now been signed in respect of him because it had been determined that his presence in the State poses a serious risk to public policy.

58. The correspondence confirmed that it had been concluded, that his conduct was such as to be contrary to public policy to permit him to remain in the State and that in accordance with the Regulations, the exclusion period preventing him from entering the State for a period of five years from the date of his removal had also been placed upon him.

59. Also the letter confirmed that due to the nature of the crimes that the applicant had committed, and in accordance with Regulation 20 (1) (b) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006, it was deemed that his removal from the state is an urgent matter. (Regulation 20 (1) (b) provides that the "time specified in a removal order shall, unless the Minister certifies that the matter is urgent, be not be less than 10 working days in a case where the person concerned has not been issued with a residence card, or less than one month in any other case.")

60. The letter confirmed that as a European citizen he had been entitled previously to live, work and reside in Ireland and this entitlement has now been withdrawn from him, and also notified him that in accordance with Regulation 20 (4) (a) of the Regulations the applicant may be arrested and detained without further notice for the purpose of ensuring his removal from the State.

61. The letter also confirmed that a person to whom the Regulations apply may seek a review of any decision concerning their entitlement to be allowed to enter or reside in the State, and confirmed that a request for a review should contain the particulars set out in Schedule 11 which were enclosed, which provided for some details and provided for a statement of grounds for the purpose of the review.

62. The letter confirmed that in accordance with Article 30 (3) of the Directive 2004/38/EC it had been substantiated that his case was an urgent matter. Attached to the letter of the 25th February, 2015 was a report recommending that a removal order, with the inclusion of an exclusion period of five years being mad,e was attached. In order to facilitate his removal from the State he was required to present himself to An Garda Síochána or an immigration officer who serves him with this notice, and to co-operate in any way necessary to enable his removal.

The basis of the removal decision

63. The removal decision, in its introduction it reviewed the correspondence. A number of points emerged:

> i. No information had been received regarding the first named applicant's social or cultural integration in the State.
>
> ii. In respect of private life it was accepted that if the Minister decided to removed the first named applicant this may constitute an interference with his right to respect for private life within the meaning of Article 7 of the Fundamental Rights of the European Union. However, it was submitted that the proposed interference in this case is in accordance with Irish law, as it pursues a pressing need and a legitimate aim (that is upholding the public policy of the State against a genuine, present and sufficiently serious threat effecting one of

the fundamental interests of society).

iii. It is necessary in a democratic society in respect of a pressing social need, and proportionate to the legitimate aim being pursued within the meaning of Article 7.

iv. The decision confirms that the first named applicant was currently serving a custodial sentence in the Midlands Prison for sexual assault on a female and that he is due for release on the 7th March, 2015.

64. The decision continues that it was believed that the first named applicant represents a threat to public policy. The first named applicant came to the attention of An Garda Síochána in relation to a public order offence on the 18th August ,2009, and the Garda National Immigration Bureau were of the view that the first named applicant is a genuine and sufficient threat to public safety and fundamental interests of Irish society, and they have applied to the Department to have a removal order made in relation to him.

65. The decision deals with the Garda report in relation to what took place and then says that while the first named applicant has only been convicted of one offence, it must be noted that it was a very serious one which resulted in a prison sentence of three years with the final eighteen months suspended. It was particularly noted that crimes of a sexual nature are grievous offences against the person, and are at the upper-end of the scale of criminal behaviour. The decision continues that the rights of the citizen's of the State and the impact on the victim of the first named applicant's crime must be given serious consideration in the making of a decision in this case. The State has a duty to protect it's citizens in the interests of the common good. And the Department is informed that the first named applicant has committed a serious offence in the State which demonstrates that he is a threat to public policy and public safety and refers to the newspaper article.

66. The decision also refers to the terms of the sentence imposed by Judge Hogan that he was instructed to undergo an alcohol treatment and a sex offenders programme suitable for him, and the decision notes that there is no evidence on file nor is there any claim by the first named applicant to show that he has attended a sexual offenders rehabilitation course after either he committed the offence or since his incarceration for it. It was also noted that the Department had not received any evidence to show that the first named applicant had taken steps to address his alcohol abuse issues which seems to be a contributory factor in his criminal behaviour and that, without going for treatment for either his alcoholism or his sexual offending. It was submitted that he continues to pose a serious threat to public policy if allowed to remain in the State, and there therefore existed substantial reasons associated with the common good which required the removal of the first named applicant.

67. In relation to family life, the decision continued that if the first named applicant were to be removed from the State and was to choose to remain in Romania or in another Member State closer to Ireland, there was a possibility that a relationship could be maintained with his wife and daughter through visits and communication during the period that the first named applicant is excluded from the State as part of his removal. It was also open to the second and third named applicants to relocate to whichever EU State the applicant may choose to reside in, if they wished to facilitate a closer relationship between them and the first named applicant, and the recommendation was that a removal order be made. The removal order was signed by the assistant principal officer on the 26th February, 2015.

Letter seeking review

68. By letter dated the 3thrd March, 2015 Mr. O'Briain, sought a review of the decision notified to him by letter dated the 25th February, 2015. He notes that the review application is without prejudice to his client's entitlement to an independent review and to any other application that his client may bring, including any application seeking to challenge in the High Court the decision to make the removal order and to impose the exclusion period of five years. He also

asked for confirmation that no steps would be taken to remove his client from the State. In relation to the Department analysis document, the following points were made:

> 1. The analysis failed to have any, or any proper, regard to the family circumstances of the applicant, in particular to the best interests of his daughter, Alina.
>
> 2. The analysis had in effect proceeded on the basis that the commission of the offence by the applicant of itself proves that he represents the requisite level of threat and that this is in breach of Article 27 (2) of the Directive 2004/28/EC.
>
> 3. And as it also proceeded, in effect, on the basis that the applicant's offence, as it was one of a sexual nature, was sufficient of itself to establish the requisite threat.
>
> 4. A copy of of a letter from the Governor of the Midlands Prison was enclosed, to say that the first named applicant had "essentially commenced a sex offenders programme. He would be brought to further comply with the programme upon his release. Consequently the applicant's release date is not effected." And with respect of the alcohol abuse, as his client has been in prison since January 2014 and is not in a position to consume alcohol,and that it was wholly disproportionate to remove the applicant when he has commenced a sex offenders programme and was about to enter a period of supervised release on condition of undergoing an alcohol treatment programme.
>
> 5. The making of the removal order was premature.
>
> 6. The removal and exclusion order of the applicant would constitute an unjustified breach of the rights of the applicant and his family.

69. By letter dated the 4th March, 2015, Mr. O'Briain's letter of the 3rd March was acknowledged and the content of the correspondence would be fully considered by the in the making of a decision in the review of the first named applicant's case. The letter dated the 4th March, 2015, by way of further letter from Mr. O'Briain to the Department of Justice and noted that, in his letter of the 3rd March, 2015 he had applied on behalf of his client for a review of the removal and exclusion order and decision. He noted that this application for review was made without prejudice to any other application his client may bring, including an application to the High Court by way of judicial review of the removal and exclusion order and decision without prejudice to his entitlement to an independent review of the removal and exclusion order and decision. He also made the point that the deeming by the Minister of his client's removal from the State as an urgent matter and the failure in this regard to afford him the requisite time period before which a removal can take place, is provided for in EU Directive 004/38 is also unlawful. He also sought confirmation that no steps would be taken in relation to his client's removal from the State noting that his client was due for release from the Midlands Prison on the 7th March, 2015.

Administrative review of decision

70. By letter dated the 5th March, 2015, the Irish Naturalisation and Immigration Service enclosed a full review of the first named applicant's case which had been conducted in accordance with Regulation 21 of the European Communities (Free Movement of Persons) Regulations 2006 to 2008. The review was conducted by a principal officer who had not taken part in the initial decision. The initial decision was reviewed together with the correspondence. The background was outlined with the details of the conviction and the grounds upon which the first named applicant seeks to review the decision made, and the grounds of Mr. O'Briain were summed up as:

> 1. The investigating and deciding officers did not have proper regard to Mr.

> Balc's family circumstances and in particular to the best interests of his daughter, Alina.
>
> 2. The investigating and deciding officers were incorrect in concluding that Mr. Balc's commission of an offence/ sexual offence represented a sufficient level of threat to warrant his removal from the State.
>
> 3. The investigating and deciding officers noted that Mr. Balc had not engaged in a sexual offenders course or taken any steps to address his alcohol abuse issues. Mr. O'Briain reports that Mr. Balc has commenced a sex offenders programme while in prison and will engage in an alcohol treatment programme upon his release. He continues tha the removal order should not have been made before Mr. Balc had a chance to undergo probation in accordance with the Circruit Court's order.

71. Under the heading of "Proportionality", the outcome of the first named applicant's serious criminal conduct in Ireland is that An Garda Síochána were of the view that he is a genuine and sufficient threat to the social order and fundamental interests of Irish society, and as such they applied to the Department to have a removal order made in respect of him. After full consideration of the evidence that was available to the investigating and deciding officers in this case, it was determined that the first named applicant's presence in the State did pose a threat to public policy and a removal order was subsequently signed on the 26th February, 2015.

72. The principal officer continued:

> "The purpose of this review is to decide whether the original decision in Mr. Balc's case achieved the legitimate aim of the State for the prevention of crime and disorder in the interests of public safety and the common good. This review will also try to determine if any new evidence is being submitted to show that Mr. Balc's circumstances have changed since the making of the order against him."

73. The principal officer then sets out the nature of the offence and stated that crimes of a sexual nature or grievous offence against the person are at the upper end of the scale of criminal behaviour. In *J.K., D.K., and D. Kovalenko (a minor) v. the Minister for Justice & Ors*. 2013 No. 612 J.R the Court found that the commission of rape was sufficiently serious to justify the invocation of the notion of public policy. The Court held:

> "It is clear from the policy underlying the offences of rape and s. 4 rape and the severe penalties that apply to those convicted of sexual offences in Ireland, not only that the conduct leading to such offences is to be condemned and punished, but that it is a matter of public policy that women and girls be protected from such vicious assaults"

74. The principal officer said then that, having regard to the content of the Garda report, he agrees with the original investigating officer, who adduced that the State had a duty to protect its citizens in the interest of the common good, and that the first named applicant had been found guilty of a serious sexual offence which shows that he poses a sufficient threat to public policy and public safety that warrants his removal from the State. He then reviews the situation of the second and third named applicants and then proceeds to review the letter of Conor O'Briain dated the 3rd February, 2015 which was a letter which included a letter submitted from Daniel Robbins, Governor of the Midlands Prison, which stated

> "Mr. Balc was offered the opportunity to take part in the Building Better Lives Programme for sex offenders in April 2014 but he declined. However in October 2014 he began to reengage with the Probation Service. The Probation Service are carrying out a risk assessment for the purpose of enrolling him in the Safer Lives Programme on his release. There is a sexual offender programme which is run in the community and risk assessment being carried out in the first part of that programme.

75. The principal officer continued:

> "Having regard to the evidence in this case I am of the view that Mr. Balc has committed a very serious sexual assault which shows his presence and status is a threat to public policy and public safety and warrants his removal from the State. The right of the citizens of the State and the impact on the victim of Mr. Balc's crime must also be given serious consideration in the making a decision in the review of this case.
>
> I am in agreement with the original deciding officer and investigating officers in this case who concluded that the Irish public would be best served if Mr. Balc were to be removed from Ireland as soon as possible. I am satisfied that in the original decision Mr. Balc's case was proportionate and reasonable to the legitimate aim being pursued which is the prevention of crime and disorder in the interests of public safety."

He submitted that the making of the removal order was proportionate and reasonable to the legitimate aim.

Release and arrest

76. On the 6th March, 2015, the applicant was released by way of a temporary release for "pre-release/ re-socialisation pursuant to the Criminal Justice Act 1960." Upon his release he was arrested and taken to Dublin Airport for the purpose of his removal to Romania and as previously indicated in this judgment, the first named solicitor, Mr. O'Briain, through counsel made an ex parte application for leave to apply by way of application for judicial review and this Court ordered that the Minister be restrained from removing the applicant from the jurisdiction up to the hearing of this matter and the judgment of the Court in relation to same.

The European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. 656/2006)

77. These Regulations were for the purposes giving effect to Directive 2004-38-EC of the European Parliament and of the Council of the 29th 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. The relevant regulations are:

> i. "*12. (1) Subject to paragraph (3) and Regulation 13, a person to whom these Regulations apply who has resided in the State in conformity with these Regulations for a continuous period of 5 years may remain permanently in the State."*
>
> ii. Regulation 14 refers to family members of a Union citizen and the acquisition of the right of permanent residence after lawfully residing in the state for a period of five consecutive years.

78. Regulation 20 [(1) (a) deals with removal from the state:

> *"20. (1) (a) Subject to paragraph (6), the Minister may by order require a person to whom these Regulations apply to leave the State within the time specified in the order where-*
>
> > *(i) the person has been refused a residence card or a permanent residence certificate or card,*
> >
> > *(ii) the person refuses to comply with a requirement under Regulation 19 or 22,*
> >
> > *(iii) the person is no longer entitled to be in the State in accordance with*

the provisions of these Regulations, or

(iv) in the opinion of the Minister, the conduct or activity of the person is such that it would be contrary to public policy or it would endanger public security or public health to permit the person to remain in the State.

(b) The time specified in a removal order shall, unless the Minister certifies that the matter is urgent, be not be less than 10 working days in a case where the person concerned has not been issued with a residence card, or less than one month in any other case.

(c) The Minister may impose an exclusion period on the person concerned in a removal order and that person shall not re-enter or seek to re-enter the State during the validity of that period.

(d) 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.

(e) A removal order made on grounds referred to in subparagraph (d) which has not been enforced after the expiry of more than 2 years from the date it was made shall not be enforced unless the Minister is satisfied that the circumstances giving rise to the making of the order still exist.

(f) A removal order shall be in the form set out in Schedule 8.

(2) (a) Where the Minister proposes to make a removal order he or she shall notify the person concerned in writing of his or her proposal and, where necessary and possible, the person shall be given a copy of the notification in a language that he or she understands.

(b) A notification under this paragraph shall contain -

(i) unless the Minister certifies that it would endanger the security of the State to make them known, the reasons giving rise to the proposal referred to in subparagraph (a),

(ii) a statement that the person concerned may make representations as set out in Schedule 9 to the Minister within 15 working days of the sending to him or her of the notification, and

(iii) if the Minister proposes to impose an exclusion period on the person concerned in the removal order, the proposed duration of the exclusion period.

(3) (a) In determining whether to make a removal order and whether to impose an exclusion period in respect of a person the Minister shall take account of -

(i) the age of the person,

(ii) the duration of residence in the State of the person,

(iii) the family and economic circumstances of the person,

(iv) the nature of the person's social and cultural integration with the

State, if any,

(v) the state of health of the person, and

(vi) the extent of the person's links with his or her country of origin.

(b) Where the Minister decides that a removal order should be made, he or she shall -

(i) make the removal order, and

(ii) notify the person in writing, where necessary and possible in a language that the person understands, of his or her decision and, unless the Minister certifies that it would endanger the security of the State to make them known, of the reasons for the decision.

(c) A notice under subparagraph (b)(ii) may require the person the subject of the removal order to do any one or more of the following for the purpose of ensuring his or her removal from the State -

(i) present himself or herself to such member of the Garda Síochána or immigration officer at such date, time and place as may be specified in the notice,

(ii) produce any travel document, passport, travel ticket or other document in his or her possession required for the purpose of such removal to such member of the Garda Síochána or immigration officer at such date, time and place as may be specified in the notice,

(iii) co-operate in any way necessary to enable a member of the Garda Síochána or immigration officer to obtain a travel document, passport, travel ticket or other document required for the purpose of such removal,

(iv) reside or remain in a particular district or place in the State pending removal from the State,

(v) report to a specified Garda Síochána station or immigration officer at specified intervals pending removal from the State,

(vi) notify such member of the Garda Síochána or immigration officer as may be specified in the notice as soon as possible of any change of address.

(d) Where a notice under subparagraph (b)(ii) contains a requirement to do an act specified in subparagraph (c), a member of the Garda Síochána or immigration officer may, if he or she considers it necessary for the purpose of ensuring the removal of the person concerned from the State, require the person in writing to do any one or more of the acts specified in subparagraph (c) and any such further requirement shall have effect as if it were a requirement in a notice under subparagraph (b)(ii).

(e) A further requirement under subparagraph (d) shall, where necessary and possible, be given to the person concerned in a language that he or she understands.

(4) (a) A person to whom a notice under paragraph (3)(b)(ii) has been issued

may without further notice be arrested and detained under warrant of an immigration officer or member of the Garda Síochána in any of the places listed in Schedule 10 in the custody of the officer or member of the Garda Síochána for the time being in charge of that place for the purpose of ensuring his or her departure from the State in accordance with the removal order concerned.
(b) For the purposes of subparagraph (a), an arresting officer shall inform the Member in Charge in the case of a station, or the Governor, in any other case, of the arrest and direct that the person be detained until further notice.
(c) A person arrested and detained under subparagraph (a) may be detained only until such time (being as soon as is practicable) as he or she is removed from the State in compliance with the removal order concerned.

(d) A person arrested and detained under subparagraph (a) may be placed on a ship, railway train, road vehicle or aircraft about to leave the State by an immigration officer or a member of the Garda Síochána, and shall be deemed to be in lawful custody whilst so detained and until the ship, railway train, road vehicle or aircraft leaves the State.

(e) The master of any ship and the person in charge of any railway train, road vehicle or aircraft bound for any place outside the State shall, if so required by an immigration officer or a member of the Garda Síochána, receive a person in respect of whom a removal order has been made and his or her dependants, if any, on board such ship, railway train, road vehicle or aircraft and afford him or her and his or her dependants proper accommodation and maintenance during the journey.

(5) (a) Paragraph (4) shall not apply to a person who is under the age of 18 years.

(b) If and for so long as the immigration officer or, as the case may be, the member of the Garda Síochána concerned has reasonable grounds for believing that the person is not under the age of 18 years, paragraph (4) shall apply as if he or she had attained the age of 18 years.

(c) Where an unmarried child under the age of 18 years is in the custody of any person (whether a parent or a person acting in loco parentis or any other person) and such person is detained pursuant to this Regulation, the immigration officer or the member of the Garda Síochána concerned shall, without delay, notify the Health Service Executive of the detention and of the circumstances thereof.

(6) (a) A removal order may not, except on serious grounds of public policy, or public security, be made in respect of a person to whom these Regulations apply, where the person has an entitlement to reside permanently in the State.

(b) A removal order may not, except on imperative grounds of public security, be made in respect of a Union citizen who -

(i) has resided in the State for the previous 10 years, or

(ii) subject to subparagraph (c), is a minor.

(c) Subparagraph (b)(ii) shall not apply where it is in the best interests of the minor concerned that he or she should be removed from the State.

(7) An application by or on behalf of a person to whom these Regulations apply for leave to apply for judicial review against a removal order shall not suspend the removal of the person concerned where -

(a) the removal decision is based on a previous judicial decision,

(b) the person concerned has had previous access to judicial review, or

(c) the removal decision is based on imperative grounds of public security.

(8) The Minister may, of his or her own volition or on application made by the person concerned after he or she has complied with a removal order, by order amend or revoke such an order."

79. Regulation 21 is headed "Review of Decisions":

"21. (1) A person to whom these Regulations apply may seek a review of any decision concerning the person's entitlement to be allowed to enter or reside in the State.

(2) A request for review under paragraph (1) shall contain the particulars set out in Schedule 11.

(3) A review under this Regulation of a decision under paragraph (1) shall be carried out by an officer of the Minister who -

(a) is not the person who made the decision,
and

(b) is of a grade senior to the grade of the person who made the decision.

(4) The officer determining the review may -

(a) confirm the decision the subject of the review on the same or other grounds having regard to the information provided for the review or substitute his or her decision for the decision the subject of the review, or

(b) set aside the decision and substitute his or her determination for the decision."

Directive of the European Parliament

80. EU Directive 2004-38-EC: Chapter 4 of these Regulations under the heading of "Right of Permanent Residence" states, under Article 16 headed "General Rule for Union citizens and their family members":-

"1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years."

Article 27, which is headed "General Principles":-

"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public

health. These grounds shall not be invoked to serve economic ends.

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.

Article 30 deals with notification of decisions:-

"1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification."

Article 31 deals with procedural safeguards:-

"1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

– where the expulsion decision is based on a previous judicial decision; or

– where the persons concerned have had previous access to judicial review; or

– where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory

pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory."

Submissions of the applicant in relation to the entitlement to challenge the original removal order decision

81. Counsel on behalf of the applicant submitted that the statement of opposition of the respondent argues that the applicants were not entitled to maintain simultaneous challenges both to the original decision to make a removal order and to the internal-review decision. The respondent argues that the internal review decision superseded and replaced the initial decision to make a removal order and it is argued by the respondent that the applicants, having initiated the internal review procedure, are not now entitled to impugn the initial decision in these proceedings. The applicants submit that this objection of the Minister is unfounded. As a matter of law any decision made by the Minister is in accordance with the *Carltona* doctrine enunciated by Lord Greene MR in *Carltona Ltd. v. the Commissioner of Public Works* [1943] 2 All ER 560. Counsel stated that this was expressly approved by the Supreme Court in *Devanney v. Shields* [1998] 1 IR 230. Accordingly, as a matter of law, the internal review merely involves the Minister taking a second look herself as to whether a removal order is warranted, rather than involving any manner of independent oversight. Counsel suggested that the purpose of the internal review may be to save court time, resources and costs by giving the Minister a second chance to correct a bad decision before it's subject has to go to the expense of initiating judicial review proceedings. Counsel further submitted that the 2006 Regulations were made by the Minister under s. 3 of the European Communities Act 1972 for the purpose of giving effect to Directive 2004/38/EC (the Directive), and he quoted Regulation 20 (7) which provides:

"(7) An application by or on behalf of a person to whom these Regulations apply for leave to apply for judicial review against a removal order shall not suspend the removal of the person concerned where -
(a) the removal decision is based on a previous judicial decision,

(b) the person concerned has had previous access to judicial review, or

(c) the removal decision is based on imperative grounds of public security."

Accordingly counsel argued that Regulation 20 (7) has the effect that seeking leave to apply for judicial review of a removal order ordinarily suspends removal and argued that there was no similar provision in the Regulations suspending removal where leave to apply for judicial review is sought of an internal review decision.

Submissions on behalf of the respondent

82. Counsel for the respondent states that the applicant requested a review of the initial decision to make the removal order by letter dated the 3rd March, 2015. The respondent's officers conducted such a review and made a decision on the 4th March, 2015. The decision on the review superseded and replaced the initial decision to make the removal order. The respondent's reasons as set out in the decision on the review are expressly different from those in the initial decision and supersede the reasoning of the initial decision. Having initiated the review procedure which led to the making of a new decision on review, the applicants are not now entitled to impugn the initial decision in these judicial review proceedings.

83. Counsel for the respondent referred to a number of cases involving the procedure under the Refugee Act 1996 (as amended). This Act gave effect to the Convention Relating to the Status of Refugees, the Protocol relating to same and the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States (Dublin Convention). In particular, counsel referred to the decision of Hedigan J. in *BNN v Refugee Applicatons Commissioner* [2008] IEHC 308 and *Kayode v. the Refugee Applications*

Commissioner, a judgment of Murray CJ. in the Supreme Court on 28th January 2009.

84. Counsel also referred to *Lamasz and Gurbuz v. the Minister for Justice Equality & Law Reform* [2011] IEHC 50 which considered the issue of administrative review under Regulation 21 of the same regulations as those applicable to the present case in which Cooke J. stated:

> *"The Court recognises that in the normal course the exercise of its jurisdiction in judicial review would not extend to a first instance decision of this kind when the error or defect is capable of being remedied by completion of the available administrative review procedure. That is especially so in cases where the reason for refusal is based on a lack of documentation or a failure to provide an explanation sought so that the administrative review is particularly apt to resolve the issue."*

85. Counsel further argued that the review had been determined by the time these proceedings were initiated and it was also unfair and prejudicial to the respondent to require her simultaneously to defend two decisions in relation to the same issue.

Decision of the Court on the entitlement to challenge the original removal order decision

86. In respect of the *Carltona* principles, the Supreme Court held in *Devanney v. Shields* [previously cited] that the principle outlined in *Carltona* was a fundamental concept which enabled democratic government to work. However the decision of Hedigan J. in *BNN v. the Refugee Applications Commissioner* [previously cited] is more helpful in dealing with the issue of the original decision. In it Hedigan J. stated:

> *"38. Having assessed the merits of the applicant's case, I now turn to consider whether judicial review is the appropriate remedy in this case, or whether the more appropriate course of action would be to leave the applicant to her remedy on appeal.*
>
> *39. In addition to commencing the within proceedings, the applicant has lodged a Notice of Appeal to the RAT, therein requesting a full oral hearing. The applicant argues, however, that judicial review is the appropriate remedy because there has been a fundamental flaw in the procedure followed, thereby bringing ORAC outside of jurisdiction. The respondents argue that all of the matters raised in the present proceedings are capable of being dealt with on appeal, and that the applicant would, in fact, be in a better position before the RAT than before this Court, as she would be able to give evidence herself at the RAT oral hearing. The respondents accept that applicants are entitled to fair procedures at every stage of the process, but suggest that a breach of fair procedures at the ORAC stage does not, per se, entitle an applicant to judicial review. Rather, they submit that in order for judicial review to be available in respect of an ORAC decision, it would be necessary for an applicant to demonstrate flaws that are far more fundamental than those alleged in the within proceedings."*

Hedigan J. continued at para. 41:

87. *"41. Guidance as to how the Court is to approach the question of alternative remedies may be gleaned from the decided case law on the subject. While the law in this area has recently been subject to refinement, particularly with respect to its application in the area of asylum and immigration law, the decision of the Supreme Court in The State (Abenglen Properties Ltd) v Dublin Corporation [1984] IR 381, remains particularly instructive. In that case, O'Higgins J. stated that "while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."*

88. Hedigan J. took the view that:

> *"45. It is clear in the light of this series of recent decisions that it is only in very rare and limited circumstances indeed that judicial review is available in respect of an ORAC decision."*

Accordingly he refused the application for *certiorari*.

89. In *Lamasz and Gurbuz v. the Minister for Justice Equality & Law Reform* [previously cited] Cooke J. dealt with the issue of the Minister's decision to refuse a "residence card". In that case an application was made on behalf of the second named Applicant pursuant to Regulation 7 (1) of the European Communities (Free Movment of Persons) (No 2) Regulations 2006 on the basis that he was a family member of a Union citizen, the first named applicant, who satisfied the condition prescribed in Regulation 6 (2) (a) (i), namely that of being in employment in the State. The EU Rights Section of the Department refused the application on the basis of "unsatisfactory evidence of the exercise of rights". The applicant's solicitors requested a review of that decision. At para. 23, Cooke J. states:

> *"23. The Court recognises that in the normal course the exercise of its jurisdiction in judicial review would not extend to a first instance decision of this kind when the error or defect is capable of being remedied by completion of the available administrative review procedure."*

90. In this case the applicant, rather than seeking a judicial review of the original decision, requested a review of the initial decision and by the time these proceedings were initiated the review had been determined. In these circumstances the Court is of the view that judicial review cannot extend to a first instance decision of this kind where there is an available administrative review procedure. In these circumstances the decision of this Court is that the only decision that can be reviewed in this case is the internal review procedure.

Submissions of the applicants in relation to "the State's redress procedures does not comply with the Directive"

91. The applicants submit that the redress procedures available in the State to challenge a removal order (the internal-review procedure and judicial review) do not either separately or cumulatively comply with the redress procedures required by the Directive. The applicants submit that the redress procedure required must have all of the following features:

1. it must be independent;

2. it must be judicial;

3. the court must be able to take into account factual matters that occurred after the removal decision to adjudicate on whether the person concerned is a "present threat" to a matter such as public security;

4. the person in question must be able to avail of an oral hearing before the court in which he or she may submit his or her defence in person.

92. The applicants submit that the internal review procedure does not constitute a lawful redress as it is not independent, it is not judicial and does not allow for an oral hearing.

93. Judicial review does not constitute lawful redress as a court cannot take into account factual matters that happened after the removal decision to adjudicate on whether the person concerned is a "present threat" to a matter such as public security and the person concerned cannot appear before the Court to submit his defence in person (which would require the Court to be able to consider fresh oral evidence to the effect he no longer presents a present threat to a matter such as public security).

94. The applicants quoted Recital 26 of the Preamble in the Directive:

> "In all events, judicial redress procedures should be available to Union citizens and their family members who have been refuse leave to entry or reside in another Member State."

95. Article 30 (3) of the Directive provides:

> "The notification shall specify the court or administrative authority [this Court's emphasis] with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification."

96. Article 31 (1) of the Directive states:

> "The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures [this Court's emphasis] in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health."

97. Article 31 (3) of the Directive provides:

> "The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28."

98. Counsel for the applicants submitted that Article 47 of the Charter requires a redress procedure. The applicants also state that the redress procedure must be judicial. In an interesting argument presented by David Leonard BL for the applicants, the redress procedures must be judicial as borne out by consideration of the *travaux préparatoires* for the Directive. He proceeded to explore the role of *travaux préparatoires* to provide clarification of EU Directives. In summarising Mr. Leonard's argument the applicants submit that the Court must be able to consider new evidence of factual matters i.e. that the judicial redress required by the Directive must be such that the Court is able to take into account factual matters that occurred after the removal decision. This is because there may [this Court's emphasis] be a change of circumstances pointing to the cessation or substantial diminution of the present threat that the conduct of the person concerned is said to constitute to the requirements of public security or public policy. Quoting from *Orfanopoulos* and *Oliveri* [2004] ECR 1 5257 the applicants submit that redress is meaningful only where the status of the threat to public policy or public security can be examined at the time the review decision is taken rather than being artificially limited to how matters stood at the time the decision being challenged was taken.

99. This Court notes that there have been lengthy delays in the past in the High Court's Asylum, Immigration and Citizenship list. This case has been given priority.

100. The applicants pointed to a judgment of McDermott J. In *PR v. the Minister for Justice* [2015] IEHC 201. The first named applicant was a Polish national who was married to the second named applicant and the third named applicant was their daughter in a similar situation to the applicants in the present case. On the 7th June, 2012 the first named applicant was sentenced to three years' imprisonment, the last sixteen months of which were suspended in the Dublin Circuit Criminal Court in respect of six counts of sexual assault. The Irish National Immigration Service (INIS) issued a removal-order against him which contained an exclusion order for a ten year period. An internal review of this decision was sought and submissions were made on his behalf. The INIS reaffirmed the removal-order and the ten year period of exclusion. The judicial review was instituted in respect of that decision. A substantive hearing of that application was commenced before Mac Eochaidh J. in the High Court in May 2013 which was adjourned, part-heard and following which negotiations and the proceedings were struck out by consent on the 16th July, 2013. The case was settled on the basis that the review decision of the Minister would be withdrawn and that the case would be reconsidered in the context of the information exhibited in the judicial review proceedings. The applicant was

released from prison having served three quarters of the custodial element of the sentence and further evidence and material was submitted before a review decision was issued affirming the removal order. A review decision was issued reaffirming the removalorder in September 2013 and an application for leave was made. Counsel for applicant pointed to a statement of McDermott J. as follows:

> *"34. It is important to emphasise that this Court's role is not to review the merits of the decision made by the Minister. The applicants must establish that by reason of the failure to apply the legal principles or a misapplication of legal principles, the decision challenged is fundamentally flawed."*

And further:

> *"… [T]he High Court could not on judicial review entertain further evidence beyond that considered by the decision maker when determining the… review."*

Counsel for the applicant submits that the inadequacy of judicial review as a remedy is analogous to an inadequacy for the purpose of Article 39 of the Directive and quoted from the following judgments: *MN v. the Minister for Justice* [2014] IEHC 638; *HID (a minor suing by her mother and next friend ED) and BA v. the Refugee Applications Commissioner & Ors.* (Cooke J.) [2011] IEHC 33; and *SUN (South Africa) v. Refugee Applications Commissioner* [2012] IEHC 338 (Cooke J.). Counsel submitted that the lack of full merits review and the inability to receive fresh evidence limited the Court in being able to engage with a relevant issue in the case, whether the first applicant knowingly turned down an offer of a sex offenders' course in April 2014. If the Court had the power to examine the facts and circumstances with which the removal-order decision was based, it could adjudicate on the applicant's indication that he was not aware that he was being offered an opportunity to participate in such a programme.

101. Counsel for the applicants also submitted that an oral hearing was required where the defence may be submitted in person. This relates to Article 31 (4) of the Directive which provides:

> "Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory."

Article 31 (4) requires that the person challenging a removal measure may be permitted to present his defence in person before the Court. This, however, appears to relate to a situation where an applicant is excluded from the territory pending the redress procedure and that the applicant is entitled to present his defence. In this Court's view this is not the situation of the applicants in this case.

Submissions on behalf of the Respondent in relation to "the State's redress procedures don't comply with the Directive"

102. Counsel on behalf of the respondent submitted that the applicant's arguments in relation to the redress procedures available are academic and irrelevant to the case. He states that the first named applicant applied for a review of the decision to make the removal-order but that no request was made for an oral hearing. Counsel pointed out that Article 31 (1) and (3) of Council Directive 2004/38/EC (The Free Movement Directive) provide as follows:

> "1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
>
> …
>
> 3. The redress procedures shall allow for an examination of the legality of the

> decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28."

103. He submitted that Article 31 (1) required that the person effected should have access to judicial and, where appropriate, administrative redress procedures. The Directive therefore requires access to judicial redress procedures and permits the Member State to allow for administrative redress procedures where this is appropriate. Under Article 31 (3), one or other procedure has to follow where an examination of the legality of the decision as well as of the facts and circumstances on which it is based as well as its proportionality. It is not however, according to counsel for the respondent, necessary for each form of redress procedure to allow for both an examination of the legality of the decision and of the facts and circumstances on which it is based. All that is required is that the redress procedures in their totality provide the facilities identified in Article 31 (3).

104. Counsel for the respondent submitted that through Regulation 21 of the 2006 Regulations that the State is provided for administrative redress. Judicial redress is available through judicial review. Regulation 21 (4) provides that the reviewing officer (who must be a different person from the one who made the initial decision and be of more senior grade) may:

> a. confirm the decision the subject of the review on the same or other grounds having regard to the information provided for the review or substitute his/her decision for the decision the subject of the review; or
>
> b. set aside the decision and substitute his/her determination for the decision

Counsel suggest that this satisfies the requirement of Article 31 (3) that a redress procedure has to allow for an examination of the facts and the circumstances on which the decision was based as well as its proportionality and he quoted s. 5 (1) of the Illegal Immigrants Trafficking Act 2000 as substituted by s. 34 of the Employment Permits (amendment) Act 2014 which provides:

> "5. (1) A person shall not question the validity of—
>
> …
>
> (k) a removal order under Regulation 20(1) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006),
>
> …
>
> made on or after the date on which section 34 of the Employment Permits (Amendment) Act 2014 comes into operation, otherwise than by way of an application for judicial review under Order 84 of Rules of the Superior Courts."

The same statutory provision applied to a decision of the Refugee Applications Commissioner under s. 13 of the Refugee Act 1996. Counsel quoted from *El Menkari v. the Minister for Justice Equality and Law Reform* [2011] IEHC 29, a decision of Cooke J., and a further decision of Cooke J. in *Saleem v. the Minister for Justice Equality and Law Reform* [2011] IEHC 49. He also cited *Lamasz and Gurbuz v. the Minister for Justice Equality and Law Reform* [previously cited]. He also cited the case of *Mohamud and Ali v. the Minister for Justice Equality and Law Reform* [2011] IEHC 54, a decision of Cooke J. He also quoted from the decision of *PR v. the Minister for Justice Equality and Law Reform* [previously cited], the decision of McDermott J. Counsel also argued that the crucial distinction between Article 39 of the Procedures Directive and Article 31 of the Free Movement Directive is that the former requires an "effective remedy before a court or tribunal", while the latter requires judicial and, where appropriate, administrative redress procedures. If the Free Movement Directive had been intended to

require the facility of an unlimited appeal before a court or independent tribunal it would have said so.

The Court's decision on "the State's redress procedures don't comply with the Directive

105. The judgment of Cooke J. in *El Menkari v. the Minister for Justice Equality & Law Reform* [previously cited] finds that Article 31 of the Free Movement Directive requires the availability of procedures in both judicial and administrative redress against adverse decisions. He said:

> *"The review provided for in Regulation 21 is clearly an "administrative review" in that it is allocated to a Departmental officer. In Irish law it is unnecessary for such a Regulation to provide expressly for access to a "judicial redress procedure" because of the general availability of judicial review under O. 84 of the Rules of the Superior Courts against any administrative decision effecting rights or imposing liabilities – at least in the absence of any statutory exclusion of that Order. An applicant may ultimately be penalised in costs for embarking upon a judicial review application without first availing of an administrative review and the Court may even exercise its discretion to refuse relief where administrative redress has not first been exhausted… It does not, however, follow from the mere existence of the administrative review facility that there can be no access to such judicial redress."*

106. The decisions of Cooke J. in *Ali Saleem & Anor. v. the Minister for Justice Equality & Law Reform* [previously cited] and *Mohamud and Ali v. the Minister for Justice Equality & Law Reform* [previously cited] are a number of cases which were heard together as raising similar issues in relation to the refusal of applicants for a residence card under the provisions of the European Communities (Free Movement of Persons) (No. 2) Regulations. And the ratio of these judgments is that the provision in Regulation 21 of access to an administrative review of the initial refusal of an application is not incompatible with or inadequate having regard to Articles 15, 30 or 31 of the Directive.

107. It is this Court's view that the authorities are clear that in the 2006 Regulations the State has provided for administrative redress and judicial redress through the judicial review procedure. In those circumstances the Court decision is that the State redress procedure does comply with the Directive.

The incorrect legal test was applied in considering the first named applicant's removal

108. The minimum standard of protection from removal given to EU citizens and their family members who have a right of residence under the Directive as set out in Article 27 of the Directive. The following general principles apply to measures restricting the freedom of movement and residence of any person who has a right of residence:

> 1. There must be grounds of public policy or public security warranting the measures. (Article 27 (1))
>
> 2. Those grounds cannot be invoked to serve economic ends. (Article 27 (1))
>
> 3. The measures taken must comply with the Principle of Proportionality. (Article 27 (2))

Counsel for the applicants argues that the first applicant is a person who qualified for a right of permanent residence in Ireland. Persons who have the right of permanent residence in the host Member State benefit from enhanced protection against removal on grounds of public policy or public security. He quoted Article 28 (2) of the Directive which provides:

> "2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public

policy or public security."

Counsel on behalf of the applicant indicated that the Minister conceded that the applicant could be removed only on serious grounds of public policy or public security and he quoted Regulation 20 (6) (a) of the 2006 Regulations.

109. Counsel indicated that there were no references to "serious grounds of public policy" in the analysis of filed documents that led to the review decision and that the Minister satisfied herself from the discussion of public policy (*simpliciter*) in that the first named applicant's removal was warranted by reference to the lowest (and wrong) test for removal under the Directive.

Response of the respondent in relation to the incorrect legal test being applied to the first named applicant's removal

110. The first point made by counsel for the respondent was that this claim demonstrates the inappropriateness of parallel simultaneous challenges to the two stages of her decision making process and this Court has already held that the applicants are confined to challenging the decision on review.

111. Counsel on behalf of the respondent quoted extensively from *PR v. the Minister for Justice & Equality* [2015] IEHC 201. In *PR* the applicant was a Polish national with a right to permanent residence in the State having been in the State for more than five years at the time when the respondent came to consider making a removal order against him. The applicant in that case was convicted of six counts of sexual assault and was sentenced to three years' imprisonment, the last 18 months of which were suspended. The offences appear to have been of a similar nature; the applicant would sit down beside a lone female on a bus and expose himself and masturbate and attempt to touch the woman's groin area. He was released after serving three quarters of the "custodial element" of the sentence. The applicant argued that the conduct in respect of which he had been convicted did not give rise to serious grounds of public policy or public security. Under the heading "serious grounds of public policy", in addressing the issue, McDermott J. stated:

> *"44. There is no doubt that sexual offences may provide the necessary basis upon which to make a removal order. In certain circumstances the previous conviction and the nature of the behaviour of the European Union citizen convict may warrant expulsion on that ground alone."*

He stated that he was satisfied, applying the above principles, that the respondent was entitled to rely upon the nature, extent and duration of P.R.'s criminal behaviour as part of the appraisal of whether he constitutes a serious threat to public policy. It is clear that past conduct alone or in conjunction with other factors may give rise to such a threat and indicate his readiness, inclination or disposition amounting to propensity to act in the same way in the future. In those circumstances counsel for the respondent argued that there can be no doubt that the respondent was entitled to consider that, in the light of his conduct and the limited or ambivalent evidence of rehabilitation, the first named applicant represented a serious risk to the public policy or safety of the State i.e. the protection of the female population from sexual assault. He also quoted from the judgment of *DS v. Minister for Justice & Equality* [delivered on the 20th October 2015]. In it McDermott J. held that the Minister had been entitled to rely upon the applicant's serious criminal behaviour leading to two convictions of s. 4 rape and a sentence of six years' imprisonment as conduct which, of itself, might constitute a serious threat to public policy. He further submitted that the review decision repeatedly emphasised the serious nature of the applicant's criminal conduct citing the physical, violence and terror inflicted on the victims. He submitted it was clear that the author of the review decision knew that the first named applicant fell into the intermediate category of protection based on the duration of residence. However he did not have the enhanced protection available after ten years' residence, which would have required imperative grounds of public policy to justify his removal.

112. Counsel further submitted that the distinction between "grounds of public policy" and

"serious grounds of public policy" is simply a gradation of risk and it was clear from the decision that the author of the review decision considered that the continued presence of the first named applicant in the state posed a very substantial risk and that this justified his removal. This approach was fully consistent with Article 28 (2) of the Free Movement Directive and Regulation 20 (6) (a) of the Regulations.

The Court's decision on the allegation that the respondent applied the incorrect test
113. McDermott J. in *P.R. & Ors. v. the Minister for Justice and Equality & Ors*. [previously cited] reviewed what amount to "serious grounds of public policy" as follows:

> *"41. The Minister could not make an expulsion order against P.R. "except on serious grounds of public policy or public security" because he had the right of permanent residence under Article 28(2) as applied under Regulation 20(6)(a).*
>
> *42. A person convicted of sexual assault is liable under s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as substituted by s. 37 of the Sex Offenders Act 2001, to a term of imprisonment not exceeding ten years. The sentence appropriate upon conviction may vary from case to case. However, factors relevant to sentencing include the circumstances in which the assault occurred, its duration, the injuries inflicted, the amount of violence used and the degree of fear, distress and trauma caused to the victim. The previous convictions, if any, of a convicted person will also be taken into account as will any other mitigating factors such as a plea of guilty, expressions of remorse and the potential for rehabilitation… There is a high level of concern in society that persons of both sexes be protected from sexual assailants, as evidenced by the number of statutes enacted in Ireland over the last thirty years with a view to modernising the law in this area and strengthening the protections available to victims of sexual crime.*
>
> *43. It is clear that there are three gradations of protection available to convicted criminals under European Union law from expulsion. A person convicted who is not a permanent resident may be expelled on the grounds of public policy. A person entitled to permanent residence, such as P.R., may only be the subject of a removal order on "serious grounds of public policy or security". A person who has lived in the host state for a period of ten years or more can only be excluded on imperative grounds of public security. The applicants claim that there are no serious grounds of public policy or security which justify P.R.'s exclusion having regard to the fact that a single sentence of three years imprisonment with sixteen months suspended was imposed in respect of all counts, to which he pleaded guilty."*

At para. 45 he stated:

> *"45. The importance to be attached to the offences committed was considered in the case of Regina v. Pierre Bouchereau [1977] E.C.R. 1999 in which the question was posed to the CJEU as to whether previous criminal convictions could "in themselves" constitute grounds for the taking of measures based on public policy, or whether there are solely relevant insofar as they manifest a present or future propensity to act in a manner contrary to public policy. The court stated:-*
>
> > *"27. The terms of Article 3(2) of the Directive (Directive No. 64/221/EEC) which states that "previous criminal convictions shall not in themselves constitute grounds for the taking of such measures" must be understood as requiring the national authorities to carry out a specific appraisal from a point of view of the interests inherent in protecting the requirements of public policy, which does not necessarily coincide with the appraisals which formed the basis of the criminal conviction.*

> *28. The existence of a previous criminal conviction can, therefore, only be taken into account insofar as the circumstances which gave rise to that conviction or evidence of personal conduct constitute a present threat to the requirements of public policy."*

114. In para. 54 he stated:

> *"54. The court is satisfied that the offences of which the applicant was convicted and sentenced are regarded under Irish law as serious in their nature as indicated by the potential penalty which may be and was imposed. The nature of a sexual assault may differ in its gravity depending on the circumstances in which it was committed. It is clear as a matter of legislative and public policy that young women such as the victims in this case, must be protected from predatory sexual assailants. In this case the sentence imposed was not the only matter considered. The conduct of the applicant over the period of the commission of these offences was also taken into account by the decision maker, including the fact that his criminality would not have been interrupted had he not been apprehended in 2011. His offences commenced in the year following his arrival in Ireland and continued over a period of four years. The seriousness of these offences is described in the judgment of the Circuit Criminal Court and the effect on the victims was significant. The court is satisfied that there was ample evidence to justify the conclusion reached by the Minister that the removal was in accordance with the common good, and that his pattern of serious sexual criminal behaviour in the state represented a serious risk to public safety."*

115. The review of the decision to make a removal-order under the heading "proportionality" set out the facts of the offences of which Mr. Balc was convicted. The decision maker refers to Mr. O'Briain, solicitor for the applicants, submission that the client's offence was truly a "once off" and that no reasonable decision maker could conclude that he represents a "genuine, present and sufficiently serious threat effecting on the fundamental interests of society such as to warrant the making of a removal-order and his exclusion from the State."

116. The decision maker stated:

> "Crimes of a sexual nature or grievous offences against the person are of the upper end of the scale of criminal behaviour. In *J,D and D. Kovalenko & Ors*. [2013] 612 JR the court found that the commission of rape was sufficiently serious to justify the invocation of the notion of public policy."

And the decision maker said that he agreed with the original investigating officer who adduced that the state has a duty to protect its citizens in the interest of the common good and that Mr. Balc had been found guilty of a serious sexual assault which shows that he poses a serious enough threat to public policy and public safety that warrants his removal from the state. He also noted that Mr. Balc was unwilling to assist Gardaí with enquiries and only pleaded guilty on the day of his trial. The officer said that this would give the victim a prolonged sense of uncertainty as to whether she might have to participate in Mr. Balc's criminal proceedings. This is an understatement of the anxiety that she would have felt in respect of any cross-examination by counsel on behalf of Mr. Balc The decision maker also says that this raises a question as to whether Mr. Balc's recent expressions of remorse were made in the context of his potential removal from the State. He also noted that Mr. Balc engaged with the Probation Service in October 2014 in anticipation of his release from prison and has only been assessed for his involvement in sex offenders' treatment initiatives. He also states that:

> "It must be remembered that as Mr. Balc was ordered to engage in sex offenders' treatment and alcohol treatment programmes under, of course, the supervision of the Probation Service for 12 months after his release."

He said it was significant to note that Mr. Balc declined an offer to take part in the sex offenders' treatment programme in April 2014 which does not suggest that Mr. Balc is voluntarily making every effort to address his behavioural issues.

117. This Court finds that in the context of the serious conduct of Mr. Balk and together with his late plea and subsequent decision not to engage in a sexual offenders' course, was clear evidence that the Minister considered his criminal behaviour and these circumstances as a matter of serious grounds of public policy. And this Court is of the view that the respondent applied the correct legal test.

The Minister's proportionality assessment was unlawful – applicant's submissions
118. The applicants, in their statement of grounds, argued that the proportionality exercise conducted in respect of the initial removal order decision was unlawful and similarly that the proportionality exercise for the internal review decision was unlawful. He quoted Case-145/09 *Tsakouridis* [2010] ECR 1-11979 where it was stated at para. 95 of the opinion of Advocate General Bot:-

> *"95. In my view, when that authority takes an expulsion decision against a Union citizen following the enforcement of the criminal sanction imposed, it must state precisely in what way that decision does not prejudice the offender's rehabilitation. Such a step, which relates to the individualisation of the sanction of which it is an extension, seems to me to be the only way of upholding the interests of the individual concerned as much as the interests of the Union in general. Even if he is expelled from a Member State and prohibited from returning, when released the offender will be able, as a Union citizen, to exercise his freedom of movement in the other Member States. It is therefore in the general interests that the conditions of his release should be such as to dissuade him from committing crimes and, in any event not risk pushing him back into offending."*

119. Lang LJ. stated in *R. (Essa) v. Upper Tribunal (Immigration and Asylum Chamber)* [2012] EWCA Civ 1718:-

> *"In my judgment, the judgment of the ECJ in Tsakouridis establishes that the decision-maker, in applying regulation 21 of the EEA regulations, must consider whether a decision to deport may prejudice the prospects of rehabilitation from criminal offending in the host country, and weigh that risk in the balance when assessing proportionality under regulation 21(5)(a). In most cases, this will necessarily entail a comparison with the prospects of rehabilitation in the receiving country…"*

Counsel for the respondent said that under this heading the applicants seek to make an argument that the respondents failed adequately to deal with the issue of rehabilitation as part of the assessment of the proportionality of the removal order from the State. He argued that this issue is not raised in the amended statement grounding the application for judicial review as they relate to the initial decision to make the removal order. He also argued that at no point in the amended statement grounding the application for judicial review do the applicants raise any issue about the prospects for rehabilitation of the first named applicant in Romania and the respondent objected to this attempt to raise this issue which had not properly been before the Court. He also argued that the optimum rehabilitation of offenders is not an objective or purpose of the Directive. The general position is that the Member States must accept the presence of the nationals of other Member States provided they comply with the requirements of the Directive.

120. This Court notes that the officer in the review decision noted that in both the first decision and the review decision that the first named applicant had been assessed for involvement in a sex offenders' treatment programme but also that he had declined a previous offer to take part in such a programme in April 2014 and it appears to this Court appropriate for the officer to conclude that Mr. Balc had not engaged in an adequate level of treatment that would suggest that he does not pose a future risk of reoffending. This Ccourt is aware of the propensity of sex offenders to repeat offenses.

Response of the Respondents to the proportionality assessment

121. Counsel for the respondent stated that the applicants seek to make an argument that the respondent failed adequately to deal with the issue of the rehabilitation of the first named applicant as part of the assessment of the proportionality of removing him from the State. He stated that this issue is not raised in the amended statement grounding the application for judicial review and said that at no point in the amended statement grounding the application for judicial review did the applicants raise any issue about the prospects for rehabilitating the first named applicant in Romania or the respondent's submission to consider same. This Court is of the view that this cannot be addressed as an issue in this judicial review. He also argued that there was not support for the proposition that the authorities of the host Member State have to consider the prospects of rehabilitation of the person in question in his Member State of origin either in terms of the Directive or in any other judgment of the Court of Justice.

122. Counsel also submitted that in the present case that the respondent's officers in the review decision considered the issue of rehabilitation. At the time of the initial decision the respondent had not been given any evidence that the first named applicant had attended a sex offenders' rehabilitation course or any alcohol abuse treatment programme. In the decision on review the respondent's officer noted the first named applicant had been assessed for involvement with a sex offenders' programme but also that he had declined a previous offer to take part in such a programme in April 2014 which did not suggest that he was voluntarily making every effort to address his behaviour issues and that the respondent was fully entitled to take the view that the first named applicant continued to pose a significant risk to public policy and public safety.

Decision of the Court in relation to the Minister's proportionality assessment was unlawful

123. This Court agrees with counsel for the respondent that the issue about the prospects for rehabilitation of the first named applicant in Romania or the respondent's submission to consider same was expressed in the amended statement grounding the application. This Court is also of the view that the respondent appropriately considered the issue of rehabilitation.

The decision making and enforcement process was cumulatively unfair

124. In the letter of the 25th February, 2015 by which the removal-order was notified to the first named applicant. Counsel for the applicant quoted from its contents:

> "In Accordance with Article 13 (3) of the Directive 2004/38/EC it has been substantiated that your case is an urgent matter"

And counsel argued that the decision that the first named applicant's removal from Ireland was a substantiated case of urgency was unlawful. It was a bald statement that urgency had been substantiated but there was in fact no substantiation or even cursory reasoning explaining how the urgency arose.

125. Counsel submitted that the decision that the first named applicant's removal was urgent infected the whole decision making and enforcement process that followed. He submitted that the review decision maker effectively prejudged the issue of whether the removal order should be upheld. In particular the circumstances of the first named applicant's release from prison, it was submitted, revealed why it was necessary to have such a quick turnaround of the review decision. The first named applicant was due to be released from prison on the 7th March, 2015. He was given temporary release a day early on the 6th March, 2015. The temporary release notice states that the first named applicant was being given temporary release "for the reasons of pre-release/ re-socialisation to an address at No. 5 Cabra Park, Flat 4, Dublin 7.

126. A condition of the release was that the first named applicant would agree not to change his address from that address without a temporary release form. The temporary release form warned the first named applicant that failure to return to prison on or before the period of temporary release, which was stated to run to the 7th March, was a criminal offence. In fact the purpose of the first named applicant's release on 6th March was solely so that GNIB

officers could take him to Dublin Airport for him to be removed to Romania.

Response of the respondent in respect of "the decision making and enforcement process was cumulatively unfair"
127. Counsel for the respondent said that the arguments made by the applicants under this heading were not logical. The applicants seem to have argued the fact that the respondent considered the removal of the first named applicant to be an urgent matter in some way rendered unlawful both the decision to make the removal order and the subsequent decision to affirm it made in the review process. He stated that the respondent deemed the removal of the first named applicant to be an urgent matter in the light of the pending release of the first named applicant from custody and the danger that he was considered to pose to the public in the light of the conduct that led to his conviction for sexual assault.

128. Counsel for the respondent also said the decision to deem the removal of the first named applicant to be an urgent matter is not now susceptible to judicial review because the first named applicant obtained an interim injunction on the 6th March, 2015 restraining the respondent from effecting his removal and that the said order was subsequently continued in force.

129. Counsel also said the mere fact that the review was conducted expeditiously does not give rise to any legitimate basis for impugning the review decision.

The Court's decision
130. The Court is satisfied that Detective Inspector Tallon applied to the respondent on the 15th January, 2015 for a removal order in respect of the first named applicant. The respondent informed the first named applicant of that fact on the 19th January, 2015. On the 9th February, 2015, the applicant's solicitors made representations and on the 11th February the respondents furnished the applicant's solicitors with a copy of the report/ letter of Detective Inspector Tallon. A report was prepared for the respondent dated the 26th February, 2015. It recommended the making of a removal order and considered the proportionality of the making of the removal order. It further refers to the content of Detective Inspector Tallon's letter and to the first named applicant's representations to the effect that the offence was a once-off offence. On the 26th February, 2105 a removal-order was signed by Tom Doyle on behalf of the respondent requiring the first named applicant to leave the State. On the 3rd March, 2015 the applicants applied for a review of the decision and made a number of substantial submissions. A decision was made on the review on the 4th March, 2015. the first notification to the applicant that he was to be removed was by letter dated the 19th Janaury, 2015. It is not the view of this Court that the decision making and enformment processes were unfair.

Decision
131. The decision of this Court is that the only decision that can be reviewed in this case is the internal review procedure.

132. This Court is satisfied that the State's redress procedures comply with the Directive.

133. The State has provided for adminstrative redress and also, through the judical review procedure, judical procedure.

134. The authority of PK is, in this Court's view, clear, that the correct test was applied in considering the first named applicant's removal.

135. This Court is satisfied that the Minister's proportionality assessment was lawful.

136. This Court is satisied that the decision making and enforcement process was not cumulatively unfair.