Neutral Citation: [2015] IEHC 201

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 700 J.R]

BETWEEN

P.R., J.R. AND K.R. (A MINOR SUING BY HER FATHER AND NEXT FRIEND P.R.)

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on 24th day of March, 2015

1. The first named applicant (P.R.) is a Polish national, born 24th May, 1977, who was married to the second named applicant (J.R.), also a Polish national on 22nd October, 2011. The third named applicant (K.R.) is their daughter born on 25th March, 2012, in Dublin. The applicant moved to Ireland in October 2006, and commenced employment in January 2007. He worked for two years following which his contract was not renewed and then completed a number of training courses through FAS and worked as a cleaner between November 2009 and May 2011. In November 2010, he also took up employment as a security officer. In October 2011, he acquired "permanent residence" in the State having lived as a worker here for five years in accordance with the Directive 2004/38/EC.

2. On 7th June, 2012, P.R. was sentenced to three years imprisonment, the last sixteen months of which were suspended at Dublin Circuit Court in respect of six counts of sexual assault. On 29th January, 2013, the Irish National Immigration Service (INIS) issued a removal order against him which contained an exclusion order for a ten year period. By letter dated 7th March, 2013, an internal review of this decision was sought and submissions were made on his behalf. By letter dated 26th March, 2013, INIS "reaffirmed" the removal order and ten year period of exclusion. A judicial review was instituted in respect of that decision (Record No. 2013/331 J.R.). A substantive hearing of that application was commenced before the High Court (MacEochaidh J.) on 29th May, 2013, which was adjourned, part heard, following which negotiations took place and the proceedings were struck out by consent on 16th July, 2013. The case was settled on the basis that the review decision of 26th March, 2013, would be withdrawn by the Minister and P.R's case would be reconsidered in the context of the information exhibited in the judicial review proceedings.

3. P.R. was released from prison on 6th September, 2013, having served three quarters of the custodial element of the sentence. The balance of the sentence of sixteen months had been suspended on condition that he be of good behaviour. In the meantime, further evidence and material were submitted before a review decision was issued affirming the removal order on 18th September, 2013.

4. The applicants applied for leave to apply for judicial review (Ryan J., 25th September, 2013) for an order of *certiorari* quashing the decision of the respondent dated 18th September, refusing to set aside the removal order and expulsion period and a declaration that the implementation of the order would be an unlawful interference with the applicants' rights. A declaration was also sought that the European Communities (Free Movement of Persons No. 2) Regulations 2006 and 2008 (the Regulations), are in breach of European Union law in failing to implement Directive 2004/38/EC because they fail to provide P.R. with a right of appeal that is independent and compliant with Article 30.3 of the Directive and Article 47 of the Charter of Fundamental Rights and because they purport to authorise the arrest and detention of the first applicant at any time from 18th September, 2013, without further notice to him. An interim injunction was granted prohibiting the implementation of the removal order and the court directed that the leave application be heard on notice to the respondent. The case proceeded by way of telescoped hearing and the injunction was continued until the determination of these proceedings.

The Removal and Expulsion Order

5. A letter issued from INIS on 12th July, 2012, notifying P.R., who was then serving his sentence at Wheatfield Prison, that the Minister proposed to make a removal order against him under Regulation 20(1)(iv) of the Regulations, and subject him to an exclusion period preventing him from entering the State for a period of ten years from the date of his removal. The reason proffered was that P.R. had come to the attention of An Garda Síochána and appeared before the courts in respect of a number of sexual offences and the Minister had formed the opinion that his conduct was such that it would be contrary to public policy to permit him to remain in the State. He was invited to make written submissions to the Minister setting out reasons why the order should not be made.

6. Submissions were made on P.R.'s behalf by his solicitor by letters dated 17th September, and 23rd November, 2012. This included a personal statement by P.R. dated 14th November and letters from his wife and brother who resided at that time with his wife and daughter in Dublin.

7. By letter dated 29th January, 2013, P.R. was informed that a removal order in accordance with Regulation 20(1)(iv) had been made because of his convictions. An exclusion period of ten years was imposed. He was informed pursuant to Regulation 20(4)(a), that he could be arrested and detained without further notice for the purpose of ensuring his removal from the State in accordance with the order. He was also informed that he might seek a review of the decision.

8. The removal order was signed by Mr. Tom G. Doyle, Assistant Principal on behalf of the Minister for Justice and dated 28th January, 2013. P.R. was also furnished with a copy of a consideration of his case file prepared by Mr. Aidan Fitzpatrick, Executive Officer and approved by Ms. Helen Masterson, Higher Executive Officer, Removal Orders Unit, Repatriation Section dated 24th January, 2013, which had been reviewed by Mr. Doyle. In summarising, P.R's background, Ms. Masterson refers to his conviction and sentence in respect of seven separate counts of sexual assault before Dublin Circuit Criminal Court in respect of which a sentence of three years imprisonment was imposed with sixteen months suspended. The consideration was carried out in accordance with Schedule 9 of the Regulations. It noted that the applicant was 35 years old and first arrived in Ireland in October. 2006. He first came to the attention of An Garda Siochana on 16th August, 2007. Family and economic circumstances were reviewed and it was noted that

representations had been received that his family were "culturally integrated into the State" and "that P.R. wished to remain in Ireland". No information was submitted in relation to his state of health nor was any information provided regarding any links he had or retained with his country of origin, Poland. He had however resided outside Poland for over six years. He and his wife wished to remain in Ireland. No issues arose under s. 5 of the Refugee Act 1996 (as amended). His rights to private and family life under Article 8 of the European Convention on Human Rights were considered. It was accepted that a decision to remove PR would constitute an interference with his right to respect for private life under Article 8 (1) of the Convention. It was concluded that the proposed interference was necessary for the prevention of disorder or crime and there was no less restrictive process available which would achieve that pressing social need.

9. It was noted that the Legal Aid Board had submitted an application for permanent residence dated 14th November, 2012, on behalf of P.R. He was living with his wife and daughter at the time of his conviction and had been lawfully resident in the State for upwards of five years and therefore entitled to permanent residence here. However, it was also noted that the offences of which he was convicted were committed over a prolonged period between 2007 and 2011:-

> "The length of P.R.'s period of residence in the State has been noted. However the State has a duty to protect its citizens in the interests of the common good while An Garda Siochana have informed this Department that Mr. PR is a convicted criminal having been convicted of numerous serious offences in this State. Based on his pattern of serious sexual criminal behaviour in the State over a sustained period of time from 2007 right through to 2011 it is determined that to allow Mr. PR to remain in the State would represent a serious risk to public safety and security. It is submitted that if the removal order is signed…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 interests of public safety and the common good. Mr. PR has demonstrated a flagrant disregard for the law and has committed a number of serious sexual offences in this State over a period of four years suggesting a high propensity to re-offend.
>
> There, therefore, exists a substantial reason associated with the common good which requires the removal of Mr. P.R…"

10. The consideration also addressed P.R's right to family life. It reviewed his family circumstances and noted that if he were to be removed from the State it was open to his wife and child to relocate to any other Member State of the European Union. It was considered that his daughter was of adaptable age and that it would not be unreasonable to expect her to adapt to life in Poland or any other Member State in which the family chose to reside. Alternatively, it was open to Mrs. J.R. to continue to reside in Ireland with her daughter as she had done whilst he was in prison. It was noted that adult members of his family (including his brother) were also residing in the State. There was no information which suggested that he was in need of "a further level of dependency than that of normal adult sibling ties", and nothing to suggest anything more than "normal emotional ties" with those family members. The consideration states:-

> "Whilst it is accepted that removal from the State may be a disruption on his family life it is determined that this is proportionate as Mr. P.R. has committed a number of serious crimes, which were seven separate sexual assault offences, and on serious grounds of public policy and security he cannot be allowed to remain in the country. Further it is noted that none of the circumstances as listed in Schedule 9 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 Poland impossible for him or one of intolerable hardship."

11. It was, therefore, concluded that the making of a removal order was proportionate and reasonable having regard to the legitimate aims of the State in the prevention of crime and disorder in the interests of public safety and the common good.

12. Mr. Fitzpatrick recommended the removal and exclusion on 23rd January, 2013. This was approved by Ms. Helen Masterson on the 24th January, who recommended that the order be signed. All the papers in the case together with the consideration were reviewed by Mr. Doyle on 28th January, 2013, before he signed the order.

The First Review

13. By letter dated 7th March, 2013, the applicant's solicitors sought a review of the removal and expulsion order and extensive submissions under Schedule 11 of the Regulations were made. A further consideration was carried out in the course of this review by Mr. Fitzpatrick on 21st March, 2013. Apart from the inclusion of extensive quotations from the submissions made on P.R's behalf, the consideration contains the same details and conclusions as the earlier one. It contains many paragraphs which are identical to those which appear in the first consideration. It stated:-

> "These offences were committed over a prolonged period of time stretching from 2007 right through to 2011 which would suggest that Mr. R. does pose a risk of re-offending and therefore his removal from the State would protect the citizens and residents of the State… Mr. P.R. has demonstrated a flagrant disregard for the law and has committed a number of sexual offences in this State over a period of four years suggesting a high propensity to re-offend and his removal would protect the citizens and residents of this State."

14. Mr. Fitzpatrick recommended that the removal order and exclusion period be upheld. This recommendation was also made by Ms. Helen Masterson, Higher Executive Officer on 22nd March, 2013, who also recommended that it be "reaffirmed" by Ms. Maura Hynes, Principal Officer. Ms. Hynes agreed and affirmed the order on 26th March. Notice of the affirmation of the order and expulsion was given to the applicant's solicitors by letter of the same date. It should be noted that at this stage no further documentation or statements had been furnished by or on behalf of P.R. in the course of the review.

15. This review was challenged in the first set of judicial review proceedings which were settled on the basis that the Minister would vacate the determination of the 26th March and review the matter afresh.

The Second Review

16. On 19th July, 2013, extensive legal submissions were made on P.R's behalf and the following further documentation was supplied:-

> (a) Two affidavits of Sinead Fitzpatrick, Solicitor, dated 29th April and 8th May, 2013;
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> (b) An affidavit of P.R. dated 9th May 2013;
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> (c) An affidavit of J.R dated 13th May 2013;
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> (d) An affidavit of M.R. (P.R's brother) dated 23rd May 2013;

These affidavits had also been used to ground the first application for judicial review. The exhibits contained in the affidavits were re-submitted on P.R's behalf. This included a transcript of the sentencing hearing before his Honour Judge Nolan on 7th June, 2012, and a joint report by Dr. Jean Nina Devolder, principal forensic psychologist, Dr. Davina Walsh, principal clinical and forensic psychologist, and Ms. Natalia Bienkowska, clinical psychologist in respect of the applicant. A short report from Dr. Roy Brown, consultant psychiatrist dated 3rd January, 2011 was also submitted together with a number of other references.

17. A further consideration carried out under Schedule 11 of the Regulations by Mr. Oilbhéar McCraith, Executive Officer, was completed on 16th September, 2013. Ms. Helen Masterson, who had also been involved in the consideration of the first review and the consideration of the making of the removal and expulsion order, again recommended that the removal order be reaffirmed to Mr. Tom Doyle. Mr. Doyle, an AP, had signed and made the original order. He considered the matter on 17th September. The matter was then submitted to Mr. Noel Waters, who agreed with the recommendations made to him on 18th September. He appended a note which stated:-

> "I agree with the recommendation having considered it and following a discussion with Mr. Doyle. The key issue here in terms of the duration of the exclusion order is that the prisoner is clearly an habitual and repeat offender. Therefore an exclusion order of ten years is warranted in this particular case."

18. P.R.'s solicitors submitted on the basis of the additional material provided that the original exclusion order was "unlawful" because:-

> "(i) It is based on findings which have no evidential basis (for example, the decision maker held that the applicant's conviction 'suggests a high propensity to re-offend' – in fact, his risk of re-offending has been assessed by experts as moderate to low and with therapy nil);
>
> (ii) It is based on a finding that the applicant is 'a serious risk to public safety and security' for which there is no valid evidential basis;
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> (iii) The respondent had no regard to the particular facts of the offences and the applicant's mental illness at the time;
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> (iv) The respondent had no regard to the rehabilitative aspect of the applicant's sentence and the legal obligation to facilitate this (the sentence is the only one);
>
> (v) The applicant's criminal conduct and character were not such as to reach the high threshold required by Directive 2004/38 in order to permit a restriction being placed on his fundamental right as an EU citizen to move freely and reside within the union;
>
> (vi) Even if they did reach the high threshold (which is denied), the removal and exclusion of the applicant from the State for a period of ten years is a disproportionate interference with his rights in EU law and those of his family."

19. The submission complained that there was no evidence before the trial judge in the criminal proceedings to support the proposition that the applicant represented a serious risk to public safety and security or had a high propensity to re-offend. It noted the range of mitigating factors which were put before the court as outlined in the transcript. In particular, it emphasised the submission made by his counsel that he was unlikely to appear before the courts again which, it was said, "was not put in issue by the judge when imposing sentence". A further complaint was made that there was no reference to the particular facts and circumstances of the offences in the initial consideration and that the offences were not placed "in the spectrum of seriousness of criminal offences or in any context". It was claimed that the applicant's mental illness at the time of the offences and his subsequent marriage and stable relationship, his remorse and his actions (accepted by the trial judge), his apology to his victims, his guilty plea and the fact that he had no previous convictions prior to these offences were not considered. Furthermore, his engagement with counselling to ensure that there was no repeat offending and the fact that the offences occurred in public were said not to have been taken into account. It was submitted that no regard was had to any of these factors by the officials in making their recommendation and drawing the conclusion that he was a serious risk to public safety and security. It was claimed that this finding was completely contrary to the psychological assessment contained in the report dated 28th March, 2012, that his risk of re-offending was "moderate to low" with a "positive prognosis should he commit to a therapy programme" which would "reduce his level of assessed risk and promote an offence free life in the future".

20. This criticism of the original recommendation is misplaced since the psychological assessment was not put before the officials when considering the making of the removal order or subsequently, in the course of the first review. The second consideration reviewed this material and the submissions made in respect of P.R's propensity to re-offend as follows:-

> "It is submitted that if the removal order is upheld in respect of Mr. P.R. 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. Mr. P.R. has demonstrated a flagrant disregard for the law and has committed a significant number of sexual offences in this State over a period of four years suggesting a propensity to re-offend and his removal would protect the citizens and residents of this State.
>
> D'Arcy Horan and Company have contested Mr. R's alleged propensity to re-offend and have stated 'his risk of re-offending has been assessed by experts as moderate to low and with therapy nil'. D'Arcy Horan and Company have not indicated the source of their statement that his experts have assessed that his risk of re-offending with therapy is nil. The only psychological report submitted…containing an assessment of risk…is the report from forensic psychological services dated 28/03/2013 (Tab 4A). This report states that Mr. R's level of risk of committing a sexual offence was evaluated using the STATIC-99 and STABLE 2007 actuarial methods. On the STATIC-99 method, the assessed level of risk scored in the moderate-low range. On the STABLE 2007 method, Mr. R. was assessed to be in the moderate range of risk. The report states that the authors of these scales have indicated that the most accurate estimate is obtained when the results are combined, and when the measures are combined, the level of risk for future sexual offending by Mr. R. can be considered in the moderate-low range. Among the factors stated in the report as contributing to Mr. R's level of risk is his distorted belief system and his hostile attitude towards women. Indeed, in other parts of the report, it states that Mr. R. tends to attribute some responsibility to his victims, that he did not consider touching women as inappropriate and that he has distorted beliefs in relation to his offending behaviour. The report concluded by recommending that Mr. R. be court mandated to attend specialised therapy in order to address these serious issues to reduce his level of assessed risk and promote an offence free life in the future. No evidence has been submitted by either the Legal Aid Board or D'Arcy Horan and Company that Mr. R. attended any course of specialised therapy following this recommendation by forensic

psychological services. The forensic psychological services report says that before their report was compiled, Mr. R. attended a number of sessions with a psychologist from My Mind Centre, Dublin, in order to learn how to cope with stress or difficult feelings. Following these sessions, the psychologist at My Mind…gave her opinion that Mr. R's anxiety symptoms are still excessive as he is experiencing a lot of hopelessness. The forensic psychological services report then says that to their knowledge, Mr. R. is no longer attending (My Mind). It would seem then that Mr. R's risk of repeating his series of sexual assaults on women remains in the moderate-low range which still poses a threat to women resident in this State."

21. A submission that Mr. R. was suffering from depression and stress and psychologically vulnerable at the time of the offences due to suffering from "acute relationship difficulties", and was now in a stable relationship within his marriage, which militated against the risk of re-offending, was considered:-

> "It should, however, be pointed out that the first assault that Mr. R. was convicted of occurred in August 2007. This was at a time when, according to the psychological report, Mr. R. had begun a job… 'an experience he enjoyed' and when he was receiving letters from his girlfriend J. back in Poland indicating that she missed him and wanted to be with him. Moreover, the sexual assault that Mr. R. committed on 03/05/2011, which led to the garda investigation revealing five previous sexual assaults on women, occurred approximately six months after Mr. R. met and began a relationship with Ms. J.R. and only one month before she became pregnant with his child and they decided to marry. If it is (asserted) that Mr. R. committed these sexual assaults in part because of acute relationship difficulties and that this factor has now been removed because of his strong relation to Ms. R., this would not tally with the fact that the assault of 03/05/2011 occurred when he was already six months into his happy relationship with J.R. Nothing has been submitted that would suggest that had Mr. R. not been apprehended by gardaí on 03/05/2011 following another assault by him that he would not have continued with his series of sexual assaults on women as he had done for four years despite his ongoing relationship."

22. It was noted that Mr. R. was eventually arrested on 3rd May, 2011, after a series of sexual assaults by him on women when one of his victims made a complaint to the gardaí who on investigation discovered the previous incidents dating back to August 2007. He was convicted of six separate sexual assault charges for offences committed on 16th August, 2007; 5th February, 2009; 10th March, 2009; 21st August, 2009; 2nd November, 2010; and 3rd May, 2011.

23. The consideration then contains a passage to which objection is taken to a reference to the fact that the gardaí discovered the previous incidents of sexual assault during the course of investigations carried out following the complaint in May, 2011:-

> "It should be noted in this context that a study by the Royal College of Surgeons in Ireland in 2002, SAVI Report: Sexual Abuse and Violence in Ireland, found that only 7.8% of women who had experienced adult sexual assault had actually reported their experience to gardaí."

24. There then follows a conclusion that:-

> "Factors relating to the rights of the State have also been considered, including the prevention of disorder and crime in the interest of public safety and the common good in light of Mr. P.R's serious criminal conduct in the State. The State has a duty to protect its citizens in the interest of the common good and Mr. R's removal from the State would fulfil this duty.
>
> There, therefore, exists substantial grounds associated with the common good and serious grounds of public policy which require the removal of Mr. P.R. from the State. It is therefore submitted that the making of a removal order was proportionate and reasonable to the legitimate aim being pursued."

25. It should also be noted that the full court transcript was before the officials considering this matter. The learned trial judge in imposing sentence described the nature of the offences and set out the matters which he thought appropriate to take into account:-

> "It seems over a reasonably prolonged period of time, Mr. P.R. committed six sexual assaults. The sexual assaults were remarkably similar. Seemingly, that he would get into a bus, pick a loan female, sit down beside her, place his hands upon her private parts or close to her private parts and then masturbate himself or attempt to masturbate himself. I think that is a brief summation of what he did. What made him do it is difficult to know, but he did it. It seems that he had a rough time in his life. It seems that over time it seems that eventually he was, one of the complainants did complain to the gardaí and it seems that he was arrested and due to good police work, all of the dots were connected and all of these offences were detected and now he has pleaded guilty to all these offences.
>
> I think in mitigation to his credit, he (pleaded) guilty. He has cooperated when confronted by the gardaí; has expressed remorse, and I think it is true remorse. It seems that Mr. R. has no criminal record prior to these offences and since these offences. It seems that he has skills and he is now in a stable relationship.
>
> Now what he did was deeply inappropriate. Obviously these assaults, sexual assaults, have affected the peace of mind of the injured parties. Now I have to sentence him justly and I have to sentence him for what he did. I am aware that he is a Polish national and I am also aware that a prison sentence for a Polish national in this country would be difficult by reason of his lack of language skills and probably by reason of the fact that his… visits would be few and far between, by reason of the absence of a support network in this country. But I have to sentence him nonetheless, and the question I have to ask myself, is a custodial sentence justified in this case? Now, there are six offences here committed on individual occasions and therefore it seems to me that Mr. R. probably went a few steps too far. It seems that probably in sentencing terms it would probably be forgivable if he had one or probably two, but six, I'm afraid is too much. It seems that he gave into his temptations and it seems to me that he must undergo a prison sentence for what he did. I think what he did is quite serious. I think to accost and sexually assault these ladies who are doing nothing but trying to go home, probably from work on most occasions, is too much. And I am going sentence him globally in relation to the matters. I think what I am going to do in relation to the major indictment, that is the 22/12 I'm going to impose a three year custodial sentence on count one. I am going to take all the remaining counts into account and by reason of the mitigating factors and he is a Polish national, I am going to suspend the last sixteen months of that sentence. That means his active sentence would be twenty months in the matter."

26. A number of additional features emerged from the documentation submitted. In the original representations, it was indicated that Mr. R. was socially and culturally integrated in the State. The psychological report noted that Mr. R. did not speak English (as was

noted by the trial judge). It also stated that even after April 2010, when he had been in the country for three and a half years, he had not developed a social network in Ireland and had no friends except his brother. The report goes on to state that he was not motivated to learn English and that the language barrier further contributed to his high level of stress and that he "did not integrate into Irish society and therefore remains socially isolated".

27. The report also indicated that he had experienced long standing depression and that he was psychologically vulnerable and prone to distress. His future job prospects were also limited. He had lost his previous job because of the offences and had been imprisoned since June 2012. His language difficulty added to his poor job prospects. It was concluded, therefore that if he were removed from Ireland, he could travel to other EU Member States, any of which had lower unemployment rates than Ireland. Consequently, it was concluded that having regard to the fact that he had not integrated into Irish society and his limited employment prospects, removal from the State would not place an intolerable burden upon him.

The Challenge
28. The applicants' challenge to the decision of 18th September, 2013, may be summarised under four headings:-

(a) A challenge to the merits of the decision (Grounds (iv) to (xi);

(b) The adequacy of review as an independent appeal (Grounds (i), (ii) and (iii));

(c) Arrest and Detention (Grounds (xii) and (xiii)); and

(d) Interlocutory Relief (Grounds (xiv) to (xvi).

Grounds (iv) to (xi)
29. The applicants contend that the legal principles applicable to the decision in this case as set out in Directives 2004/38/EC and the Jurisprudence of the Court of Justice of the European Union (CJEU) limit the restrictions which can be imposed on a European Union citizen convict who is resident in the state. It is claimed that the decision is a breach of the right to fair procedures, a right to be heard and the right to good administration under European Union law, because findings and inferences were made in a contested decision to which the applicant had no opportunity to respond. It is said they contained unfair or material errors of fact, or incorrect inferences. Considerable emphasis is laid on the alleged failure of the respondent to give any or any adequate consideration to the circumstances in which the offences were committed, including P.R.'s mental health at the time and his subsequent changed circumstances which included his marriage, the birth of his daughter, the sentence served and his engagement in therapy.

30. Particular emphasis is laid on an alleged failure by the respondent to consider the close family ties between the applicants, the second applicant's employment history and length of residence in the state, and the fact that his brother (his only sibling) and his family also resided here.

31. It is contended that no serious grounds of public policy or public security existed under Regulation 20(6)(a) of the Regulations and Article 28(2) of Directive 2004/38/EC sufficient to justify the decision, and that the high threshold imposed was not met by conduct which led to one sentence of three years imprisonment, sixteen months of which was suspended. In the circumstances it is submitted that the first named applicant did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society as required by Article 17.2 of the Directive.

32. It is claimed that Article 27.1 of the Directive which provides that freedom of movement shall not be restricted to serve economic ends was breached by a consideration by the respondent that the high unemployment rate in Ireland compared with other EU countries was a justifiable reason for removing P.R. from the state.

33. It is contended that P.R.'s removal and exclusion for a period of ten years was a disproportionate interference with the rights of the applicants.

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.

Criminal Convictions and Free Movement of Persons
35. Articles 18 and 20 of the Treaty on the Functioning of the European Union (TFEU) provides that every person holding the nationality of a member state shall be a citizen of the Union, and that all citizens shall enjoy the rights and be subject to the duties provided for in the Treaties and, in particular, the right to move and reside freely within the territory of the member states. Article 21 TFEU provides that every citizen shall have the right to move and reside freely within the territory of the member states subject to the limitations and conditions laid down in the Treaties, and the measures adopted to give them effect.

36. Directive 2004/38/EC concerns the rights of citizens of the Union and their family members to move and reside freely within the territory of the member states. The Recitals in the Directive provide, inter alia, that expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that may seriously damage persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host member states. It is noted that the scope for such measures will therefore be limited in accordance with the principles of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host member state, their age, state of health, family and economic situation and their links with their country of origin. The greater the degree of integration of Union citizens and their families in the host member state, the greater the degree of protection there should be against expulsion. If Union citizens have resided for many years in the territory of the host member state and, in particular, if they were born and have resided there throughout their life, expulsion measures on the basis of public security should only occur in exceptional circumstances where there are imperative grounds. In addition, procedural safeguards should also be specified in detail in order to ensure a high level of protection of rights and 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.

37. A convicted European Union citizen in the host state has an enhanced status and protection compared to that of a convicted criminal from a non-European Union country who is subject to a wider discretionary power to deport to his/her home country under s. 3 of the Immigration Act 1999 (see *People (DPP) v. Alexiou* [2003] 3 I.R. 513).

38. The following Articles of the Directive are relevant to this case:-

Article 27(2) provides:

> "Measures taken on grounds of public policy or public security shall comply with the principles of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."

Article 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.
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> 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.
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> 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public policy 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…"

39. Article 16 of the Directive provides that a Union citizen who has resided legally for a continuous period of five years in a host member state shall have the right of permanent residence there. In this case it is accepted that P.R. is a "permanent resident" as a result of which the state could not make an expulsion decision against him "except on serious grounds of public policy or public security". If resident in the state for the previous ten years, an expulsion decision might only be taken against a Union citizen if based "on imperative grounds of public security, as defined by the member states". In this instance the letter informing P.R. of the Minister's proposal to make a removal order against him was on the basis of the Minister's opinion that his conduct was such "that it would be contrary to public policy" to permit him to remain in the state. The letter of 29th January, 2013, confirms that the order was made on the ground of "public policy". Following the review a letter enclosing the second consideration informed P.R. that the removal and exclusion period had been reaffirmed, and enclosed a copy of the decision "in which 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".

40. A number of the Regulations mirror the provisions of the Directive. Regulation 20 provides, *inter alia*,:-

> "(1)(a) Subject to paragraph (6), the Minister may by order require a person to whom these Regulations apply to leave the state within the time specified in the order where - …
>
> (iv) in the opinion of the Minister, the conduct or activity of the person is such that it would be contrary to public policy…to permit the person to remain in the state…
>
> (c) The Minister may impose an exclusion period on the person concerned in a removal order and that person shall not re-enter or seek to re-enter the State during the validity of that period.
>
> (d) Without prejudice to paragraph (1)(a)(iv), the Minister shall not, except on grounds of public order, public security or public health make a removal order in respect of a person to whom these Regulations apply solely on the basis that the person concerned has served a custodial sentence…
>
> (2)(a) Where the Minister proposes to make a removal order he or she shall notify the person concerned in writing of his or her proposal and, where necessary and possible, the person shall be given a copy of the notification in a language that he or she understands…
>
> (b) A notification under this paragraph shall contain –
>
> (i) unless the Minister certifies that it would endanger the security of the State to make them known, the reasons given to the proposal referred to in subpara. (a)…
>
> 3(a) In determining whether to make a removal order and whether to impose an exclusion period in respect of a person the Minister shall take account of –
>
> (i) the age of the person,
>
> (ii) the duration of residence in the State of the person,
>
> (iii) the family and economic circumstances of the person,
>
> (iv) the nature of the person's social and cultural integration with the State, if any,
>
> (v) the state of health of the person, and
>
> (vi) the extent of the person's links with his or her country of origin…

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

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

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

(ii) …is a minor."

Serious Grounds of Public Policy

41. The Minister could not make an expulsion order against P.R. "except on serious grounds of public policy or public security" because he had the right of permanent residence under Article 28(2) as applied under Regulation 20(6)(a).

42. A person convicted of sexual assault is liable under s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as substituted by s. 37 of the Sex Offenders Act 2001, to a term of imprisonment not exceeding ten years. The sentence appropriate upon conviction may vary from case to case. However, factors relevant to sentencing include the circumstances in which the assault occurred, its duration, the injuries inflicted, the amount of violence used and the degree of fear, distress and trauma caused to the victim. The previous convictions, if any, of a convicted person will also be taken into account as will any other mitigating factors such as a plea of guilty, expressions of remorse and the potential for rehabilitation. (See *Sentencing Law and Practice* (2nd Ed.) Thomas O'Malley para. 11-16 to 11-17). There is a high level of concern in society that persons of both sexes be protected from sexual assailants, as evidenced by the number of statutes enacted in Ireland over the last thirty years with a view to modernising the law in this area and strengthening the protections available to victims of sexual crime.

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

44. There is no doubt that sexual offences may provide the necessary basis upon which to make a removal order. In certain circumstances the previous conviction and the nature of the behaviour of the European Union citizen convict may warrant expulsion on that ground alone. In this case extensive consideration was given in the original decision and in the review, to the nature and extent of the offences and a number of other matters to which I will return.

45. The importance to be attached to the offences committed was considered in the case of *Regina v. Pierre Bouchereau* [1977] E.C.R. 1999 in which the question was posed to the CJEU as to whether previous criminal convictions could "in themselves" constitute grounds for the taking of measures based on public policy, or whether there are solely relevant insofar as they manifest a present or future propensity to act in a manner contrary to public policy. The court stated:-

> "27. The terms of Article 3(2) of the Directive (Directive No. 64/221/EEC) which states that "previous criminal convictions shall not in themselves constitute grounds for the taking of such measures" must be understood as requiring the national authorities to carry out a specific appraisal from a point of view of the interests inherent in protecting the requirements of public policy, which does not necessarily coincide with the appraisals which formed the basis of the criminal conviction.
>
> 28. The existence of a previous criminal conviction can, therefore, only be taken into account insofar as the circumstances which gave rise to that conviction or evidence of personal conduct constitute a present threat to the requirements of public policy.
>
> 29. Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy.
>
> 30. It is for the authorities and, where appropriate, for the national courts, to consider that question in each individual case in the light of the particular legal position of persons subject to community law and of the fundamental nature of the principle of the free movement of persons."

46. The court also emphasised that the concept of public policy, when used as a justification for derogating from the fundamental principle of free movement of workers, must be interpreted strictly so that its scope cannot be undermined unilaterally by each member state without being subject to control by the institutions of the community. Importantly, it also stated (citing *Van Duyn v. Home Office* [1974] ECR 1337:-

> "34. Nevertheless…the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty and the provision adopted for its implementation."

47. In that regard the court stated that reliance upon the concept of public policy by the national authority presupposed the existence in addition to the "perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society". (See Case C-348/96 *Calfa* [1999] E.C.R. 1-11, para. 24; Case C-441/02, *Commission v. Germany* [2006] E.C.R. 1-3449, para. 33 and *Commission v. the Netherlands* Case C-50/06 [2007] E.C.R. 1-04383). As in *Calfa*, in this case, an expulsion order may only be made against a European Union citizen convict if apart from his having committed the sexual offences, his personal conduct created a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

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.

49. In *P.I. v. Oberbürgermeisterin der Stadt Remscheid* (Case C-348/09) the CJEU reviewed the conditions for granting protection against expulsion under Article 28(3)(a) of Directive 2004/38/EC. It considered whether the concept of expulsion on the grounds of "imperative grounds of public security" of a person who had resided in excess of ten years in Germany following his conviction for the sexual abuse of a fourteen year old minor, sexual coercion and rape, were acts which directly threatened the "calm and physical security of the population as a whole or a large part of it".

50. The court held that the concept of "imperative grounds" of public security was one which was considerably more strict than that of "serious grounds" within the meaning of Article 28(2), and was clearly intended to limit measures taken under Article 28(3) to "exceptional circumstances". It requires a threat to public security of "a particularly high degree of seriousness". (Paras. 19 and 20) In considering whether the offences committed by P.I. were covered by the concept of "imperative grounds of public security", the court took into account a number of factors including the fact that Article 83(1) TFEU provided that the sexual exploitation of children was one of the areas of particularly serious crime with a cross border dimension in which the European Union legislature may intervene. A member state could regard such offences 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…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". The court also noted that even though according to the particular values of the legal order of the member state, offences such as those committed by P.I. posed a direct threat to the calm and physical security of the population, that should not necessarily lead to the expulsion of the person concerned, because under Article 27(2) of the Directive, the issue of any expulsion measure was 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. This "…implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future". Other considerations must also be taken into account including how long the individual concerned has resided in the host member state, his/her age, state of health, family and economic circumstances, social and cultural integration into that state and the extent of his/her links with the country of origin (paras. 28 – 32.)

51. P.I. had been convicted and sentenced to a term of seven years and six month's imprisonment for sexual assault, sexual coercion and rape of a minor in respect of acts which occurred between 1990 and 2001. From 1992, he had compelled his victim to have sexual intercourse or perform other sexual acts on an almost weekly basis by using force and threatening to kill her mother or brother. The victim of the criminal offences was his former partner's daughter who was eight years old when the offences commenced.

52. It is clear from this and the decision in *Land Baden Wurtenberg v. Tsakouridis* Case C-145/09 [2010] E.C.R. 1-11979 (applied in the P.I. case) 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 offences 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).

53. It is clear that P.R. does not have the enhanced protection afforded by Article 28(3)(a) whereby he could only be the subject of a removal order if there were "imperative grounds of public security". He enjoys the lesser protection allowing removal on "serious grounds of public policy or public security under Article 28(2)".

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

55. It is clear from the extracts quoted from the consideration which grounded the decision and from other conclusions which are summarised earlier in the judgment, that every facet of the applicant's life was considered on the basis of the evidence advanced on behalf of P.R. and his family.

56. The evidence of "rehabilitation" submitted in the psychological report was carefully analysed, including the assessment that he was at a "moderate to low" risk of reoffending. In the second review consideration it was determined that P.R. had shown a flagrant disregard for the law and had committed a significant number of sexual offences over a period of four years suggesting "a propensity to reoffend" which indicated a threat to women resident in the state.

57. As required under the Directive and Regulations, P.R.'s individual circumstances were taken into account including the length of his residence in Ireland, his age, state of health, family and economic situation and his social and cultural integration in Irish society. The respondent was clearly satisfied that P.R. constituted a continuing and present threat to public policy on the basis of the serious sexual offences repeated over a four year period on victims chosen at random. It could not be suggested that there is anything irrational, unreasonable or disproportionate in the conclusions reached by the respondent in this regard.

58. I do not consider that there is any merit in the applicants' contention that it was inappropriate to consider P.R.'s employment prospects in other member states of the European Union or his country of origin as against his employment prospects in Ireland, having regard to the obligation to consider his and his family's economic situation and his integration and potential for integration in Irish society.

59. There was an extensive consideration of the applicants' rights under Article 8 of the European Convention on Human Rights and, in particular, the applicant's right to family life and the likely affect a ten year expulsion would have on the applicants' family. The relevant considerations were taken into account in that regard and the appropriate tests were applied in considering whether the

likely effect upon them would be disproportionate.

60. The period of ten years exclusion is not, in the court's view, disproportionate when viewed in the context of the conclusions reached in respect of P.R.'s length of residence in the state, the period over which the offences were committed, and the fact that he then served a sentence of imprisonment within the state. In all, having arrived in the state in 2006, he engaged in criminality between 2006 and 2011 and served a custodial sentence between 7th June, 2012, and 6th September, 2013. There was nothing irrational, unreasonable or disproportionate in imposing an exclusion period of ten years, particularly when it is open to the applicant to apply to the respondent to revoke the removal order after a period of three years in accordance with Article 32(1) of the Directive.

61. It is clear that for four years P.R. engaged in a pattern of serious sexual offending and exhibited a propensity over that period to commit similar offences which was only interrupted upon his detection and arrest. There 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 Directive and Regulations require that the respondent consider whether that pattern of behaviour is such that it demonstrated a present propensity to commit such offences. A decision maker is entitled to take account of the assessment of that risk as moderate to low, together with the description of his distorted belief system, his hostile attitude to women, his tendency to attribute responsibility to his victims, the fact that he did not consider touching the victims to be inappropriate and had distorted beliefs in relation to his offending behaviour and the other factors to which reference has already been made. The court is satisfied having regard to all of the evidence considered, the careful assessment made by the respondent of the nature of the offending, and the other factors considered in the review, that it was open to the decision maker to reach an informed, reasonable, rational and proportionate decision that P.R. should be removed from the state and excluded for a period of ten years on the basis of the existence of serious grounds of public policy for so doing.

The Adequacy of Review and Independent Appeal - Grounds (i), (ii) and (iii)
62. These grounds challenge the adequacy of the review procedure which was available to P.R. and resulted in the challenged decision. It was submitted that he was denied a right of appeal as provided by Article 30 of the Directive and that the Regulations failed to provide a court or administrative authority to which he could bring an independent appeal against his removal order, and in the course of which he could adduce new and/or updated evidence. It is submitted that the failure to provide an independent appellate mechanism also constituted a failure to transpose the Directive fully and effectively. In addition, it is claimed that the letter notifying P.R. of the refusal to vacate the removal order failed to inform him of the court or administrative authority with which he might lodge an appeal and the time limit for that appeal, contrary to Article 30 of the Directive.

63. The following are the relevant provisions of the Directive:-

"Article 30

Notification of Decisions:

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

(3) The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the member state. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be no less than one month from the date of notification.

Article 31

Procedural Safeguards

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

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

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

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

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

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

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

64. A review of a decision is provided for in the Regulations as follows:-

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

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

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

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

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

(4) The officer determining the review may –

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

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

65. It is submitted that the review carried out in P.R.'s case was not independent because of the involvement of officials who made the decision to issue the removal order. Those who considered the original removal and exclusion order were Mr. Aidan Fitzpatrick, Executive Officer, whose recommendation was approved by Ms. Helen Masterson, Higher Executive Officer, who in turn recommended that the order be signed by Mr. Doyle, an Assistant Principal Officer. The first review was conducted by Mr. Fitzpatrick who made a further recommendation to Ms. Masterson who recommended that the removal order and expulsion be reaffirmed by Ms. Maura Hynes, Principal Officer. Ms. Hynes did so. The second review (following the judicial review proceedings) was conducted by Mr. Oilbhéar McCraith, Executive Officer, and was reviewed once again by Ms. Masterson who had been involved in the consideration of the first order and recommended its reaffirmation. She again recommended that the original order be reaffirmed to Mr. Doyle, the Assistant Principal who had signed and made the original order. The matter was then submitted to Mr. Noel Waters who agreed with the recommendation made to him on 18th September and appended a note in which he stated that he did so following a discussion with Mr. Doyle.

66. The respondent submits that Article 31 of the Directive does not require that the judicial or administrative redress or appeal be "independent". However, Regulation 21(3) provides that a review of a decision under the Regulation shall be carried out by an officer of the Minister who is not the person who made the decision and is of a grade senior to the grade of the person who made the decision. The officer determining the review has wide powers to confirm, reverse or vary the decision under review or set it aside and substitute his or her determination for that decision. The court is satisfied that the intention of the Regulation is to provide an aggrieved party an opportunity to appeal the decision within the administrative process provided to a different decision maker to ensure its independence. The review must be conducted in accordance with fair procedures under Article 40.3 of the Constitution in accordance with which the Regulations must be interpreted.

67. The official who determined the review was Mr. Waters. He did not make the original decision and was a grade senior to the decision maker, Mr. Doyle. The respondent submits that there was an independent administrative review procedure which in this case complied with the provisions of Regulation 21.

68. The essence of P.R.'s submission is that the departmental review process, together with judicial review, do not provide an independent appeal mechanism which complies with European Union law and the right to access an effective remedy. It is submitted that the process is not independent not least because in this instance officials who were involved in the making of the initial removal order were also involved in the review.

69. The court is satisfied that the close involvement of the officials who were engaged in making and approving recommendations and/or the decision in respect of the original order for removal and in the review, is unfair and unlawful. Ms. Helen Masterson was involved in reviewing the recommendation made by Mr. Fitzpatrick, who prepared the original consideration prior to the making of the removal order. She recommended the making of the order to Mr. Doyle. Ms. Masterson was also involved in the first review in which she recommended the affirmation of the original order which she had herself recommended to Mr. Doyle. The decision made on the first review was quashed by the High Court by consent. However, Ms. Masterson was then called upon again to review Mr. McCraith's consideration and recommendation to reaffirm the original order. Mr. Doyle who made the original order was consulted by Mr. Waters on the second review and undoubtedly, having regard to the note appended to the consideration prepared in the course of that review, had a significant input to the decision made by Mr. Waters. Administrative procedures constructed by the respondent for the making and review of removal and expulsion orders under the Regulations require the officials to receive information, to gather it and to reach conclusions in relation to it on which they base a recommendation. The dynamic of the process requires each official to come to a conclusion as to whether an order should be made and to make a recommendation in that regard: it is not simply an information gathering exercise. The recommendations made by the executive and higher executive officers are calculated to influence the decision maker. I am satisfied that it is unfair that the same official should be involved in a review of these matters in which she had previously made a recommendation. The further involvement of Mr. Doyle, who made the original order in the review and was consulted by Mr. Waters prior to the making of his decision, also undermines the fairness and independence of the process. Ms. Masterson and Mr. Doyle were both placed in the position where they were reaffirming their own conclusions and contributing in a very significant way to the ultimate decision made. The officials were an essential part of the decision making process in these cases.

70. The court is satisfied that the involvement of Ms. Masterson and Mr. Doyle in the second review process gives rise to a reasonable apprehension of bias in the making of the review decision insofar as a reasonable person might consider that their chances of a fair and independent hearing were compromised in the circumstances (see *Dublin Well Woman Centre Ltd v. Ireland* [1985] ILRM 418 and *O'Neill v. Irish Hereford Breed Society Ltd* [1992] 1 I.R. 431, *Prendiville v. Medical Council* [2008] 3 I.R. 122 and *Kovalenko & Ors v. the Minister for Justice and Equality & Ors* [2014] IEHC 624): justice must not only be done, but be seen to be done.

71. No specific allegation of bias has been made against either official nor was leave sought on that specific ground. The court is satisfied that the officers were carrying out duties assigned by their superiors. However, the respondent is responsible for the review process set up under Regulation 21, and the spirit and intention of the Regulations requires that the review process be independent of the first instance decision maker, and that the same officials should not be involved in reviewing and making recommendations, *de novo*, concerning a challenged decision to which they made a significant contribution. The constitutional interpretation of the Regulation in accordance with fair procedures requires that those involved in making recommendations which have been acted upon, should not be involved in an independent review process. I am satisfied, therefore, that the decision is fundamentally flawed for the above reasons.

72. The flaw in the decision lies in the involvement of the particular personnel, not in the structure of the review provisions which are

capable of being operated in accordance with fair procedures. The court is not satisfied that the respondent has failed to provide an independent appellate mechanism or failed to transpose fully and effectively Directive 2004/38/EC, or to comply with the Charter of Fundamental Rights. Therefore, the court is satisfied that P.R. has established a fundamental flaw in the review decision because of a breach of fair procedures for the reasons set out above.

73. The applicants also complain that contrary to the provisions of Article 30 of the Directive the decision of 18th September on review failed to state "the court or administrative authority with which (he) may lodge an appeal (and) the time limit for the appeal". The court is satisfied that the letter which notified the applicant of the affirmation of the removal order is not covered by Article 30.3 of the Directive. The notification under Article 30.3 refers to any decision taken under Article 27(1) which authorises member states to restrict the free movement and residence of Union citizens and their families on grounds of public policy, public security or public health. The procedural safeguards dealt with in Article 31 provide that persons shall have access to judicial and where appropriate, administrative redress procedures, to appeal against or seek review of any decision taken against them. It is that appeal to which Article 30.3 applies. It does not apply to notification of the decision reached on the review process which is the appeal procedure provided by the respondent and which, of course, has been concluded. Furthermore, a refusal to undertake not to remove P.R. from the state as set out in the letter of 23rd September, 2013, was for the same reason not in breach of Article 30.3. In any event, having regard to the intervention of this Court and the granting of an injunction P.R. was not removed pending the determination of his review or these judicial review proceedings. Consequently, the applicant has not established the grounds set out at (xii) to (xvi) inclusive.

Abuse of Process
74. The respondent contends that by reason of the settlement of the judicial review proceedings [2013 No. 313 J.R.] by the first named applicant, he now estopped and/or precluded from objecting to the legality of the procedures employed under the review process. It is submitted that the proceedings were compromised on the express basis that the previous decision of the respondent of 26th March, 2013, affirming the removal order would be set aside and he would make fresh representations in support of his request for review. It is said that the settlement was in full and final settlement of all matters or issues howsoever arising relating, *inter alia*, to the initial decision of the Minister on review dated 26th March. It is submitted that the first named applicant in entering this compromise expressly acknowledged the legality of the review or appeal procedure and that it was not now open to him to challenge it at this time. The court is satisfied that the second review is an entirely separate entity to the first review. It ought to have involved an independent determination, *de novo*, following the consideration of the additional material which, it was agreed, could be submitted by the first named applicant, following the setting aside of the first review decision.

75. The issue of estoppel cannot apply to the second and third applicants who were not parties to the previous judicial review proceedings. They are also challenging P.R.'s removal from the state. Furthermore, the court is not satisfied that the compromise reached necessarily involved an acceptance that the remedies available to the applicants were in accordance with an effective remedy under European Union law. That matter had not been litigated. It is fair to observe that the applicants were availing themselves of remedies afforded by the member state by way of administrative review of the original order and judicial review. Both parties behaved reasonably in the course of the hearing of the first judicial review proceedings when they entered into a compromise whereby the additional material would be considered by the Minister on the setting aside of the first review decision. This occurred in circumstances in which the High Court could not on judicial review entertain further evidence beyond that considered by the decision maker when determining the first review. The court is satisfied that it would be unfair having regard to the history of this case to exercise its discretion to exclude the applicants from relief and access to the courts in respect of the determination of constitutional and European Union law rights, when it is not clear upon the evidence that it was intended pursuant to the terms of the settlement to deprive the applicants of any further remedy open to them at the conclusion of the review process. Furthermore, I am not satisfied that the respondent, having compromised the first set of proceedings, is entitled to adopt and apply a clearly unfair procedure to the second review which is fundamentally flawed, because one or more of the applicants failed to advance this argument at an earlier stage.

Conclusion
76. For the reasons set out at paragraphs 69-72, which the court considers are encompassed by grounds 1-3 and the arguments arising thereunder, the court will grant leave to apply for judicial review by way of certiorari and quash the decision made by the respondent on the review. The respondent acted in breach of fair procedures in failing to provide the first named applicant with a review which was independent for the reasons set out above. The other grounds advanced are rejected.