



# THE COURT OF APPEAL

## Civil

Neutral Citation Number [2022] IECA 89

Record Number: 2019/372

High Court Record Number: 2016/803JR

**APPROVED**

**NO REDACTION NEEDED**

**Ní Raifeartaigh J.**

**Power J.**

**O'Connor J.**

**BETWEEN/**

**J.B.**

**APPLICANT/APPELLANT**

**-AND-**

**THE MINISTER FOR JUSTICE AND EQUALITY,**

**THE ATTORNEY GENERAL AND IRELAND**

**RESPONDENTS**

## Contents

<b>INTRODUCTION .....</b>	<b>- 4 -</b>
<b>REDACTION/ANONYMITY .....</b>	<b>- 5 -</b>
<b>OUTLINE OF RELEVANT LEGAL FRAMEWORK .....</b>	<b>- 5 -</b>
THE 2004 DIRECTIVE.....	- 5 -
THE 2006 REGULATIONS.....	- 7 -
<b>CHRONOLOGICAL SUMMARY OF RELEVANT CIRCUMSTANCES .....</b>	<b>- 8 -</b>
<b>MOOTNESS.....</b>	<b>- 17 -</b>
THE SUBMISSIONS OF THE PARTIES ON MOOTNESS .....	- 17 -
DECISION ON MOOTNESS.....	- 20 -
<b>TRIAL JUDGE’S JUDGMENT ON THE SUBSTANTIVE ISSUES .....</b>	<b>- 22 -</b>
<b>GROUNDS OF APPEAL.....</b>	<b>- 25 -</b>
<b>ISSUES FOR CONSIDERATION IN THIS APPEAL .....</b>	<b>- 26 -</b>
<b>1ST ISSUE: THE PROPORTIONALITY ASSESSMENT .....</b>	<b>- 27 -</b>
THE SUBMISSIONS OF THE PARTIES .....	- 27 -
<i>Appellant</i> .....	- 27 -
<i>Respondents</i> .....	- 29 -
THE COURT’S CONSIDERATION OF FIRST ISSUE (PROPORTIONALITY).....	- 30 -
APPLICATION OF GENERAL PRINCIPLES TO THE APPELLANT’S CASE .....	- 37 -
<i>The specific nature of the offence committed</i> .....	- 37 -
<i>Propensity to re-offend</i> .....	- 38 -
<i>Up- to-date position on propensity to re-offend at time of 2016 Review</i> .....	- 40 -
<i>Other personal and family circumstances</i> .....	- 41 -

<i>The inference which was drawn from the appellant's return to home state</i> .....	- 44 -
<i>Authorities relied upon by respondents</i> .....	- 45 -
CONCLUSION ON PROPORTIONALITY .....	- 48 -
<b>2ND ISSUE: THE RIGHT TO AN EFFECTIVE REMEDY UNDER ARTICLE 47 OF CFREU AND COMPLIANCE WITH ARTICLES 30 AND 31 OF THE CITIZENS' RIGHTS DIRECTIVE. ....</b>	<b>- 49 -</b>
<b>FINAL ORDERS AND THE QUESTION OF REMITTAL.....</b>	<b>- 52 -</b>

**JUDGMENT delivered by Mr. Justice Tony O'Connor on 7 April 2022**

**Introduction**

1. This appeal concerns the right of a European Union citizen to reside in another Member State (Ireland in this appeal), and specifically, the question of the expulsion of such a person pursuant to Article 27 of the 2004 Citizens' Rights Directive. Following a conviction for sexual assault the appellant was the subject of a removal order and a subsequent five-year exclusion order by the Minister for Justice and Equality ("**the Minister**") in December 2014. The letter addressed to the appellant stated: "It has been concluded that your conduct is such that it would be contrary to public policy to permit you to remain in the State." The removal order was the subject of an unsuccessful review in 2016, which was in turn the subject of judicial review proceedings in the High Court. The judgment of the High Court delivered on 28 June 2019 [2019] IEHC 470 in those proceedings is the subject of this appeal. The High Court judgment rejected the challenge to the review decision issued in October 2016 ("**the 2016 review decision**") which had affirmed the removal order made in 2014.

2. It is worth keeping the following questions in mind when trying to ascertain the degree of scrutiny required for the making of an expulsion order and particularly in the case of the appellant: (i) How does one assess whether a removal order is proportionate? (ii) To what extent is the conduct of a person investigated before making an exclusion order? (iii) What is the degree of consideration afforded to the effect of an exclusion order on an individual and the family of that individual? (iv) What is the effect of the different tests mandated for the different categories of European Citizens which depend on length of stay in the State?

## **Redaction/Anonymity**

3. Following the granting of leave to issue judicial leave proceedings, Humphreys J. on 26 October 2016 directed that the judicial review pleadings be redacted, and he prohibited publication or broadcast of any matter which could identify any non-professional person referred to in these proceedings. Despite the submissions from the respondents that the appellant's identity ought not to be protected given the imperative of Art. 34.1 of the Constitution, Humphreys J. on 6 February 2017 ordered that nothing be reported which would give rise to identifying the appellant. Notwithstanding the renewed opposition from the respondents, the trial judge at the substantive hearing in February 2018 did not alter the anonymising initials for the appellant. The respondents did not appeal those orders of Humphreys J. Therefore, this Court will protect the anonymity of all non-professionals in this judgment.

## **Outline of relevant legal framework**

### **The 2004 Directive**

4. The substantive legislative provisions which form the relevant background to this appeal are the provisions of the Directive 2004/38/EC of the EU Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (“**the 2004 Citizens’ Rights Directive**”). Article 6 provides for a right of residence for up to three months, while Article 7 deals with the right of residence for more than three months.

5. Chapter VI concerns “restrictions on the right of entry and right of residence on grounds of public policy, public security or public health”. **Article 27** (1) and (2) 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.”

6. **Article 28** provides further information about the basis on which different categories of European Union citizens may be expelled from the State:

“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.

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 ten 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.” (emphasis added)

7. Article 16 provides that ‘Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there’. As the appellant had not acquired the right of permanent residence by the date of the 2016 review decision, neither the test of “serious grounds of public policy or security” as set out in Article 28(1) nor the higher test of “imperative grounds of public security” as set out in Article 28(2) applied. The ground of “public policy” *simpliciter* was correctly used in the 2016 review decision.

### **The 2006 Regulations**

8. The 2004 Citizens’ Rights Directive was transposed into domestic law in 2006 by the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. 656 of 2006) as amended by European Communities (Free Movement of Persons) (Amendment) Regulations 2008 (S.I. 310 of 2008) (“**the 2006 Regulations**”).

9. The 2016 review decision was made after the revocation of the 2006 Regulations by European Communities (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015) (“**the 2015 Regulations**”) which came into operation on 1 February 2016. However, under the transitional provision of reg. 31 (28) of the 2015 Regulations, the review provisions of reg. 21 of the 2006 Regulations continued to apply for the appellant. It is also worth noting, in order to understand the submissions made and described later, that reg. 20 (8) of the 2015 Regulations requires the Minister “after the expiry of more than two years from the date on which [the removal order] was made” before enforcing it to ascertain by way of a prescribed assessment “whether there has been any material change in the circumstances giving rise to the making of the removal order”.

### **Chronological summary of relevant circumstances**

10. The following are the circumstances leading to the decision of the trial judge which is the subject of this appeal. The key events are (1) the making of a removal order in December 2014; (2) the issue of judicial review proceedings which were compromised in 2015; (3) the review decision in 2016; and (4) a challenge to the review decision which is the subject of the appeal before this Court. A more detailed chronology is as follows:

2005	The appellant (a citizen of another European Union State) arrived in Ireland aged 24 to undertake a course and work.
Aug 2006	The appellant sexually assaulted another person at a party. The appellant was interviewed by An Garda Síochána and released “pending preparation of an investigation file”.



- August 2006-  
August 2012
- The following averments in the appellant’s grounding affidavit sworn on 20 October 2016 for the High Court (which reiterated assertions and averments made previously by and on behalf of the appellant) remain uncontradicted by any affidavit filed on behalf of the respondents: i) “it was indicated to [the appellant] by the Gardaí that nothing might result from the interview”; ii) the appellant “was not asked to remain in Ireland” and had no reason to think otherwise; iii) having been told that it could take months to decide on whether to prosecute, the appellant told the Gardaí of an intention to return and complete studies in the home state of the appellant; iv) while in the home State there was cooperation with the requests from the Gardaí ; v) there was no need for a European Arrest Warrant (“EAW”) because a request to return would have been answered positively and vi) there was never an attempt “to avoid meeting the charge...” .
- September 2012
- The appellant returned to Ireland voluntarily after an arrest pursuant to an EAW issued in August 2012.
- December 2013
- McCarthy J. following the trial of the appellant before a jury acknowledged as a factor in the sentencing process that the appellant had been “generally a person of good character and that indeed since that time he has manifested good character

apart from this offence” McCarthy J. imposed a prison sentence of two years with six months suspended.

6.2.2014

The Irish Naturalisation and Immigration Service (“INIS”) acting on behalf of the Minister notified the appellant of the proposal to issue a removal order under reg. 20(1)(9)(ix) of the 2006 Regulations on the grounds that the conviction for sexual assault constituted conduct “such that it would be contrary to public policy to permit [the appellant] to remain in the State.” In addition, the Minister proposed “to place an exclusion order preventing the appellant from entering the State for a period of up to five years from the date of [the] removal”.

26.2.2014

The appellant’s solicitor replied in a five page letter outlining how the appellant had remained in Ireland since 2012, had a partner and a child (actually born in Ireland during September 2013), had an extensive network of friends and family in Ireland, had a positive employment record in Ireland, had an excellent command of the English language, had then no family ties in the European Union State of birth and had no convictions prior to or subsequent to the conviction in 2013 for the sexual assault. The solicitor submitted that further details were necessary for the Minister to consider before issuing a removal order on the grounds of “public policy”.

17.12.2014           The Removal Orders Unit of the Repatriation Section recommended the request from the Garda National Immigration Bureau (“GNIB”) dated 15.1.2014 for a removal order with an exclusion period of five years for the appellant.

18.12.2014           The INIS, referring to previous exchanges with the appellant’s solicitor, notified the appellant of a “removal order” with the subsequent five-year exclusion order from the date of removal. The letter advised: “In accordance with Article 30(3) of the [2004 Citizens’ Rights Directive] it [had] been substantiated that your case is **an urgent matter**.[emphasis added] Therefore, in order to facilitate your removal from the State pursuant to the provisions of reg. 20(3)(c) of [the 2006 Regulations] you are required to: - (i) Present yourself to such member of An Garda Síochána or immigration officer who serves you this notice at the time and place of service;

(ii) produce at that appointment any travel documents, passports, travel tickets or other documents in your possession to facilitate your removal;

(iii) cooperate in any way necessary to enable a member of An Garda Síochána or immigration officer to obtain travel documents, passports, travel tickets or other documents required for your removal;

(iv) reside at the above address pending your removal from the State”.

- 2.1.2015            The appellant’s solicitor advised the INIS *inter alia* that the appellant had not been given an opportunity to respond to the finding “that [the appellant] represents a risk to public policy and public safety and that there is a high propensity to reoffend”. A review of whether it could lead to the quashing of the removal order ab initio was requested. The letter stated: “This is very important to our client because [the appellant] does not want the existence even for a short period of time, of a removal order on [the] record.” The appellant had not been afforded an independent appeal or review according to the solicitor.
- 6.1.2015            The INIS emailed the appellant’s solicitor that a review would now be conducted in accordance with Regulation 21 of the 2006 Regulations. This allows for an officer who is senior in grade to the officer who made the decision, to confirm, set aside or substitute the decision on the same or other grounds.
- 8.1.2015            This was the scheduled date for release of the appellant from prison according to the recommendation of 17 December 2014 and page 9 of the 2016 Review decision which also noted: “Time spent in incarceration is not considered ... for

permanent residency (Communication from the Commission to the European Parliament and the Council COM (2009) 313.)”

- 20.4.2015 A principal officer in the Repatriation Section of the INIS in a ten-page review affirmed the removal order incorporating an exclusion period of five years as it was “proportionate and reasonable to the legitimate aim being pursued” (“**the 2015 Review Decision**”)
- 7.5.2015 The appellant was granted an interim injunction prohibiting the removal of the appellant following the commencement of proceedings in 2015 (“**the 2015 Proceedings**”).
- 21.1.2016 The High Court was informed that the 2015 proceedings coming on for hearing that day had been settled on the basis that the 2015 review decision would be withdrawn so that another review would take place.
- 4.4.2016 The appellant’s solicitor outlined in a three-page letter the legal principles which were submitted to be applicable for the new internal review that was agreed to be undertaken following the settlement of the 2015 proceedings.
- 4.10.2016 An eleven-page report from an officer in the “Removal Unit”, which referenced the above events ending with the outline dated 4.4.2016, was considered by the acting Director General

of the INIS who affirmed the removal order incorporating the five-year exclusion period (“**the 2016 review decision**”). On page 9 of the report following an outline of facts elicited from a Garda report dated 16 January 2015, the author, after referring to the absence of evidence that the appellant had “undertaken any sex offenders’ therapy”, concluded that the appellant “could potentially pose a future risk of re-offending”. The author “... submitted that [the appellant’s] removal from the State would not cause egregious hardship for [the appellant] in terms of the loss of existing friendship/social ties or future employment opportunities.” Under the heading “Family Life” the author “... submitted that [the appellant’s] removal from the State would not cause an insurmountable disruption for [the appellant] or [the appellant’s] family unit”

20.10.2016 -

The judicial review proceedings giving rise to this appeal (“**the 2016 proceedings**”) were commenced; the amended statement required to ground the application for judicial review sought an order of certiorari quashing the 2016 review decision and a declaration that the 2006 Regulations failed to provide the appellant “with a right of appeal or review that is full, independent and compliant with Article 30.3 of the [2004 Citizens’ Directive] and Article 47 of the Charter of Fundamental Rights” (“**CFREU**”).

- 26.10.2016 Humphreys J. in addition to directing redaction stayed the enforcement of the removal order.
- 6.2.2017 Humphreys J. granted leave to appeal with directions for the proceedings confined to the 2016 review decision.
- 10.2.2017 The amended statement required to ground the application for judicial review was filed and served.
- 6.10.2017 The statement of opposition for the respondents was served.
- Feb 2018 The trial judge continued the order securing anonymity for the appellant and heard the judicial review application.
- 5.10.2018 According to the solicitor for the respondents in a letter dated 21 November 2019 to the appellant's solicitor, "the relevant two-year period" for enforcement of the removal order had expired because this date (5.10.2018) was the second anniversary of the 2016 review decision.
- 19.7.2019 An order was made by the trial judge dismissing the 2016 proceedings with an order directing the appellant to pay the costs of the respondents.
- 6.8.2019 The Notice of Appeal was issued which included grounds that the 2016 review decision and the judgment failed to address the appellant's principal argument which centred on the requisite criteria under Article 27 of the 2004 Citizens' Rights

Directive for the removal order to be lawful. Specific grounds related to inferences drawn, the approach to proportionality, the adequacy of the review process and the awarding of costs to the respondents including those related to the successful redaction and anonymising applications.

21.11.2019

The Chief State Solicitor informed the appellant's solicitor that Regulation 20(8) of the 2015 Regulations provides that a removal order which has not been enforced after more than two years shall not be enforced unless the Minister carries out an assessment to ascertain whether there has been a material change in the circumstances which gave rise to the making of the removal order. It was stated that the Minister "is not proposing **at this time** to carry out an assessment to ascertain whether there has been any material change in circumstances which gave rise to the making of the removal order." (emphasis added).

30.1.2020

The offer from the appellant's solicitor to withdraw the appeal if the respondents agreed not to pursue the order for costs in the High Court was rejected by the Chief State solicitor acting for all the respondents.

4.2.2020

The appellant was notified under reg. 21(1) of the 2015 regulations that the Minister "is satisfied that your personal conduct is such that it would be contrary to public policy not



to make you subject of the following requirements” which mirrored those imposed in the letter dated 18 December 2014.

17.4.2020 The GNIB notified the appellant of the obligation to reside at the address used in the notice “pending your removal from the State.”

16.9.2020 A notice similar to the notice served on 4 February 2020 was delivered to the appellant and it required attendance at the offices of the GNIB on 2 March 2021.

23.2.2021 On this date, two days before the appeal hearing, the Chief State Solicitor informed the appellant that there was no longer a requirement to present at the offices of the GNIB.

25.2.2021 In view of the above communication, this Court invited the parties to have discussions. These did not result in a resolution of the appeal and the remainder of the day was devoted to submissions on the issue of mootness only.

11.5.2021 This Court reconvened for submissions on the substantive issues in the appeal.

## **Mootness**

### **The submissions of the parties on mootness**

**11.** The respondents cited Haughton J. in *Kozinceva v. The Minister for Social Protection* [2020] IECA 7 (Unreported, Court of Appeal, 28 January 2020) which referred to the

distillation of the relevant principles concerning mootness by McKechnie J. in *Lofinmakin v. Minister for Justice* [2013] IESC 49, [2013] 4 I.R. 274 at 298. They maintain that the proceedings were moot by the time the appeal came on.

**12.** As seen above, the Minister notified the appellant that the Minister was not proposing to carry out an assessment under reg. 20 (8) of the 2015 Regulations and that therefore the removal order made in 2014 could not be enforced. The respondents point to the notification from the Minister that the appellant was no longer required to report to GNIB. The respondents submit that there is no “live controversy between the parties” because the appellant continues to reside in the State without any threat of enforcement of the exclusion order.

**13.** The respondents also contend that mootness arises from the appellant’s failure to appeal the order of 6 February 2017 because that order granting leave, limited the relief which could be sought in the 2016 proceedings to (i) a quashing of the 2016 review decision and (ii) a declaration that the 2016 Regulations were in breach of the 2004 Citizens’ Rights Directive. No leave was granted in respect of the removal order itself which was made on 18 December 2014. This, the respondents contend, renders the appeal moot because one way or another, the exclusion order will continue to stand even if the subsequent review decision is held to be invalid. They combine this with the earlier point that the exclusion order will not be enforced and is therefore moot.

**14.** The respondents further submit that the five-year exclusion period runs from the date of the exclusion order made on 18 December 2014 which expired in December 2019. So, in their view, if the appellant were to leave the State, the appellant would not be affected by the five-year exclusion order notwithstanding that such order was never, in fact, executed.

**15.** The appellant maintains that the notification from the Minister that no post-two-year assessment is under contemplation was a “device” to try to disallow him from bringing his appeal by seeking to render it moot. The respondents describe this as a baseless and improper allegation. They point to the fact that the two-year limit had not expired when the proceedings were heard in the High Court and had only expired since delivery of the High Court judgment, which in turn led to the Minister’s notification.

**16.** During the hearing of the appeal, the potential impact (if any) of the existence of the original removal and exclusion orders upon the appellant’s ability to apply for a permanent residence certificate under reg. 14 of the 2015 Regulations was debated. The appellant contended that the existence of the orders could present an obstacle to his obtaining a residence certificate. The fact that the respondent did not propose to carry out an assessment under reg. 20(8) of the 2015 Regulations, did not, by itself, render the issue of the validity of the review decision moot. The respondents contended that this prospect was irrelevant because the appellant had not applied or submitted the information required for such a certificate. Moreover, it is submitted on their behalf that such a process to gain permanent residence status is separate to the enforceability of the orders.

**17.** The appellant strongly urged the Court to take the view that the appeal was not moot in circumstances where the removal order and review upholding that order remained in existence despite the indication that it was not proposed to carry out a post-two-year assessment. The appellant pointed *inter alia* to the fact that it was unclear whether the orders would have an impact upon any future application for permanent residence by the appellant. Counsel for the appellant also highlighted the outstanding liability of the appellant for costs awarded in the High Court.

## **Decision on mootness**

**18.** The appellant's appeal is not moot, not least because of the serious finding in the 2016 review decision that the appellant was likely to reoffend at some stage after 2014. That finding may be characterised by the respondents as having the limited purpose to remove and exclude the appellant for periods which have now expired. The removal order had an effect for a two-year period unless there was another assessment. However, there is a record of that finding which has been maintained by the Minister. The chronological summary above shows how the record of the removal order appears to have triggered the notices sent by the GNIB to the appellant from 4 February 2020 to 16 September 2020.

**19.** The efforts on behalf of the Minister to limit the appellant's right, as an EU citizen, to prosecute this appeal are disconcerting, when the following circumstances are considered:

- (1) Two days before the hearing of this appeal commenced, the Chief State Solicitor notified the appellant's solicitor by letter dated 23 February 2021 for the first time that the appellant was no longer required to attend at the offices of the GNIB. Further it was confirmed "that the conditions to reside in a particular place no longer applies to [the appellant]". Up to then the appellant had been reminded to comply with those conditions and there was uncertainty about whether the removal order had continuing effect. The risk for the appellant of not being allowed back into Ireland if he travelled abroad also loomed.
- (2) The decision and notification of it to the appellant, that a post two-year assessment was not currently under consideration, was indeed tardy. This was not done until November 2019 and after the notice of appeal had been filed.

Equally, the prospect of the Minister proceeding to a fresh consideration of the matter at some future date was not addressed.

- (3) No assurance has been offered by the Minister that the 2016 review decision, which had confirmed the removal order made in 2014, will be overlooked in any future application, such as an application for a residence certificate. This suggests that the removal order may indeed become relevant in the future. The respondents' submission that the appellant could judicially review a refusal to grant a certificate of residence which may rely in some way on the 2016 review decision is manifestly unfair to a citizen who is entitled to certainty about the effect of the 2016 review decision.
- (4) The appellant remains obliged to discharge the order for costs made by the trial judge in favour of the respondents not only in respect of the substantive issues but also, on one interpretation, in respect of the order granting anonymity to the appellant which order was not appealed by the respondents. The order for costs follows on from the successful defence by the respondents of the challenge to the 2016 review decision. The respondents maintain that they are entitled to the costs awarded by the trial judge although the appellant is entitled in this appeal to challenge "the event" (the upholding of the 2016 review decision) which leaves the appellant facing a bill of costs for losing the challenge in the High Court. The statement of O'Donnell J. in *O'Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 I.R. 751 at para. 27 is rather apt for the issue of mootness in this appeal: "To dismiss an appeal as moot may leave the law in a state of even greater uncertainty. It is also the case that in our system a costs order will have been made in the courts below which an appellant has a real interest in seeking to overturn. While that in itself does not justify the

maintenance of proceedings which are otherwise moot, it is not an irrelevant factor.”

- (5) The appellant has endured considerable delays even though the letter of 18 December 2014 on behalf of the Minister stated that the appellant’s case was “an urgent matter”. The appellant is entitled to have these proceedings and appeal determined in a timely manner so that the rights of a citizen of the European Union can be vindicated. A sense of unfairness emerges for the appellant if delays are used to curtail the effectiveness of the appeal process.

**20.** The respondents have tended to minimise the effects of any point of appeal which may succeed in this Court by submitting that the removal order remains unenforceable. The record of the removal order still remains. For the foregoing reasons, I conclude that the appeal in this case is not moot and I now turn to the substantive issues in this appeal.

### **Trial Judge’s Judgment on the substantive issues**

**21.** The trial judge in his judgment delivered on 28 June 2019 refused the following reliefs which were limited by the order granting leave to seek:

- (1) certiorari quashing the 2016 review decision; and
- (2) a declaration that the 2006 Regulations are in breach of the 2004 Citizen’s Rights Directive for failing to provide an independent right of appeal or review compliant with Art. 30.3 of the 2004 Citizen’s Rights Directive and Art. 47 of the CFREU.

22. The judgment at paras 21 to 24 noted that the appellant acknowledged that *Balc & Ors v Minister for Justice* [2016] IEHC 47 (Unreported, High Court, Eagar J., 19 January 2016) and *P.R. & Ors. v Minister for Justice and Equality (No. 1)* [2015] IEHC 201 (Unreported, High Court, McDermott J., 25 March 2015) (“**P.R.**”) had ruled against the contention that the appellant did not have access to procedures required by Art. 31 of the 2004 Citizens’ Rights Directive. The trial judge mentioned that the Court of Appeal had delivered judgment in *Balc & Ors. v Minister for Justice* [2018] IECA 76 (Unreported, Court of Appeal, 7 March 2018) since the hearing before him had concluded. He specifically did not rely upon that judgment for the purpose of his judgment.

23. The trial judge identified that the appellant had been imprisoned from December 2013 to January 2015. He also noted the duration of the appellant’s residence and clarified (at para. 29 of this judgment) that the appellant did not have any “enhanced protection in respect of the [2016] review decision. He was susceptible to removal on public policy grounds that did not have to be serious”. He found at para. 31 that the appellant at the time of the review decision in 2016 “had less than two years continuous residence in the State towards the calculation of the five-year continuous residence period necessary to acquire the right to permanent residence in the State.”

24. At para 35, the trial judge found that the Minister was “entitled to rely upon the serious criminal behaviour of the appellant as evinced by the conviction and sentence imposed, as conduct which, of itself, might constitute a threat to the requirements of public policy” (relying on McDermott J.’s finding in *D.S. v Minister for Justice and Equality & Ors.* [2015] IEHC 643 (Unreported, High Court, 20 October 2015) and in *P.R.*).

25. The trial judge found that the 2016 review decision demonstrated no misunderstanding of the nature and extent of the criminal conduct engaged by the appellant. Para. 39 of the judgment explains that the judge who sentenced the appellant did not assess the future risk of sexual assault by the appellant. The judgment then proceeds to explain the possible difference between rape and sexual assault charges. Paras. 45-47 concern the impugned inference in the 2016 review decision relating to the return of the appellant to the appellant's home State before the trial in 2013. The trial judge found that it was open to the Minister to draw that inference. The 2016 review decision specifically had not accepted "that [the appellant] simply left the state to attend college in [the appellant's] home state" and went on to question "whether [the appellant] would ever have voluntarily returned to Ireland in the absence of the EAW."

26. At para 52 of the judgment, the trial judge remarked how the requirement of proportionality in Art. 27 (2) and the factors to be taken into account under art. 28 (1) before taking an expulsion decision on grounds of public policy or public security are "... deliberately reminiscent of those incumbent upon a State required to consider the rights to respect for family life under Art. 8 of the European Convention of Human Rights" ("**ECHR**"). The trial judge noted the corresponding rights of the CFREU before holding that the 2006 review decision had engaged "with the requirements of Articles 27 and 28 the 2004 Citizens' Rights Directive in general and with those of Article 28(1) in particular."

27. The trial judge accepted that the limited grounds for which leave was granted for appeal by way of judicial review precluded a review of the alleged failure to provide reasons for the exclusion period of five years.



## **Grounds of Appeal**

**28.** It is not necessary to recite the grounds of appeal in full. They included complaints that the trial judge had failed to condemn the 2016 review decision on the basis that:

- (i) the decision-maker had failed to engage properly with the requirement in Article 27 that the person must represent a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”;
- (ii) that there was no evidential foundation for the finding of a future risk of re-offending;
- (iii) the correct test had not been applied; and
- (iv) a proportionality assessment had not been carried out properly in accordance with the 2004 Citizens’ Rights Directive.

**29.** Complaint was also made about how the trial judge

- (i) dealt with the remarks of the sentencing judge which had not been queried or rejected by the Minister,
- (ii) described the evidence of the appellant returning to the home State as “unsworn and uncorroborated” in view of the appellant’s affidavit which had been served on the Minister before the contested decision;
- (iii) speculated about the distinctions made by the jury when acquitting the appellant of rape and delivering a verdict of sexual assault;
- (iv) determined the allegation concerning the return to the home State of the appellant, particularly having regard to the uncontradicted affidavit evidence of the appellant.

30. The notice of appeal also claimed that the “egregious hardship” test applied by the judge was wrong in law. A further ground of appeal was that the trial judge erroneously equated the proportionality test in a “removal case” with that to be carried out in an Article 8 ECHR immigration case.

31. A separate ground of appeal was that the trial judge erred when holding that the appellate/review mechanisms available to the appellant were compliant with EU law (particularly Article 47 of the CFREU) and that there had been a failure to transpose the 2004 Citizens’ Rights Directive in this regard.

### **Issues for consideration in this appeal**

32. I shall now address the issues under the following headings:

(i) *The Proportionality Assessment Issue*

Was the issue of proportionality properly addressed in the 2016 review decision and by the trial judge in his judicial review of the 2016 review, having regard to Articles 27 and 28 of the Directive, and the decision in *PI*? More particularly:

- a) Did the 2016 review decision assess the propensity of the appellant to reoffend adequately and in a proportionate manner?
- b) Did the 2016 review decision identify reasonable grounds for the inferences which were drawn from the appellant’s return to his home State after the sexual assault in 2006?
- c) Was the correct legal test applied by the decision-maker?

d) Is the proportionality assessment to be undertaken for a European Union citizen resisting a removal order the same as the one undertaken by a migrant who relies upon Art. 8 ECHR?

(ii) *The Effective Remedy Issue*

Did the 2016 review decision together with the remedy of judicial review constitute an “effective remedy” in respect of the appellant’s EU law rights in this context, for the purposes of Article 47 of the CFREU?

## **1st Issue: The Proportionality Assessment**

### **The Submissions of the Parties**

#### *Appellant*

**33.** Counsel for the appellant correctly submit that the principle of freedom of movement for EU citizens is one of the four fundamental freedoms on which the European Union is based.

**34.** The appellant goes on to argue that, by reason of the importance of freedom of movement, the derogation from that freedom requires “a particularly restrictive interpretation” because of the fundamental status of Union citizenship. Referring to *Orfanopolous* and *Olivieri*, joint cases C-482/01 and C-493/01, 29 April 2004 EU:C:2004:262 (“*Orfanopolous*”), they submit:

“The ‘public policy exception’ is a derogation from the fundamental principle of the free movement of persons, which must be interpreted strictly, and its scope cannot be determined unilaterally by the Member States: *Commission v Germany*, Case C-441/02, paragraph 34.

The concept of ‘public policy’ presupposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of ‘a genuine, present and sufficiently serious threat’ affecting one of the fundamental interests of society: Art. 27.2 of the 2004 Citizens’ Rights Directive and *Orfanopolous* paragraph 66.

Union citizens have a right not to be subjected to expulsion measures ‘save in the extreme cases’ provided by the secondary legislation: *Orfanopolous* paragraph 81” [The said para 81 reads: ”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” (emphasis added)]

“Previous criminal convictions shall not in themselves constitute grounds for the issuing of removal order: Article 27.2 of Directive 2004/38.

A removal order must be proportionate: Article 27.2 of Directive 2004/38.”

**35.** Counsel for the appellant submits that “... the trial judge failed to carry out the type of ‘searching review’ or carry out any, or any adequate proportionality review.” “... Furthermore, there is no mechanism by which a Court can consider up-to-date information when reviewing a removal or exclusion order, which appears to be in breach of European Union law as stated in *Orfanopoulos and Oliveri*”.

36. The appellant makes complaint about how individual matters (propensity, inference from the appellant's return to the home state in 2006, and the manner of addressing the appellants' family circumstances) were addressed.

***Respondents***

37. The respondents point out that the role of courts is not to review the merits of the Minister's decision but rather to decide whether there was a failure to apply or a misapplication of the legal principles, such that the decision is fundamentally flawed, citing *PR v. Minister for Justice and Equality* (no.1) [2015] IEHC 201 (Unreported, High Court, McDermott J., 24 March 2019) ("**P.R.**"). They also point out that the appellant was not a permanent resident and therefore did not benefit from the higher levels of protection provided for in the 2004 Citizens' Rights Directive.

38. The respondents observe that it is clear from the judgment in P.R. that certain sexual offences may in themselves be serious enough to constitute the basis for a removal order. They point to the maximum penalty for the offence of which the appellant was convicted and the automatic placement on the sex offenders register which flow from conviction as factors indicating the gravity of the offence. Having discussed the cases of *P.R. & Ors. v Minister for Justice and Equality (No. 1)* [2015] IEHC 201 (Unreported, High Court, McDermott J., 25 March 2015), *Rola v. Minister for Justice and Equality* [2016] IEHC 811 (Unreported, O'Regan J. 8 November 2016), and *M.S. v. Minister for Justice and Equality* [2016] IEHC 762 (Unreported, O'Regan J., 8 November 2016) and compared the facts therein, the respondents submit that the respondent Minister was well within his margin of discretion in deciding that a removal order was warranted and should be upheld on review.

39. The respondents also rely heavily upon the judgment of the Court of Appeal in *C v Minister for Justice and Equality* [2019] IECA 219 (Unreported, Court of Appeal, 9 August 2019) for the proposition that the function of the Court is to conduct “an assessment of the validity of the approach adopted by the trial judge”, and to determine whether there was sufficient evidence to warrant a conclusion that the relevant material had been adequately assessed and appropriately weighed with regard to the principle of proportionality. In that case, Whelan J. said:

“While the appellant may be aggrieved with the balance struck by the respondent, it is insufficient to claim that a decision lacks proportionality on the basis that greater weight out to have been given to some factors and less to others-there must be an identifiable consideration that was either relied on by the decision and was demonstrably wrong or else was material and was overlooked in the process of making the decision”.

40. The respondents seek to defend the way the issues of propensity, the return to the home State in 2006, and family circumstances were dealt with in the 2016 review decision and by the trial judge. They submit that the principle of proportionality was indeed observed and that the conclusions were grounded upon the evidence.

### **The Court’s Consideration of first issue (proportionality)**

41. At paragraph 32 above, the first issue was described as “the proportionality issue assessment” and it was divided into sub-headings. It will be recalled that Article 27 allows Member States to restrict freedom of movement and residence “on grounds of public policy, public security or public health”, provided the measures comply “with the principle of

proportionality [and are] based exclusively on the personal conduct of the individual concerned”. Thus, proportionality is mandatory.

**42.** Articles 27 and 28 of the 2004 Citizens’ Rights Directive provide guidance on what factors are relevant. “Previous criminal convictions shall not in themselves constitute grounds for taking such measures”. The person must represent a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”. Further, we have seen that Article 28 (1) requires host Member States “before taking an expulsion decision” to take account of the duration of residence, 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”. Different tests are applied, depending on how long the person has been in the host State (less than five years, more than five years, more than ten years: see paragraph 6 above which recites Article 28 with appropriate emphases).

**43.** The judgment of the Grand Chamber in *P.I. v Oberbürgermeisterin der Stadt Remscheid* (Case C-348/09) EU:C: 2012:300 (“**P.I.**”) is particularly relevant in this appeal, as it sets out the framework of analysis when assessing an expulsion order pursuant to Articles 27 and 28 of the Directive.

**44.** In that reference for a preliminary ruling, an Italian citizen who had lived in Germany since 1987 compelled his young victim to perform sexual acts by using force and threatening to kill her mother or brother. The victim, who was a daughter of Mr. I.’s former partner, was eight years old when the offences commenced, and they lasted for some eleven years. Prior to the end of the custodial sentence imposed in 2006, a determination was made that Mr. I. had lost the right to enter and reside in Germany. He was ordered to leave Germany and faced deportation. In 2008 the Administrative Court in Dusseldorf dismissed the action

of Mr. I. against the expulsion decision. They considered that the acts which warranted the conviction revealed personal conduct which constituted a serious threat to one of the fundamental interests of society, namely the protection of girls and women from sexual assault and rape. “Mr. I. had been relentless in his criminal conduct, having regard in particular to the lengthy period during which the offences were committed, the age of the victim and the measures he took to prevent the offences being discovered by continually threatening his victim and isolating her.”

45. Mr. I.’s appeal led to a reference to the Court of Justice for a preliminary ruling as follows: “Does the term ‘imperative grounds of public security’ contained in Art. 28(3) of Directive [2004/38] cover only threats posed to the internal and external security of the State in terms of the continued existence of the State with its institutions and important public services, the survival of the population, foreign relations and the peaceful co-existence of nations?”

46. Paragraphs 28 – 34 of *P.I.* are most instructive when reviewing the 2016 review decision:

“28. It is apparent from the above that it is open to the Member States to regard criminal offences such as those referred to in the second paragraph of Art. 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of “imperative grounds of public security”, capable of justifying an expulsion measure under Article 28(3) of Directive 2004/38, **as long as the manner in which such offences were committed discloses**



**particularly serious characteristics**, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it.

29. Should the referring court find that, according to the particular values of the legal order of the Member State in which it has jurisdiction, offences such as those committed by Mr. I pose a direct threat to the calm and physical security of the population, that should **not necessarily lead to the expulsion of the person concerned**. [Emphasis added]

30. Under the second subparagraph of Article 27(2) of Directive 2004/38, the issue of any expulsion measure is conditional on the requirement that the personal conduct of the individual concerned must represent **a genuine, present threat affecting one of the fundamental interests of society or of the host Member State, which implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future**. [Emphasis added]

31. It should be added that where an expulsion measure has been adopted as a penalty or legal consequence of a custodial penalty but is enforced more than two years after it was issued, Article 33(2) of Directive 2004/38 requires the Member State to check that the individual concerned **is currently and genuinely a threat to public policy or public security and to assess whether there has been any material change in the circumstances since the expulsion order was issued**.

32. Lastly, as is clear from the terms in which Article 28(1) of Directive 2004/38 is couched, before taking an expulsion decision on grounds of public policy or public security, the host member state must 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 that State and the extent of his/her links with the country of origin.**

33. In the light of the foregoing considerations, the answer to the question referred to is that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is open to the member states to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might **pose a direct threat to the calm and physical security of the population and thus be covered by the concept of “imperative grounds of public security”, capable of justifying an expulsion measure under Article 28(3)**, [emphasis added], as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it.

34. The issue of an expulsion measure is conditional on the requirement that the personal conduct of the individual concerned must represent a genuine, present threat affecting one of the fundamental interests of society or of the host Member State, which implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future. Before taking an expulsion decision, the host member state must 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 that state and the extent of his/her links with the country of origin.”

47. The earlier judgment of the CJEU in *Orfanopolous* and *Olivieri*, joint cases C-482/01 and C-493/01, 29 April 2004 stressed the importance of the decision-maker having up-to-date information:

“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 of 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 paragraph 22 [Case C-348/96 *Calfa* [1999] ECR I-II EU:C:1999:6]. As the Advocate General points out in point 126 of her Opinion [EU:C:1998:64], 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. (emphasis added)

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 the 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**”. (emphasis added)

48. Accordingly, and having regard both to the terms of Articles 27 and 28 of the 2004 Citizens’ Rights Directive and the judgment in *PI*, I can summarise matters as follows. In considering whether an expulsion is justified, the question is whether the person represents a “genuine, present and sufficiently serious threat” and the overarching test is one of proportionality. Depending on the duration of the citizen’s residence within a host state,

different levels of justification are required. The matters to which a decision-maker must have regard include the following:

(1) *Examination of the specific nature of the offence committed by the individual:*

There must be an examination of the particular offence committed by the individual and the circumstances in which it was committed. It is open to Member States to regard criminal offences such as the sexual exploitation of women and children (one of the offences listed at Article 83(1) second paragraph, TFEU) as constituting a particularly serious threat to one of the fundamental interests of society. The characteristics and seriousness of each offence should be identified on a case by case basis. The gravity of the particular offence in addition to the category of the offence is important. The background and duration of the offence and conduct are matters which should be examined on the basis of each specific case of a proposed expulsion.

(2) *Assessment of propensity to re-offend* - There should be an assessment of whether the individual represents a genuine and present threat. Regard should be had to the existence of a propensity for the individual concerned to act in the same way in the future.

(3) *The assessment of propensity should be kept up to date* - Where an expulsion measure has been adopted as a penalty or legal consequence of a custodial penalty but is enforced more than two years after it was issued, the Member State must be satisfied that the individual concerned is currently and genuinely a threat to public policy or public security and ascertain whether there has been any material change in the circumstances since the expulsion order was issued.

(4) *Length of residence in the host State* - The host Member State must take account of how long the individual concerned has resided on its territory. Indeed, as

Article 28 provides and as set out in para. 5 above, there are three categories of residence provided for in the Directive: (i) EU citizens who have not acquired the right of permanent residence, that is, who have resided in the host State for fewer than 5 years; (ii) EU citizens who have acquired the right of permanent residence by reason of having resided in the host State for 5 years; and (iii) permanent EU citizens who have resided in the host State for 10 years or longer. A decision to remove an EU citizen may not be taken unless it meets the legal test appropriate to the length of the individual citizen's residence in the host State.

- (5) *Other personal and family circumstances:* There should be an assessment of "his/her age, state of health, family and economic situation, social and cultural integration into that State and the extent of his/her links with the country of origin." (Article 28 (1) of the 2004 Citizens' Rights Directive).

### **Application of general principles to the appellant's case**

**49.** In my view, matters were not scrutinised in both the 2016 review and the High Court judgment in a proportionate manner. Some of the relevant factors were considered briefly. Then, some were omitted from the assessment completely.

#### ***The specific nature of the offence committed***

**50.** Following the sequence above, I turn first to address the specific nature of the offence committed. The appellant was convicted of sexual assault of an individual at a party. It goes without saying that all sexual offences are serious because they constitute a serious assault upon a person's bodily integrity. The offence in question was a single incident that was not rape. In terms of its gravity, it may be contrasted with the offence in *P.I.*, for example, which involved a prolonged course of sexual offending against a child.

51. The decision maker in the 2016 review merely gave the following description: “This was a grievous assault on a totally innocent party who would have suffered physically and psychologically as a result of the offence. In addition, it is noted that [the appellant] is on the Sex Offenders register until 2023”. The decision maker then sought to quote a single sentence from *Kovalenko & others v MJE & others* [2014] IEHC 624 (Unreported, High Court, McDermott J., 12 December 2014) (“**Kovalenko**”) about the more serious offence of rape where it was said: “... “that it is a matter of public policy that women and girls be protected from such vicious assaults.” In so doing, the decision maker and the trial judge effectively equated the sexual assault committed by the appellant with a verdict of rape and cast the appellant’s conduct as a “vicious assault” which justified “an expulsion decision on grounds of public policy or public security”. Lest there be any misunderstanding, I am not underestimating the gravity of the appellant’s conduct. However, the decision in the 2016 review and High Court judgment failed to differentiate the circumstances of the offence committed by the appellant from the more serious offences of rape and serial sexual offending. The conduct of the appellant and the consequences of an expulsion decision required an assessment which was personal to the appellant’s offending.

52. In short, the 2016 review decision merely referenced the notion of “public policy” mentioned in *Kovalenko* when determining that the offence was sufficiently serious to invoke “... the notion of ‘public policy’”.

***Propensity to re-offend***

53. In terms of whether or not the appellant had a propensity to re-offend, the extent of the reasoning to remove the appellant is contained in two separated paragraphs in the 2016 review decision: -

“The State has a duty to protect its citizens in the interests of the common good and it must be noted that [the appellant] was found guilty of a sexual offence contrary to section 2 of the Criminal law (Rape) (Amendment) Act 1990. Taken (sic) into consideration the garda incident report (Tab 5), I agree with the original investigating officer in this case who found that [the appellant] poses a sufficient enough threat to public policy in the State to warrant [the appellant’s] removal from Ireland”; and

“While making attempts to engage in rehabilitation programmes is to be commended, however there is no evidence that [the appellant] has undertaken any sex offenders therapy, voluntary or otherwise.”

**54.** The 2016 review decision does not refer to any evidence or expert view relied upon to conclude that the appellant was likely to reoffend. There was no indication that a probation report had been obtained and considered. Further, the decision maker did not address the extent of the threat, if any, posed by the appellant and considered risk in a broad and non-specific manner rather than in a manner which was specific to the then personal circumstances of the appellant.

**55.** In terms of how the trial judge dealt with the matter of propensity, he in turn referred to the comment of Eagar J. in *Balc* that: “... this court is aware of the propensity of sex offenders to repeat offences”. The trial judge was critical of how the appellant sought to adduce an excerpt from the comments of McCarthy J. (the sentencing judge), saying that that his propensity to reoffend had not been assessed in sentencing.

**56.** The trial judge’s speculation about the finding of the jury and why the jury may have given an alternative verdict of sexual assault for rape based on the absence of any evidence of penetration may be correct, but it formed no part of the decision maker’s disclosed

consideration. More significantly the dismissal by the trial judge of the observations of McCarthy J. who, in sentencing, described the appellant as “a person of good character apart from the offence” was rather harsh. It is true that McCarthy J. was not assessing propensity as such, but the trial judge was equally not entitled to wholly dismiss McCarthy J.’s observation as to good character simply on the ground that the whole transcript had not been adduced in evidence. In any event the 2016 review having actually recited that excerpt gave no reason for ignoring the absence of any offence before or after the assault.

**57.** It is also relevant to note that a conviction for a sexual offence such as that for which the appellant was sentenced leads automatically to the application of the legislative provision which requires inclusion on the sex offenders’ register. An individualised assessment of risk is not undertaken before including an offender on the register.

**58.** Further, the decision-maker’s use of the phrase “a sufficient enough threat”, does not accord with the test in Article 27 of the Directive or the decision in *P.I.*

***Up-to-date position on propensity to re-offend at time of 2016 Review***

**59.** A notable feature of the appellant’s case is that 10 years had elapsed between the commission of the offence and the review decision (2006-2016). It is true to say that the thirteen months spent by the appellant in prison for all of 2014 and slightly more might be excluded from the period to be considered in this context. Nonetheless, the overall period during which the appellant had not re-offended was significant. This was a relevant factor which should have been considered but was not adverted to by either the decision-maker or by the trial judge. As already noted, the assessment of propensity to re-offend should have regard to the up-to-date position.



***Length of residence in the State***

**60.** The decision maker in the 2016 review concluded that the appellant "... could potentially pose a future risk of re-offending". There is no specific reference in the 2016 review decision about whether the Minister took into consideration the length of time during which the appellant resided in the State at the time of the 2016 review decision, which was less than five years. In applying the "public policy" test, the decision-maker was implicitly taking this into account, but it would have been preferable if he had explicitly referred to his length of residence. In that context, I find that the 2016 review decision was deficient.

***Other personal and family circumstances:***

**61.** The 2016 review concluded that the appellant could reside in another member State of choice and that the removal of the appellant "would not cause egregious hardship for [the appellant] in terms of the loss of existing friendship/social ties or future employment opportunities". Here again, the trial judge erred in my view by introducing a test of 'egregious hardship' that is not to be found in the case law. The decision only mentioned that the appellant's then three-year old child was "still of a relatively young and adaptable age" without any reference to the age of the appellant and partner of the appellant. The comment that this family unit could locate to another Member State chosen by the appellant was not reasoned by reference to information available. Under "Family Life" the decision maker "submitted that [the appellant's] removal from the State would not cause an insurmountable disruption for [the appellant or the appellant's] family unit".

**62.** The 2016 review's comment that the expulsion of the appellant would not constitute an "insurmountable disruption for [the appellant] or [the appellant's] family unit" did not

refer in any way to the points raised in the letter of 26 February 2014 particularly (summarised in the chronology above) about how established the appellant had become in Ireland. As noted, neither the test of “insurmountable disruption” or an absence of “egregious hardship” are to be found in Articles 27 or 28 of the Directive or in the caselaw of the CJEU. They ought not to have been relied upon in the decision proposing to remove the appellant, a European Union Citizen, from the State notwithstanding that he had not acquired a right of permanent residence therein.

**63.** There is considerable force in the appellant’s submission that the proportionality assessment under article 27 (2) of the 2004 Citizens’ Rights Directive is not identical to proportionality analysis under article 8 of the European Convention on Human Rights. Article 8 cases often relate to a third country national who has no legal right of residence in a Member State; this caselaw does not have the same focus, or starting point, as the 2004 Citizens’ Rights Directive.

**64.** In *Jeunesse v. The Netherlands* (2014) 60 E.H.R.R. 17, ECLI:CE:ECHR:2014:1003JUD001273810, the Grand Chamber (by a majority 14-3) found a violation of Art. 8 (1) of the ECHR which guarantees “the right to respect for...family life...” and of Art. 8 (2) of the ECHR which provides “there should be no interference by a public authority with this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, or for the protection of rights and freedom of others”

**65.** The applicant (“J”) effectively overstayed her limited 45-day visa in the Netherlands for more than 16 years without any criminal record. She married “W”, a fellow national from

Suriname, in 1999 and had three children by November 2010. J was the only member of the family unit who was not a citizen of the Netherlands by the time of the application to the ECtHR. There were repeated unsuccessful applications for regularisation on J's behalf. Importantly, J was not in a position to assert the rights of a European citizen under the 2004 Citizens' Rights Directive but rather relied on Article 8 of the ECHR.

**66.** In that context one can understand how the ECtHR was obliged to approach the question by reference to the margin of appreciation afforded to member states in immigration matters. After applying the relevant principles to the consideration of the overall processes provided by the law of the Netherlands to "third country nationals", the majority of the Grand Chamber concluded that a fair balance had not been struck between the competing interests which they described at para. 121 as "the personal interests of [J], her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. In view of the particular circumstances of the case, it is questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing [J] residence in the Netherlands."

**67.** The trial judge when considering the complaint about the omission in the 2016 review decision to engage with the personal circumstances of the appellant appears to have paid insufficient regard to the repeated statements of the CJEU that any interference with the right of residence under article 27(2) of the 2004 Citizens' Rights Directive must be "restrictively interpreted".

**68.** Having regard to the various factors considered above, I find that the 2016 review decision was not taken in accordance with the requirements of the Directive. In particular, the decision maker had regard to matters which do not appear in Article 28 (1) of the 2004

Citizens Rights' Directive and failed to have sufficient or any regard to specific factors that are required to be considered (see *P.I.* at para. 46 above). As a consequence, the assessment that was required to be made before a removal order could be made in the appellant's case was not a proportionate assessment in all the prevailing circumstances.

***The inference which was drawn from the appellant's return to home state***

**69.** Another aspect of the analysis by the decision-maker and by the trial judge raises a concern. The 2016 review decision concluded that although the appellant had voluntarily returned to Ireland to face criminal prosecution, the appellant would not have done so unless an EAW had been sought. The appellant had strenuously denied this suggestion through correspondence before the 2015 Review decision, in the grounding affidavit for the 2015 proceedings and in the grounding affidavit of 20 October 2016 for these proceedings. The credibility of the appellant was implicitly undermined without giving any reason. Despite the availability of that correspondence and the affidavit in the 2015 proceedings, the decision maker still found that there was a "serious question as to whether [the appellant] would ever have returned ..." for a trial in 2012 without an EAW. The trial judge endorsed the approach taken by the decision-maker.

**70.** Given that the decision-maker laid some emphasis on this aspect despite strenuous contest from the appellant, the decision maker failed to explain how the assessment of the appellant's credibility about events between the assault and the return of the appellant to Ireland was undertaken, and why his account was rejected. The underlying seriousness of the issue at stake (an EU citizen's freedom of movement), and the requirement that a decision on expulsion be proportionate in all the circumstances merited more than what emerges from the approach adopted on this issue.

*Authorities relied upon by respondents*

71. It may assist a further and better understanding of this judgment by the respondents in particular to distinguish the following case law cited by counsel for the respondents where parties who might be compared with the appellant were refused relief by way of judicial review.

The Court of Appeal judgment in *C v. Minister for Justice and Equality* [2019] IECA 219 (Unreported, Court of Appeal, 24 July 2019) (“C”) is most prominently cited. There, a Romanian national who had gained permanent residence violently assaulted a woman while intoxicated in 2014. The injuries were extensive and severe. He was sentenced to 3 years and 6 months imprisonment with the final 2 years suspended for the offence (“with theft also taken into consideration”). He had only come to the attention of the Gardaí previously for a public order offence in 2009. A removal order was made in 2015 with an exclusion for 3 years because he was a sufficiently serious threat affecting one of the fundamental interests of society. O’Regan J. in the proceedings which were then entitled *G.C. v. Minister for Justice and Equality* [2017] IEHC 215 (Unreported, High Court, 4 April 2017) refused the relief sought and Whelan J. in dismissing the appeal concluded at para.48:

“There was evidence before the High Court on which the Judge was entitled to rely which demonstrated that the decision of the respondent was not solely based on the conviction of the appellant but on his personal conduct considered in its entirety. Where, as in this case, an applicant fails to discharge the burden of demonstrating that the proportionality judgment of the decision maker was unreasonable in the sense identified in *Meadows* [2010] 2 IR 701, then the courts ought not intervene”.

The decision maker and the trial judge in this appeal merely relied on a general view that a sex offender will re-offend as opposed to the consideration in *C* of the facts which included intoxication, severity of effects on the victim and the *C*'s initial false allegation that he was acting in self-defence.

72. McDermott J. in *P.R, J.R and K.R v. Minister for Justice* [2015] IEHC 201 (Unreported, High Court, 24 March 2015) examined the extensive consideration given in the review decision of 18 September 2013. P.R. had acquired permanent residence in 2011 but had engaged in a number of serious sexual assaults from 2007 to 2011 and "...[t]here was clear evidence that he had a disposition, an inclination or readiness amounting to a propensity to assault young unaccompanied women, randomly selecting his victims in a frightening way". The unsuccessful challenge to the independence of the decision and review process is not relevant in the determination of this appeal at this stage. At para. 34 McDermott J. stated:

"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 the legal principles, the decision challenged is fundamentally flawed"

As P.R. had not acquired permanent residence at the time of the offences, McDermott J. explained that P.R. "enjoys the lesser protection allowing removal on 'serious grounds of public policy or public security' under Art. 28(2)". Whereas the appellant in this case also enjoys 'the lesser protection' permitting removal on 'serious grounds of public policy or public security', it may be observed that unlike the review in the appellant's case, there were psychological reports of P.R. which referred to "a significant number of sexual offences over a period of four years suggesting a propensity to reoffend". That was relied upon in the review decision and by McDermott J. and is an important distinguishing feature.

**73.** *D.S., R.S. and M.S. (an infant) v. Minister for Justice and Equality, Ireland and the Attorney General* 2015 IEHC 647 (Unreported, High Court, McDermott J., 20 October 2015) considered a removal and exclusion order for D.S. made in October 2013. D.S. was a Lithuanian national who had arrived in Ireland in 2004. D.S. had been convicted of rape in 2009 and had completed his 6 years sentence on 19 August 2013. Much of the judgment concerned the alleged lack of independence and “subjective bias” in the decision-making process which were dismissed by McDermott J. Paragraph 54 summarised the challenge to the public policy reason which had been explained in the decision and review:

“It is clear that all relevant matters which the Regulations and the Directive require to be considered were taken into account. In particular, the Court is not satisfied that [the Minister] considered the matter solely by reference to the fact that [C.S.] had been convicted of a serious offence and served a custodial sentence. His attitude to the s.4 offence [rape] and his victim, further convictions and the consequences that might flow from his removal from the State were taken into account.”

These considerations were far more detailed and grounded upon evidence than existed in the 2016 review decision affecting the appellant, where a single conviction for sexual assault, a dubious inference about the appellant’s return to Ireland, and the erroneous use of an “egregious hardship” test featured in the analysis.

**74.** *Rola v. Minister for Justice and Equality* [2016] IEHC 811 and *M.S. v. Minister for Justice and Equality* [2016] IEHC 762 were judgments delivered by O’Regan J. on 8 November 2016. They involved two Polish nationals who had permanent residence because they had been in Ireland since 2006. They pleaded guilty in 2014 to offences of cultivating marijuana plants worth over €97,000. They both received 3-year sentences with 1 year

suspended. Then they were the subjects of removal and exclusion orders. O'Regan J. reiterated the long-established principle that the decision maker determines the factors constituting serious grounds of public policy. O'Regan J was not persuaded by the argument "...[t]hat "cannabis 'only' brings the status of an individual into a different category than narcotics generally in so far as the relevant legislation is concerned" and that acts of violence must accompany the offence. O'Regan J. decided that the decision makers were entitled, as indicated in *Calfa* [Case C-348/96 *Calfa* [1999] ECR I-II EU:C:1999:6] to recognise "...[t]hat the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs" , in order to maintain public order.

**75.** The inclusion of these two judgments on behalf of the respondents in the book of authorities demonstrates yet again the well-recognised margin of discretion afforded to a decision maker. However, the judgments are not authority for the proposition that the decision-maker may dispense with the necessity to show that regard was had to the general principles and protections against expulsion to which I have made repeated reference above. Although I readily acknowledge the margin of appreciation which should be afforded to the 2016 review decision maker, there ought to have been a proportionate assessment of risk and a more reasoned engagement with the issues described above in this judgment.

### **Conclusion on Proportionality**

**76.** Given the fundamental nature of the right to freedom of movement for European Union citizens, the analyses of the various matters which were relevant to the assessment in question were superficial and cursory and contained errors having regard to the principles to be applied. In short, the trial judge erred in law in determining that the way the decision-



maker had approached the question of removal of the appellant from the State was adequate and proportionate. I would therefore quash the 2016 Review Decision.

**2nd Issue: The right to an effective remedy under Article 47 of CFREU and compliance with Articles 30 and 31 of the Citizens' Rights Directive.**

77. Given the conclusion expressed above, an adjudication on the second broad issue raised in these proceedings may not be required. The appellant brought an application for a declaration that the 2006 regulations and the 2015 regulations failed to implement the 2004 Citizens' Rights Directive correctly "by failing to provide the applicant with a right of appeal that is full, independent and compliant with Article 30.3 of [the 2004 Citizens' Rights Directive] and Article 47 of the [CFREU]". The relief in the present case is broadly similar, although perhaps not precisely the same, as the declarations or reliefs sought in other cases which considered whether judicial review is an effective remedy for the purpose of Article 47 of CFREU. The penultimate ground of appeal in the Notice of Appeal raises an issue about whether the review mechanisms available for the appellant complied with Articles 30 and 31 of the 2004 Citizens' Rights Directive.

78. The question as to whether judicial review constitutes an effective remedy for the purpose of Article 47 CFREU was indeed considered in several recent judgments of the Court of Appeal and of the Supreme Court. For completeness, I shall address the two provisions relatively briefly so that the parties can indicate whether they need to make further submissions in circumstances where the underlying decision in the 2016 review will now be quashed after the order of this Court is finalised. Article 47 of the CFREU provides, in the relevant part:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a Tribunal in compliance with the conditions laid down in this Article...

**79.** The recent jurisprudence of the Irish courts supports the view that the remedy of judicial review is sufficiently flexible and robust to constitute an effective remedy for the purposes of Article 47 of the CFREU. This has been made clear by recent decisions of Supreme Court. In *V.J. v Minister for Justice and Equality* [2019] IESC 75 (Unreported, Supreme Court, 31 October 2019), the Supreme Court affirmed that:

“The consistent position of the jurisprudence has been that judicial review in Irish law is a sufficiently flexible remedy to constitute an effective remedy, whether viewed through the prism of the CFREU, the ECHR, or indeed the Irish Constitution.”

**80.** In *Pervaiz v The Minister for Justice and Equality Ireland and the Attorney General* [2020] IESC 27 (Unreported, 2 June 2020), the Supreme Court reiterated “that judicial review, as is applied in Ireland especially in the field of international protection, “is both a flexible and powerful remedy” because: ‘[d]ecisions may be reviewed for legality, procedural error, irrationality, proportionality, and compliance with and protection of rights under the Constitution and the ECHR, rights under European Union law, and the rights protected by the [CFREU].’ ” The degree of protection offered by the remedy of judicial review has been the subject of repeated examination since *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 70. Recent decisions include *E.O. & A.O. v Minister for Justice and Equality, Ireland and the Attorney General* [2020] IECA 246 (Unreported, Court of Appeal, 13 August 2020), and *F.M. & Ors v Minister for Justice and Equality* [2020] IECA 184 (Unreported, Court of Appeal, 27 February 2020). The issue of reasons was considered by the CJEU in *Diouf v Ministre du Travail, de L’Emploi et de*

*L'Immigration* (Case C-69/10) EU:C:2011:524 and in *N.M. v Minister for Justice* [2016] IECA 217, 2018 2 I.R. 591, where Hogan J. said at para. 59: -

“What is critical is that – as *Samba Diouf v Ministre du Travail* Case C-69/10 [2011] ECR I-7151 makes clear – the judicial review court can subject the reasons of the decision-maker to a thorough review. For the reasons I have endeavoured to state, I believe that this task can be performed by the High Court using contemporary judicial review standards as explained by the recent authorities.”

**81.** The trial judge at paras 23 and 24 of the judgment explained that he was not relying on the ruling against the appellant’s contention which emerged from *Balc & Ors v Minister for Justice* [2018] IECA 76, (Unreported, Court of Appeal 7 March 2018) because it was delivered following the hearing before the trial judge. Rather he simply rejected “the argument that the State has failed to properly implement, transpose or implement the procedural safeguards of Art. 31 of the Citizens Directive...”

**82.** The respondents in written submissions contend that the issue is now well settled. Moreover, the respondents contend that the appellant did not advance submissions before the trial judge about the alleged failure to implement the safeguards of Article 31 of the 2004 Citizens’ Rights Directive. The respondents requested time to respond more fully at the hearing of the appeal before this Court if the appellant intended to pursue that ground of appeal. There was little time available to Counsel to address this point.

**83.** The main thrust of the appeal hearing concerned mootness and the proportionality of the decision-making process. Counsel for the appellant admirably conceded the effect of the Supreme Court judgments for the ground of appeal based on an effective remedy relying upon Article 47 of CFREU and explained briefly the further point about compliance with Articles 30 and 31 of the 2004 Citizens’ Rights Directive.

**84.** In fairness to all parties, it seems that they should consider this judgment first and then the terms of the orders which could now be made. It may be unnecessary for this Court to hear further submissions and to adjudicate on the ground of appeal which refers to Articles 30 and 31 if the appellant is satisfied with the orders to be made following the delivery of this judgment.

**85.** The appellant made one specific argument arising from the fact that leave was granted only in respect of the 2016 review decision and not in respect of the original 2014 removal order. The appellant submits that, if the respondents are correct in their submission that the effect of quashing the 2016 review decision is to leave the 2014 removal order intact, this in turn means that there is no effective remedy under Article 47 of the CFREU.

**86.** The appellant did not seek an extension of time within which to judicially review the 2014 decision and did not appeal the decision of Humphreys J to confine leave to the 2016 decision. Accordingly, any difficulty for the appellant flows from the appellant's failure to take appropriate legal steps rather than from any inherent limitation which stems from the remedy of judicial review itself. Therefore, this specific argument on behalf of the appellant is not accepted. However, insofar as the appellant wishes to pursue a ground relating to compliance with Articles 30 and 31 of the 2004 Citizens Rights Directive more generally, the position of the appellant should be clarified following a consideration of this judgment.

### **Final orders and the question of remittal**

**87.** I propose that this Court grant certiorari of the 2016 review decision for the reasons set out earlier. The question of remitting the matter for a review in accordance with the principles set out in this judgment arises. There may be arguments for and against this course of action, particularly in light of the situation concerning the 2014 removal which is untouched by the relief of certiorari. The Court will not make final orders until it has heard

from the parties in relation to the question of remittal, the appropriate final orders to be made and whether the parties wish to make detailed submissions about the issue of compliance with Articles 30 and 31 of the 2004 Citizens' Rights Directive outlined above. Also, the issue of costs in courts both has yet to be determined. In the circumstances, the following seems to be the appropriate way to proceed:

- (i) The appellant to indicate within a period of 14 days from delivery of this judgment if the appellant still wishes to pursue the ground of appeal concerning the review mechanisms available – this can be addressed by way of email to the Registrar;
- (ii) In the event that the appellant does not wish to do so and so indicates, the parties are to deliver written submissions no longer than 2,000 words in respect of the question of remittal and the question of costs, within 21 days of the expiry of the 14-day period referred to at (i). The parties should engage by email with the Registrar subsequently to obtain a date for final oral submissions.

**88.** As this is being delivered electronically, Ní Raifeartaigh J. and Power J. have indicated their agreement with this judgment.