THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 304

Record Number: 2016/421

Peart J.
Edwards J.
Hedigan J.

BETWEEN:

M.V. (LITHUANIA)

APPLICANT/APPELLANT

- AND -

THE MINISTER FORJUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 10th DAY OF OCTOBER 2018

1. In these judicial review proceedings the appellant, a Lithuanian national, seeks an order of *certiorar*i to quash a removal order made in respect of him by the Minister on the 19th March 2013, and affirmed by decision dated the 13th May 2014. By order of the High Court (Stewart J.) dated the 22nd July 2016, his application was refused for reasons given in a written judgment delivered on that same date [2016] IEHC 432.

2. The Minister has power to make a removal order under Regulation 20(1)(a)(iv) of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 ("the Regulations") which provides, as relevant:

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

3. The Regulations give effect in the State to Directive 2004/38/EC (which amended/repealed previous Directives in this regard) on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

4. One of the grounds on which the applicant seeks to have the Minister's decision to make the removal order quashed is that Regulation 20 (1) (d) fails to properly to transpose Article 27 (2) of the Directive. I will come to that ground in due course, but it is convenient to set forth those provisions at this point:

> Regulation 20(1)(d):
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> (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*. [Emphasis provided]
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> Article 27(2) of the Directive:
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> (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.*
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> The personal conduct of the individual concerned must represent a *genuine, present and sufficiently serious threat* affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted." [Emphasis provided]

5. The grounds upon which the appellant relied in the High Court, and again on this appeal, and the submissions made, must be considered in the light of the facts and circumstances known to the Minister, and/or of which he had been apprised, when the decision to make the removal order was made on the 19th March 2013, and when the decision to affirm the removal order was made on the 13th May 2014.

Relevant Factual Background

6. The appellant is a Lithuanian national who was born on the 19th September 1990. He came to live in this State in June 2011. It is clear that during the years 2011 and 2012 he engaged in a significant amount of criminal behaviour for which he was on numerous occasions arrested, charged and convicted, and which led to several terms of imprisonment and other penalties being imposed on him in the District Court. His offending was not confined to one area or even one county in the State. His criminal behaviour led to

appearances in several different District Courts – *e.g.* Tullamore, Naas, Portlaoise, Drogheda. The record shows him to have been arrested on thirteen different occasions between 19th August 2011 and 19th March 2012. In the main the offences which he committed, and for which he was convicted and served sentences of imprisonment, comprised theft contrary to s. 4 of the Criminal Justice (Theft and Fraud) Offences Act, 2001, road traffic offences, and unlawful possession of certain articles.

7. In total the appellant was convicted of 26 offences during this period, and served a number of sentences of imprisonment, including an 8 month sentence imposed upon him at Galway District Court on 30th April 2012, a 6 month sentence imposed at Cloverhill District Court on the 25th April 2012, a 6 month sentence imposed at Monaghan District Court on the 23rd April 2012, a 5 month sentence imposed at Tullamore District Court on the 28th April 2012, and lastly, an 8 month sentence imposed at Naas District Court on the 25th January 2012. These facts are not disputed.

8. By letter dated the 3rd April 2012 the Garda National Immigration Bureau requested the Minister to make a removal order in respect of the appellant. This letter outlined the circumstances in which he had come to the adverse attention of An Garda Siochana, and had been convicted of the various offences referred to, and the sentences imposed.

9. By letter dated the 16th May 2012 the Irish Naturalisation and Immigration Service (INIS) wrote to the appellant notifying him that the Minister proposed making a removal order under Regulation 20(1)(iv) of the Regulations including an exclusion from the State for a period of 3 years, and invited submissions. The appellant was in Midlands Prison at this time, but wrote a letter dated 21st May 2012 to INIS. In its first paragraph this letter stated, inter alia, that "all my immediate family live in Ireland, namely my father and three other siblings. That appears from a later submission made by his solicitor not to have been a correct statement (see para. 12 *infra*). The letter went on to state that he wished to appeal the "deportation order" that had been served on him, stating that he had no family left in Lithuania, and that there were not many employment prospects in Lithuania, whereas in Ireland he had been gainfully employed in a clothing recycling company. He asked that consideration be given by the Minister to his request to remain in Ireland.

10. That letter was acknowledged by letter dated the 21st June 2012, stating that its contents were noted and that it would be fully considered. It went on to state that the appellant could make further representations in advance of the decision being made, but urged that this be done immediately, and that, in particular, he should provide evidence of any efforts that he had made to gain future employment in the State in advance of his release from prison.

11. A removal order was made by the Minister on the 19th March 2013. The appellant was notified of the making of this order (and the 3 year exclusion), and of the reasons for same, i.e. that the order had been signed "because you have come to the attention of An Garda Siochana and the Courts as follows …", and thereafter proceeded to set out those numerous occasions to which I have already referred. The letter went on to state that "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", and to inform him of his entitlement under Regulation 21(1) of the Regulations to seek a review of the decision to make the removal order, and enclosed a form for so doing.

12. Almost a year later on 10th March 2014 solicitors wrote on the appellant's behalf seeking such a review. The letter indicated that the removal order had been served on the appellant while he had been in prison in May 2013, and had been re-served in February 2014. The letter acknowledged that the appellant "has a criminal record of unfortunate length [and] that our client has been in prison and subject to arrest on a number of occasions". However, it was stated that "none of these crimes are of a serious nature and our client instructs us that he is now a reformed character", and that they were instructed that he was now employed by a named company, that he was paying tax and social welfare contributions, and that he was in a relationship that was having a steadying and beneficial effect upon him. As for his propensity to offend, the letter stated:

> "Our client also informs us that he no longer associates with the criminal elements who were such a bad influence on him. Our client has spent a considerable portion of his adult life (since early 2011) in this country and is endeavouring to put down roots and to stabilise his existence in order to become a contributing member of society. Our client has no family in Ireland. However, if returned to Lithuania our client would clearly experience grave difficulties in establishing a productive family life and all his progress over the last few months would be undone. We submit that any such move would be disproportionate and we hereby ask the Minister to exercise his discretion in our client's favour." [Emphasis provided]

13. In due course by letter dated 29th April 2014 the Minister wrote to the appellant's solicitors to inform them that there were further convictions in addition to those set forth in the Minister's previous letter dated 16th May 2013. A significant number of additional convictions were set forth in respect of further offences committed in 2011/2012, and for which in some instances periods of imprisonment were imposed. Once again there were convictions for theft, and road traffic offences, including two "hit and run" offences where the appellant had not remained at the scene of the incident in question. The solicitors were invited to make any further representations that they wished to make.

14. In their letter of reply dated the 6th May 2014 the appellant's solicitors stated that "we are unable to add much more to ours of 10th March 2014". This letter acknowledged that the appellant had been in prison and subject to arrest on numerous occasions, and stated "we repeat that none of the crimes are of a serious nature and our client instructs us that he is now a reformed character". That attempt to reassure the Minister as to the appellant's character reformation sits uncomfortably with the next sentence of the letter which states: "Our client is currently serving a short prison sentence". The letter went on to state that their client intended upon his release from prison to resume his employment with a named company, and to submit that to remove the appellant would be disproportionate, and request that the Minister's discretion be exercised in their client's favour.

15. By letter dated the 14th May 2014 INIS wrote to the appellant informing him that a full review had been conducted in accordance with Regulation 21 of the Regulations, and that a decision had been made to "uphold" the removal order dated the 29th April 2013. A copy of the review was provided with the letter.

16. This review states that the reason for the making of the removal order was the appellant's recurring criminal behaviour "represents a threat to public policy and necessitates the making of a removal order". That criminal behaviour which I have already outlined is set out in detail. Detailed reference is made to the submissions received by the Minister, including to the fact that payslips from the appellant's employment were provided, and to the other matters to which the representations had referred, such as his instruction to his solicitor that he was by then in a relationship. Consideration was given to the appellant's personal circumstances in the State as known to the Minister, including that An Garda Siochana's report in April 2012 disclosed no record as of that time of the appellant having had any record of employment in the State, or having claimed social welfare benefit. However, it goes on to refer to the instruction given to his solicitors that he had gained employment with a named company "for the past four months", and to the payslips furnished to corroborate that instruction. The review referred also to the relationship which the appellant had disclosed in his submissions.

17. This review also considered, as required, the question of refoulement, and concluded that the removal order would not give rise to refoulement, noting also that the appellant had not claimed that it would. In addition, consideration was given to the appellant's rights under Article 8 ECHR, and while it was accepted that the removal of the appellant would interfere with his right to respect for his private life, that interference was in accordance with law (Article 20 of the Regulations), was in pursuit of a pressing need and a legitimate aim (*i.e.* the prevention of disorder and crime), and was necessary and proportionate to that legitimate aim. It went on to state:

> "The proposed interference is necessary for the prevention of disorder or crime. Mr V. has been given an individual assessment and due process in all aspects and there is no less restrictive process which would achieve the pressing social need which is the prevention of disorder and crime in this case.

18. The review contains a lengthy passage where consideration is given to the issue of 'Proportionality'. It is detailed and should in my view be set forth in its entirety:

> "The reason for the Minister's decision to make a Removal Order in respect of Mr V. was that his recurring criminal behaviour represents a threat to public policy and necessitates his removal from the State. Mr V. first came to the attention of An Garda Siochana on 19/08/2011 in relation to a theft offence and he has come to their adverse attention in relation to a range of criminal incidents since that time. It must be noted that Garda National Immigration Bureau (GNIB) are of the view that Mr V's pattern of criminal behaviour to date demonstrates that he is a genuine and sufficient threat to the social order and fundamental interests of Irish society and as such they applied to the Department to have a Removal Order made in respect of him.
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> Mr V. has engaged in criminal activity for a significant proportion of his period of residence in the State. He has appeared before the courts 10 times in relation to 29 charges and has been arrested on numerous occasions (see 'Background' section above). The State has a duty to protect its citizens in the interests of the common good while the Department is informed Mr V. has committed offences in the State which show that he is a threat to public policy and public safety including a hit and run offence and multiple incidents of theft. The Irish justice system has afforded Mr V. a number of opportunities to alter his behaviour but he continued to act in a reckless manner with a flagrant disregard for the safety of the citizens and laws of this State. Mr V.'s criminal behaviour to date suggests that he has a propensity to re-offend and underlines the view that his presence in Ireland is contrary to public policy and is a disturbance to social order in the State.
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> In their representations dated 10/03/2014 MS Solicitors informed this section that Mr V. is employed with Oceanpath, Westpier, Howth, Co. Dublin where he had been working for four months (Tab 3). While engaging in paid employment is to be commended, it raises a question as to whether Mr V's recent efforts at self-improvement stem from the Minister's decision to make a Removal Order in respect of him. In this regard, it is noted that An Garda Siochana previously informed this section that there was no record of Mr. V. ever working or claiming social welfare benefits in the State. This raises a further question as to how Mr V. was supporting himself in Ireland prior to his current period of employment particularly in light of the frequency and nature of his criminal offences in the State.
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> MS Solicitors submit that "However if returned to Lithuania our client would clearly experience grave difficulties in establishing a productive family life and all his progress over the last few months would be undone" (Tab 3). Mr V. would be free to reside in whichever EU Member State he chooses if removed from this State many of which have lower unemployment rates than Ireland. It could therefore not be said that removal from Ireland would cause an egregious hardship for Mr V. with regard to his future career and employment opportunities.
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> I have considered the nature of Mr V.'s social and cultural integration in the State. MSs Solicitors submit that Mr V. has informed them that he is in relationship which "has a steadying and beneficial influence over him." (Tab 3). No evidence has been received to support Mr V.'s assertion that he is in a relationship. Mr V.'s history of criminal and anti-social behaviour and previous period of unemployment would not suggest that Mr V. has strong social links to the State or that he has made reasonable efforts to integrate himself in Irish society. It is therefore submitted that Mr V.'s removal from the State would not impose an intolerable burden upon him in this regard.
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> Mr V. has been given an individual assessment and due process in all aspects and his rights under Article 8 to respect for his private life have been considered. Factors relating to the rights of the State have also been considered, including the prevention of disorder and crime in the interests of public safety and the common good in light of Mr V's criminal conduct in the State.
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> Having reviewed the details of Mr V.'s case, it is submitted that the making of the Removal Order was proportionate and reasonable to the legitimate aim of the State for the prevention of crime and disorder in the interest of public safety and the common good and should be upheld."

19. Following that consideration of proportionality, consideration was given to the question of interference with the appellant's Article 8 rights. Reference is made to the fact that in his own letter of representation the appellant had stated that "his father and three siblings were residing in Ireland), and then to what was stated by his solicitors namely that there were "no family members residing in Ireland". The review then states:

> "It would appear that Mr V.'s family circumstances may have changed and raises a possibility that some of Mr V.'s [family members] have returned to Lithuania or relocated to another country. It would be open to Mr V. if removed from Ireland to relocate to whatever country his family members are now residing. However, if Mr V. does in fact have family members residing in Ireland, he has not provided any information which would suggest he is in need of a further level of dependency other than that of normal adult sibling ties."

20. Immediately upon receipt of the notification that the removal order was affirmed, the applicant commenced judicial review proceedings in the High Court challenging the Minister's decision. As already stated, he sought an order of *certiorari*, and in addition certain declarations and ancillary orders. Leaving aside for the moment the issues raised as to whether the Directive is properly transposed into Irish law by the Regulations, the objections raised to the decision to make a removal order are, as stated in the statement of grounds filed, firstly, none of the offences of which the appellant was convicted can reasonably be regarded as posing a threat to public policy, public security or public health. It was submitted that these offences are at the lower end of offending, and were dealt with on a summary basis in the District Court, and further more were confined to the years 2011/2012; and secondly that the Minister failed to give any, or any adequate weight to the appellant's "proof of steady employment with Oceanpath" and had

proceeded to "unreasonably and irrationally characterise and/or dismiss this entry into employment as an attempt by the applicant to avoid the execution of the Removal Order against him".

21. In her written judgment the trial judge considered Article 27 (2) of the Directive, and Regulation 20(1)(a)(iv) of the Regulations, as well as Article 20(1)(d) of the Regulations. These provisions have already been set forth at paras. 2 and 4 above. She made reference to case-law to which she was referred by counsel for the appellant, and in particular Case 36/75 *Rutili* [1975] ECR - 1219, Case 30/77 *Boucherou* [1977] ECR-1999, and Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Olivieri* [2004] ECR I-5257.

22. The trial judge concluded that in the light of these cases it was clear that there must be a genuine and serious threat to public policy before removal could be imposed, and that "a recidivist tendency can be sufficient justification to warrant the affirmation of a proposed removal order from the State". She went on to state that "given the applicant's history, which was extensively laid out in the impugned decision, the respondent's finding of a recidivist tendency is neither irrational, nor without basis".

23. The objection based on the failure to give proper consideration to the fact that the appellant had gained some employment and had provided pay slips as evidence of this. The appellant pointed to the fact that the Minister had commented in the review that this was commendable, but that he had then irrationally and unreasonably characterised this attempt as being one designed to avoid the execution of the removal order. The trial judge considered these submissions and concluded as follows in respect of same:

> "With regard to the alleged irrational consideration of the applicant's employment history, the applicant has resided in the State for five years. Indeed, he had only resided in the State for three years at the time the impugned decision was affirmed. In that time, he has been sentenced to a cumulative 33 months in prison and, according to the Irish Prison Service, became unlawfully at large in February, 2013. The Court finds such a scenario to be incongruous with the notion of "consistent and reliable employment" and sees no reason to invalidate the impugned decision on that basis".

24. On this appeal the appellant makes a number of criticisms of the trial judge's conclusions. He submits that the trial judge failed to conduct any adequate analysis of the requirement that before a removal order is justified the conduct of the applicant must represent not just a genuine and serious threat to public policy but a current threat. He submits that the trial judge failed to give consideration to the fact that there was no evidence before the Minister other than that his offending consisted of petty crime dealt with in the District Court, and not of such a serious nature as to present a serious threat to public policy, and also that it was confined to a relatively short period in 2011/2012, and that there was no evidence that he constituted a present threat as of the date on which the decision to make the removal order was made, or when it was reviewed.

25. The appellant submitted also that the trial judge fell into error when she concluded that his recidivist tendency could itself provide justification for considering that he presented a present serious threat to public policy. Characterising the offending as "petty crime" counsel submitted that where the offending was of a minor nature and constituted petty crime, the concept of recidivism was irrelevant. In other words, for the purposes of the test identified in the Directive the fact that a petty offence is repeated many times is not a fact that can ever satisfy the test and justify removal.

26. It is submitted also that when giving consideration to the question whether the appellant was a present and serious threat to public policy insufficient consideration was given by the Minister, and the trial judge, to the fact that at the time that the decision to make the removal order was made there was evidence that the appellant was in employment for some weeks. It was submitted that this evidence combined with the instruction to the appellant's solicitor that he was by then in a steady relationship and was turning his life around was not given proper consideration, and that it should have led the Minister to conclude that, whatever about the past, he was by then no longer a present and serious threat to public policy.

27. Counsel for the Minister submitted that it was clear from the review decision that an adequate and proper analysis of the appellant's offending conduct had been carried out in order to reasonably conclude that he posed a genuine, present and serious threat to a fundamental interest of society, namely the safety of the citizenry. Counsel referred to the correspondence between the appellant and the Minister in relation to the review decision where the appellant's "pattern of criminal behaviour to date" was said to suggest a propensity to re-offend, and that his presence in the State was contrary to public policy and was a disturbance to social order in the State.

28. Counsel for the Minister submitted that the trial judge was correct to conclude that the recidivist nature of the appellant's criminal behaviour, even though the offences themselves were at the lower end of criminality, was a sufficient justification for his removal from the State in accordance with the Directive and the relevant case-law.

29. As for the appellant's complaint that the Minister gave insufficient weight to the fact of some employment engaged in by the appellant, and querying whether it was simply an attempt postdating the removal order to avoid its execution, counsel submitted that the Minister had simply expressed a doubt in relation to the applicant's motives for seeking employment, in a context where he had never shown any desire to work in previously, and that there is nothing to suggest that this was a material consideration in the decision to affirm the removal order. In any event counsel, in my view correctly, has objected to this matter being raised as an issue on this appeal, since it is not one of the grounds contained in the grounds of appeal in the notice of appeal.

Conclusions in relation to the challenge to the decision

30. As explained, the appellant's challenge to the decision to make a removal order is based firstly on his contention that the petty or minor nature of the offences for which he was convicted, though numerous, precludes a conclusion by the Minister that he poses such a threat to public policy as to justify his removal from the State pursuant to the Directive; and secondly on his contention that the Minister in his consideration failed to give adequate weight to the record of employment as evidenced by the pay slips provided.

31. In its judgment in Murat *Pollat v. Stadt Rüsselsheim* [2007] ECR 8167 the Court at para.42 made clear that the question of proportionality that arises in relation to decisions affecting the freedom of movement of EU citizens within the territory of the Union must be assessed by reference to the personal conduct of the person whose freedom is being restricted on grounds of public policy, and that conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The Court also made clear that it is a matter for the national court to determine whether the decision to remove the appellant does not go beyond what is necessary to protect that fundamental interest.

32. Other judgments of the CJEU such as in *Bouchereau*, and in *Orfanopoulos and Olivieri* support this position.

33. In the present case it is clear that the Minister considered the personal conduct of the appellant. This conduct was considered in its totality. The decision was not based solely on the fact that there were convictions or on the fact that there were sentences of imprisonment imposed. The material adduced in evidence shows that a most detailed consideration of the appellant's offending

behaviour was carried out. The Minister was aware of the very numerous occasions on which the appellant had been arrested, and had been charged and convicted of the various offences that he committed over a two year period after his arrival in the State. The Minister was aware also of the several sentences of imprisonment that had been imposed in respect of some of the offences.

34. While the offence of theft which constituted the majority of the criminality involved is undoubtedly at the lower end of offending behaviour, compared, say, to offences which involve violence and injury, and which would be dealt with on indictment, nonetheless the Minister was entitled to have regard to the fact not only of the number of such offences and the period of time within which they were committed, but also to the fact that sentences of imprisonment had been imposed in respect of some of them.

35. These offences were all dealt with in the District Court, but nevertheless it has to be borne in mind that the District judges who dealt with these matters saw fit to impose significant periods of imprisonment in respect of some of the offences. That of itself takes those offences outside any concept of a trivial offence.

36. The Minister was entitled in my view to regard that pattern of recidivist offending as indicating a propensity or tendency to commit crime, and in turn to consider that to indicate a clear present risk to the legitimate public policy of protecting the general public in the State. The Minister made it clear in the decision that it was this pattern of recidivist behaviour on the part of the appellant that justified the making of the removal order, and not simply the fact that the appellant had been convicted, or even sentenced to terms of imprisonment. The Minister's focus was on the personal conduct of the appellant, and not simply the fact of the convictions, and the sentences of imprisonment imposed. Accordingly, the Minister complied with the requirement of Regulation 20(1)(iv) of the Regulations which precludes the making of a removal order "solely on the basis that the person concerned has served a custodial sentence".

37. It has been urged on the appellant's behalf that the Minister failed to give adequate weight to the fact that the appellant had instructed his solicitor that he was in a steady relationship at the time the removal order was being considered, and that he had gained employment and paying his taxes, and in effect that he had "turned his life around" so to speak. But the Minister clearly considered these submissions. As to failing to attach sufficient weight to these factors, it must be pointed out that there was very little to corroborate the appellant's mere assertions and instructions to his solicitor. Undoubtedly he provided some pay slips showing some short period of employment. But there was not any testimonial from that employer indicating what view was formed of the appellant as an employee. There was nothing from the employer to indicate whether or not his employment could continue indefinitely into the future. Any such additional material might have given the Minister some basis for attaching additional weight to the question of whether the appellant continued to pose a risk to public policy. A steady employment record backed by positive testimonials from the employer or others in a supervisory capacity over the appellant would undoubtedly assist in showing that whatever about his past conduct, the appellant had indeed turned a corner in his life, such that he could not reasonably and fairly be considered to pose an ongoing risk to society. But here there was nothing added to his assertions in this regard besides the small number of pay slips referred to.

38. As for the steady relationship that the appellant instructed his solicitor he had formed, and about which the solicitor informed the Minister, again this is entirely uncorroborated. One would expect that there would be something offered by way of corroboration, either from the partner concerned, or perhaps even from friends. The Minister cannot be expected reasonably to attach any significant weight to a mere instruction to a solicitor that such a relationship exists. The onus is on the appellant to provide to the Minister any material to support his representations. This appellant has failed in this regard.

39. In my view the trial judge was correct in her conclusion that the Minister was entitled on the basis of the material provided in the appellant's representations and on the facts as known, to affirm the removal order.

Failure to properly transpose Article 27(2) of the Directive

40. On this appeal, counsel indicated that he did not propose making oral arguments in support of this ground of appeal, but would rely on his written submissions.

41. As previously set out in para. 4 above, Article 27 (2) provides in its first sentence as follows:

> "(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.* [Emphasis provided]

42. As previously set forth also, Regulation 20(1)(d) which transposes that provision provides:

> (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.* [Emphasis provided]

43. The point sought to be made is that the Regulation allows a removal order to be made in respect of a person based on previous convictions, whereas that is contrary to what is provided for in the Directive.

44. However, in my view, and as submitted by counsel for the Minister, this appellant does not have *locus standi* to argue this ground, given that it is perfectly clear that the Minister's decision was made based on Regulation 20(1)(iv) of the Regulations. This Minister's letter states this. In other words, the decision comes within the exception provided for in Article 20(1)(iv) namely *"except on grounds of public order, public security or public health"*. The decision affecting this appellant comes within that exception even if he is correct in his argument that the regulation fails to properly transpose the Directive. The Minister's decision is clearly based on the opinion that the appellant's conduct indicated a pattern of recidivist criminal behaviour justifying a conclusion that he was a genuine and serious present risk to public policy in the State at the time the removal order was made. Such an argument, if it is to be made, will have to await a case in which on the facts it clearly arises.

45. It is sought also to argue that the test provided for in Regulation 20(1)(iv) and to be satisfied before making a removal order is not the test mandated by Article 27 of the Directive, since the former makes no reference to the "the personal conduct of the individual" but simply to "the conduct or activity of the person". It is submitted that the Regulation therefore fails to provide for the threshold seen in the Directive, namely that "*the personal conduct* of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". It was submitted that the test under the Regulation is less protective than that prescribed under the Directive. However, for much the same reasons already stated in the previous paragraph, I do not consider that this appellant has *locus standi* to argue this ground on the facts of his case. It is quite clear that the conduct considered by the Minister was without any doubt the conduct of the appellant personally. It was not anybody else's

conduct. It was solely his own criminal behaviour. Notwithstanding the lack of *locus standi*, it is perhaps worthy of note now, as counsel for the Minister has submitted, the CJEU has made it clear (see e.g. *Case C-233/00 Commission v. France [2003] ECR I-6625*) that "it is not always necessary formally to enact the requirements of a directive in a specific express legal provision, since the general legal context may be sufficient for implementation of a directive, depending on its content".

46. For all these reasons, I am satisfied that the trial judge did not err, and I would dismiss this appeal.