Irish Court of Appeal

Judgment

Title:	Balc & Ors -v- The Minister for Justice & Equality
Neutral Citation:	[2018] IECA 76
Court of Appeal Record Number:	2016 225
High Court Record Number:	2004 38 EC, 2006 SI 656, 2015 121 JR
Date of Delivery:	07/03/2018
Court:	Court of Appeal
Composition of Court:	Ryan P., Peart J., Hedigan J.
Judgment by:	Peart J.
Status:	Approved
Result:	Allow and set aside

THE COURT OF APPEAL
Neutral Citation Number: [2018] IECA 76

Record Number: 225/2016

Ryan P.
Peart J.
Hedigan J.

BETWEEN:

TRAIAN BALC, DOINA BALC AND ALINA BALC

APPELLANTS

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 7TH DAY OF MARCH 2018

1. The first and second named applicants are husband and wife. The third named applicant is their daughter who at the date of commencement of these proceedings in 2015 was aged 17 years, but is now an adult. They are all Romanian nationals who arrived in the State in March 2007.

2. The second and third named applicants have continued to reside lawfully in the State since their arrival. The first named applicant continued to reside lawfully in the State until he was removed from the State pursuant to a removal order dated the 26th February 2015 made by the Minister pursuant to the provisions of Regulation 20 of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 ("the Regulations"). It is the lawfulness of this removal order that is at the heart of this appeal.

3. The removal of the first named applicant was effected on the 17th May 2016 following the order of the High Court (Eager J.) made on the 16th February 2016 whereby the applicants' application for reliefs by way of judicial review (including for an order to quash the removal order) was refused. An injunction which had restrained removal pending the determination of the judicial review proceedings expired upon the said refusal of reliefs.

4. In addition to making the removal order, the Minister imposed an exclusion period of five years pursuant to Regulation 20(1)(c) of the Regulations, meaning that the first named applicant is unable to re-enter or seek to re-enter the State prior to 17th May 2021.

5. In their judicial review application the applicants put forward a number of grounds for contending that the removal order and 5 year exclusion are unlawful. All were rejected by the trial judge. However, upon application being made to him for leave to appeal pursuant to s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000 (as amended) on the basis that the decision of the High Court involves a point of exceptional public importance and that it is desirable in the public interest that an appeal should be made, the trial judge certified the following point for appeal:

> "Whether, once a review decision is made pursuant to Regulation 21(4) of the European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. No. 656 of 2006) confirming a removal order made under Regulation 20(1)(a) of those Regulations, that order itself loses its amenability to judicial review."

6. Once a point of exceptional public importance is certified for appeal pursuant to s. 5(3)(a) of the 2000 Act, the appellant is not confined to arguing only that point, as he would be for example on an appeal certified under s. 50A(7) of the Planning and Development Act 2000, as amended. In that regard s. 50(11) of the 2000 Act specifically provides that such appeal is confined to the certified point of law - see *e.g. People (Attorney General) v. Giles* [1974] I.R. 422 at 436 per Walsh J. This explains how it has come about that a number of grounds of appeal are relied upon in the present appeal in addition to the single ground certified by the trial judge. Before addressing the grounds of appeal and the submissions made to this Court, I will provide some factual background, and refer to the grounds relied upon in the High Court and the trial judge's conclusions.

Factual background

7. This family arrived here in May 2007. At all times Mrs Balc has worked hard as a part-time cleaner, and is highly regarded by her employer. Mr Balc does not appear to have

been employed here, except perhaps for a very short period. Their daughter attended secondary school, and is now attending university having attained excellent results in her Leaving Certificate examinations. The testimonials provided to the Minister and to the High Court in respect of both mother and daughter speak of each in glowing terms. These facts make it all the more unfortunate that Mr Balc committed what for him was a first, but very serious criminal offence (sexual assault), on the 3rd June 2010 involving what was described by the sentencing judge as "quite a degree of aggression", and to which he very belatedly pleaded guilty on the first day of his trial on the 24th January 2014. He received a three year prison sentence, with the final eighteen months suspended on certain conditions. It is that offence alone which has formed the basis for the decision to make a removal order and to exclude him from the State until 2021. He was imprisoned from the 24th January 2014 until his early release on the 6th March 2015, whereupon he was immediately re-arrested for the purposes of his removal from the State.

8. The conditions imposed for the purpose of suspending part of the prison sentence were the following:

> (a) keep the peace and be of good behaviour towards all the people of Ireland from the date of his release from serving the sentence;
>
> (b) that he would put himself under the supervision of the Probation Service for a period of 12 months from the date of his release from serving the sentence;
>
> (c) that under the auspices of the Probation Service, he would undergo an alcohol treatment programme and that he would comply with all the requirements of such a alcohol treatment programme. In the event of his non-compliance with the requirements of the alcohol treatment programme, liberty was granted to the Probation Services to re-enter the matter, and further that he would engage in offence focused work with his supervising probation officer; and
>
> (d) that he would undergo a sex offenders programme deemed suitable whilst in custody, and if he did not comply with such a programme while in custody, he would serve the full sentence, and if on his release he did not comply with such program liberty was granted to re-enter the matter.

9. I mention these conditions because on this appeal counsel for the appellants has drawn attention to the objective of rehabilitation reflected in the conditions for suspension, in support of a submission that a removal from the State for five years is a disproportionate measure imposed in addition to the sentence, that it amounts in effect to a double punishment, and interferes with the rehabilitative objective of the sentencing judge. I shall return to that and other submissions in due course.

10. Prior to his release from prison Mr Balc received a letter dated the 19th January 2015 from the repatriation unit of the Department of Justice notifying him of a proposal to make a removal order under Regulation 20 of the Regulations on the basis that his presence in the State was a serious risk to public policy. The letter went on to state the Minister's opinion that his conduct which gave rise to the sexual offence was such that it was contrary to public policy to permit him to remain in the State. He was also informed of the proposal that he be the subject of a five year exclusion from the State, and of his right to make submissions as to why a removal order should not be made. The applicant's solicitor made such written representations on Mr Balc's behalf by letter dated the 9th February 2015, enclosing also documentary material in support thereof including several testimonials in respect of his wife and his daughter to which I have

referred earlier, indicating the degree to which the family had integrated well into, and were valuable contributors to, Irish society.

11. By letter dated the 25th February 2015 the applicant's solicitor was informed that the removal order had been signed, it being determined that Mr Balc poses a serious risk to public policy. He was informed of the five year exclusion order, and that due to the nature of the offending it was deemed in accordance with Regulation 20(1)(b) of the Regulations that his removal from the State was an urgent matter. Other matters were referred to, but in particular he was informed of his entitlement to seek a review of the decision as provided by Article 21(1) of the Regulations, and that any such request for a review should be made within a period of 30 days.

12. A review was sought by letter dated 3rd March 2015 from Mr Balc's solicitor. This letter made clear that his seeking a review was without prejudice to his client's entitlement to seek an independent review, and/or a judicial review of the removal decision. This letter made a number of observations about the process culminating in the decision under review, in addition to seeking an assurance that pending any review no steps would be taken to remove Mr Balc from the State. It was asserted in this letter that the analysis of the application for the removal order had failed to have regard to the family circumstances of Mr Balc, and in particular to the best interests of his daughter. It was asserted also that the analysis had proceeded on the basis that the commission of the offence of itself proved that Mr Balc represented a threat to public policy, and that the nature of the offence (i.e. a sexual offence) was sufficient to establish the requisite threat to public policy. The letter referred to a letter from the prison governor which stated that Mr Balc had commenced a sex offenders programme and would be brought to further comply with this programme upon his release, and that therefore the applicant's release date was not affected. The letter went on to state that with regard to his alcohol abuse, the fact was that Mr Balc had been in prison since January 2014, and therefore had not been in a position to consume alcohol. It was suggested in those circumstances that it was wholly disproportionate to remove him where he had already commenced a sex offenders programme, and was about to enter a period of supervised release on the condition, inter alia, that he would undergo an alcohol treatment programme. The point was also made that the removal order was premature, and that his removal, and his exclusion for five years thereafter, would constitute an unjustified breach of his and his family's rights.

13. This request for a review of the decision to make a removal order was acknowledged by letter dated the 4th March 2015, and it informed that the content of the letter dated the 3rd March 2015 would be fully considered, and that Mr Balc's solicitor would be notified when a decision had been reached. There was, however, no reference made to the request for an assurance that Mr Balc would not be removed from the State pending the review. By letter dated the 4th March 2015 Mr Balc's solicitor wrote again seeking such confirmation, and indicated that in the absence of any such assurance an application would be made to Court. I should perhaps mention at this stage that it was anticipated that Mr Balc would be released from prison on the 7th March 2015, hence the desire to get such an assurance in good time prior to that date.

14. On the following day, by letter dated the 5th March 2015 the Repatriation Unit wrote to both Mr Balc and his solicitor informing them that a full review of the case had been conducted and a decision made to uphold the removal order. Enclosed with the letter to Mr Balc was a copy of the review decision, and it was explained that "it has been concluded that your conduct is such that it would be contrary to serious grounds of public policy to permit you to remain in the State". He was informed also that the manner and timing of his removal from the State was an operational matter for the Garda National Immigration Bureau.

15. Thereafter on 6th March 2015 the applicants sought leave of the High Court *ex parte* to seek reliefs by way of judicial review, including an order to quash the decision to remove Mr Balc and to exclude him from the State for a period of five years from the date of removal, and other declaratory reliefs. That leave application was granted, as was an application for an injunction to restrain removal pending the determination of these proceedings. The injunction prevented his onward removal to Romania pending the determination of the proceedings. Following that determination he was removed, and currently remains outside the State. His wife and daughter have remained here.

The Decision and Review Decision

16. This removal order had been sought by the Garda National Immigration Bureau (GNIB) by letter dated the 15th January 2015. Before the order was signed, the application had been the subject of detailed consideration by the Removal Orders section of the Repatriation Unit within the Department of Justice and Equality. Mr Balc was provided with a copy of this written consideration of the removal order application, which is dated the 26th February 2015. This concluded with a recommendation that a removal order be made including a five year exclusion period pursuant to Article 20(1)(a)(iv) of the Regulations. That consideration and recommendation was approved by an Executive Officer in the Department on the very same day. It was seen also on that same day by an Assistant Principal who in turn signed the removal order that day.

17. The consideration of the application for the removal order is detailed and runs to six pages. Having set forth the background to the application it proceeds to address the personal circumstances of Mr Balc and his family . It refers to the representations made to the Minister by Mr Balc's solicitor as to his family and economic circumstances, his good health, his family links in the State, the issue of *refoulement* under s. 5 of the Refugee Act 1996, and then gives consideration to the application by reference to Article 7 of the Charter of Fundamental Rights of the European Union. In this respect consideration was given to whether removal would interfere with his right to respect for private life within the meaning of Article 7. The conclusion was that it would constitute such interference but that it was nevertheless:-

> (a) in accordance with Irish law (i.e. Article 20 of the Regulations);
>
> (b) in pursuit of a pressing and legitimate aim (i.e. upholding the public policy of the State against a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society), and
>
> (c) necessary in a democratic society in pursuit of a pressing social need, and proportionate to the legitimate aim being pursued under Article 7 of the Charter.

18. Proportionality was given specific consideration. Reference was made to the view of the GNIB that Mr Balc was "a genuine and sufficient threat to public safety and [the] fundamental interest of Irish society" that he be removed. Details of the offence to which he had pleaded guilty are set out. It refers to the submission made in his solicitor's representations referring to the remorse and shame felt by Mr Balc, and points to the fact that the offence was a "once off" offence. It refers to the solicitor's submission that since this is the only offence committed by Mr Balc while in Ireland he should not be considered to be "a genuine and present and sufficiently serious threat" to Irish society as would justify a removal order being made and an exclusion for five years. The consideration then states the following:

> "Whilst Mr Balc has only been convicted of one offence it must be noted that his offence was a very serious one, "sexual assault on female" which resulted in a prison sentence of three years with the final 18 months suspended. It is particularly noted that crimes of a sexual nature are

grievous offences against the person and are at the upper end of the scale of criminal behaviour. The rights of the citizen of the State and the impact on the victim of Mr Balc's aforementioned crime must also be given serious consideration in the making of a decision in this case. The State has a duty to protect its citizens in the interests of the common good while the Department is informed Mr Balc has committed a serious offence in the State which shows that he is a threat to public policy and public safety."

19. Having again set out details of the particular offence the author states:

" … He was also instructed to undergo an alcohol treatment programme and a sex offenders programme suitable to him. There is no evidence on file, nor is there any claim by Mr Balc, to show that he has attended a sexual offender's rehabilitation course either after he committed the offence or since his incarceration for it. It must also be noted that the Department has not received any evidence to show that Mr Balc has taken steps to address his alcohol abuse issues which seem to be a contributory factor in his criminal behaviour. Certainly without Mr Balc undergoing any treatment for either his alcoholism or his sexual offending it is submitted that he continues to pose a serious threat to public policy if allowed to remain in the State."

20. On the question of proportionality the following concluding remarks are made:

"Mr Balc has been given an individual assessment and due process in all respects and his rights under Article 7 of the Fundamental Rights of the European Union to respect for private life have been considered. Factors relating to the rights of the State have also been considered, including the prevention of disorder and crime in the interests of public safety and the common good in the light of Mr Balc[`s] criminal conduct in the State. As previously Mr Balc has not worked in the State which, in the light of his convictions, raises the question as to how he has supported himself in the State.

It is submitted that if the Removal Order is signed in respect of Mr Balc , there is no less restrictive process available which would achieve the legitimate aim of the State for the prevention of crime and disorder in the interest of public safety and the common good.

These therefore exist as substantial reasons associated with the common good which require the removal of Mr Balc. Therefore on the basis of the foregoing, I recommend that a Removal Order be made in respect of Mr Balc."

21. This consideration then dealt with the possible interference caused to his family rights under Article 7. It referred to a letter of representation from his daughter which referred to the very difficult time endured by the family in the aftermath of his arrest and imprisonment, and refers also to the effect his removal would have on both her father and the family. In this respect the consideration concludes as follows:

"If Mr Balc were to be removed from the State and was to choose to reside in Romania, or in another member State closer to Ireland, there is a possibility that a relationship could be maintained with his wife and daughter through visits and communication during the period that Mr Balc is excluded from the State as part of his removal.

It is also open to Mr Balc's wife and daughter to relocate to whichever EU State Mr Balc may choose to reside in if they wish to facilitate a closer relationship between them and Mr Balc. This is a decision for Ms. Balc to make.

> Further it is noted that none of the circumstances as listed in Schedule 9 [of the Regulations] above and in particular his family and economic circumstances and the nature of his social and cultural integration in the State would make his return to Romania impossible for him, or one of great hardship.
>
> It is therefore submitted that the making of a Removal Order is proportionate and reasonable to the legitimate aim being pursued and is required on serious grounds of Public Policy."

22. By letter dated the 5th March 2015 Mr Balc was informed that the removal order was affirmed on review, and he was provided with a copy of the consideration which was given to his application for a review by a different Executive Officer within the Removal Orders Unit of the Repatriation Section of the Department. That consideration is dated the 4th March 2015 and runs to some nine pages. It sets out some detail in relation to the initial decision, and then proceeds to describe the general background to the application for removal and the basis for the decision made, namely that Mr Balc's personal conduct represents a threat to the public policy of the State. It sets out the grounds upon which a review was sought as follows:

> "(i) The investigating and deciding officers did not have proper regard to Mr Balc's family circumstances and in particular to the best interests of his daughter, Alina.
>
> (ii) The investigating and deciding officers were incorrect in concluding that Mr Balc's commission of an offence/sexual offence represents a sufficient level of threat to warrant his removal from the State.
>
> (iii) The investigating and deciding officers noted that Mr Balc had not engaged in [a] sexual offenders' rehabilitation course or taken any steps to address his alcohol abuse issues. Conor O'Briain Solicitors [Mr Balc's solicitors] report that Mr Balc has commenced a sex offenders' programme while in prison and that he will engage in an alcohol treatment programme on his release from custody.
>
> (iv) The removal order should not have been made before Mr Balc had a chance to undergo probation in the State."

23. The review consideration then refers to the various matters to be considered under Schedule 9 of the Regulations, and which were previously considered for the purpose of the initial consideration, such as the family and economic circumstances of the family, his social and cultural integration in the State, his state of health, and the extent of his links here, as well as *refoulement*. Article 7 of the Charter is considered in much the same way as was the initial consideration, and issues of family life and proportionality are given quite extensive treatment. Referring to the view of An Garda Siochana that Mr Balc is a genuine and sufficient threat to the social order and fundamental interests of our society to warrant a removal order being made, the author of this review consideration states :

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

24. Details of the sexual assault committed by Mr Balc are then described, and the submission by the solicitor that it was a once-off offence and ought not to be considered to be sufficient, that Mr Balc should not be considered to represent such a threat to

society, and that the making of the removal order is warranted. The author goes on to state that crimes of a sexual nature are grievous offences against the person and are at the upper end of the scale of criminal behaviour. The author then expresses agreement with the conclusion of the original investigating officer that the State has a duty to protect its citizens in the interests of the common good and that "Mr Balc has been found guilty of a serious sexual assault which shows that he poses a sufficient enough threat to public policy and public safety that warrants his removal from the State". It refers particularly to the fact that the offence involved physical violence and that it would have been a terrifying ordeal for the victim who was three months pregnant at the time and who had tried repeatedly to escape during the ordeal, managing to do so eventually. But the author then states "this raises the question as to what could have happened to her if she had not managed to evade Mr Balc". His apology and remorse is noted as is his statement that "it happened due to that I was drunk". In that regard the author states "I do not accept that alcohol should be regarded as a mitigating factor in this heinous sexual offence". The author also refers to the very late plea of guilty entered by Mr Balc, and that he had been unwilling to assist the Gardai with their enquiries, and to the fact that these features would have given the victim a prolonged sense of uncertainty as to whether she might have to participate in criminal proceedings. The author states "this raises a question as to whether Mr Balc's recent expressions of remorse were made in the context of his potential removal from the State".

25. Consideration is also given to submissions made by Mr Balc's solicitor including by reference to a letter dated the 26th of January 2015 from the prison governor which stated that Mr Balc was offered the opportunity to take part in the Building Better Lives Programme for sex offenders in April 2014 "but he declined". That letter however went on to state that in October 2014 he had begun to engage with the Probation Service. It noted also that the Probation Service was carrying out a risk assessment for the purpose of enrolling him in the Safer Lives programme on his release from prison. It described this as a sex offender program which is run in the community, and that the carrying out of such a risk assessment is the first part of that programme. The governor's letter continued:

> "Having met with the Psychology and Probation services in the Midlands Prison we are satisfied that the work Mr Balc is doing with Probation satisfies the conditions of his warrant insofar as he essentially commenced a sex offenders programme. He will be required to further comply with this programme upon his release. Consequently, as matters stand, Mr Balc's release date is not affected".

26. The author concluded that, while efforts at rehabilitation were to be commended, it had to be remembered that as Mr Balc was ordered to engage in sex offenders treatment and alcohol treatment programmes, and undergo the supervision of the Probation Service for twelve months after his release, it was significant to note that he had declined an offer to take part in the sex offenders programme in April 2014 "which does not suggest that Mr Balc is voluntarily making every effort to address his behavioural issues". The author stated:

> "I am not satisfied that Mr Balc has engaged in an adequate level of treatment that would suggest that he does not pose a future risk of re-offending. It is further noted that Mr Balc has not begun any treatment for his alcohol abuse issues which were a contributory factor in his criminal conduct".

27. The consideration of proportionality concluded with the following:

> "Having regard to the evidence in this case, I am of the view that Mr Balc has committed a very serious sexual assault which shows that his presence in Ireland is a threat to public policy and public safety and warrants his removal from the State. The rights of the citizens of this State and the impact on the victim of Mr Balc's crime must also be given serious consideration in the making of a decision in the review of this

case.

I am in agreement with the original deciding and investigating officers in this case who concluded that the Irish public would be best served if Mr Balc were to be removed from Ireland as soon as practicable. I am satisfied that the original decision in Mr Balc's case was proportionate and reasonable to the legitimate aim being pursued which is the prevention of crime and disorder in the interest of public safety and the common good.

Therefore on the basis of the foregoing, I recommend that the Removal Order made in respect of Traian Balc be affirmed."

The grounds for a judicial review (as amended)

28. The grounds in respect of which leave was granted by order of the High Court dated the 27th March 2015 (Eager J.) to seek judicial review are set out comprehensively in the judgment of the trial judge by reference to the amended statement of grounds filed. They are quite numerous, but can be summarised as follows:

(a) The available redress procedures in order to challenge a removal order i.e. by internal review and/or by judicial review do not either separately or cumulatively comply with the requirements of Directive 2004/38 EC, and do not constitute an effective remedy. It was submitted that those procedures lack independence and impartiality, do not permit the decision-maker to take account of facts and circumstances that postdate the removal decision in order to adjudicate upon whether the person is a present threat to public policy, and do not allow for an oral hearing and for the possibility of a reversal of the original decision on the merits by a judicial decision as is reflected in Recital 26 of the Directive which states:

> "26. In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State."

It was urged that by failing to provide an independent appeal mechanism the Regulations fail to properly transpose Directive 2004/38/EC, and fail to comply with the Charter of Fundamental Rights, such that the Minister has acted in breach of EU law.

The trial judge, having considered the submissions of the parties and the case law to which he was referred, expressed himself satisfied that the Regulations provide for administrative redress, and for judicial redress through the judicial review procedure, and that in those circumstances they comply with the Directive.

(b) The incorrect legal test was applied when considering whether to make the removal order, and on the review. Reliance is placed on the provisions of Article 28 of the Directive in light of the fact that at the date of the removal order Mr Balc had been in this State for more than 5 years and was therefore *entitled to permanent residence*. In that regard, Article 28(2) of the Directive (which is reflected in Article 26(6)(a) of the Regulations) provides:

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

security" [Emphasis provided].

By contrast the test for Union citizens who have not resided in the host member state for 5 years of more is under Article 27(1) of the Directive that there must be "*grounds* of public policy, public security or public health" warranting the measures, but not "serious grounds" as in Article 28. This is reflected in Article 20(1)(iv) of the Regulations.

It was urged that in the present case the consideration of the application for the removal order, and of the review of same fail to address the application by reference to the correct test of whether there are *serious grounds* of public policy which warrant his removal, given his right to permanent residence here, and fail to state by way of conclusion that his removal is warranted on serious grounds of public policy as Article 28 of the Directive and Article 20(6) of the Regulations provide.

It was submitted that Mr Balc does not pose a serious threat given that this was his first offence, and that he has committed no subsequent offence, and therefore does not pose an ongoing risk to public policy, serious or otherwise. Having considered the parties' submissions, and in particular the decision of McDermott J. in *P.R. & ors v. Minister for Justice and Equality & ors* [2015] IEHS 201, the trial judge concluded as follows at para. 117:

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

The trial judge considered that the serious nature of the offence, and the fact that Mr Balc had declined to participate in the sexual offender programme offered to him in August 2014, and the known propensity for sexual offenders to re-offend, was sufficient for a conclusion that Mr Balc posed a significant risk to public policy and public safety.

(c) The Minister's proportionality assessment was unlawful. The amended statement of grounds argued that Mr Balc had committed just a single offence, albeit a serious offence, had pleaded guilty to same, and had served his sentence. In addition he had to, and would, comply with the conditions of his suspended sentence which were intended to assist his rehabilitation both as regards his sexual behaviour and his difficulties with alcohol, objectives that could be fulfilled by remaining in this State where he would be supervised by the Probation Services. There was no pressing need in such circumstances to remove him. A lack of proportionality was urged also by reference to the serious effect his removal would have on his wife and daughter who would be deprived of his presence within the family unit. It was submitted that inadequate consideration and regard was had to this aspect of the case.

Specifically in relation to the exclusion for a 5 year period, the grounds put forward in relation to proportionality were that no reasons were given for why an exclusion was required at all, or why five years was considered to be the appropriate period of exclusion, as opposed to some shorter

period. There was no consideration of the effect of exclusion on his wife and daughter, and this is a breach of the Directive, the Charter (Articles 7 and 24), as well as Article 41 of the Constitution.

It is not clear from the trial judge's judgment that the argument before him on proportionality followed the grounds relied upon in the amended statement of grounds. I say that because the trial judge in his judgment states the argument made by reference to whether the prospects for rehabilitation taking place in Romania if removed from this State had been adequately addressed or addressed at all in the decision to remove and in the internal review. The Minister had argued that this issue was not raised in the grounds for which leave had been granted and that it ought not to be permitted to be argued. The applicant must have argued that it was adequately reflected in the grounds for which leave was granted, as the trial judge stated at para. 123:

> "This Court agrees with counsel for the respondent [? perhaps this should read "applicant"] that the issue about the prospects for rehabilitation of the first named applicant in Romania, or the respondent's submission to consider same, was expressed in the amended statement grounding the application. This Court is also of the view that the respondent appropriately considered the issue of rehabilitation".

(d) The Minister's categorisation of this matter as "urgent" so as to disapply the one month period provided for in Article 30(3) of the Directive, and in Article 20(1)(b) of the Regulations was unreasoned and unlawful. Article 20(1)(b) provides:

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

29. The amended statement of grounds urged that in breach of his right to fair procedures Mr Balc had been provided with no opportunity to address that issue before the decision was made.

30. In fact it appears that the trial judge did not express a conclusion on that particular argument in his judgment. Given that Mr Balc had obtained an injunction to restrain his removal until after the determination of the proceedings, perhaps the point was not pressed in argument in the High Court. While it appears as an argument in the appellant's written submissions before this court, it was not argued orally. Counsel stated that he would rely upon his written submissions in that regard.

The appeal

31. The appeal from the judgment and order of the trial judge raises four issues for determination:

(a) The certified question, namely:

"Whether, once a review decision is made pursuant to Regulation 21(4) of the European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. No. 656 of 2006) confirming a removal order made under Regulation 20(1)(a) of those Regulations, that order itself *loses its*

amenability to judicial review."

(b) Does the administrative review of the decision to make the removal order which is available under the Regulations comply with the requirements the Directive (2004/38 EC), namely that such review must be:

(i) independent,

(ii) judicial in nature,

(iii) must enable matters that post-date the decision to be taken into account in the assessment of whether the applicant presents a present threat to public policy such as national security, and

(iv) provide an oral hearing where the applicant may be present and be heard.

(c) Whether the correct test was used when considering whether serious grounds of public policy existed for making the removal order.

(d) Whether the proportionality exercise was properly carried out both in relation to the decision to make the removal order, including the five year exclusion, and in relation to the internal review of same.

(e) Whether the failure of the Minister to provide any reasons for the exclusion period of five years invalidates the exclusion.

A: The certified question – is the removal order amenable to judicial review where the applicant has availed of the internal administrative review provided by the Regulations?

32. This issue arose in the High Court because in her statement of grounds of opposition the Minister raised it as a preliminary objection. It was pleaded that the applicants ought not to be permitted to maintain simultaneous challenges to both the initial decision to make the removal order and the internal review. The Minister contended that the decision on the internal review replaced the original removal decision, and attention was drawn to the fact that the reasons given in the review decision are somewhat different from those given for the original decision to make the removal order, and that it is these reasons that are being relied upon by the Minister.

33. In the High Court the Minister relied upon, inter alia, the judgment of Hedigan J. in *BNN v. Refugee Appeals Commissioner* [2008] IEHC 308. She relied also on the judgment of Cooke J. in *Lamasz and Gurbuz v. Minister for Justice and Equality* [2011] IEHC 50. These cases were relied upon for support for the overall submission that normally a first instance decision of the Minister will not be amenable to judicial review where the unsuccessful applicant is entitled to seek a review of the decision, and that any judicial review should await the outcome of any such review.

34. In *BNN* the applicant had sought a judicial review application to quash a recommendation by the Office of the Refugee Commissioner that the applicant's application for refugee status be refused, on the basis that her interview with ORAC was flawed. It was said that adverse credibility findings were made without putting relevant

matters as to country of origin information to the applicant at interview, so that she had an opportunity to address matters of concern to ORAC, and that she was not called back to provide her with such an opportunity. Hedigan J. concluded that it was only in some rare and exceptional circumstance that judicial review should be available in respect of the first instance decision, where an appeal or other alternative remedy is available, such as the internal review in the present case.

35. In *BNN* the alternative remedy was an appeal by way of oral hearing before the Refugee Appeals Tribunal. In fact the applicant had lodged an appeal with the R.A.T but that had not been determined by the time the judicial review of the ORAC decision was heard. The Minister's argument was that she should pursue her oral appeal, rather than be permitted to judicially review the ORAC recommendation, and where she would have the opportunity to give evidence and address the matters within the ORAC recommendation which she said she had had no opportunity to address at interview. In his judgment, Hedigan J. stated by way of conclusion at para. 45:

> "45. It is clear in the light of this series of recent decisions that it is only in very rare and limited circumstances indeed that judicial review is available in respect of an ORAC decision. The investigative procedure with which ORAC is tasked must be properly conducted, but the flaw in that procedure that entitles an applicant to judicial review of an ORAC decision must be so fundamental as to deprive ORAC of jurisdiction. The Courts, the applicants themselves, and the general public have a right to expect that no such fundamental flaw should ever occur in such an application. An applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the RAT. If such a clear and compelling case is not demonstrated, the applicant must avail of the now well established procedure that has been set up by the Oireachtas, which provides for an appeal to the RAT."

36. An example of the type of fundamental flaw in a first instance decision to which Hedigan J. referred, and which was found to merit a quashing of a first instance administrative decision is to be found in the other judgment referred to above namely that of Cooke J. in *Lamasz and Gurbuz v. Minister for Justice and Equality* [supra]. That case did not involve an application for refugee status, but was rather an application to quash the refusal of a residence card to the second named applicant who was the non-EU spouse (Turkey) of the first named applicant, a Polish national, who, it was claimed, had been working in Limerick from 2007 until August 2008 when she was made redundant. An application was made by non-EU spouse on the basis that he was a family member of a Union citizen who satisfied the requirement of being in employment in the State. The application for a residence card was accompanied by certain documentary evidence, including a P60 for 2007 and a P45 from the first named applicant's employer. The application was refused on the basis that the evidence of the exercise of the right to work by the first named applicant was unsatisfactory. The reason it was found to be unsatisfactory was explained by the fact that the relevant section of the Department had been unable to verify that the EU Citizen was exercising her treaty rights in the State in accordance with the requirements of Regulation 6(2)(a) of the Free Movement Regulations or Article 7 of the Directive 2004/38/EC. It was only as a result of a Freedom of Information request that an internal memorandum signed by two officials within the department revealed that the reason for the inability to verify that the first named applicant had been working for the period claimed was that the officials had tried on a number of occasions to contact the employer but had been unable to make such contact. This was against the background where the employer had confirmed to the first named applicant that he had received no communication or contact from the Department. This was found by Cooke J. to be an inadequate ground upon which to refuse an application which was otherwise accepted as validly made under the Regulations. He stated that the position might be different if enquiries had disclosed that a particular company/employer did not appear to exist, or not to be at the address

given, or to have no telephone at the number given on its documents. But the mere inability to make contact was found to be an inadequate reason refusal. It was in those circumstances that Cooke J. concluded:

> "23. The Court recognises that in the normal course the exercise of its jurisdiction in judicial review would not extend to a first instance decision of this kind when the error or defect is capable of being remedied by completion of the available administrative review procedure. That is especially so in cases where the reason for refusal is based on a lack of documentation or a failure to provide an explanation sought so that the administrative review is particularly apt to resolve the issue. In the circumstances of this case, however, where the initial refusal was not based upon any alleged inadequacy or defect in the application or its supporting documentation but merely on the Department's own (and largely unexplained) ability to carry out enquiries it thought appropriate, it is clear to the Court that this refusal decision ought not to have been made and, unless or until the respondent can adduce some valid reason for its refusal, the applicants ought not to be put to the delay of an administrative review."

37. However, the nature of the defects contended for in the present case are of a different character altogether. They are more akin to the sort of complaint that is made in relation to a decision by ORAC to recommend that an application for refugee status be refused, where the applicant complains, say, that the decision-maker has erred in the way credibility has been assessed, or that relevant matters have not been given adequate weight, or that irrelevant matters have been wrongly taken into account. In a refugee application context such matters can be appropriately addressed at an oral appeal before the RAT, where the applicant is present, and indeed is entitled to have legal representation.

38. Mr Balc submits that the administrative and paper internal review should not be equated with the appeal from the ORAC to the RAT. He submits that such review does not comprise an independent review since even though the initial decision a departmental officer is reviewed by a different departmental officer, they are each officers of the Minister, and in accordance with the Carltona doctrine (viz. *Carltona Ltd v. Commissioners of Public Works* [1943] 2 All ER 560 at 563 – *per* Lord Greene MR) and approved by the Supreme Court in *Devanney v. Shields* [1998] 1 IR 230, each such official is acting "as the Minister", and therefore the review must be seen simply as the Minister herself having a second look at the decision, albeit in the light of any further submissions received, in order to determine whether the removal is warranted. This, it is submitted, is not the sort of review that, if requested, removes the applicants' entitlement to seek to judicially review the initial decision, and to seek to have it quashed, and whereby the only decision that may be reviewed is the decision made following such review, as the trial judge concluded was the case.

39. First of all, I would refer to the fact that when requesting a review of the removal decision the applicants' solicitor specifically stated that the review was being sought without prejudice to their entitlement not only to an independent review, but also to their right to challenge the removal decision in the High Court by way of a judicial review. I do not say that this reservation of rights is itself determinative. It is not. But it certainly indicates that there was no acquiescence by the applicants such that they might be seen as having given up their entitlement to anything beyond the administrative review which they were informed they could request.

40. Secondly, it is relevant to refer to Regulation 20(7) of the Regulations which provides:

> "An application by or on behalf of a person to whom these Regulations apply for leave to apply for judicial review against a removal order shall

not suspend the removal of the person concerned where:

> (a) the removal decision is based on a previous judicial decision,
>
> (b) the person concerned has had previous access to judicial review,
>
> (c) or the removal decision is based on imperative grounds of public security."

41. This section makes clear that the removal order shall be suspended until, inter alia, any challenge to it by way of judicial review is determined. If there is to be the sort of distinction between the removal decision and the decision made upon the internal review of that decision for which the Minister contends, it would clearly act as a disincentive to any aggrieved applicant from seeking an internal review, where the seeking of such a review would remove the entitlement to have the removal order suspended in the event that a judicial review challenge was brought to the review decision. It would clearly be in such an applicant's better interests not to seek an internal review, but simply to challenge the removal order by way of judicial review. Such a disincentive cannot have been the intention of the Oireachtas in providing for an internal review of the removal order decision.

42. It is also relevant to refer to s. 5 (1) of the Illegal Immigrants (Trafficking) Act 2000 (as substituted in 2014). That section lists a number of decisions that are to be subject to the modified judicial review procedure set out in that section. Among those decisions is that referred to at (k), namely:

> "*a removal order* under Regulation 20 (1) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S. I. No. 656 of 2006)" [Emphasis provided].

43. The section does not include an internal review decision in respect of a removal order. This also suggests that the Oireachtas intended that an applicant who seeks an internal review might nevertheless seek to challenge the removal order itself by way of judicial review. As counsel for the appellants has pointed out, the first instance decisions of the ORAC in respect of a recommendation to refuse an application for refugee status, and an application for subsidiary protection, among those decisions which are subject to the modified judicial review procedure set out in s. 5 of the Act of 2000, as are the appeal decisions of the RAT.

44. Counsel for the Minister has responded by submitting that the fact that an internal review decision is not referred to in s. 5 of the Act of 2000 should not be taken as indicating that an intention by the Oireachtas that where a review has taken place the removal decision itself remains amenable to judicial review. Counsel submits that all it means is that a judicial review of the internal review decision is governed by the leave application rules provided fro in Ord.84 of the Rules of the Superior Courts, and not s. 5 of the Act of 2000. However, I do not think that submission is persuasive, particularly where the leave threshold under Ord.84 Rules of the Superior Courts is a lower one than under s. 5. If anything one would expect that the relevant threshold would be higher where the initial decision has already been the subject of an internal review, rather than the threshold laid down in *G v. DPP* [1994] 1 I.R. 374.

45. An internal administrative review of the kind provided for in respect of a removal decision should not be equated with the quite elaborate appeal on the merits which is available to an unsuccessful applicant for refugee status by way of appeal to an independent body *i.e.* the Refugee Appeals Tribunal. The judgment of Hedigan J. in *BNN* is not an authority which can be relied upon by the Minister in this case given the very different context in which *BNN* was decided. Nor is the judgment of Cooke J. in *Lamasz*

and Gorbuz on point.

46. In my view the certified question for this appeal should be answered in the negative for the reasons stated. A removal decision may be challenged by way of judicial review notwithstanding that an internal review has been sought and decision given on same.

B: Does the administrative review available under the Regulations comply with the requirements of Directive 2004/38/EC?

47. Article 31 of the Directive provides under the heading 'Procedural safeguards':

> "1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
>
> 2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:
>
> - where the expulsion decision is based on a previous judicial decision; or
>
> - where the persons concerned have had previous access to judicial review, or
>
> - where the expulsion decision is based on imperative grounds of public security under Article 28 (3).
>
> 3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28."

48. Article 28 provides:

> "1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
>
> 2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the *right of permanent residence* on its territory, *except on serious grounds of public policy or public security.* [Emphasis provided]
>
> 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

49. Having summarised the parties' submissions, the trial judge referred to the judgments of Cooke J. in *El Menkari v. Minister for Justice, Equality & Law Reform* [2011] IEHC 29, and in *Mohamud and Ali v. Minister for Justice, Equality & Law Reform* [2011] IEHC 49. At para. 105 of his judgment the trial judge quoted the following passage from para. 14 of the judgment of Cooke J. in *El Menkari*:

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

50. At paras. 106 – 107 the trial judge expressed his conclusions on this issue as follows:

> "106. The decisions of Cooke J. in *El Menkari v. Minister for Justice, Equality & Law Reform …* , and in *Mohamud and Ali v. Minister for Justice, Equality & Law Reform* … are a number of cases which were heard together as raising similar issues in relation to the refusal of applicants for a residence card under the provisions of the European Communities (Free Movement of Persons) (No. 2) Regulations. And the ratio of these judgments is that the provision in Regulation 21 of access to an administrative review of the initial refusal of an application is not incompatible with or in adequate having regard to Articles 15, 30 or 31 of the Directive.
>
> 107. It is this Court's view that the authorities are clear that in the 2006 Regulations the State has provided for administrative redress and judicial redress through the judicial review procedure. In those circumstances the Court decision is that the State redress procedure does comply with the Directive."

51. The appellants submit that the trial judge erred in concluding that the available procedures by way of administrative review and/or by way of judicial review satisfy the requirements of the Directive.

52. Counsel has emphasised that under Article 31.1 of the Directive the first requirement is that all such persons "shall have access to judicial redress procedures, and that it is only on a secondary basis, and only "where appropriate", that such procedures may be administrative in nature. In answer to a question from the bench on this appeal counsel fell short of submitting that "judicial redress" required that any appeal/review be conducted by a judge, but submitted that at a minimum it required a hearing before a body which is independent of the decision-maker, such as occurs in refugee cases before the Refugee Appeals Tribunal.

53. The appellants refer also to Article 47 of the Charter which provides, inter alia, that persons whose rights and freedoms under EU law are violated have the right to an effective remedy - a fair and public hearing within a reasonable time before an independent and impartial tribunal, and at which they may be legally represented. In relation to the redress procedures required under Article 31 of the Directive, it is submitted that it must be independent, must be judicial in nature, and must be in a position to take account of factual matters that have arisen since the decision was taken because the decision-maker must be able to determine at the time the review decision is being carried out whether or not Mr Balc is still considered to be a threat to serious public policy and public safety.

54. It is submitted that when measured against the requirements of the Directive and the Charter, the administrative internal review of the removal decision falls short of what the appellants are entitled to, as it is self-evidently neither independent, impartial nor judicial in nature, and further that a judicial review does not enable new facts and circumstances to be taken into account which have post-dated the decision under review. In this respect, counsel submits that a significant issue for the Court to consider if it could receive new evidence and make new findings of fact would have been the extent to which Mr Balc was, prior to his removal, making progress with the probation services in relation to his rehabilitation. Also, when the administrative review was undertaken, the official had before him a letter from the prison governor which stated, *inter alia*, that Mr Balc was offered an opportunity to take part in a sex offenders programme (Better Lives) but declined the offer. This letter is referred to in the review decision. Counsel has referred to Mr Balc's averments in relation to this in his affidavit sworn on the 20th March 2015 where he stated that he was not aware that he was being offered an opportunity to participate in such a programme. He did recall being offered a transfer to Arbour Hill Prison around February 2014 which he declined. However he stated that he had not understood this to be related to participation in a sex offenders programme. In the light of these averments, counsel submits that if the Court could, on a judicial review, examine these facts and circumstances on which the removal order was based, it would be in a position to adjudicate on the issue, but that this is not possible since the applicant's explanation was not before the Minister when the review was being conducted.

55. The appellants have also drawn attention to the fact that while Article 20(7) of the Regulations provides for the suspension of the removal order while judicial review proceedings are being determined, there is no such provision suspending the operation of the removal order while an internal review is being considered and determined. I should add that the decision in the present case predates the replacement of the 2006 Regulations by the European Communities (Free Movement of Persons) Regulations (S.I. No. 548 of 2015) which provide for an application to be made for a stay on any removal pending a determination of a review.

56. In urging for an interpretation of Article 31(1) of the Directive that mandates that an effective redress procedure be judicial in nature (i.e. some sort of tribunal akin to the RAT), counsel has referred to the Commission's *'travaux preparatoires'* which, it is submitted, makes clear the Directive's intention in this regard. In explaining certain changes to what became Article 31 the Commission stated at p. 9 of these *travaux*:

> "Article [31](1) (amendment 83): the amendment is designed to make it clear that there must always be judicial redress, and that administrative redress is also possible if it is provided for by the host Member State (for example before judicial redress)."

57. A major deficiency in the redress procedures available under the Regulations, and relied upon by the appellants for their submission that those procedures do not meet the requirements of the Directive is that they do not allow for the decision maker to take

account of new facts and information that come to hand after the date of the decision under review, such as in the present case the misunderstanding deposed to by Mr Balc in relation to his declining the offer to participate in the Better Lives programme for sex offenders. His refusal of that offer, as stated in the Governor's letter, was something taken into account both in relation to the original decision and on the review, when determining that Mr Balc was a threat to public policy such that his removal was justified. It is submitted that the redress procedures provided for by the Directive must include the possibility that the person or body carrying out the review have before it not only facts and information that were before the original decision maker, but any new facts and information which touch upon the question of whether Mr Balc is, at the date of the review decision, a present threat to public policy.

58. Counsel has referred to the judgment of the Court of Justice in *Orfanopoulos and Oliveri* [2004] ECR I -5257 at paras. 77–79 where the Court stated:

> "77. For the purposes of deciding whether a national of another Member State may be expelled under the exception based on reasons of public policy, the competent national authorities must assess, on a case-by-case basis, whether the measure or the circumstances which gave rise to that expulsion order prove the existence of personal conduct constituting a present threat to the requirements of public policy (see, in particular, Calfa, cited above, paragraph 22). As the Advocate General points out in point 126 of her Opinion, no more specific information as to what constitutes the 'presence' of the threat is evident from the wording of Article 3 of Directive 64/221 or the Court's case-law.
>
> 78. It is not disputed that, in practice, circumstances may arise between the date of the expulsion order and that of its review by the competent court which point to the cessation or the substantial diminution of the threat which the conduct of the person ordered to be expelled constitutes to the requirements of public policy.
>
> 79. As is clear from paragraphs 64 and 65 of this judgment, derogations from the principle of freedom of movement for workers must be interpreted strictly, and thus the requirement of the existence of a present threat must, as a general rule, be satisfied at the time of the expulsion.
>
> 80. While it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, the fact remains that those rules *must not be such as to* render virtually impossible or excessively difficult the exercise of rights conferred by Community law (see, to that effect, Case 33/76 Rewe [1976] ECR 1989, paragraph 5, and Case C-129/00 Commission v Italy [2003] ECR I-0000, paragraph 25).
>
> 81. A national practice such as that described in the order for reference is liable to adversely affect the right to freedom of movement to which nationals of the Member States are entitled and particularly their right not to be subjected to expulsion measures save in the extreme cases provided for by Directive 64/221. That is especially so if a lengthy period has elapsed between the date of the decision to expel the person concerned and that of the review of that decision by the competent court.
>
> 82. In the light of the foregoing, the reply to the second question must be that Article 3 of Directive 64/221 precludes a national practice whereby the national courts may not take into consideration, in reviewing the

> lawfulness of the expulsion of a national of another Member State, factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy. That is so, above all, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court."

59. It should be noted that Article 3 of Directive 64/221 was the equivalent provision in that Directive which was replaced by Article 27(2) of Directive 2004/38/EC. It is submitted therefore that the redress procedures available under the Regulations fail to fulfil the requirements of Article 27 of the Directive which provides:

> "Article 27: General Principles:
>
> 1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
>
> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. *Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.* [Emphasis provided]

60. Emphasis is placed on the requirement that the person must represent a *present* sufficiently serious threat to public policy, and not just that he may have done so in the past as a result of his personal conduct, and therefore that in accordance with *Orfanopoulos* and *Oliveri* the procedures must permit up to date facts and circumstances to be taken into account at the time not only that the internal review decision is being made, but also at the date of any judicial review. In so far as this cannot happen under the judicial review rules and procedures, it is submitted that the redress procedures do not comply with the requirements of the Directive.

61. In further support of these submissions the appellants refer to the judgment of McDermott J. in *P.R. v. Minister for Justice* [2015] IEHC 201. That case involved a challenge to a review decision taken by the Minister under Article 21 of the Regulations. During the course of his judgment he commented at para. 34:

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

In the same judgment at para. 75, McDermott J. stated that "the High Court could not on judicial review entertain further evidence beyond that considered by the decision maker when determining the … review".

62. The appellants submit that as part of any review procedure they are entitled to an oral hearing as is the case with the RAT, and in so far as no oral hearing is provided for, the Directive has not been complied with. For that submission they rely upon Article

31(4) of the Directive which provides:

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

63. The trial judge stated the following at para. 101 of his judgment in relation to Article 31(4):

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

64. Counsel submits that the trial judge has misunderstood Article 31(4). Counsel submits that its meaning is that where a person has been removed after a review application has been filed but before the decision on the review is made, the authorities may not prevent the person from submitting his/her defence in person, other than for the reasons stated. In other words, it is submitted, he/she must be permitted to return for the purpose of making submissions in person at the review hearing, and it is submitted that this clearly implies that an oral hearing is contemplated by this Article. It is submitted that the trial judge fell into error when he stated that this article applies only to a person who has already been removed, and therefore not to Mr Balc, as it would lead to an illogical situation whereby a removed person would have a right to an oral hearing, whereas a person who was still in the State prior to the review decision has no such right.

65. The appellants go on to submit however that even if there is an entitlement to ask for an oral hearing for the purpose of the internal review provided for under Article 21 of the Regulations, it is still not an independent review, and is not judicial in nature. It therefore would continue to fall short of what the Directive requires.

Minister's submissions

66. The Minister submits that the redress procedures required by Article 31(1) and (3) of the Directive are provided for in the State (a) by the availability of judicial review which allows for an examination of the legality of any decision made, and (b) by the review provided for by Article 21 of the Regulations which enables the facts and circumstances on which the decision is based to be examined by a different and more senior departmental official. It is submitted that it is not a requirement that each form of redress provided for should allow for an examination of both the facts and the legality of the removal decision, so long as the totality of the procedures provide for what is required by Article 31 of the Directive. Counsel submits that Article 21 of the Regulations fulfil these requirements. Article 21 of the Regulations provides:

> "21.(1) A person to whom these Regulations apply may seek a review of any decision concerning the person's entitlement to be allowed to enter or reside in the State.
>
> (2) A request for review under paragraph 91) shall contain the particulars set out in Schedule 11.
>
> (3) A review under this Regulation of a decision under paragraph (1) shall be carried out by an officer of the Minister who:

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

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

(4) The officer determining the review may:

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

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

67. The Minister drew attention to the fact that when the appellants sought a review they made no request for an oral hearing, and submits that they ought not now be entitled to try and impugn the procedures by reference to the absence of provision for an oral hearing.

68. In answer to the appellants' submissions that the procedures do not meet the requirements of the Directive because they are not independent and judicial, and do not enable new facts and circumstances to be taken into account that may have arisen since the decision was made, the Minister submits that the Directive makes no such requirements, and that there is nothing in the Directive that suggests that some form of de novo appeal to a court or tribunal is required. It is submitted that the Directive permits where appropriate an administrative review, as well as a judicial review, and that the procedures provided for in Article 21 of the Regulations satisfies these requirements.

69. Counsel for the Minister has referred to a number of cases where Article 31 of the Directive has been examined. He referred the Court to the passage quoted by the trial judge in his judgment from the judgment of Cooke J. in *El Menkari v. Minister for Justice, Equality and Law Reform*. In support of a submission that the review procedure was appropriate and adequate for the purposes of having material considered that is made available after the removal decision is made, counsel referred to the judgment in *Saleem v. Minister for Justice, Equality and Law Reform* [2011] IEHC 29 where Cooke J. stated at para. 13:

> "13. In the present case the application was refused because additional documents had been sought in relation to the compliance with the condition in regulation 6(2)(a)(i) but when they had not been received within the 10 days stipulated, the decision was taken before it was realised that the documents had belatedly arrived. This, in the judgment of the Court it is precisely the type of situation for which the administrative review of Regulation 21 is particularly apt…".

70. Reference was made also to a passage from the judgment of Cooke J. in *Lamasz and Gorbuz* [supra] where at para. 23 he stated:

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

71. Reliance was placed also on the judgment of Cooke J. in *Mohamud and Ali v. Minister for Justice, Equality and Law Reform* [2011] IEHC 54 where at para. 23 he stated:

> "(c) In the judgement of the Court, the provision in Regulation 21 of access to an administrative review of the initial refusal of an application is not incompatible with, or inadequate having regard to, Articles 15, 30 or 31of the Directive. Article 31.1 explicitly recognises the appropriateness of having both forms of redress available to Union citizens and their family members. As the conclusions reached in these jointly heard cases illustrate, initial refusals may result from the absence of documents, the lack of an explanation for discrepancies or misunderstandings on the part of applicants as to what is being requested. Such cases are particularly apt to be dealt with by a purely administrative review without the delay or expense of judicial redress because they are matters which are essentially administrative in character and capable of being rectified as such. The fact that the review decision is taken within the same administration does not diminish the utility or appropriateness of that redress. Independent judicial redress is likely only to be relevant and appropriate against a definitive refusal decision. Further, as the judgement today in this case and the judgement of 16 February 2011 in the Lamasz case demonstrate, the availability of an administrative remedy against the initial decision does not preclude immediate recourse to judicial redress by means of Order 84 of the RSC in suitable cases.

Accordingly, there has not in the judgement of the Court been any failure or inadequacy in the transposition of the Directive by the Regulations in these regards."

72. Insofar as the appellants have relied upon the fact that in the asylum context and unsuccessful applicant may seek an oral appeal before the Refugee Appeals Tribunal, the Minister has referred to the clear difference between the wording in the Article 39 of the asylum Procedures Directive (2005/85/EC) and that contained in Article 31 of Directive under consideration here. The former provided specifically that Member States must ensure that applicants for asylum have the right to *an effective remedy before a court or tribunal*, against a number of specific decisions in the asylum context. It is submitted that the RAT was established in the light of that very specific requirement, whereas in stark contrast Article 31 of the Directive under consideration herein made no such requirement, and simply provided that persons concerned have access to judicial redress, and where appropriate administrative redress. In these circumstances the Minister submits that Article 31 cannot properly be interpreted as requiring an appeal to an independent tribunal, with or without an oral hearing.

73. It is of some note also, as submitted by the Minister, that in its decision in *NM v. Minister for Justice and Equality* [2016] IECA 217, this Court (per Hogan J.) has found that the availability of judicial review in the High Court constitutes an effective remedy before a court for the purposes of Article 39 of the Procedures Directive. That was a case where the Minister had refused to admit an otherwise failed asylum seeker back into the asylum process, and where an internal review procedure could be invoked against that refusal. NM applied for such a review. That was carried out but the decision remained. Simultaneously NM commenced judicial review proceedings contending that this review procedure was incompatible with Article 39 of the Procedures Directive. Having reviewed the provisions of the Refugee Act, 1995, and the relevant provisions of the Procedures Directive, Hogan J. then examined recent case law in relation to contemporary judicial review, and in particular *Meadows v. Minister for Justice* [2010] 2 IR 701, *ISOF v. Minister for Justice* [2010] IEHC 457 (Cooke J), and his own judgment in *Efe v. Minister for Justice* [2011 2 IR 798. Having done so, Hogan J. stated at para. 50-51:

> "50. Having reviewed the case-law in Meadows and ISOF, I then concluded this part of the judgment in *Efe* by saying [2011] 2 IR 798,

819-820:

> 'In summary, therefore, it is clear that, post-*Meadows* at any rate, it can no longer be said that the courts are constrained to apply some artificially restricted test for review of administrative decisions affecting fundamental rights on reasonableness and rationality grounds. This test is broad enough to ensure that the substance and essence of constitutional rights will always be protected against unfair attack, if necessary through the application of a *Meadows*-style proportionality analysis … Against that background, it is clear that the common law rules of judicial review satisfy the constitutional requirements of Article 40.3.1 and Article 40.3.2 in that they must in particular provide an adequate remedy to vindicate constitutional rights.'

> 51. In the light of this trilogy of case-law – *Meadows, ISOF* and *Efe* – it is clear that what might be termed modern, post-*Meadows*-style judicial review will satisfy the effective remedy requirements of Article 39.1 of the Procedures Directive. As I have already stated, what is clear from the judgement in *Diouf* [Case C-69/10 [2011] ECR I-7151] that what is necessary is that "the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review". Whatever might have been the situation within the narrow and artificial confines of *O'Keeffe*, it is clear from other important authorities that the decision of the Minister must satisfy the requirements of factual sustainability … and the reasons for that decision can furthermore be fully scrutinised within the parameters of the judicial review procedure (*Meadows*) …".

74. It follows, in the Minister's submission, that by parity of reasoning with *NM*, judicial review must be considered to be an effective remedy for the purposes of Article 31(1) of the Directive, all the more so in the absence of any wording in the Article akin to what was provided for in Article 39 of the Procedures Directive.

75. The Minister has submitted that the reliance placed by the appellants on the judgment of the CJEU in *Orfanopolous and Oliveri* is misplaced given that it addresses matters arising from a different provision, namely Article 9 of Directive 64/221, and the Court had to consider that article against a very differently worded national legislative provision, and under which the administrative review took place *prior to* the final decision being made by the national authority. It is in that context that the Court's decision must be seen, since where new facts emerged post the final decision there was not under the relevant German national law any provision for taking those facts into account unless they actually supported the negative decision. It was against that background that the CJEU concluded as it did.

76. By contrast in the present case, it is submitted by the Minister, it is perfectly possible for facts that come to light after the removal decision is made, to be taken into account by the person carrying out the administrative review, and if necessary in the light of those new facts to make a different decision. Even where the decision remains the same, a full judicial review can subsequently be sought in order to test the legality of the decision. It is submitted that in this way it is clear that the administrative redress combined with judicial review provides an effective remedy which is consistent with the requirements of Article 31 of the Directive.

77. I am satisfied that the trial judge was correct to conclude as he did that the redress procedures available under the Regulations, and by way of judicial review, fulfil the requirements of Article 31 of the Directive, and provide an effective remedy. Quite apart from the fact that the appellants never sought an oral hearing when seeking a review

(which might affect standing to challenge on that ground, but is neither here nor there as far as the proper interpretation of the Directive is concerned), I am satisfied that an oral hearing is not mandated or even required to be available if sought. The Minister is correct to refer to the difference between the wording of the Procedures Directive and the present Directive in this respect. If it was intended that an oral hearing was required, the Directive would have made that intention clear. T he fact that Article 47 of the Charter refers to an effective remedy before a tribunal must not be taken as mandating in the case of every administrative decision that an aggrieved party must have a review with an oral hearing before an independent judicial tribunal. If it was that prescriptive the Directive itself would have so specified. The availability of judicial review as discussed above fulfils any requirement for judicial oversight of the decision that is made on the merits.

78. I am also satisfied that while judicial review itself does not enable the appellants to put new material before the court for its consideration of its merits, it does not take from the fact that on the administrative review under the Regulations fresh and up to date information can be furnished so that the review decision maker can have regard to it when deciding to either affirm the removal order or make a different decision.

79. In the present case it was clear from the consideration of the original decision to make a removal order, which was provided to Mr Balc and his solicitor that a concern was expressed as to his having declined the offer of a place on the Better Lives programme, and concerns also about his not having addressed his difficulties with alcohol. While the latter was addressed by pointing out that he would have had no access to alcohol while in prison, the opportunity was not taken to make the points that were made by Mr Balc in his affidavit sworn on the 20th March 2015 (para. 6 thereof). If he had indicated his lack of awareness of being offered the opportunity to go on that programme and that he may have been confused because of language difficulties, that question could have been pursued during this review process. He was not disadvantaged in this regard because he was not afforded an oral hearing. It could easily have been addressed had he addressed it as he did in his later affidavit. The procedures available enable post-decision matters to be brought to attention and addressed as part of the administrative review.

80. I am also satisfied that it is not contrary to the Directive that the review would be carried out by another and more senior official from within the Minister's department. While under the *Carltona* doctrine referred to above both the first instance official and the more senior reviewing official are each acting "as the Minister", it is overly simplistic to assert that it is therefore the Minister who is making both decisions, and consequently that the review is not "independent" thereby rendering the remedy ineffective. The fact is that the review is carried out by a different and more senior official as provided for in the Regulations. Any requirement for independence as it is to be considered in this particular context is met by the need for it to be undertaken by a different and more senior official. It would of course be different if the Regulation permitted the review to be carried out by the same first instance decision-maker. But that is not the case. Where an administrative review is permitted by the Directive, and where there is no requirement for an independent tribunal such as the RAT in the asylum context, there can be nothing objectionable about a different and more senior official in the same department carrying out the review.

C. The incorrect test:

81. Central to this issue is the uncontroverted fact that at the relevant time in February 2015 when this removal order application was being considered, Mr Balc was a person who was entitled to permanent residence in the State having been resident here for in excess of five years. It is central to the argument that the incorrect test was applied both in relation to the original decision to make the removal order, and on the review of

that decision, since by virtue of Article 28(2) of the Directive, to which effect is given by Article 20(6)(a) of the Regulations an enhanced level of protection against the making of a removal order is given to a person such as Mr Balc who is entitled to permanent residence in the host Member State, compared to a person who does not yet enjoy that right.

82. Article 28 of the Directive, under the heading 'Protection against expulsion', provides:

> "1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
>
> 2. *The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security*.[Emphasis provided]
>
> 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
>
> (a) have resided in the host Member State for the previous 10 years; or
>
> (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

83. Article 20(6)(a) of the Regulations provides:

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

84. The appellant draws attention to the fact that under the heading 'General principles' Article 27 (1) and (2) of the Directive provide:

> "1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on *grounds of public policy*, public security or public health. These grounds shall not be invoked to serve economic ends.
>
> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
>
> *The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*. Justifications that are isolated from the

> particulars of the case or that rely on considerations of general prevention shall not be accepted. [Emphasis provided]

85. Much of the appellants' argument rests upon the distinction they seek to draw between "grounds of public policy" and "serious grounds of public policy" as used in these articles. Essentially it is contended that when one reads the analysis of the initial removal decision, and of the review it becomes apparent that the question of whether Mr Balc was a risk to public policy was addressed not by reference to whether there were "grounds of public policy" (Art. 27.1) justifying the making of a removal order, but rather whether there were "serious grounds of public policy" (Art. 28.2) for doing so. In other words, it is argued that he was not afforded the benefit of what is contended as an enhanced protection to which he is entitled as a Union citizen who enjoys a right to permanently in this State.

86. The Minister's letter to Mr Balc dated the 25th February 2015 which enclosed the removal order, together with the analysis of the application and the reasons, stated that the reason for making the order was "because it has been determined that your presence in the State poses a serious risk to public policy". Within the consideration/reasons document enclosed, it states under the heading "Background": "The reason for the Minister's proposal is that it is believed that Mr Balc through his personal conduct represents a threat to the public policy of the State". The document goes on to state that the proposed interference with his freedom of movement and residence rights is necessary "for the prevention of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". Under the consideration of proportionality, it is stated that it is believed that he "represents a threat to public policy" and "is a genuine and sufficient threat to public safety and fundamental interest of Irish society". Later on in the document it is stated that there exist "substantial reasons associated with the common good which require the removal of Mr Balc". This document concludes by stating that the making of a removal order is "proportionate and reasonable to the legitimate aim being pursued and is required on serious grounds of public policy".

87. A copy of the decision made following the review was sent to Mr Balc under cover of the Minister's letter dated the 5th March 2015. That document under the heading "Background" stated, just as the earlier document stated, "The reason for the Minister's proposal is that it is believed that Traian Balc through his personal conduct represents a threat to the public policy of the State". This document went on to state, just as the previous document stated, that the interference with his freedom of movement and residence rights is necessary "for the prevention of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". The same document, when considering proportionality, stated, as had the previous document, that Mr Balc's presence in the State poses a threat to public policy and public security. The reviewing official went on to state that he was of the view that Mr Balc "has committed a very serious sexual assault which shows that his presence in Ireland is a threat to public policy and public safety and warrants his removal".

88. The appellant points to the fact that in both the initial consideration of the request for a removal order and in the consideration upon review it is stated that the appellant "represents a threat to the public policy of the State" and make no reference to him being "a serious threat", or to there being "serious grounds of public policy" (in the words of the Directive) justifying his removal. Reliance is placed also on a passage of text on page 5 of the review consideration to which I have not yet referred. That passage states:

> "Crimes of a sexual nature are grievous offences against the person and are at the upper end of the scale of criminal behaviour. In *J.D & D*

> *Kovaleko v. MJE & ors*… The court found that the commission of rape was sufficiently serious to justify the invocation of the notion of "public policy". The court held that "It is clear from the policy underlying the statutory offences of rape and s. 4 rape, and these severe penalties that apply to those convicted of sexual offences in Ireland, not only that conduct leading to such offences is to be condemned and punished, that *it is a matter of public policy* for the authorities in women and girls be protected from such vicious assaults [sic]".[Emphasis provided]

89. Counsel for the appellant has submitted that the reference in this document to it being "a matter of public policy" as opposed to the phrase "serious public policy" used in the Directive is particularly illustrative of the fact that the incorrect test was applied by the Minister when reviewing the decision to make the removal order.

90. In his judgment, the trial judge set out the arguments on this issue in more detail than I have. But his conclusion was briefly stated as follows at para. 117 of his judgment:

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

91. The respondents accept that Mr Balc was entitled to permanent residence in the State at the time these decisions were made, and therefore that he comes within the provisions of Article 28.2 of the Directive, and that he may not be expelled from the State unless there are *serious grounds* of public policy which justify doing so. But they submit that a reading of the decisions as a whole, and not simply taking short passages or phrases in isolation, indicates that the correct test was considered and applied by the Minister. In the Minister's submission, the manifestly serious nature of the conduct giving rise to the sexual assault offences to which Mr Balc pleaded guilty gives rise to a serious public policy ground for making the removal order. This, it is submitted, is not affected by the fact that in one or two places in the consideration documents to which I have referred, the Minister has stated that the appellant represented a threat to public policy, as opposed to "serious public policy".

92. The Minister has referred to the judgment of McDermott J. in *P.R. v. Minister for Justice and Equality* [2015] IEHC 201. That was a case where a Polish national resident in the State and, like Mr Balc, was entitled to permanent residence here, was convicted of seven offences of sexual assault and was given a three year sentence with the final sixteen months suspended. The facts of his repeated offending differ from Mr Balc's offences, but arguably were less serious in nature, at least when considered individually. A removal order was made against PR with an exclusion period of ten years. It was considered that his pattern of offending made him a serious risk to public safety and security, and that he had "demonstrated a flagrant disregard for the law and has committed a number of serious sexual offences in the State over a period of four years suggesting a high propensity to re-offend".

93. In that case the Minister's letter had explained that the reason for making the removal order was that the Minister considered that PR's conduct was such "that it would be contrary to *public policy*" to permit him to remain in the State. Following a review of that decision, PR was informed that it was considered that his conduct was such that "it would be contrary to *serious grounds of public policy* to permit [him] to remain in the State". Having considered the relevant provisions of the Directive and the Regulations McDermott J. stated at para. 43:

> "43. It is clear that there are three gradations of protection available to

convicted criminals under European Union law for expulsion. A person convicted who is not a permanent resident may be expelled on grounds of public policy. A person entitled to permanent residence, such as P. R., may only be the subject of a removal order "on serious grounds of public policy or security". A person who has lived in the host state for a period of 10 years or more can only be excluded on imperative grounds of public security. The applicant's claim that there are no serious grounds of public policy or security which justify PR's exclusion having regard to the fact that a single sentence of three years imprisonment with 16 months suspended was imposed in respect of all accounts, to which he pleaded guilty."

94. Having considered the case of *Regina v. Pierre Bouchereau* [1977] ECR 1999, and the principles therein stated relating to reliance upon public policy for the making of a removal order, McDermott J. stated at para. 48:

> "48. I am satisfied applying the above principles, that the respondent was entitled to rely upon the nature, extent and duration of P.R's criminal behaviour as part of the appraisal of whether he constitutes a serious threat to public policy. It is clear that past conduct alone or in conjunction with other factors may give rise to such a threat, and indicate his readiness, inclination or disposition amounting to propensity to act in the same way in the future. Though the facts of each case must be individually assessed, guidance as to what may constitute "serious grounds" as opposed to "imperative grounds" can be obtained from a number of decided cases."

95. The cases to which McDermott J. referred involved a consideration by the CJEU of what was meant by "imperative grounds of public policy" and "serious grounds of public policy" - (*P.I. v. Oberburgermeisterin der Stadt Remscheid* (Case C-348/09; and *Land Baden Wurtenberg v. Tsakouridis* Case C-145/09 [2010] E.C.R 1-11979). Having considered these cases, McDermott J. stated:

> "52. It is clear from this and the decision in Land Baden Wurtenberg v. Tsakouridis … that serious offences such as dealing in narcotics and repeated sexual assaults may be regarded as constituting a basis for justifying special measures against foreign nationals who commit such offences on the ground of public policy, and it is for the national decision-maker to determine whether the conduct is covered by the concept of "public policy" for the purposes of Article 28.2. It is for the decision-maker in the member state to determine whether the offence is committed, on their own or with other factors, constitute "serious" or "imperative" grounds of public policy pursuant to the provisions of Article 28 (2) or (3)."

96. *P.R* was clearly a person who came within Article 28(2) of the Directive and not Article 28(3) thereof. McDermott J. went on to consider the question of "serious grounds of public policy" in relation to the conduct of P.R which gave rise to the offences for which he was convicted. At paragraph 54 of his judgment he stated:

> "54. The court is satisfied that the offences of which the applicant was convicted and sentenced are regarded under Irish law as serious in their nature as indicated by the potential penalty which may be and was imposed. The nature of a sexual assault may differ in its gravity depending on the circumstances in which it was committed. It is clear as a matter of legislative and public policy that young women such as the victim in this case, must be protected from predatory sexual assailants. In this case the sentence imposed was not the only matter considered. The conduct of the applicant over the period of the commission of these offences was also taken into account by the decision maker, including the fact that his criminality would not have been interrupted had he not been apprehended in 2011. His offences commenced in the year following his arrival in Ireland and continued over a period of four years. The seriousness of these offences as described in the judgement of the Circuit

> Criminal Court and the effect on the victims was significant. The court is satisfied that there was ample evidence to justify the conclusion reached by the Minister that the removal was in accordance with the common good, and that his pattern of serious sexual criminal behaviour in the State represented a serious risk to public safety. This series of sexual assaults is covered by the concept of "public policy" and in the court's view, P.R's conduct was reasonably capable of giving rise to "serious grounds of public policy" for the purpose of Article 28 (2)."

97. It is reasonable to view the offences for which PR was convicted as being individually of lesser gravity, though greater in number and over a lengthier period of time, than the two offences committed by Mr Balc in what was a single incident. All sexual offences are by their very nature serious offences. But within that category of seriousness, some can obviously be considered more serious than others. It follows in my view that the conduct giving rise to any sexual assault offence can reasonably be considered to constitute a serious risk to public policy, or, to use the phraseology of the Directive and the Regulation, to justify a removal order on the basis that this conduct amounts to a ground of serious public policy. The protection of females from the sort of predatory conduct engaged in by Mr Balc is clearly not just a reasonable public policy to seek to uphold, but also a serious public policy.

98. As already discussed earlier in this judgment, the Directive has provided for the expulsion of EU citizen from a host member state in certain circumstances already described, despite the fact that this will be an interference with certain rights, such as free movement and residence, guaranteed to such citizen under the Treaty on the Functioning of the European Union. Certain criteria by which this administrative decision is made are laid down also. A necessary protection for the EU citizen against whom a removal order is being made are prescribed, such as in the case of Mr Balc, the need for serious grounds of public policy to exist, and compliance with the principle of proportionality. As we have seen earlier, it is necessary that the citizen has access to judicial redress, and where appropriate, administrative redress procedures (Art. 31) as part of the procedural safeguards built into the legislative scheme. The decision to make a removal order, and under the Regulations the decision made under the review process, are administrative decisions, and not judicial. But the availability of judicial review of each or either such administrative decision enables the lawfulness of these decisions to be challenged, examined by a court, and determined. But it should be emphasised, perhaps unnecessarily, that the judicial review scrutiny is confined to the legality of all aspects of the administrative decision-making process. Provided that this decision-making process has been carried out in accordance with law, the administrative decision will be upheld, even if the court which considers the legality of the decision might itself think that on the merits it might reasonably have reached a different decision.

99. In my view, when read as a whole, and in the light of the serious and grave conduct which gave rise to the offences to which Mr Balc pleaded guilty and for which he was sentenced, the consideration documents demonstrate that while at times the phrase "grounds of public policy" are used by the decision maker, there can be no doubt that the view formed and held is that this conduct was serious, that the offences were of their nature serious offences, and that Mr Balc should be removed on serious grounds of public policy, i.e. the protection of society. The merits of that decision are not a matter for this court. It is the decision making process that must be scrutinised. I am satisfied that as far as the test applicable to Mr Balc is concerned, the correct test was applied by each decision maker, despite the phraseology used in one or two instances as pointed out by the appellants. The documents must be read as a whole to properly interpret and understand their real meaning. The appellants have sought to parse and analyse these documents and to find an occasional infelicity of language to support the argument that the incorrect test was applied. The construction of a document containing the reasons for the decision is not to be approached in the same strict and literal manner by which a statute will be construed. It is a matter of reading the whole document to get its sense,

without separating out one or two phrases here and there and considering them in isolation to the remainder of the document.

D: Proportionality

100. Article 31(3) of the Directive provides that the redress procedures shall, *inter alia*, "ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28". The relevant requirements, apart from a consideration of "serious grounds" in the case of Mr Balc, are stated in Article 28(1) which provides:

> "1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin."

101. These matters are provided for in Article 20 (3) (a) of the Regulations. If these matters were not taken into account by the decision-makers, and if proportionality was not considered either appropriately, or at all, then clearly the High Court, or this Court on appeal would be obliged to quash the decision to make a removal order and remitted for further consideration so that all relevant factors affecting the question of proportionality can be addressed and a new decision made.

102. The argument sought to be advanced in the High Court in relation to proportionality was that the decision makers had failed to consider the effect on the appellant of being removed from the State as regards his ability to rehabilitate himself. This is submitted in the light of what is submitted to be the clear intention of the sentencing judge when he suspended 18 months of the sentence imposed, on condition, inter alia, that Mr Balc would, under the supervision of the probation services, undergo an alcohol treatment programme and a sex offenders programme.

103. There seems to have been some issue raised in the High Court by the respondents as to whether this issue relating to rehabilitation had been raised in the amended statement of grounds, and therefore that the appellant ought not to permitted to rely upon it for the purpose of his submissions relation to proportionality. The trial judge refers to that submission in his judgment stating at para. 121:

> " 121. … [Counsel for the respondent] stated that this issue is not raised in the amended statement grounding the application for judicial review and said that at no point in the amended statement grounding the application for judicial review did the applicants raise any issue about the prospects for rehabilitating the first named applicant in Romania or the respondent's submission to consider same. This Court is of the view that this cannot be addressed as an issue in this judicial review… ".

104. There may be an error in the text of the judgment in para. 123, as otherwise it is inconsistent with para. 121 above. It would appear that the word "not" should appear in the third line of the passage quoted below, between the word "was" and the word "expressed": The trial judge stated at para. 123:

> "123. This Court agrees with counsel for the respondent that the issue about the prospects of rehabilitation of the first named applicant in Romania or the respondent's submission to consider same *was [not] expressed* in the amended statement granting the application. This Court is also of the view that the respondent appropriately considered the issue of rehabilitation."

105. One way or another, the issue was given substantive consideration, resulting in that conclusion by the trial judge that the respondent had appropriately considered the

issue raised in relation to rehabilitation. I would also note however that at paragraph 5, subparagraph 9 of the amended statement of grounds, the following ground is recited:

> "9. The decision of the respondent as notified to the first named applicant's solicitor by letter of 25th February to make the removal order (with exclusion order) and the decision-making process and analysis giving rise to that decision fails to have due and proper regard for directly relevant factors and matters. In particular, there has been a failure in the decision-making process to have due regard for the remorse shown by the first named applicant in respect of the crime he committed *and/or to have due and proper regard for the rehabilitation process and element attaching to his conviction, and the manner in which he has demonstrated to the satisfaction of the relevant authorities (Probation Service) is commitment and willingness to undertake and complete the rehabilitation programs set out for him.* In any balancing exercise conducted and in order to comply with the principle of proportionality as set down in Article 27 of the Directive, the respondent was required to fully and adequately consider these factors and has failed to do so."

106. The respondents maintain this pleading objection in their written submissions on this appeal. The appellant raised a ground of appeal based on the trial judge's conclusion as stated in para. 121 of his judgment that the issue based on the failure to have considered rehabilitation as part of the assessment of proportionality could not be addressed as it was not pleaded in the statement of grounds.

107. I must say it seems to me that the rehabilitation issue is adequately covered within para. 5, sub-para. 9 as set forth above. The parties have in fact dealt with the issue on its merits (albeit the respondent does so without prejudice to the preliminary objection), and the trial judge reached a substantive conclusion also. I therefore will address the issue and the appeal against that substantive conclusion.

108. In the initial consideration of the application for a removal order the consideration of proportionality commences at page 4 thereof. The decision maker then at page 5 refers to the conditions attached to the suspension of sentence, and states the following:

> "Mr Balc was ordered to keep the peace and be of good behaviour for four years and to undergo the supervision of the probation services for 12 months after his release. He was also instructed to undergo an alcohol treatment programme and a sex offenders programme suitable for him. There is no evidence on file, nor is there any claim by Mr Balc, to show that he has attended a sexual offender's rehabilitation course either after he committed the offence or since his incarceration for it. *It must also be noted that the Department has not received any evidence to show that Mr Balc has taken steps to address his alcohol abuse issues which seem to be a contributory factor in his criminal behaviour*. Certainly without Mr Balc undergoing any treatment for either his alcoholism or his sexual offending it is submitted that he continues to pose a serious threat to public policy if allowed to remain in the State."

109. The consideration of the review application states on page 3 that in their letter seeking a review, Mr Balc's solicitor had submitted a number of grounds in relation to the review including that:

> (i) The investigating and deciding officers did not have proper regard to Mr Balc's family circumstances and in particular to the best interests of his daughter, Alina.
>
> (ii) The investigating and deciding officers were incorrect in concluding that Mr Balc's commission of an offence/sexual offence represents a

sufficient level of threat to warrant his removal from the State.

(iii) *The investigating and deciding officers noted that Mr Balc had not engaged in sexual offenders rehabilitation course or taken any steps to address his alcohol abuse issues. [The solicitors] report that Mr Balc has commenced a sex offenders programme while in prison, and that he will engage in an alcohol treatment programme on his release from custody*.

(iv) *The Removal Order should not have been made before Mr Balc had a chance to undergo probation in the State."* [Emphasis provided]

110. The consideration of the review states at page 5 thereof:
"The purpose of this review is to decide whether the original decision in Mr Balc's case achieved the legitimate aim of the State for the prevention of crime a disorder in the interest of public safety and the common good. This review will also try to determine if any new evidence has been submitted to show that Mr Balc's circumstances have changed since the making of the order against him."

111. On page 7 thereof the following appears:
"On 03/03/2015 [the solicitors] submitted a letter dated 26/01/2015 from Daniel Robbins, Governor, Midlands Prison which states "Mr Balc was offered the opportunity to take part in the Building Better Lives Programme for sex offenders in April 2014 but he declined. However, in October 2014 he began to engage with the Probation Service. The Probation Service are carrying out a risk assessment for the purpose of enrolling him in the Safer Lives Programme on his release. This is a sex offender programme which is run in the community and the risk assessment being carried out is the first part of that programme. Having met with the Psychology and Probation services in the Midland Prison we are satisfied that the work Mr Balc is doing with Probation satisfies the conditions of his warrant in so far as he essentially commenced a sex offenders programme. He will be required to further comply with this program upon his release. Consequently, as matters stand, Mr Balc's release date is not affected". It is noted that Mr Balc engaged with the Probation Service in October 2014 in anticipation of his release from prison, and has only been assessed for his involvement in sex offenders treatment initiatives. While efforts at rehabilitation are to be commended, it must be remembered that as [sic] Mr Balc was ordered to engage in sex offenders treatment and alcohol treatment programmes and undergo the supervision of the Probation Service for 12 months after his release. It is significant to note that Mr Balc declined an offer to take part in the sex offender treatment programme in April 2014 which does not suggest that Mr Balc has engaged in an adequate level of treatment that would suggest that he does not pose a future risk of re-offending. It is further noted that Mr Balc has not begun any treatment for his alcohol abuse issues which were a contributory factor in his criminal conduct.

Having regard to the evidence in this case, I am of the view that Mr Balc has committed a very serious sexual assault which shows that his presence in Ireland is a threat to public policy and public safety and warrants his removal from the State. The rights of the citizens of this State and the impact on the victim of Mr Balc's crime must also be given serious consideration in the making of a decision in the review of this case.

I am in agreement with the original deciding and investigating officers in

this case who concluded that the Irish public would be best served Mr Balc if were to be removed from Ireland as soon as practicable. I'm satisfied that the original decision in Mr Balc's case was proportionate and reasonable to the legitimate aim being pursued which is the prevention of crime and disorder in the interest of public safety and the common good."

112. The balancing exercise that the appellant submits has not been undertaken by the decision makers in this case, as evidenced by the analyses already referred to, is one which is described in the following terms by the CJEU in its judgment in *Land Baden Wurtenberg v. Tsakouridis Case* C-145/09 [2010] E.C.R 1-11979). The appellant relies upon paragraph 50 of that judgment which states:

> "50. In the application of Directive 2004/38, a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made … by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and, if appropriate, the risk of reoffending … on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which, as the Advocate General observes in point 95 of his Opinion, is not only in his interest but also in that of the European Union in general."

113. Since point 95 of the Advocate General's Opinion has been referenced in the judgment of the CJEU I should set out what is stated therein:

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

114. I note in passing that *Tsakourdis* was a case where the relevant offences involved multiple offences of unlawful drug dealing as part of a gang, and where T had been resident in Germany for in excess of 10 years, thereby bringing him within the enhanced protection provided by Article 28(3) of the Directive, namely that he could be expelled only on "imperative grounds" of public policy as opposed to "serious grounds". Nothing in particular turns on that distinction for present purposes.

115. I have set out the extent of the consideration given to the question of rehabilitation within the considerations on the initial decision and on the review. The Minister submits that at the time of the first decision the Minister had received no submission or evidence from Mr Balc's solicitor in relation to any steps that had been taken by Mr Balc towards his rehabilitation, though submissions had been received which dealt with other matters. The appellant on the other hand submits that the Minister was clearly aware that certain conditions had been attached to the suspension of the sentence which were clearly directed at the objective of rehabilitation, and that these ought to have been considered as part of the balancing exercise to be undertaken by the decision maker as part of the consideration of proportionality. Given the wider interest of the European Union referred to in *Tsakouridis*, it is submitted that a very relevant matter for the Minister to have considered is whether it was likely that Mr Balc would rehabilitate more easily and effectively were he to remain in this State and subject to the supervision of the

Probation Services as the sentencing judge required, rather than be expelled to Romania where no such supervision would occur, and where it may be unlikely that he would take steps to engage with programmes to address his difficulties with alcohol, and his sexual offending propensity – though it must be said that counsel has pointed to the fact, which is not in dispute, that the particular incident which gave rise to the offences committed by Mr Balc, was an isolated incident, and one that has not been since repeated.

116. Similar complaint is made by the appellant in relation to the lack of a consideration of this issue on review. The correspondence received from Mr Balc's solicitor as part of the review request enclosed a letter from the Governor which is relied upon to indicate that in fact prior to his release from prison and re-arrest he had commenced to engage in a sex offender programme – albeit only to the point of being assessed for risk, which was said to be the first part of the programme. The Minister was not satisfied that Mr Balc had engaged to an adequate level of treatment. The fact that in April 2014 he had declined an offer to go on a programme for sex offenders was noted, and led to a conclusion that Mr Balc was not making an effort to address his behaviour. But the appellant submits that while the question of rehabilitation was mentioned, it was not considered in the way mandated by *Tsakouridis*, namely as the Advocate General stated: "it must state precisely in what way that decision does not prejudice the offender's rehabilitation". In my view that test is applicable whether the matter is being considered under Article 28(2) (serious grounds) or Article 28(3) (imperative grounds). In other words, there must be a consideration as part of the consideration of proportionality as to whether the need to protect the public from the risk of re-offending by Mr Balc can only be achieved by expelling him, or whether despite the fact that he has undoubtedly committed a serious sexual assault in the past, he might satisfactorily rehabilitate himself in this State by adherence to the conditions imposed as a condition of his suspension of sentence, and where he would continue to have the support of his wife and daughter in that endeavour. It might have to be borne in mind that if expelled to Romania he may not be able to access the necessary programmes, and certainly on the facts as known would not have the company and support of his family.

117. It is useful to see how an issue such as this has been considered in the English Court of Appeal. This Court has been helpfully referred by counsel to the judgment of Lord Justice Maurice Kay in *R (Essa) v. Upper Tribunal (Immigration & Asylum Chamber)* [2012] EWCA Civ 1718. That case involved a consideration of proportionality in the decision to expel Mr Essa from the United Kingdom under Directive 2004/38/EC who had committed a number of offences. It was concluded by the Secretary of State that his deportation was "conducive to the common good". Essentially the same issue as arises in the present appeal arose in *Essa*, and the Court of Appeal had to consider the then recently-decided case of *Tsakouridis.* Having referred to point 95 in the Opinion of the Advocate general to which I have earlier referred herein, Kay L.J stated:

> "8. … This emphasis on "the general interests" and the "the interests of the Union in general" is mediated through the proportionality test which "takes on a special significance which requires the competent authority to take account of factors showing that the decision adopted is such as to prevent the risk of reoffending".
>
> 9. In its judgement (which post dated the decision of the FTT in the present case) the CJEU described (at paragraph 50) one side of the equation as:
>
> > 'the risk of compromising the social rehabilitation of the Union citizen in the State in which she has become genuinely integrated,

> which as the AG observes in point 95 of his Opinion is *not only in his interest but also in that of the European Union in general*'. [Emphasis in original]

118. 111. In *Essa* at first instance, Lang J. had stated as regards *Tsakouridis*:

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

119. Lord Justice Kay stated that he agreed with this statement by Lang J., and went on to say that "the European dimension … is now part of the proportionality exercise when the Secretary of State seeks to deport an EU citizen". The deportation decision made by the FTT was considered by Kay L.J. to have been made "without a conscious consideration of the prospect of rehabilitation as between this country and the Netherlands or an awareness of the interest 'of the European Union in general" which would have required a comparison of rehabilitation prospects as indicated by Lang J…".

120. At paragraph 15 of his judgment, Kay L.J. concluded:

> "The case for the Secretary of State in this Court is that, even if the FTT did not have the European dimension in mind, in the end it did have regard to the matters relevant to that dimension. In particular, there is a positive passage in the determination about the ability of the appellant 'to rebuild his life in Holland' and a degree of scepticism about how responsive he would be to guidance from his siblings in this country once this litigation is at an end. In effect, Mr Hall is submitting that the FTT adventitiously did comply with *Tsakouridis*, rather as Moliere's M. Jourdain had talked in prose for years without realising it. In my judgement, although this submission is not unarguable, in the end it does not hit its target. Even when benevolently construed, the tribunal cannot be said to have done what *Tsakouridis* and Lang J required of it. For this reason, I would allow this appeal and remit the case UT so that it can grant permission to appeal to itself."

121. In the present case there is certainly nothing in the consideration of the review decision to indicate that this type of balancing exercise was carried out as required by Tsakouridis, even though there are comments made in reliance on his failure to take part on a programme offered to him. The Governor had expressed himself as being satisfied that Mr Balc had engaged with what was the first part of that programme, namely a risk assessment. The carrying out of this exercise did not require evidence from Mr Balc's solicitor to be provided in order to carry out that exercise. The Minister was aware that conditions for suspending the sentence were in place. It was clear from these that they were intended to enable Mr Balc attempt to rehabilitate himself. I do not believe that the failure by Mr Balc's solicitor to make submissions by reference to the *Tsakouridis* exercise absolves the Minister from undertaking it as part of her consideration of proportionality. Without carrying out the exercise, it cannot be said that this element of the consideration of proportionality was completed. Expulsion is an extreme measure which interferes significantly with the free movement and residence rights of a European citizen. They are rights to be interfered with to the minimum extent necessary in order to, *inter alia*, protect the public from re-offending on the part of Mr Balc. It will be relevant also on any fresh consideration of proportionality to consider Mr Balc's likelihood of re-offending having regard to the length of time that had passed since these offences were committed, and that they appear to be isolated offences or 'once-off' as described by Mr Balc's solicitor, in an otherwise unblemished life. That is not in any way to diminish the seriousness of the offences committed, or to ignore the fact that it is widely recognised that a person who has committed an offence of a sexual nature has a propensity to do so again. But Mr Balc must be considered individually, so

that his particular circumstances are taken into account.

122. In view of this conclusion I would quash the initial removal decision and the review decision dated the 3rd March 2015 since each contain the same defect as far as the consideration of proportionality is concerned. I would remit the matter for fresh consideration in the light of these conclusions.

E: The failure of the Minister to provide any reasons for the exclusion period of five years

123. The trial judge expressed no conclusion in relation to the failure to provide any rationale in the decision to exclude Mr Balc for a period of five years from the date of removal. Article 20(1)(c) of the Regulations provides:

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

124. The length of any such exclusion period is at the discretion of the Minister. Where that is the case the Minister must provide reasons for the decision made. The person affected to such a significant degree is entitled to know why he is excluded for a period of five years, rather than for some lesser period. Indeed, it is not necessary to include an exclusion period at all. It is but an option available in addition to making the removal order. The person is entitled to know why an exclusion order was considered necessary . If he does not know the reasons for these decisions it is impossible for him to challenge their legality.

125. The Minister has referred to the Minister's discretion, and has also pointed to the provisions of Article 20(8) of the Regulations which provides:

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

126. It is submitted, in the light of this provision, that it remains open to Mr Balc to put before the Minister any new information which he claims would justify the modification of the exclusion period. I do not consider that this is an answer to the complaint that no reasons have been provided for the decision to exclude him for a period of five years. Regardless of his entitlement to seek an amendment or revocation of the removal order, in my view he is entitled to know the reasons why it was made in the first place, and the reasons for its duration.

127. For these reasons I would allow this appeal and remit the matter to the Minister for a fresh consideration of the application for removal in the light of this judgment.