High Court of Ireland Decisions

URL: *http://www.bailii.org/ie/cases/IEHC/2016/H47.html*
Cite as: [2016] IEHC 47

Judgment

Title:	Balc & Ors -v- Minister for Justice and Equality
Neutral Citation:	[2016] IEHC 47
High Court Record Number:	2015 121 JR
Date of Delivery:	19/01/2016
Court:	High Court
Judgment by:	Eagar J.
Status:	Approved

THE HIGH COURT

JUDICIAL REVIEW

BETWEEN

TRAIAN BALC, DOINA BALC AND ALINA BALC (A MINOR, SUING THROUGH HER NEXT FRIEN

AND

THE MINISTER FOR JUSTICE AND EQUALITY

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 a
the third applicant. He is married to the second applicant, who is also the mother of the third applicant. Th
("the Minister") made a removal order which imposed an exclusion period of five years against the first app
European Communities (Free Movement of Persons Regulations) (No. 2) 2006 (S.I. No. 656 of 2006) ("the
order was notified to the applicant and his solicitor by letter dated the 26th February, 2015. The first applic
an internal review of the decision by letter dated the 3rd March, 2015. An internal review decision was issu
the 5th March, 2015. The first applicant was in the process of serving a sentence of imprisonment which w
2015. However he was released on temporary release pursuant to the Criminal Justice Act 1960 on the 6th
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 judicial review seeking an order of *certiorari* quashing the decision of the respondent to mak
which will be set out further. This Court ordered that the Minister be restrained from removing the applican
the 16th March and subsequently to the 27th March, 2015. Leave to seek judicial review was granted to th
and they were granted leave to seek an amended statement of grounds. The amended statement groundin
dated 27th March, 2015, sought the following reliefs:

> (a) An order of *certiorari* quashing the decision of the respondent as notified to the first nam
> 25th February, 2015 to make a removal order pursuant to the European Communities (Free
> 2006 and 2008 (the Regulations) in respect of the first named applicant and quashing said r
>
> (b) an order quashing the decision of the respondent as notified to the first named applicant
> February, 2015 to apply pursuant to the Regulations for a five year exclusion period from en
> named applicant;
>
> (c) an order of *certiorari* quashing the decision of the respondent as notified to the first nam
> 25th February 2015 deeming the first named applicant's removal from the State on foot of th
> (and failing to afford him the normal thirty day period prior to any removal);
>
> (d) an order pursuant to and/ or having regard to the provision of Regulation 20 (7) of the E
> Movement of Persons) Regulations 2006 and 2008 suspending the removal of the first name
> the outcome of these proceedings;
>
> (e) without prejudice to the foregoing, an injunction, including an interim injunction restraini
> agents from removing the first named applicant from the State (and/ or detaining him follow
> Prison for that purpose) pending the outcome of these proceedings and/ or pending further o
>
> (f) as and if necessary, an injunction requiring the respondent to return the applicant to the
> proceedings in the event of his removal;
>
> (g) A declaration that Regulation 20 (1) (b) of the European Communities (Free Movement o
> is incompatible with Article 30 (2) and/ or Article 31 of Directive 2004/38/EC;
>
> (h) a declaration that Regulation 20 (4) (a) of the European Communities (Free Movement o
> and 2008 is incompatible with Article 30 (3) of Directive 2004/38/EC in that it purports to au
> the first named respondent at any time following the making of the removal order, without fu
>
> (i) an order pursuant to the inherent jurisdiction of the Court directing the release from dete
> such terms and conditions as the Court may direct and/or directing his release from detentio
> Superior Courts.
>
> (j) A declaration that the proposed removal of the first named applicant from this State (and
> exclusion for entry to this State for a period of five years is in breach of the constitutional rig
> Article 40.3 of the Constitution and/ or their right to protection pursuant to Articles 7 and 24
> and/or is in breach of the respondent's obligation pursuant to s. 3 (1) of the European Conve

perform her functions in a matter compatible with Article 8 of the European Convenction on

(k) a declation that the European Communities (Free Movement of Persons) (No. 2) Regulati
therein with respect to a review or an appeal against a deicsion to make a removal and/ or e
procedures in combination with the supervisory role of the High Court in exercising judical re
remedy or adequate procedural safeguards within the terms of Article 30 (3) of Directive 200
of Fundamental Rights;

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

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

(n) as necessary and appropriate an order permitting the applicants having regard to the pro
Immigrants (Trafficking) Act 2000 (as amended by s. 34 of the Employment Permits (Amend
statement of grounds within the period of twenty eight days from the date of the removal or

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 p
applicant's right to fair procedures and natural and constitutional justice as protected by Article 40.3 of the
and coloured by pre-judgement and a failure to approach the decision making process in a fair and balance
The removal order (incorporating the exclusion period) is dated the 26th February, 2015. The analysis of fi
which the purported decision to make the removal order is based is also dated the 26th February, 2015. Th
named applicant's solicitor, is dated the 25th February, 2015. Having regard to the above outlined, the dec
tainted as the respondent has reached a decision to make a removal order with an exclusion period (and to
advance of a full proper and adequate analysis and consideration of the case and circumstances or without
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
on the first named applicant until the 6th March, 2015, after the decision to make the removal order was a
conducted by the respondent department. The decision to make the removal order and said removal order
the failure to comply with Article 20 (3) (b) (ii) of the Regulations and Article 30 (2) of the Directive. Furth
an entitlement pursuant to Regulation 20 (3) (b) (ii) to be notified in writing of the removal and exclusion
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
February 2015 is unlawful by reason of the failure in the analysis conducted and in the decision making pro
in the context of a potential expulsion decision, the appropriate legal tests and criteria which apply to Euro
movement rights pursuant to Directive 2004/38/EC. These legal tests or principles, as set down in Directiv
of the Court of Justice of the European Union, limits strictly the restrictions which can be imposed on an EU
with particular reference to the EU citizen, such as the first named applicant herein, who has resided in the
five years.

7. The decision of the respondent to make the removal/expulsion order (with exclusion period) as notified
unreasonable and irrational and/ or unjustified and disproportionate. In particular the respondent in the an
in the decision making process failed to have due and proper regard for the status of the first named applic
in Ireland for in excess of five years (prior to his imprisonment) having regard to circumstances where the
permanent right of residence in this State, an expulsion decision could only legitimately be made on seriou
security. In the assessment/ analysis conducted and in the decision making process giving rise to the maki
exclusion period) the respondent failed to adequately or properly consider and appreciate the right to perm

applicant (and the second and third named applicants as EU citizens in the State) and the requirement in t
serious grounds of public policy or public security to justify an expulsion decision. No serious grounds of pu
required by Article 28 (2) of the Directive such to justify the removal of order decision and negate the prot
EU law and the Directive. Article 28 (2) imposes a high threshold which is not met by the conduct which le
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
to the making of the removal order (with the exclusion period) has failed to support on a rational and coge
the serious grounds of public policy or security which justify the making of the removal order (with five yea

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

10. In the decision making process giving rise to the making of the removal order (with the exclusion perio
failed to have due or adequate regard for the protection of the fundamental rights of the applicants and in
applicants. Article 28 (1) of the Directive requires that the familial and economic situations and social and
Member State be properly and adequately considered in the context of a potential expulsion decision. In th
analysis conducted, there is a lack of proportional and fair assessment of all the relevant circumstances of
there has been a failure in the assessment to adequately protect and vindicate the rights and best interest
protected under Article 24 of the Charter and the rights of the family as protected under Article 7 of the Ch
as protected under Article 41 of the Constitution and/or Article 8 of the ECHR (in this respect the decision
the protection afforded the applicant family pursuant to Article 8 ECHR and is in contravention of s. 3 (1) E
above outlined, in the decision making process there has been a manifest failure to properly and fairly or in
extremely negative and adverse impact on the third named applicant of the removal of her father from the
consider and appreciate that it is clearly untenable and not in the best interests of the third named applica
potentially relocate from Ireland.

11. There has been a failure in the decision making process to adequately respect and vindicate the rights
applicants as EU citizens exercising free movement rights in this territory. The decision to make the remova
applicant does not comply with the principles of proportionality as contained in Article 27 of the Directive. T
core and fundamental value of the European Union and encroachment on and removal of this right by way
attended by an assessment and analysis which properly balances and considers the right of free movemen
risk to public policy or public security. The decision making process in the first named applicant's case did n

12. The decision of the respondent as notified to the first named applicant's solicitor by letter of the 25th F
(with exclusion period) and the decision making process and analysis giving rise to that decision fails to ha
directly relevant factors and matters. In particular, there has been a failure in the decision making process
shown by the first named applicant in respect of the crime he committed and/ or to have due and proper r
and element attaching to his conviction and the manner in which he has demonstrated to the satisfaction o
Service) his commitment and willingness to undertake and complete the rehabilitation programmes set out
conducted and in order to comply with the principle of proportionality as set out in Article 27 of the Directiv
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 enter
applicant is unreasonable and irrational and in breach of the principle of proportionality. No adequate and c
to justify the imposition of the exclusion period or without prejudice to justify an exclusion period of this le
year exclusion period, the respondent in the assessment conducted, has failed in particular to have due an
Directive, the Charter and Articles 7 and 24, in particular of it and Article 41 of the Constitution for the imp
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 app
foot of the removal order as "urgent" is unreasonable and/ or irrational and fails to respect the principle of
cogent reasons are set out or put forward in the decision such as to justify the removal of the first named a
basis or to distinguish his case as an exceptional one such as to justify the deeming of his removal as both

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

16. The decision to deem the removal of the first named applicant from the State on foot of the removal or
procedures and natural and constitutional justice. The applicants and their legal representatives were denie
decision being made to consider or address that matter and the respondent proceeded to make a decision
removal as "urgent" without affording the applicant family and their solicitor an opportunity to consider an
relevant to the said decision. Fair procedures and natural and constitutional justice as protected by Article
demanded such an opportunity be afforded and that the respondent make available any relevant informati
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 affor
pursuant to Article 30 (3) of the Directive before expulsion would take place is in denial of the first named
remedy and amounts to a failure by the respondent to comply with the procedural safeguard requirements
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 remo
contained in Regulation 20(1) of the European Communities (Free Movement of Persons) Act 2006 is not in
effect or proper effect to Article 30(3) and/ or Article 31 of the Directive. The respondent has failed to prov
effective remedy against the removal order decision by way of a review/ appeal to an independent court or
conducted by a higher official within the respondent department does not provide an effective remedy or a
the terms and meaning of the Directive and/or having regard to the provisions of Article 41 (Good Adminis
Remedy) of the Charter.

19. There is no procedure or remedy in place under national law giving proper effect to Articles 30(3) and
provides the first named applicant with an effective remedy to an independent court or tribunal capable of
with capacity and jurisdiction to reverse the decision to make the removal order and fails to provide the fir
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 tran
2004/38/EC, and fail to comply with the Charter of Fundamental Rights, such that the respondent is in bre

21. The first named applicant is unlawfully denied his right of appeal as provided for by Article 30 of Direct
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 s
unlawful and invalid by reason of the defective appeals/ review procedure which is in place in this State. Th
or giving effect to the relevant procedural safeguards and provisions against expulsion measures as contai
decision to affirm a removal order (with exclusion period) conducted in a process which fails to provide ade
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
constitutional justice and is in infringement of the first named applicant's constitutional rights as protected
and his right to be heard and the right to good administration, as protected by EU law and Article 41 of the
internal review failed to have regard to relevant information, documentation and material and failed to app
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 an
undue and unreasonable haste and speed with which that process was both conducted and concluded. It w
properly and adequately allowed for and facilitated a fair and balanced decision making process. The intern
was tainted, coloured and unduly influenced to the detriment and prejudice of the first named applicant an

reason of the classification of the first named applicant by the respondent as a person whose removal from
matter and the determination of the respondent to effect his removal from the State in an urgent manner
February. In this regard, the temporary release of the first named applicant from the Midlands Prison on th
due and scheduled date for release and him been met by immigration officers outside the prison following
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 re
letter of 5th March, 2015, is unlawful by reason of the failure in the analysis conducted underpinning said d
apply the appropriate legal test and criteria for European Union citizens exercising free movement rights pu
context of a potential expulsion of an EU resident with more than five years residency from a Member Stat
decision making process has failed to have due and proper regard for the first named applicant's status as
movement rights, who has a permanent right of residence in this State and/ or to appreciate that an expul
can only legitimately be valid where there are serious grounds of public policy or public security to justify s

26. In the internal review assessment and analysis conducted giving rise to the affirmation decision the res
rational and cogent basis and with adequate reasons, the serious grounds of public policy or security which
the removal order incorporating a five year exclusion period. The decision to affirm the removal order with
irrational and/ or unjustified and disproportionate. Furthermore, the internal review affirmation decision do
proportionality as contained in Article 27 of the Directive and fails to have due and proper regard for the co
principle of free movement under EU law.

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

28. The conclusions reached in the internal review decision making process and analysis are unreasonable
in the decision making process to have due and proper regard for relevant factors with particular reference
expression of remorse for his crime, the rehabilitation process and element attaching to his conviction, imp
release and the manner in which he has demonstrated to the satisfaction of the relevant authorities his co
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
in the circumstances where none of the matters specified in Regulation 20(a), (b) or (c) are applicable and
made an application for leave to apply for judicial review and has sought in that application a suspension o
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 (an
having regard to the interests of justice and balance of justice and convenience and having regard to all th
the fundamental EU law rights at stake for the applicant family and their employment and education circum
appropriate and prudent that the respondent be restrained from effecting the removal of the first named a
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
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 B
was also an affidavit sworn by Alina Blac on the 6th March, 2015 and one by Conor O'Briain, solicitor, also
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.

applicant, Doina Blac. The third applicant, Alina Blac is the child of the first and second applicants and at th
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 e

35. On the 3rd June, 2010, a twenty one year old female was locked out of her apartment on the North Cir
inside. She rang the landlord in an effort to get a separate key to gain access. She waited on the staircase

36. Whilst sitting on the stairs, this woman heard an argument from another apartment resulting in a fema
time, the applicants were also living on the North Circular Road. A short time later, the first applicant came

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

38. The first applicant then grabbed the woman and tried to force her into flat No. 1, an unoccupied dwellin
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
it to the front door. Upon reaching the front door, she met with a girl who was about to enter the house. Th
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
(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 Immig
first applicant came to the attention of An Garda Síochána on the 18th August, 2009, in relation to a public
about this and this Court will not take any account of this information. There is no suggestion that the first
order incident. Detective Inspector Tallon says that on the 24th January, 2014, the first applicant appeared
three offences and it is common case that the first applicant pleaded guilty on the day of the trial rather th
which I have previously mentioned were outlined to Judge Hogan who said that "it was a serious offence w
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 2
last eighteen months of the sentence on the basis that the first applicant would (a) keep the peace and be
people of Ireland for a period of four years from the date of his release from serving the sentence; (b) that
supervision of the Probation Service for a period of twelve months on the date of his release from serving t
auspices of the Probation Service, he would undergo an alcohol treatment programme and that he would c
such an alcohol treatment programme. In the event of his non-compliance with the requirements of the alc
was granted to the Probation Services to re-enter the matter and further that he would engage in offence f
probation officer; and (d) he would undergo a sex offenders programme deemed suitable whilst in custody
programme while in custody, the accused would serve the full sentence and if on his release he did not con
was granted to re-enter the matter. He could be called on any time within the said period of four years to s
imposed but suspended. The learned judge directed that he be placed on the sex offenders register. This is
as by virtue of the entering of a plea to two charges, he automatically became subject to the Sex Offender

The removal order

43. By letter dated the 19th January, 2015, the repatriation section of the Department of Justice and Equa
was then serving a sentence in the Midlands Prison, Portlaoise, notifying him that the Minister proposed to
him under the power given to the Minister by Regulation 20(1)(a)(iv) of the European Communities (Free M
2006 and 2008.

44. The letter further stated that the reason for the Minister's proposal was that it has been submitted that

risk to public policy (this Court's emphasis).

45. The Department noted that the first applicant appeared before Dublin Circuit Criminal Court on the 24t
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 perm*

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

48. The correspondence also indicated that he was entitled to make written representations to the Minister
sending of the letter from the Department. The correspondence further indicated that if no response was r
working days the Minister would assume that he did not wish to make any representations and that a remo
accordingly. Also attached was a schedule, called Schedule 9, and it relates to representations with a head
made to the Minister as to why a removal order should not be made" and it cites Regulation 20 (4) (a) and
following representations to the Minister may be made as to why he should not make a removal order in re
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 Immigratio
the first applicant in the Midlands Prison enclosing a newspaper report on the proceedings in the Dublin Cir
This correspondence noted that the following news report would be considered in the making of a decision
provide any observations in relation to the news article to forward them for the attention of the Repatriatio

50. Conor O'Briain, solicitor for the applicant, wrote to the Repatriation Unit of the Irish Naturalisation and
was instructed to represent the first named applicant and enclosed a letter of authority in that regard and
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
19th January. With that letter (which I will outline later) Mr. O'Briain enclosed a significant number of supp
from the third named applicant and confirmation that she participated in a range of community and educat
considerable level of commendable achievement both in terms of her education and extra-curricular activit
integrated and deeply rooted in Irish society. Also enclosed with Mr. O'Briain's letter was a body of docume
applicant's schooling. The second-named applicant also submitted a letter in support of the representation

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 l
notifying the first named applicant of the Minister's proposal to make a removal order in respect of him. Mr

> 1. The first named applicant has a right of permanent residence in the State on the basis tha
> continuous period of five years in the host member state.
>
> 2. Article 28 (2) of the Directive 2004/38/EC states that the host Member State may not ma
> Union citizens except on serious grounds of public policy or public security.
>
> 3. The proposal to make a removal order in respect of the first named applicant was based o
> be contrary to public policy to permit him to remain in the State. The Minister had not invok
> *public policy*"- the minimum basis required for a decision to expel a Union citizen who has a
> Minister's opinion forming the basis for the proposal to make the removal order cannot lawfu
> make a removal order. He also referred to the nature of social and cultural integration into th
> Balc, the second and third named applicants.
>
> 4. The applicant is aged forty-one and has resided in the State for almost eight years. He ha
> save for the offence for which he pleaded guilty and that he was due for release on the 7th M
>
> 5. A removal of the applicant would serve to frustrate the Circuit Court's order and that such
> power of the State would be inimicable to the public policy consideration of respect for the d
> though utterly reprehensible and acknowledged by the applicant as such, is not part of a pat

53. By letter dated the 11th February, 2015, the Repatriation Unit wrote to Mr. O'Briain enclosing the appli
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
representations had been noted and that the applicant's case would now be processed with a full considera

55. By letter dated the 25th February, 2015, which was sent by registered post to the Midlands Prison and
receive until the 6th March, the day he was released from prison. However a copy of this letter was sent to

56. This correspondence refers to the earlier letter from the Removal Section dated the 19th January, 2015
Minister proposed to make a removal order in respect of him under the powers given to the Minister by Reg
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
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
remain in the State and that in accordance with the Regulations, the exclusion period preventing him from
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
(b) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006, it was deemed th
urgent matter. (Regulation 20 (1) (b) provides that the "time specified in a removal order shall, unless the
urgent, be not be less than 10 working days in a case where the person concerned has not been issued wit
month in any other case.")

60. The letter confirmed that as a European citizen he had been entitled previously to live, work and reside
now been withdrawn from him, and also notified him that in accordance with Regulation 20 (4) (a) of the R

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 decis
allowed to enter or reside in the State, and confirmed that a request for a review should contain the partic
were enclosed, which provided for some details and provided for a statement of grounds for the purpose o

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

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 in

ii. In respect of private life it was accepted that if the Minister decided to removed the first n
interference with his right to respect for private life within the meaning of Article 7 of the Fu
Union. However, it was submitted that the proposed interference in this case is in accordanc
pressing need and a legitimate aim (that is upholding the public policy of the State against a
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 proportion
pursued within the meaning of Article 7.

iv. The decision confirms that the first named applicant was currently serving a custodial sen
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
came to the attention of An Garda Síochána in relation to a public order offence on the 18th August ,2009,
Bureau were of the view that the first named applicant is a genuine and sufficient threat to public safety an
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 firs
convicted of one offence, it must be noted that it was a very serious one which resulted in a prison sentenc
eighteen months suspended. It was particularly noted that crimes of a sexual nature are grievous offences
upper-end of the scale of criminal behaviour. The decision continues that the rights of the citizen's of the S
the first named applicant's crime must be given serious consideration in the making of a decision in this ca
citizens in the interests of the common good. And the Department is informed that the first named applica
the State which demonstrates that he is a threat to public policy and public safety and refers to the newspa

66. The decision also refers to the terms of the sentence imposed by Judge Hogan that he was instructed t
sex offenders programme suitable for him, and the decision notes that there is no evidence on file nor is th
applicant to show that he has attended a sexual offenders rehabilitation course after either he committed t
for it. It was also noted that the Department had not received any evidence to show that the first named a
his alcohol abuse issues which seems to be a contributory factor in his criminal behaviour and that, withou
alcoholism or his sexual offending. It was submitted that he continues to pose a serious threat to public po
and there therefore existed substantial reasons associated with the common good which required the remo

67. In relation to family life, the decision continued that if the first named applicant were to be removed fr
remain in Romania or in another Member State closer to Ireland, there was a possibility that a relationship
daughter through visits and communication during the period that the first named applicant is excluded fro
was also open to the second and third named applicants to relocate to whichever EU State the applicant m
to facilitate a closer relationship between them and the first named applicant, and the recommendation wa

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 le
He notes that the review application is without prejudice to his client's entitlement to an independent revie
his client may bring, including any application seeking to challenge in the High Court the decision to make
exclusion period of five years. He also asked for confirmation that no steps would be taken to remove his c
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 a
> interests of his daughter, Alina.
>
> 2. The analysis had in effect proceeded on the basis that the commission of the offence by th
> represents the requisite level of threat and that this is in breach of Article 27 (2) of the Direc
>
> 3. And as it also proceeded, in effect, on the basis that the applicant's offence, as it was one
> 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 th
> "essentially commenced a sex offenders programme. He would be brought to further comply
> release. Consequently the applicant's release date is not effected." And with respect of the a
> prison since January 2014 and is not in a position to consume alcohol,and that it was wholly
> applicant when he has commenced a sex offenders programme and was about to enter a per
> 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 o
> family.

69. By letter dated the 4th March, 2015, Mr. O'Briain's letter of the 3rd March was acknowledged and the c
be fully considered by the in the making of a decision in the review of the first named applicant's case. The
way of further letter from Mr. O'Briain to the Department of Justice and noted that, in his letter of the 3rd
of his client for a review of the removal and exclusion order and decision. He noted that this application for
to any other application his client may bring, including an application to the High Court by way of judicial r
order and decision without prejudice to his entitlement to an independent review of the removal and exclus
the point that the deeming by the Minister of his client's removal from the State as an urgent matter and t
the requisite time period before which a removal can take place, is provided for in EU Directive 004/38 is a
confirmation that no steps would be taken in relation to his client's removal from the State noting that his
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 re
case which had been conducted in accordance with Regulation 21 of the European Communities (Free Move
to 2008. The review was conducted by a principal officer who had not taken part in the initial decision. The
with the correspondence. The background was outlined with the details of the conviction and the grounds u
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 circ
> best interests of his daughter, Alina.
>
> 2. The investigating and deciding officers were incorrect in concluding that Mr. Balc's commis
> 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 off

> address his alcohol abuse issues. Mr. O'Briain reports that Mr. Balc has commenced a sex off
> will engage in an alcohol treatment programme upon his release. He continues tha the remo
> before Mr. Balc had a chance to undergo probation in accordance with the Circuit Court's or

71. Under the heading of "Proportionality", the outcome of the first named applicant's serious criminal conc
Síochána were of the view that he is a genuine and sufficient threat to the social order and fundamental in
they applied to the Department to have a removal order made in respect of him. After full consideration of
investigating and deciding officers in this case, it was determined that the first named applicant's presence
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 achie
> the prevention of crime and disorder in the interests of public safety and the common good.
> if any new evidence is being submitted to show that Mr. Balc's circumstances have changed s
> him."

73. The principal officer then sets out the nature of the offence and stated that crimes of a sexual nature c
are at the upper end of the scale of criminal behaviour. In *J.K., D.K., and D. Kovalenko (a minor)*
J.R the Court found that the commission of rape was sufficiently serious to justify the invocation of the not

> "It is clear from the policy underlying the offences of rape and s. 4 rape and the severe pena
> sexual offences in Ireland, not only that the conduct leading to such offences is to be conder
> 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 th
adduced that the State had a duty to protect its citizens in the interest of the common good, and that the
guilty of a serious sexual offence which shows that he poses a sufficient threat to public policy and public s
the State. He then reviews the situation of the second and third named applicants and then proceeds to re
the 3rd February, 2015 which was a letter which included a letter submitted from Daniel Robbins, Governo

> "Mr. Balc was offered the opportunity to take part in the Building Better Lives Programme for
> declined. However in October 2014 he began to reengage with the Probation Service. The Pr
> assessment for the purpose of enrolling him in the Safer Lives Programme on his release. Th
> which is run in the community and risk assessment being carried out in the first part of that

75. The principal officer continued:

> "Having regard to the evidence in this case I am of the view that Mr. Balc has committed a v
> shows his presence and status is a threat to public policy and public safety and warrants his
> the citizens of the State and the impact on the victim of Mr. Balc's crime must also be given
> decision in the review of this case.
>
> I am in agreement with the original deciding officer and investigating officers in this case wh
> would be best served if Mr. Balc were to be removed from Ireland as soon as possible. I am
> Mr. Balc's case was proportionate and reasonable to the legitimate aim being pursued which
> 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
Justice Act 1960." Upon his release he was arrested and taken to Dublin Airport for the purpose of his remo
indicated in this judgment, the first named solicitor, Mr. O'Briain, through counsel made an ex parte applica
application for judicial review and this Court ordered that the Minister be restrained from removing the app
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. 656/200
77. These Regulations were for the purposes giving effect to Directive 2004-38-EC of the European Parliam
April 2004 on the right of citizens of the Union and their family members to move and reside freely within t
The relevant regulations are:

i. "*12. (1) Subject to paragraph (3) and Regulation 13, a person to whom these Regulations*
conformity with these Regulations for a continuous period of 5 years may remain permanent

ii. Regulation 14 refers to family members of a Union citizen and the acquisition of the right
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 t
State within the time specified in the order where-

(i) the person has been refused a residence card or a permanent residence certificate

(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 provisio

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

(b) The time specified in a removal order shall, unless the Minister certifies that the matter i
working days in a case where the person concerned has not been issued with a residence ca
other case.

(c) The Minister may impose an exclusion period on the person concerned in a removal orde
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 p
health, make a removal order in respect of a person to whom these Regulations apply solely
concerned has served a custodial sentence.

(e) A removal order made on grounds referred to in subparagraph (d) which has not been e
2 years from the date it was made shall not be enforced unless the Minister is satisfied that
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 pers
proposal and, where necessary and possible, the person shall be given a copy of the notifica
understands.

(b) A notification under this paragraph shall contain -
(i) unless the Minister certifies that it would endanger the security of the State to ma
rise to the proposal referred to in subparagraph (a),

(ii) a statement that the person concerned may make representations as set out in S
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 i
duration of the exclusion period.

(3) (a) In determining whether to make a removal order and whether to impose an exclusio
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 decision and, unless the Minister certifies that it would endanger the security of the S reasons for the decision.

(c) A notice under subparagraph (b)(ii) may require the person the subject of the removal o 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 o may be specified in the notice,

(ii) produce any travel document, passport, travel ticket or other document in his or purpose of such removal to such member of the Garda Síochána or immigration office may be specified in the notice,

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

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

(v) report to a specified Garda Síochána station or immigration officer at specified int State,

(vi) notify such member of the Garda Síochána or immigration officer as may be spec of any change of address.

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

(e) A further requirement under subparagraph (d) shall, where necessary and possible, be g language that he or she understands.

(4) (a) A person to whom a notice under paragraph (3)(b)(ii) has been issued may without detained under warrant of an immigration officer or member of the Garda Síochána in any o the custody of the officer or member of the Garda Síochána for the time being in charge of t 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 Ch Governor, in any other case, of the arrest and direct that the person be detained until furthe
(c) A person arrested and detained under subparagraph (a) may be detained only until such

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, railwa to leave the State by an immigration officer or a member of the Garda Síochána, and shall b 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 airc State shall, if so required by an immigration officer or a member of the Garda Síochána, rec removal order has been made and his or her dependants, if any, on board such ship, railway afford him or her and his or her dependants proper accommodation and maintenance during

(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 G reasonable grounds for believing that the person is not under the age of 18 years, paragraph attained the age of 18 years.

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

(6) (a) A removal order may not, except on serious grounds of public policy, or public securi whom these Regulations apply, where the person has an entitlement to reside permanently

(b) A removal order may not, except on imperative grounds of public security, be made in re

(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 concern from the State.
(7) An application by or on behalf of a person to whom these Regulations apply for leave to 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 concer 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 conce allowed to enter or reside in the State.

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

(3) A review under this Regulation of a decision under paragraph (1) shall be carried out by

(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 havi for the review or substitute his or her decision for the decision the subject of the revi

(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 Re 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 M permanent residence there. This right shall not be subject to the conditions provided for in C

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State 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 mo citizens and their family members, irrespective of nationality, on grounds of public policy, pu grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the princip based exclusively on the personal conduct of the individual concerned. Previous criminal con constitute grounds for taking such measures

The personal conduct of the individual concerned must represent a genuine, present and suf of the fundamental interests of society. Justifications that are isolated from the particulars o 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(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 which the decision taken in their case is based, unless this is contrary to the interests of Sta

3. The notification shall specify the court or administrative authority with which the person c time limit for the appeal and, where applicable, the time allowed for the person to leave the in duly substantiated cases of urgency, the time allowed to leave the territory shall be not le notification."

Article 31 deals with procedural safeguards:-

"1. The persons concerned shall have access to judicial and, where appropriate, administrati Member State to appeal against or seek review of any decision taken against them on the gr or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is acc interim order to suspend enforcement of that decision, actual removal from the territory ma 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 unde

3. The redress procedures shall allow for an examination of the legality of the decision, as w on which the proposed measure is based. They shall ensure that the decision is not dispropo requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the red prevent the individual from submitting his/her defence in person, except when his/her appea public policy or public security or when the appeal or judicial review concerns a denial of ent

Submissions of the applicant in relation to the entitlement to challenge the original removal ord
81. Counsel on behalf of the applicant submitted that the statement of opposition of the respondent argues to maintain simultaneous challenges both to the original decision to make a removal order and to the inter argues that the internal review decision superseded and replaced the initial decision to make a removal ord that the applicants, having initiated the internal review procedure, are not now entitled to impugn the initia applicants submit that this objection of the Minister is unfounded. As a matter of law any decision made by *Carltona* doctrine enunciated by Lord Greene MR in *Carltona Ltd. v. the Commissioner of Public Works* this was expressly approved by the Supreme Court in *Devanney v. Shields* [1998] 1 IR 230 merely involves the Minister taking a second look herself as to whether a removal order is warranted, rathe independent oversight. Counsel suggested that the purpose of the internal review may be to save court tim Minister a second chance to correct a bad decision before it's subject has to go to the expense of initiating further submitted that the 2006 Regulations were made by the Minister under s. 3 of the European Commu 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 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 rev suspends removal and argued that there was no similar provision in the Regulations suspending removal w 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 3rd March, 2015. The respondent's officers conducted such a review and made a decision on the 4th March superseded and replaced the initial decision to make the removal order. The respondent's reasons as set ou expressly different from those in the initial decision and supersede the reasoning of the initial decision. Hav which led to the making of a new decision on review, the applicants are not now entitled to impugn the init proceedings.

83. Counsel for the respondent referred to a number of cases involving the procedure under the Refugee A effect to the Convention Relating to the Status of Refugees, the Protocol relating to same and the Conventi for examining applications for asylum lodged in one of the Member States (Dublin Convention). In particula Hedigan J. in *BNN v Refugee Applicatons Commissioner* [2008] IEHC 308 and *Kayode v. the Refugee Appli* 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*

administrative review under Regulation 21 of the same regulations as those applicable to the present case

> *"The Court recognises that in the normal course the exercise of its jurisdiction in judicial rev instance decision of this kind when the error or defect is capable of being remedied by comp review procedure. That is especially so in cases where the reason for refusal is based on a la provide an explanation sought so that the administrative review is particularly apt to resolve*

85. Counsel further argued that the review had been determined by the time these proceedings were initia prejudicial to the respondent to require her simultaneously to defend two decisions in relation to the same

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] was a fundamental concept which enabled democratic government to work. However the decision of Hedig *Applications Commissioner* [previously cited] is more helpful in dealing with the issue of the original decisio

> *"38. Having assessed the merits of the applicant's case, I now turn to consider whether judic in this case, or whether the more appropriate course of action would be to leave the applica*
>
> *39. In addition to commencing the within proceedings, the applicant has lodged a Notice of A a full oral hearing. The applicant argues, however, that judicial review is the appropriate rem fundamental flaw in the procedure followed, thereby bringing ORAC outside of jurisdiction. T matters raised in the present proceedings are capable of being dealt with on appeal, and tha better position before the RAT than before this Court, as she would be able to give evidence respondents accept that applicants are entitled to fair procedures at every stage of the proce procedures at the ORAC stage does not, per se, entitle an applicant to judicial review. Rathe judicial review to be available in respect of an ORAC decision, it would be necessary for an a 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 subject. While the law in this area has recently been subject to refinement, particularly with respect to its a immigration law, the decision of the Supreme Court in The State (Abenglen Properties Ltd) v Dublin Corpo particularly instructive. In that case, O'Higgins J. stated that "while retaining always the power to quash, a 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 lim 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. dea decision to refuse a "residence card". In that case an application was made on behalf of the second named (1) of the European Communities (Free Movment of Persons) (No 2) Regulations 2006 on the basis that he citizen, the first named applicant, who satisfied the condition prescribed in Regulation 6 (2) (a) (i), namely State. The EU Rights Section of the Department refused the application on the basis of "unsatisfactory evid 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 instance decision of this kind when the error or defect is capable of being remedied by comp review procedure."*

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

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

91. The applicants submit that the redress procedures available in the State to challenge a removal order (judicial review) do not either separately or cumulatively comply with the redress procedures required by th 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 remova 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 h defence in person.

92. The applicants submit that the internal review procedure does not constitute a lawful redress as it is no does not allow for an oral hearing.

93. Judicial review does not constitute lawful redress as a court cannot take into account factual matters th decision to adjudicate on whether the person concerned is a "present threat" to a matter such as public se cannot appear before the Court to submit his defence in person (which would require the Court to be able 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 fam 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] w lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the te 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 emphasis] in the host Member State to appeal against or seek review of any decision taken a 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 wel which the proposed measure is based. They shall ensure that the decision is not disproportio requirements laid down in Article 28."

98. Counsel for the applicants submitted that Article 47 of the Charter requires a redress procedure. The a procedure must be judicial. In an interesting argument presented by David Leonard BL for the applicants, t judicial as borne out by consideration of the *travaux préparatoires* for the Directive. He proceeded to explo provide clarification of EU Directives. In summarising Mr. Leonard's argument the applicants submit that th evidence of factual matters i.e. that the judicial redress required by the Directive must be such that the Co matters that occurred after the removal decision. This is because there may [this Court's emphasis] be a c the cessation or substantial diminution of the present threat that the conduct of the person concerned is sa of public security or public policy. Quoting from *Orfanopoulos* and *Oliveri* [2004] ECR 1 5257 the applicants only where the status of the threat to public policy or public security can be examined at the time the revie 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, Immigrati been given priority.

100. The applicants pointed to a judgment of McDermott J. In *PR v. the Minister for Justice*

Polish national who was married to the second named applicant and the third named applicant was their da
applicants in the present case. On the 7th June, 2012 the first named applicant was sentenced to three yea
months of which were suspended in the Dublin Circuit Criminal Court in respect of six counts of sexual assa
Service (INIS) issued a removal-order against him which contained an exclusion order for a ten year perio
was sought and submissions were made on his behalf. The INIS reaffirmed the removal-order and the ten
review was instituted in respect of that decision. A substantive hearing of that application was commenced
Court in May 2013 which was adjourned, part-heard and following which negotiations and the proceedings
16th July, 2013. The case was settled on the basis that the review decision of the Minister would be withdr
reconsidered in the context of the information exhibited in the judicial review proceedings. The applicant w
three quarters of the custodial element of the sentence and further evidence and material was submitted b
affirming the removal order. A review decision was issued reaffirming the removalorder in September 2013
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 deci*
> *applicants must establish that by reason of the failure to apply the legal principles or a misa*
> *decision challenged is fundamentally flawed."*

And further:

> *"… [T]he High Court could not on judicial review entertain further evidence beyond that cons*
> *determining the… review."*

Counsel for the applicant submits that the inadequacy of judicial review as a remedy is analogous to an ina
of the Directive and quoted from the following judgments: *MN v. the Minister for Justice* [2014] IEHC 638;
and next friend ED) and BA v. the Refugee Applications Commissioner & Ors. (Cooke J.) [2011] IEHC 33
Applications Commissioner [2012] IEHC 338 (Cooke J.). Counsel submitted that the lack of full merits revi
evidence limited the Court in being able to engage with a relevant issue in the case, whether the first appli
of a sex offenders' course in April 2014. If the Court had the power to examine the facts and circumstance
decision was based, it could adjudicate on the applicant's indication that he was not aware that he was bei
participate in such a programme.

101. Counsel for the applicants also submitted that an oral hearing was required where the defence may b
Article 31 (4) of the Directive which provides:

> "Member States may exclude the individual concerned from their territory pending the redre
> prevent the individual from submitting his/her defence in person, except when his/her appea
> public policy or public security or when the appeal or judicial review concerns a denial of ent

Article 31 (4) requires that the person challenging a removal measure may be permitted to present his def
however, appears to relate to a situation where an applicant is excluded from the territory pending the red
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 co
102. Counsel on behalf of the respondent submitted that the applicant's arguments in relation to the redre
and irrelevant to the case. He states that the first named applicant applied for a review of the decision to r
request was made for an oral hearing. Counsel pointed out that Article 31 (1) and (3) of Council Directive
Directive) provide as follows:

> "1. The persons concerned shall have access to judicial and, where appropriate, administrati
> Member State to appeal against or seek review of any decision taken against them on the gr
> or public health.
>
> …
>
> 3. The redress procedures shall allow for an examination of the legality of the decision, as w
> on which the proposed measure is based. They shall ensure that the decision is not dispropo
> requirements laid down in Article 28."

103. He submitted that Article 31 (1) required that the person effected should have access to judicial and,
redress procedures. The Directive therefore requires access to judicial redress procedures and permits the

administrative redress procedures where this is appropriate. Under Article 31 (3), one or other procedure h
the legality of the decision as well as of the facts and circumstances on which it is based as well as its prop
according to counsel for the respondent, necessary for each form of redress procedure to allow for both an
decision and of the facts and circumstances on which it is based. All that is required is that the redress pro
facilities identified in Article 31 (3).

104. Counsel for the respondent submitted that through Regulation 21 of the 2006 Regulations that the St
redress. Judicial redress is available through judicial review. Regulation 21 (4) provides that the reviewing
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 regar
> 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 f
circumstances on which the decision was based as well as its proportionality and he quoted s. 5 (1) of the
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 o
> (S.I. No. 656 of 2006),
>
> …
>
> made on or after the date on which section 34 of the Employment Permits (Amendment) Act
> otherwise than by way of an application for judicial review under Order 84 of Rules of the Su

The same statutory provision applied to a decision of the Refugee Applications Commissioner under s. 13 o
quoted from *El Menkari v. the Minister for Justice Equality and Law Reform* [2011] IEHC 29
Cooke J. in *Saleem v. the Minister for Justice Equality and Law Reform* [2011] IEHC 49. He also cited
Justice Equality and Law Reform [previously cited]. He also cited the case of *Mohamud and Ali v. the Minis*
Reform [2011] IEHC 54, a decision of Cooke J. He also quoted from the decision of *PR v. the Minister for J*
[previously cited], the decision of McDermott J. Counsel also argued that the crucial distinction between Ar
and Article 31 of the Free Movement Directive is that the former requires an "effective remedy before a cou
requires judicial and, where appropriate, administrative redress procedures. If the Free Movement Directiv
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*
Movement Directive requires the availability of procedures in both judicial and administrative redress again

> *"The review provided for in Regulation 21 is clearly an "administrative review" in that it is al*
> *Irish law it is unnecessary for such a Regulation to provide expressly for access to a "judicial*
> *general availability of judicial review under O. 84 of the Rules of the Superior Courts against*
> *rights or imposing liabilities - at least in the absence of any statutory exclusion of that Order*
> *penalised in costs for embarking upon a judicial review application without first availing of ar*
> *may even exercise its discretion to refuse relief where administrative redress has not first be*
> *follow from the mere existence of the administrative review facility that there can be no acce*

106. The decisions of Cooke J. in *Ali Saleem & Anor. v. the Minister for Justice Equality & Law Reform*
the Minister for Justice Equality & Law Reform [previously cited] are a number of cases which were heard t
relation to the refusal of applicants for a residence card under the provisions of the European Communities
Regulations. And the ratio of these judgments is that the provision in Regulation 21 of access to an admini
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 provide judicial redress through the judicial review procedure. In those circumstances the Court decision is that the 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 Directive as set out in Article 27 of the Directive. The following general principles apply to measures restric residence of any person who has a right of residence:

1. There must be grounds of public policy or public security warranting the measures. (Articl

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 have the right of permanent residence in the host Member State benefit from enhanced protection against 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 thei nationality, who have the right of permanent residence on its territory, except on serious gro security."

Counsel on behalf of the applicant indicated that the Minister conceded that the applicant could be remove 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 o review decision and that the Minister satisfied herself from the discussion of public policy (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 name
110. The first point made by counsel for the respondent was that this claim demonstrates the inappropriat challenges to the two stages of her decision making process and this Court has already held that the applic decision on review.

111. Counsel on behalf of the respondent quoted extensively from *PR v. the Minister for Justice & Equality* was a Polish national with a right to permanent residence in the State having been in the State for more th respondent came to consider making a removal order against him. The applicant in that case was convicte was sentenced to three years' imprisonment, the last 18 months of which were suspended. The offences a nature; the applicant would sit down beside a lone female on a bus and expose himself and masturbate an area. He was released after serving three quarters of the "custodial element" of the sentence. The applican of which he had been convicted did not give rise to serious grounds of public policy or public security. Unde 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 circumstances the previous conviction and the nature of the behaviour of the European Unio expulsion on that ground alone."*

He stated that he was satisfied, applying the above principles, that the respondent was entitled to rely upo P.R.'s criminal behaviour as part of the appraisal of whether he constitutes a serious threat to public policy. in conjunction with other factors may give rise to such a threat and indicate his readiness, inclination or di act in the same way in the future. In those circumstances counsel for the respondent argued that there ca was entitled to consider that, in the light of his conduct and the limited or ambivalent evidence of rehabilita represented a serious risk to the public policy or safety of the State i.e. the protection of the female popula quoted from the judgment of *DS v. Minister for Justice & Equality* [delivered on the 20th October 2015]. In had been entitled to rely upon the applicant's serious criminal behaviour leading to two convictions of s. 4 imprisonment as conduct which, of itself, might constitute a serious threat to public policy. He further subm repeatedly emphasised the serious nature of the applicant's criminal conduct citing the physical, violence a submitted it was clear that the author of the review decision knew that the first named applicant fell into th

based on the duration of residence. However he did not have the enhanced protection available after ten y
required imperative grounds of public policy to justify his removal.

112. Counsel further submitted that the distinction between "grounds of public policy" and "serious ground
gradation of risk and it was clear from the decision that the author of the review decision considered that t
named applicant in the state posed a very substantial risk and that this justified his removal. This approach
(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
public policy" as follows:

> *"41. The Minister could not make an expulsion order against P.R. "except on serious grounds because he had the right of permanent residence under Article 28(2) as applied under Regul*
>
> *42. A person convicted of sexual assault is liable under s. 2 of the Criminal Law (Rape) (Ame s. 37 of the Sex Offenders Act 2001, to a term of imprisonment not exceeding ten years. Th conviction may vary from case to case. However, factors relevant to sentencing include the occurred, its duration, the injuries inflicted, the amount of violence used and the degree of f the victim. The previous convictions, if any, of a convicted person will also be taken into acc factors such as a plea of guilty, expressions of remorse and the potential for rehabilitation… society that persons of both sexes be protected from sexual assailants, as evidenced by the over the last thirty years with a view to modernising the law in this area and strengthening t sexual crime.*
>
> *43. It is clear that there are three gradations of protection available to convicted criminals u expulsion. A person convicted who is not a permanent resident may be expelled on the grou to permanent residence, such as P.R., may only be the subject of a removal order on "seriou security". A person who has lived in the host state for a period of ten years or more can only of public security. The applicants claim that there are no serious grounds of public policy or s having regard to the fact that a single sentence of three years imprisonment with sixteen mo 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 E.C.R. 1999 in which the question was posed to the CJEU as to whether previous criminal co constitute grounds for the taking of measures based on public policy, or whether there are s 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 state shall not in themselves constitute grounds for the taking of such measures" must be authorities to carry out a specific appraisal from a point of view of the interests inher public policy, which does not necessarily coincide with the appraisals which formed th*
> >
> > *28. The existence of a previous criminal conviction can, therefore, only be taken into which gave rise to that conviction or evidence of personal conduct constitute a presen policy."*

114. In para. 54 he stated:

> *"54. The court is satisfied that the offences of which the applicant was convicted and sentenc serious in their nature as indicated by the potential penalty which may be and was imposed. differ in its gravity depending on the circumstances in which it was committed. It is clear as policy that young women such as the victims in this case, must be protected from predatory sentence imposed was not the only matter considered. The conduct of the applicant over the offences was also taken into account by the decision maker, including the fact that his crimi had he not been apprehended in 2011. His offences commenced in the year following his arr period of four years. The seriousness of these offences is described in the judgment of the C*

the victims was significant. The court is satisfied that there was ample evidence to justify th
that the removal was in accordance with the common good, and that his pattern of serious s
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 fa
was convicted. The decision maker refers to Mr. O'Briain, solicitor for the applicants, submission that the cl
and that no reasonable decision maker could conclude that he represents a "genuine, present and sufficien
fundamental interests of society such as to warrant the making of a removal-order and his exclusion from

116. The decision maker stated:

> "Crimes of a sexual nature or grievous offences against the person are of the upper end of t
> *and D. Kovalenko & Ors*. [2013] 612 JR the court found that the commission of rape was suf
> invocation of the notion of public policy."

And the decision maker said that he agreed with the original investigating officer who adduced that the sta
the interest of the common good and that Mr. Balc had been found guilty of a serious sexual assault which
threat to public policy and public safety that warrants his removal from the state. He also noted that Mr. Ba
enquiries and only pleaded guilty on the day of his trial. The officer said that this would give the victim a p
whether she might have to participate in Mr. Balc's criminal proceedings. This is an understatement of the
respect of any cross-examination by counsel on behalf of Mr. Balc The decision maker also says that this ra
Balc's recent expressions of remorse were made in the context of his potential removal from the State. He
the Probation Service in October 2014 in anticipation of his release from prison and has only been assesse
treatment initiatives. He also states that:

> "It must be remembered that as Mr. Balc was ordered to engage in sex offenders' treatment
> 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
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 a
in a sexual offenders' course, was clear evidence that the Minister considered his criminal behaviour and th
serious grounds of public policy. And this Court is of the view that the respondent applied the correct legal

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 re
decision was unlawful and similarly that the proportionality exercise for the internal review decision was un
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 foll*
> *sanction imposed, it must state precisely in what way that decision does not prejudice the o*
> *which relates to the individualisation of the sanction of which it is an extension, seems to me*
> *interests of the individual concerned as much as the interests of the Union in general. Even*
> *and prohibited from returning, when released the offender will be able, as a Union citizen, to*
> *the other Member States. It is therefore in the general interests that the conditions of his re*
> *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
> *"In my judgment, the judgment of the ECJ in Tsakouridis establishes that the decision-make*
> *regulations, must consider whether a decision to deport may prejudice the prospects of reha*
> *the host country, and weigh that risk in the balance when assessing proportionality under re*
> *will necessarily entail a comparison with the prospects of rehabilitation in the receiving coun*

Counsel for the respondent said that under this heading the applicants seek to make an argument that the
with the issue of rehabilitation as part of the assessment of the proportionality of the removal order from t
not raised in the amended statement grounding the application for judicial review as they relate to the initi
order. He also argued that at no point in the amended statement grounding the application for judicial revi
about the prospects for rehabilitation of the first named applicant in Romania and the respondent objected
which had not properly been before the Court. He also argued that the optimum rehabilitation of offenders
Directive. The general position is that the Member States must accept the presence of the nationals of othe
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 re
applicant had been assessed for involvement in a sex offenders' treatment programme but also that he ha
part in such a programme in April 2014 and it appears to this Court appropriate for the officer to conclude
adequate level of treatment that would suggest that he does not pose a future risk of reoffending. This Cc
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
issue of the rehabilitation of the first named applicant as part of the assessment of the proportionality of re
stated that this issue is not raised in the amended statement grounding the application for judicial review a
amended statement grounding the application for judicial review did the applicants raise any issue about th
named applicant in Romania or the respondent's submission to consider same. This Court is of the view tha
issue in this judicial review. He also argued that there was not support for the proposition that the authorit
consider the prospects of rehabilitation of the person in question in his Member State of origin either in ter
judgment of the Court of Justice.

122. Counsel also submitted that in the present case that the respondent's officers in the review decision c
At the time of the initial decision the respondent had not been given any evidence that the first named app
rehabilitation course or any alcohol abuse treatment programme. In the decision on review the respondent
applicant had been assessed for involvement with a sex offenders' programme but also that he had decline
a programme in April 2014 which did not suggest that he was voluntarily making every effort to address hi
respondent was fully entitled to take the view that the first named applicant continued to pose a significant
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
Romania or the respondent's submission to consider same was expressed in the amended statement groun
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 ap
quoted from its contents:

"In Accordance with Article 13 (3) of the Directive 2004/38/EC it has been substantiated tha
And counsel argued that the decision that the first named applicant's removal from Ireland was a substant
was a bald statement that urgency had been substantiated but there was in fact no substantiation or even
urgency arose.

125. Counsel submitted that the decision that the first named applicant's removal was urgent infected the
enforcement process that followed. He submitted that the review decision maker effectively prejudged the
should be upheld. In particular the circumstances of the first named applicant's release from prison, it was
necessary to have such a quick turnaround of the review decision. The first named applicant was due to be
March, 2015. He was given temporary release a day early on the 6th March, 2015. The temporary release
applicant was being given temporary release "for the reasons of pre-release/ re-socialisation to an address

126. A condition of the release was that the first named applicant would agree not to change his address fr
release form. The temporary release form warned the first named applicant that failure to return to prison
release, which was stated to run to the 7th March, was a criminal offence. In fact the purpose of the first n
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 cu
127. Counsel for the respondent said that the arguments made by the applicants under this heading were
have argued the fact that the respondent considered the removal of the first named applicant to be an urg
unlawful both the decision to make the removal order and the subsequent decision to affirm it made in the
respondent deemed the removal of the first named applicant to be an urgent matter in the light of the pen
applicant from custody and the danger that he was considered to pose to the public in the light of the conc

sexual assault.

128. Counsel for the respondent also said the decision to deem the removal of the first named applicant to susceptible to judicial review because the first named applicant obtained an interim injunction on the 6th M 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 review decision.

The Court's decision
130. The Court is satisfied that Detective Inspector Tallon applied to the respondent on the 15th January, 2 the first named applicant. The respondent informed the first named applicant of that fact on the 19th Janu the applicant's solicitors made representations and on the 11th February the respondents furnished the ap report/ letter of Detective Inspector Tallon. A report was prepared for the respondent dated the 26th Febru making of a removal order and considered the proportionality of the making of the removal order. It furthe Inspector Tallon's letter and to the first named applicant's representations to the effect that the offence wa February, 2105 a removal-order was signed by Tom Doyle on behalf of the respondent requiring the first na the 3rd March, 2015 the applicants applied for a review of the decision and made a number of substantial s the review on the 4th March, 2015. the first notification to the applicant that he was to be removed was by 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 rev

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, judi

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

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.