THE HIGH COURT

[2015 No. 609 J.R.]

BETWEEN

BARTOSZ STANILAW LUKASZ

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 21st day of July, 2017

1. This is a challenge to the first named respondent's decision of 22nd September, 2015, to make a Removal Order in respect of the applicant.

2. The applicant is a Polish national who has been resident in Ireland since early 2007. The applicant first came to the adverse attention of An Garda Síochána on 6th May, 2010, in relation to a traffic offence. Since May 2010, he has been convicted of 40 offences including theft, road traffic, assault, threatening/abusive/insulting behaviour, possession of drugs for the purpose of sale or supply, unlawful possession of drugs, intoxication, damaging property, entering a building with intent to commit an offence, obstructing a police office and failure to comply. As a result of his convictions he has served a number of periods in custody between 2010 and 2015.

3. A Removal Order was first sought by the Garda National Immigration Bureau (GNIB) under Article 20 of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 ("the 2006 Regulations") by way of letter dated 8th December, 2012. At the time of this request, the applicant was serving a four months sentence for assault. On 16th January, 2013, while in Cork Prison, the applicant was notified of the intention to issue a Removal Order in respect of him pursuant to Regulation 20(1)(a)(iv) of the 2006 Regulations for a period of five years from the date of his removal.

4. On 29th January, 2013, the applicant acknowledged receipt of the first named respondent's letter and he sought "one last chance" to prove that he could be a law abiding citizen and a useful member of Irish society. He made reference to his employment history in the State as a landscape gardener and carpenter and advised hat when he lost his employment he "broke down completely" and "started abusing alcohol".

5. Representations on behalf of the applicant were received from NASC (Irish Immigration Support Centre) on 6th March, 2013, setting out reasons why the applicant did not wish to be removed back to Poland. It was represented, *inter alia*, that he was in a serious relationship with an Irish national and that prior to his custodial sentence he had resided with her and her child in Tralee, Co. Kerry. It was submitted that the applicant and the Irish national were engaged to be married and that he considered himself a parent to the Irish national's son, albeit that the applicant and his partner were going through "temporary relationship difficulties" as a result of his incarceration. Reference was also made to the applicant's addiction to alcohol.

6. On 8th May, 2013, GNIB wrote to the Repatriation Unit of the first named respondent's department advising of additional convictions in respect of the applicant. On 5th November, 2013, NASC advised the first named respondent that the applicant's relationship with the Irish national had broken down but that he was hopeful of achieving a reconciliation once released from prison.

7. On 11th February, 2014, NASC advised the first named respondent that the applicant was accessing educational and other services in prison and that in anticipation of his release he had commenced an employability skills course and a pre-release course.

8. Additional convictions in relation to the applicant were submitted to the first named respondent by GNIB on 14th April, 2014. Further representations were received from NASC on 24th April, 2014, which enclosed FETAC certificates and a Life Skills Award. On 21st January, 2015, NASC advised the Repatriation Unit that since his release from prison, the applicant had not come to the attention of the gardaí and that he had rehabilitated himself.

9. On 3rd February, 2015, the Repatriation Unit furnished NASC with copies of the removal order applications which had been received from GNIB in respect of the applicant dated 8th December, 2012, 8th May, 2013 and 14th April, 2014.

10. A decision to issue a Removal Order was made on 4th March, 2015, and the applicant was so informed on 5th March, 2015. He was advised that it had been concluded that his conduct was such that it would be contrary to public policy to permit him to remain in the State.

11. The consideration of file which accompanied the letter of 5th March, 2015, stated, *inter alia*, as follows:-

> "The reason for the Minister's proposal is that it is believed that Mr. Lukas represents a threat to public policy. Mr. Lukasz first came to the attention of An Garda Síochána in relation to a traffic offence on 06/05/2010 and has come to their adverse attention with further traffic, theft, public order, criminal, searches and drug offences since that time. He has received numerous convictions and has been incarcerated on a number of occasions. Mr. Lukasz has, through his repeated pattern of criminal behaviour over a number of years, demonstrated a flagrant disregard for the laws of the State and has committed a number of serious offences over a sustained period of time suggesting a high propensity to re-offend. It is also acknowledged that [GNIB] are of the opinion that Mr. Lukasz's pattern of criminal behaviour to date warrants the making of a Removal Order.
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> Since the initial Removal application received from GNIB on 08/12/2012, Mr. Lukas has received numerous convictions for which he has been incarcerated. That these offences were committed not only after we had issued the proposal to issue a Removal Order to Mr. Lukas on 16/01/2013 but also after he had made representations to the Department stating why he should not be removed, show the utter contempt that Mr. Lukasz [holds] for the laws of the State."

12. An application for a review of that order was made by NASC at the request of the applicant on 23rd March, 2015, pursuant to Regulation 21 of the 2006 Regulations. It was submitted that the applicant had used his time in prison in a positive and productive

manner, that he had continued with his rehabilitation following his release from prison in May, 2014, that he had moved from Tralee to Killarney to distance himself from negative influences and that he had been law abiding since his release from prison and had not come to the negative attention of the Gardai.

13. Subsequent to the aforesaid representations, on 22 June, 2015, GNIB were advised by the Gardai that on 19th May, 2015, the applicant appeared at Killarney District Court charged with a series of offences, namely intoxication in a public place, theft and criminal damage which had been committed on diverse dates in March, 2015. He received sentences ranging from four to seven months for the theft and criminal damage offences. The applicant was invited to make representations to the first named respondent in this regard but none was in fact received.

14. On 21st September, 2015, a decision was made by the first named respondent to affirm the Removal Order of 4th March, 2015. On 22nd September, 2015, the applicant was advised him to present himself for deportation.

15. The consideration of a file which accompanied the first named respondent's letter, set out, *inter alia*, the representations made by the applicant in respect of the 4th March, 2015, decision:-

> "a. Mr. Lukasz instructs that he sincerely regrets the offences he has committed. He has taken responsibility for those offences and served his prison sentence. He instructs that he has been law-abiding since his release from prison and has not come to the negative attention of theGardaí."
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> b. Article 27(2) of the Directive 2004/38/EC states 'previous criminal convictions shall not in themselves constitute grounds for taking such measures'.
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> c. It is submitted the decision-maker incorrectly interpreted information which may have led her to place undue reliance on Mr. Lukasz's previous convictions and his potential risk to public policy.
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> d. It is submitted that contrary to the decision-maker's assertions, he has altered his destructive behaviour and for the past three years has been working towards gaining qualification and ultimately employment.
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> Mr. Lukasz instructs that Ireland is his home and that his links with Poland have diminished in the last eight years he has lived in Ireland. Mr. Lukasz instructs that he has no contact with any family in Poland and were he to return, he could not rely on finding accommodation or any assistance. Mr. Lukasz instructs that his life has stabilised since his imprisonment and he has overcome his problems with alcohol which fuelled many of his offences."

16. Under the heading "Consideration under Article 7 of the Charter of the Fundamental Rights of The European Union" (2000/C/364/01, the applicant's criminal behaviour was addressed as follows:-

> " The outcome of Mr Lukasz's criminal behaviour during his time in Ireland is that [GNIB] are of the view 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. After full consideration of the evidence that was available to the investigating and deciding officers in the case, it was determined that Mr Lukasz's presence in the State posed a threat to public policy and a Removal Order was subsequently signed…on 04/03/15.
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> The purpose of this review is to determine whether the original decision in Mr. Lukasz's case achieved the legitimate aim of the State for the prevention of crime and disorder in the interest of public safety and the common good. This review will also try to determine if any new evidence has been submitted to show that Mr. Lukasz's circumstances have changed since the making of the order against him.
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> Mr. Lukasz during his time in the State has come before the courts on 8 occasions and has amassed a total of 40 convictions for a number of offences, including theft, road traffic offences, assault, threatening/abusive/insulting behaviour, possession of drugs for the purpose of sale or supply, unlawful possession of drugs, intoxication, damage property, entering building with intent to commit offences, obstructing a peace office and failure to comply. Mr. Lukasz has also received a number of custodial sentences in relation to his convictions.
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> It appears that Mr. Lukasz upon his release from prison in May 2014 continued with his criminal behaviour. According to the GNIB report dated 10/06/2015… Mr. Lukasz was charged on 09/04/2015 with Damaging Property Belonging to Another, contrary to Section 2(1) Criminal Damage Act, 1991, he was convicted for the offence on 19/05/2015 and received a seven month sentence in Cork Prison from 19/05/2015. In addition on 19/05/2015 he was convicted of a further 6 convictions, 3 theft, 2 intoxication in a public place and 1 threatening/abusive/insulting behaviour. Mr. Lukas has continued to be involved in criminal activities since the signing of the Removal Order made in respect of him on 04/03/2015."

17. It was observed that these later convictions had followed upon NASC's representations dated 23rd March, 2015, to the effect that the applicant had taken responsibility for his earlier offences and had served his prison sentence and had been law abiding since his release from prison in 2014.

18. After noting NASC's representations of 23rd March, 2015 that, pursuant to Article 27(2) of Directive 2004/38/EC ("the 2004 Directive"), 'previous convictions shall not in themselves' constitute grounds for a Removal Order and 'must represent a genuine and sufficiently serious threat affecting one of the fundamental interests of society', the decision-maker went on to state:-

> "Mr Lukasz's has been convicted of a total of 40 offences which stem from 2010-2015. His last 7 convictions were for offences which occurred between 08/03/15 -09/04/2015, all of them after the Removal Order was signed in respect of him on 04/03/15 and after his review application was submitted by NASC dated 23/03/15."

Noting NASC's submissions that the applicant had used his incarceration in prison between 2010 and 2014 in a positive and productive manner and that the applicant had been in fact convicted of further offences post his release from prison in 2014, the decision-maker stated:-

> "Mr. Lukaszs's convictions which stem from 2010 – 2015 show Mr. Lukasz to be someone with a proclivity to re-offend and a total disregard for the Irish justice system which has afforded him a number of opportunities to alter his behaviour."

19. It was further noted that the applicant has been approved to a drug residential treatment centre and that at the time of the review decision he was resident in Coolmine since 18th August, 2015, with an estimated remission date of 24th October, 2015. The decision maker went on state:-

> "I have considered Mr. Lukasz's social and culture integration in the State. While it is noted that NASC submit that Ireland is his home. However, his history of criminal behaviour does not suggest that he has strong links to the State or that he has made reasonable efforts to integrate himself into a normal law abiding Irish society.
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> NASC submitted in their representations dated 23/03/2015…that Mr. Lukasz is very eager to find employment again. Should Mr. Lukasz be removed from Ireland, he would be free to reside in Poland or another EU Member State of his choice many of which have lower unemployment rates than Ireland. It is there (sic)submitted that Mr. Lukasz's removal from the State would not cause undue hardship for him in terms of the loss of existing social ties or future employment opportunities.
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> NASC in their representations dated 23/03/2015, submitted that Mr. Lukasz has been residing in the State for the last 8 years. While the Department is informed that Mr. Lukasz has been resident in Ireland since 2007, it is noted that he has spent periods of time in custody during his period of residence in the State, Mr. Lukasz has spent over two years in prison. Time spent in incarceration is not considered when calculating does a person qualify for permanent residency…Mr. Lukasz falls short of the 10 year period of residency which would require imperative grounds of public policy to justify his removal. However, it is accepted that Mr. Lukasz does qualify for permanent residency having been resident for over 5 years it would require serious grounds of public policy justify his removal. Therefore while Mr. Lukasz is a person who would qualify for permanent residence, Regulation 20 (6)(a) allows a Removal Order be made in respect of a person with an entitlement to reside permanently if there are serious grounds of public policy. It is submitted that Mr. Lukaz's continued pattern of criminal behaviour represents a serious threat to public policy and on this basis Removal is justified.
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> These therefore exist as substantial reasons associated with the common good and serious grounds of public policy which require the removal of Mr. Lukasz from the State. Therefore on the basis of the foregoing, I recommend the Removal Order made in respect of Mr. Lukaz be upheld, including the exclusion period of 5 years."

20. The decision-maker then noted that "none of the circumstances as listed in Schedule 9 [of the Regulations] and in particular his family and economic circumstances and the nature of his social and cultural integration in the State make his return to Poland impossible for him or one of great hardship."

21. The recommendation to the first named respondent was that "the Removal Order (incorporating an exclusion period of 5 years) made under Article 20(1)(a)(iv) of the [2006 Regulations] on 04/03/2015 authorising the removal of Mr. Lukasz from the State be upheld".

22. Leave to challenge the decision was granted by MacEochaidh J. on 16th November, 2015.

23. In the course of the hearing of these proceedings counsel for the applicant distilled the grounds of challenge to the following:

> (i) None of these offences for which the applicant was convicted are characterised by their systematic or serious nature. Contrary to the finding of the first named respondent, the applicant could not reasonably be regarded as posing a threat to public policy, public security or public health. In this regard the applicant relies, *inter alia*, on the decisions of the European Court of Justice in Case C-36/75 *Rutili* ([1975] ECR 1219); Case C-30/77 *Bouchereau* ([1977] ECR 1999); Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* ([2004] ECR 1-5257); Case C- 33/07 *Jipa* ([2008] ECR 1-5157); Case C-434/10 *Aladzhoz* ([2011] ECR 1-0000) and case C-348/09 *P.I. v. Oberbürgermeisterin der Stadt Remscheid*; and
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> (ii) Article 27 (2) of the 2004 Directive provides for a two stage test. It allows for removals under the public order rubric which requires the Member State to determine that an individual's conduct is of sufficient seriousness before they may lawfully be removed. The second stage of this test requires that the actions of the individual must satisfy four aspects of the definition as set out in Article 27 (2) of 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". The test in this jurisdiction by virtue of Regulation 20(1)(a) (iv) of the 2006 Regulations only reproduces the first stage of the necessary assessment and does not in any way address the second stage elements. It reproduces none of the four element of the test stipulated by the Directive. The mere requirement that a person's continued presence in the jurisdiction is deemed contrary to public policy by the first named Respondent is a test demonstrably less protective of an EEA citizen's rights than that required by Article 27 of the Directive. The transposition of the Directive is therefore clearly and materially flawed in a second matter central to the Removal Order made in this case. The statutory test applied by the respondent does not in any way reflect that required by the Directive.

24. In their statement of opposition, the respondents submit that "the impugned decision was correctly made in circumstances where it was the lawful and rational opinion of the first-named respondent, based on cogent evidence before her, that the personal conduct of the applicant has been such that he represents serious, ongoing threat to public policy such as to justify his removal from the State, and his exclusion there from, for a period of five years." With regard to the applicant's second ground of challenge, the respondents plead, *inter alia*, as follows:

> "Article 27 (2) the Directive and its transposition into Irish law by virtue of [the 2006 Regulations] in particular must be considered as a whole and cannot be deconstructed into individual parts in an attempt to identify alleged inconsistencies in the transposition. Furthermore, regard must be had to the margin of appreciation afforded national authorities under the third para. of Article 288 TFEU. Any contradiction or conflict between the two is denied. Furthermore, and for avoidance of doubt, although no assertion to this effect is made by the applicant, the Removal Order made by the first-named respondent, on the basis, *inter alia*, of Regulation 20(1)(a)(iv) and the cogent evidence before her, was lawful and in accordance with both the Directive and the Regulations, as well as with the underlying provisions of the TFEU, particularly Article 45 (3) TFEU."

Relevant EU legislation

25. Article 27 of the 2004 Directive provides:

> "General principles
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> 1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
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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. 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.
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> 3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when
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> issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.
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> 4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

26. Article 28 states:

> 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 security, as defined by Member States, if they: (a) have resided in the host Member State for the previous ten years; or (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

27. In relevant part, Regulation 20 the 2006 Regulations provides:

> 20. (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-
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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.

28. Regulation 20(6) of the 2006 Regulations provides:

> " (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.
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> (b) A removal order may not, except on imperative grounds of public security, be made in respect of a Union citizen who -
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> (i) has resided in the State for the previous 10 years, or
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> (ii) subject to subparagraph (c), is a minor.
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> (c) Subparagraph (b)(ii) shall not apply where it is in the best interests of the minor concerned that he or she should be removed from the State.

The applicant's submissions

29. In aid of the first ground of challenge counsel for the applicant submits that the applicant's criminal behaviour, whilst unpleasant and difficult, was not sufficiently serious to warrant the first named respondent's conclusion, even based on the first named respondent's test as set out in the 2006 Regulations. It is acknowledged that little of the applicant's life over a number of years can be painted in a positive light. However, the Directive provides that an individual may only be removed if he poses a serious systemic threat to the State or its citizens.

30. As acknowledged by the first named respondent, the applicant is an individual who has a right of permanent residence in the State. Accordingly, he can only be removed on "serious grounds of public policy".

31. It is submitted that not a single case from the Court of Justice of the European Union (ECJ), UK or Ireland has allowed the removal

of an individual who has committed the kind of offences of which the applicant has been convicted. If the first named respondent is correct in her contention that the applicant's actions merit removal, this would be a considerable expansion of how the Directive has been applied by the ECJ and how the 2006 Regulations have been applied by Irish courts. Notwithstanding that the applicant committed further offences post his release from prison in 2014, and which, it is acknowledged, demonstrate a pattern of offending on his part, it does not in fact change the fundamental calculus as to the severity or seriousness required for the applicant's removal, as set out in the jurisprudence of ECJ.

32. Contrary to the finding of the first named respondent, the applicant could not reasonably be regarded as posing a threat to public policy where he has engaged in behaviour of an incompetent petty thief. None of the convictions received by the applicant are of a serious nature such as to constitute "serious grounds of public policy".

33. It is submitted that the ECJ makes it clear that the fundamental principle has to be the freedom of movement of EU citizens and that any derogation there from it is to be strictly interpreted. Therefore, there is a burden on the respondent to prove in fact that she has in fact interpreted the restriction as a default to free movement. It is submitted that it is difficult to see how the first named respondent can say that she took the principle of free movement seriously when the requisite analysis as to whether there were serious grounds of public policy such as to justify the applicant's removal was confined to one sentence in the analysis conducted. Whilst the applicant's presence in the State may not be desirable as far as the first named respondent is concerned, the question is whether his removal is necessary for the protection of any defined interest.

34. While the first named respondent is entitled to take account of previous criminal convictions, they are only relevant if they constitute evidence of a present threat or propensity to act contrary to public policy.

35. It is submitted that not only is there demonstrably no overlap between the applicant's conduct as represented by his convictions and any identified element of public policy but, moreover, the first named respondent has also failed to make any attempt to assess why the specific circumstances of those convictions engender a public policy concern. The first named respondent has simply identified that there are a large number of convictions, without more. It is submitted that the first named respondent has engaged not at all with the specifics of the applicant's convictions and had she done so the only conclusion that could have been arrived at was that his behaviour was that of an incompetent petty criminal who had an alcohol addiction. It is submitted that the flaw in the review decision is compounded by virtue of the fact that the first named respondent shows no recognition of the fact that the applicant was entitled to the additional protections contained in Regulation 20(6)(a). The first named respondent simply repeats, without more the operative part of the Regulation without any engagement as to why or on what basis she came to the conclusion that his conduct satisfied the high threshold set by that Regulation.

36. Counsel submits that the ECJ's treatment of the serious crime at issue in Case C- 348/09 *P.I. v. Stadt* Remscheid can be juxtaposed with the first named respondent's treatment of the applicant's offences. It is submitted that there is a considerable magnitude of difference between what the EU citizen in *P.I.* was convicted of and the applicant's offences.

37. Counsel further submits that the manner in which the ECJ has considered the high threshold which the host Member State faces when expelling an EU citizen with permanent residence is reinforced by the approach of the Irish courts. In this regard, counsel cites *P.R. v. Minister for Justice, Equality and Law Reform* [2015] IEHC 201 and *D.S. v. Minister for Justice, Equality and Law Reform* [2015] IEHC 643. It is submitted that the applicant's offences cannot be said to be on par with the serious sexual offences which arose in the foregoing cases.

38. It is further submitted that whilst the ECJ jurisprudence affords a margin of discretion to Member States, that same case law requires the Member State to identify a perturbation of the social order over and above what the criminal law provides, before a Removal Order is made.

39. With regard to the second ground of challenge, counsel submits that the removal order as made pursuant to Regulation 20(1)(a)(iv) of the 2006 Regulations cannot stand as the test provided for therein is a less protective one than that guaranteed by Article 27 of the 2004 Directive. The mere requirement that an individual's continued presence in the jurisdiction is deemed to contrary public policy by the first named respondent is a test demonstrably less protective of an EU citizens' rights than that required by Article 27 of the 2004 Directive. It is submitted that the transposition of the Directive is therefore clearly materially flawed in a manner central to the Removal Order in issue in this case. The statutory test applied by the respondent does not in any way reflect that required by the Directive and the applicant relies, if necessary, on the doctrine of direct effect.

40. Insofar as Regulation 20(1)(a)(iv)of the 2006 Regulations purports to transpose Article 27, it provides merely that the Minister may order a person to leave the State where "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." There is no mention in Regulation 20(1)(a)(iv)of the four aspects of the definition for a removal order determination as provided for in Article 27(2), namely that an individual's personal conduct must represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". It is submitted that while the first named respondent does enjoy latitude in terms of the process, form and method of transposition of the Directive, what is not allowed is the adoption of a clearly and obviously less protective position in respect of an EU citizen's entitlement to free movement than that granted by the Directive. Counsel for the applicant notes that the first named respondent has now reproduced the relevant elements of the test in the Directive by the European Communities (Free Movement) Regulations 2015 (S.I. 548 of 2015), where Regulation 23(1) provides:

> "subject to this Regulation, the Minister may make an order under this Regulation ('exclusion order') in respect of a person where in the opinion of the Minister the person represents a danger for public policy or public security by reason of the fact that his or her personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."

Clearly, the test now set out in the 2015 Regulations is more protective of EU citizens, which is in line with the 2004 Directive.

41. It is submitted that what has occurred in the present case is that the first named respondent, based on the applicant's past offences, has reasoned that he is likely to offend in the future – an approach that it is specifically prohibited by Article 27 of the Directive. More problematic for the first named respondent is that the review decision does not address which aspects of the applicant's personal conduct present a genuine and sufficiently serious threat affecting one of the fundamentals of society, as mandated by Article 27(2) of the 2004 Directive. In all those circumstances, it is submitted that the test upon which the applicant's removal was considered was demonstrably less protective than that provided for by the 2004 Directive.

The respondents' submissions

42. It is submitted that since 2011, the applicant has been convicted of over forty different offences and has spent over two years in prison on foot of various custodial sentences arising from some of those offences. The serious threat to public policy that this conduct presents, coupled with the applicant's failure to avail of the various opportunities afforded to him to reform and refrain from such conduct, has given rise to the Removal Order, as confirmed in the review decision.

43. It is submitted that the first named respondent took the decision to removal the applicant on the basis on personal conduct, as provided for in Article 27(2), albeit that this principle was not expressly transposed into the 2006 Regulations.

44. It is further submitted that ECJ jurisprudence does not support the applicant's contention the removal on public policy grounds must be based on extraordinarily serious offences such as serious sex offences or serious drug offences.

45. An overview of the review decision demonstrates that the first named respondent concluded that the applicant posed a serious threat as a result of his conduct and failure to rehabilitate himself. It is therefore not correct for counsel for the applicant to contend that the decision maker's conclusion was confined to one sentence in the review decision.

46. It is also noted that in the within proceedings, the applicant does not challenge the review decision on the basis of its assessment of his rights or on proportionality grounds, rather what is asserted is that the test applied does not comply with relevant EU principles, a contention which the first named respondent disputes.

47. It is evident from the contents of the consideration of file that a substantial amount of leeway was afforded to the applicant by the first named respondent. Despite GNIB seeking his removal on a number of occasions, it was only after a pattern of consistent behaviour, and after the applicant's assertion that he had reformed proved to be incorrect, that a decision was taken for his removal. Contrary to the applicant's submissions, the first named respondent did not use the applicant's assertions that he had reformed against him, rather his submissions and representations were listened to and he was given the benefit of the doubt on many occasions. Ultimately however the first named respondent properly concluded that the applicant's conduct represented an ongoing threat into the future. It is submitted that in the applicant's case, the risk that he would continue to offend in the future was manifest. The question to be decided is whether the level of that threat was such as to justify the first named respondent's decision to remove him. It is submitted that question has to be answered in the affirmative.

48. While the applicant avers that his offences can be categorised as opportunistic and caused by his destructive reliance on alcohol, whatever the cause of his behaviour the first named respondent was obliged to have regard to the interests of society as a whole. The first named respondent was satisfied from the pattern of the applicant's conduct that such conduct was likely to continue regardless of what caused it. Moreover, counsel for the applicant's description of the applicant as a petty criminal is not correct given his conviction of assault and for the supply and possession of drugs.

49. It is accepted that the circumstances which give rise to a removal order must be exceptional. Nevertheless, it is clear that Member States are afforded a clear margin of discretion subject to overview by the court and the ECJ. It is submitted that in the present case, the first named respondent acted within the limits of her discretion.

50. While as said by the ECJ in Case C– 348/96 [1999] 1-00011, *Calfa, "the existence of a previous criminal conviction can … only be taken into account insofar as the circumstances which give rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy",* in the applicant's case, his forty convictions constituted an ample basis for the first named respondent to conclude that he represented a future threat to the fundamentals of society. Accordingly, there was no automatic decision made to exclude him.

51. It is also accepted that mandatory expulsion following conviction for certain offences will infringe EU law (Case C– 441/02 *Commission v. Germany* [2006] ECR 1-03449 refers). While it is not permissible to apply to EU citizens general legislation relating to foreign nationals which makes its possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion, it is submitted that it is manifest that no such connection exist in the 2006 Regulations.

52. The first named respondent relies on the decision of the ECJ in Case C– 349/06 [2007] 1-8167, *Polat*, as persuasive authority for the discretion which vests in a host Member State to issue a removal order in respect of an individual who has been subject of several criminal convictions.

53. The applicant's reliance on the decision of the ECJ in *P.I.* is as that case related to a removal of an EU citizen who had in excess of ten years residence in the host Member State. It is submitted that there was a qualitative difference between imperative grounds of public security and serious grounds of public policy.

54. With regard to the applicant's second ground of challenge, counsel submits that even if there was a frailty in the transposition of Article 27 in the 2006 Regulations, same is immaterial to the applicant's case as the first named respondent has in fact applied the relevant test as prescribed by TFEU and the 2004 Directive. The mere fact that the first named respondent may have mended her hand in the 2015 Regulations is irrelevant as when making the decision to remove the applicant, she was bound in any event by the provisions of 2004 Directive.

Considerations

55. As can be seen, both the 2004 Directive and 2006 Regulations provide three gradations of protection to convicted criminals who are EU citizens. A person who has lived in the host Member State for in excess of ten years can only be excluded on imperative grounds of public security. Persons, such as the applicant, entitled to permanent residence may only be the subject of a Removal Order on "serious grounds of public policy or security". Thirdly, a convicted person who is not a permanent resident may be expelled on the grounds of public policy.

56. It is common case that the rubric of public health and security do not apply in this case and that the applicant's removal from the State was based on grounds of public policy. Before any Removal Order could be made in respect of the applicant, the first named respondent was required to be satisfied that his conduct or activities were such that it would be contrary to public policy to permit him to remain in the State. It is also manifestly clear from Article 27 of the 2004 Directive and Regulation 20(1)(d) of the 2006 Regulations the first named respondent is precluded from removing an EU citizen on the basis that that person has served a custodial sentence, unless the requirements of Article 27(2) or Regulation 20(1)(iv) are satisfied.

57. It is essentially the applicant's case, in aid of the first ground on which the decision is challenged, that his conduct was not sufficient to merit his removal and that the proper test as prescribed by EU legislation and case law was not applied when his removal from the State was being considered. Counsel for the respondents contends that the review decision perfectly accords with EU

legislation and the jurisprudence of the ECJ.

58. I agree with the respondents' contention that based on the first ground of challenge (and irrespective of the applicant's argument that the 2006 Regulations did not properly transpose Article 27(2) of the 2004 Directive), the issue for the Court is whether the review decision is compatible with the 2004 Directive and EU jurisprudence. As made in clear Case C-41/74 *Van Duyn* [1974] ECR 1337, the provisions of TFEU and the 2004 Directive are directly applicable. Accordingly, the salient consideration in these proceedings is whether the review decision flows from Article 27 and Article 28 of the 2004 Directive. The review decision will thus be considered against the backdrop of the relevant EU legislation and the jurisprudence of the ECJ.

59. The public policy derogation from the principle of free movement has been the subject of extensive discussion in the ECJ. In aid of his submissions, counsel for the applicant cited Case C-36/75 *Rutili* [1975] ECR 1219. In *Rutili*, the ECJ was dealing with Directive 68/360/EEC, which was a forerunner to the 2004 Directive. The ECJ held that the derogation has to be:

(a) construed strictly and its scope cannot be determined unilaterally by each Member State; and

(b) is to be exercised only where the activities of an individual constitute *"a genuine and sufficiently serious threat to public policy".*

60. In Case C – 30/77 *Bouchereau* [1977] ECR 1999, the ECJ considered whether convictions in respect of two drug possession offences, leading to periods of imprisonment for twelve months for the EU citizen concerned, could in themselves trigger the public policy provision in that Directive. The ECJ addressed the issue in the following terms:

> *"25.The second question asks 'whether the wording of article 3 (2) of Directive no 64/221/EEC , namely that previous criminal convictions shall not 'in themselves' constitute grounds for the taking of measures based on public policy or public security means that previous criminal convictions are solely relevant in so far as they manifest a present or future propensity to act in a manner contrary to public policy or public security; alternatively, the meaning to be attached to the expression 'in themselves' Article 3 (2) of Directive no 64/221/EEC'.*
>
> *26. According to the terms of the order referring the case to the court, that question seeks to discover whether , as the defendant maintained before the national court , 'previous criminal convictions are solely relevant in so far as they manifest a present or future intention to act in a manner contrary to public policy or public security' or, on the other hand, whether, as counsel for the prosecution sought to argue, although 'the court cannot make a recommendation for deportation on grounds of public policy based on the fact alone of a previous conviction' it 'is entitled to take into account the past conduct of the defendant which resulted in the previous conviction'.*
>
> *27. the terms of Article 3 (2) of the Directive, 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 the 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 in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting 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."*

61. Citing *Van Duyn,* the Court again emphasised that the public policy derogation cannot be determined unilaterally by Member States, but also stated that "*the concept of public policy may vary from one country to another and from one period to another*". It was therefore necessary to allow competent national authorities "*an area of discretion*" within the limits imposed by the EU Treaty and the provisions adopted for its implementation.

62. The ECJ went on to state:

> *"35. Insofar as it may justify certain restrictions on the free movement of persons subject to community law, recourse by a national authority to the concept of public policy presupposes, in any event, 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."*

63. In *Calfa*, the ECJ held that automatic expulsion, without any account being taken of the personal conduct of the offender, or of the danger that the offender represented, was contrary to the "personal conduct" requirement. In that case, the individual's expulsion from a host Member State could only be justified if "*besides her having a committed an offence under drugs law, the personal conduct created a genuine and sufficiently serious threat affecting one of the fundamental interests of society*" in the host Member State.

64. As stated in *Olazabal*, Case C – 100/01 [2002] ECR 1-10981, *"it is for the national courts to determine whether the measures taken …do in fact relate to individual conduct which constitutes a genuine and sufficiently serious threat to public order or public security, and whether they comply with the principle of proportionality."*

65. It is also clear that the category of offences which may give rise to the public policy derogation is not to be considered in a restrictive sense. In Case C– 434/10, *Aladzhoz* [2011] ECR 1-11659, the ECJ was confronted with a situation where a Removal Order was made in respect of an EU national on the basis that he had refused to pay a tax liability equivalent to approximately €22,000. The host Member State argued that as the tax code was enforced for the ultimate good of the people it was consistent with the requirement of the Directive to invoke a Removal Order for what was alleged to be consistent breaches of the tax code. The ECJ addressed this issue in the following terms (at para. 37):

> *"[T]he possibility cannot be ruled out as a matter of principle, as has moreover been recognised by the European Court of Human Rights (see Riener v. Bulgaria, paragraphs 114 to 117), that non-recovery of tax liabilities may fall within the scope of the requirements of public policy. That can however, in the light of the rules of European Union law relating to the freedom of movement of Union citizens, be the case only in circumstances where there is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society related, for example, to the amount of*

the sums at stake or to what is required to combat tax fraud."

66. In *P.I*, the ECJ had occasion to consider the greater protection afforded to EU nationals under Article 28(3)(a) of the Directive. The case concerned the expulsion of an Italian national with residence in the host Member State in excess of ten years whose removal required "imperative grounds of national security". In 2006, a German Regional Court imposed a sentence of seven years and six months on the Italian national (who had been registered in Germany since in 1987) for the sexual assault of the minor child of his partner from 1990 to 2001. The ECJ was asked:

> *"whether it is possible to expel from the host Member State Union citizens, who, whilst not belonging to a criminal group or any other kind of criminal organisation, have committed extremely serious criminal offences which affect individual interests benefiting from legal protection, such as sexual autonomy, life, freedom and physical integrity, where there is a high level of risk that they will re-offend, committing other similar offences."* (at para.17)

67. The ECJ had to consider whether "*imperative grounds of public security*" covered only "*threats posed to the internal and external security of the State in terms of the continued existence of the State with its institutions and important public services, the survival of the population, foreign relations and the peaceful co-existence of nations*". In addressing this issue, the ECJ stated:

> *"19. According to the Court, it follows from the wording and scheme of Article 28(3) of Directive 2004/38 that, by subjecting all expulsion measures in the cases referred to in that provision to the existence of 'imperative grounds' of public security, a concept which is considerably stricter than that of 'serious grounds' within the meaning of Article 28(2), the European Union legislature clearly intended to limit measures based on Article 28(3) to 'exceptional circumstances', as set out in recital 24 in the preamble to that directive (Tsakouridis, paragraph 40).*
>
> *20. The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative grounds' (Tsakouridis, paragraph 41)."*

68. It is established therefore that the concept of "imperative grounds" of public security under Article 28(3) is one that is considerably stricter than the concept of "serious grounds" of public policy within Article 28(2) of the 2004 Directive. In this regard, in *P.I.*, the ECJ went on to state, at para. 30:

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

69. The question whether an accumulation of offences could give rise to the public policy derogation has also been considered by the ECJ. *Polat*, upon which the respondents rely in these proceedings, concerned the expulsion of a Turkish national from Germany, a matter which fell under the auspices of the ECJ by virtue of Counsel Regulation (EEC) No. 2760/72 and Decision No. 1/80 of the Association Council of 19th September 1980. The Turkish national had been convicted 18 times for criminal offences relating to narcotics and theft for which he was initially fined and latterly (for similar offences) subjected to a number of months of imprisonment between 1999 and 2004. The German authorities took the view that Mr Polat had not integrated into German society and that the earlier non custodial penalties imposed on him had not prevented him from committing other serious offences. Accordingly, he was to be regarded as a repeat offender and his expulsion was necessary and indispensible on specific preventative grounds.

70. One of the questions referred to the ECJ was whether Article 14(1) of Decision No. 1/80 (which applied essentially the same test as set out in the 2004 Directive) was to be interpreted as "*precluding that a number of minor offences which, taken individually, are not sufficient to constitute a genuine and sufficiently serious threat to a fundamental interest society, may justify a measure ordering expulsion of a Turkish national if further offences are likely and a criminal conviction is not accompanied by any other measure in respect of German nationals in the same circumstances."* (at para.28)

71. In answering the question, and applying its jurisprudence in, *inter alia*, *Bouchereau*, the ECJ stated that measures taken on grounds of public policy or public security were to be based exclusively on the personal conduct of the individual concerned and that previous criminal convictions do not in themselves constitute grounds for the taking of such measures. The ECJ reiterated that the existence of a previous criminal conviction can only be taken into account insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy. It again emphasised that the concept of public policy pre-supposes 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 a fundamental interest of society. It went on to state that Article 14(1) of Decision No. 1/80:

> *"must be interpreted as not precluding the taking of an expulsion measure against a Turkish national who has been the subject of several criminal convictions, provided that his behaviour constitutes a genuine and sufficiently serious threat to a fundamental interest of society. It is for the national court to determine whether that it is the case in the main proceedings*." (at para. 39)

72. Counsel for the respondents submits that the applicant's offences were of a similar nature to those in *Polat*, albeit that the applicant had in addition a conviction for assault.

73. The courts in this jurisdiction have had occasion to consider when the State may deport an EU citizen who has permanent residence in the State on serious grounds of public policy. In *P.R.,* the Polish citizen in question had acquired permanent residence. In 2012 he received a three year sentence (of which sixteen months was suspended) in respect of six counts of sexual assault. Ultimately, a Removal Order was made on 18th September, 2013. In the course of that case, McDermott J. had occasion to consider "*serious grounds of public policy"* as applied under Regulation 20(6)(a) of the 2006 Regulations. After citing the decision of the ECJ in *Bouchereau* and other ECJ jurisprudence, McDermott J. stated, at para. 48:

> *" I am satisfied …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."*

74. He went on to state:

> *"52….[S]erious 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.*
>
> *… 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)."*

75. In *D.S.,* McDermott J. had again occasion to consider what was required to remove an EU citizen who had a permanent of residence in the State. In that case, a Removal Order was issued against a Lithuanian National (following a review) who had been convicted of a s. 4 rape offence contrary to the Criminal Law (Rape) (Amendment) Act 1990 and who had been sentenced to six years imprisonment. The Removal Order was made pursuant to Regulation 20(1)(a)(iv) of the 2006 Regulations.

76. While ultimately quashing the decision on grounds of objective bias (as he had also done in *P.R.*), McDermott J. did not find fault with the Minister's reliance upon the serious criminal behaviour as justification removal from the State. McDermott J. stated:

> *"52. I am satisfied that the Minister was entitled to rely upon the serious criminal behaviour of the defendant as evidenced by the details of the offence provided and the sentence of six years imprisonment imposed, as conduct which, of itself, might constitute a threat to the requirements of public policy. It is not permissible to remove a Union citizen simply because he/she has been convicted of a criminal offence. It must be demonstrated that the removal is necessary "either because public policy has been seriously effected (sic) by the offence committed, or because it is to be feared that the person concerned would repeat the anti-social acts in question." (see Bonsignore v. Stadt Koln, case 64/74 [1975] ECR 00297). It is clear, therefore, that the nature and seriousness of the criminal conduct and the attitude and subsequent behaviour of the applicant in respect of offences committed may alone or, in appropriate circumstances, be considered cumulatively with other facts in respect of "public policy" when deciding to remove or exclude an offender (see Kovalenko and P.R. cited above). If the concept of public policy is relied upon by the Minister, 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" must be established (see Case C – 348/96 Calfa [1999] ECR 1-11 paragraph 24). There may be cases in which past conduct alone or in conjunction with other factors may give rise to a threat to public policy or indicate a readiness, inclination or disposition amounting to a propensity to act in the same way in the future."*

He went on to opine, at para. 53:

> *"The Minister is further entitled to consider the commission of other offences by the Union citizen as part of that process. The Minister is entitled to consider whether "public policy has been seriously affected by the offence(s) committed" (in the sense discussed in Bonsignore). I am satisfied, therefore, that the nature and seriousness of the criminal conduct and the attitude and subsequent behaviour of the applicant in respect of the offence(s) committed may be considered alone, or, in appropriate circumstances, cumulatively with other facts under the heading of "public policy" when deciding to remove or exclude an offender. (see Kovalenko paragraph 44-56)."*

77. The case made on the applicant's behalf is that there is only one reference in the decision to the applicant's behaviour as constituting a serious threat to public policy. It is claimed that the review-decision maker does not identify which of the applicant's activities in fact represents a serious threat to public policy. Counsel for the applicant submits that it is not permissible for first named respondent to satisfy herself (or the Court) that the serious threat to public policy threshold has been met by merely repeating the contents of Regulation 20(6)(a) of the 2006 Regulations without any analysis of how the applicant's behaviour in fact represents a serious threat to public policy. It is submitted however that even if these elements were present in the applicant's conduct or activities, they have not been identified at any point in the decision the subject matter of these proceedings. It is asserted that the first named respondent did not carry out the requisite appraisal beyond reciting a list of past convictions. Counsel contends that the decision-maker did not identify the element of public policy to which the convictions were relevant in the future and contends that there was no consideration of how the applicant's previous conduct represented a serious threat for the purposes of Regulation 20(6)(a) of 2006 Regulations. It is argued that the decision-maker's analysis can be contrasted with the nature of the analysis conducted by the respective decision-makers in *P.R.* and *D.S.*

78. On the other hand, counsel for the respondents submits that the fact that the applicant has not been convicted of very serious crime is of no relevance and that the review decision-maker was entitled to take account of the cumulative nature of the applicant's forty convictions as indicative of a future propensity to offend. The respondents argue that it is not the test that the decision-maker has to be satisfied that the applicant will go on to commit more serious crimes; the apprehension that he will continue with his past conduct is sufficient. As acknowledged in the review decision, the first named respondent was required to meet the serious threat on public policy grounds threshold which, counsel submits, was met. Counsel also argues that a reading of the review decision as a whole demonstrates the seriousness of the applicant's conduct and, most especially, the pattern of his offending, which entitled the first named respondent to view his remaining in the State as a serious threat, thereby entitling her to make a removal order based on a real future threat of criminal behaviour.

79. The first observation the Court makes is that it cannot be said but that the decision-maker was alert to the requirements of Article 27(2) of the Directive. The decision incorporates NASC's submission that the applicant's removal had to meet the threshold set in Article 27(2). Moreover, in her consideration of the applicant's rights under Article 7 of the EU Charter of Fundamental Rights, the decision-maker describes the "pressing need" and "legitimate aim" of the Removal Order as "upholding the public policy of the State against a genuine and sufficiently serious threat affecting one of the fundamental interests of society." Under the "proportionality" assessment, there is reference to GNIB being of the view that the applicant represented "a genuine and sufficient threat to the social order and fundamental interests of Irish society". Accordingly, I am satisfied that the decision-maker was cognisant of the appropriate test under the 2004 Directive.

80. While obviously alert to the requisite threshold for the applicant's removal, the next question is whether the decision-maker properly addressed the circumstances of the applicant's conduct for the purpose of the analysing whether he constituted a present threat to the fundamental interests of society. Counsel for the applicant submitted that a factor which weighed heavily with McDermott J. in *P.R.* was the "*extensive consideration*" which was given by the decision-maker to the "*nature and extent*" of the offences in issue in that case. McDermott J. also noted that the decision-maker had carefully analysed evidence of "*rehabilitation*" which had been submitted in a psychological report and noted that the EU national had committed a significant number of sexual offences over the years and that there was clear evidence that the EU national had "*a disposition, an inclination or readiness amounting to a propensity to assault young unaccompanied women, randomly selecting his victims in a frightening way.*" McDermott J. also noted that the full court transcript of the criminal proceedings in the case was before the decision-maker including the ruling of the trial Judge in imposing sentence. In the course of his judgment in *D.S.,* McDermott J. observed that the review decision-maker had assessed, *inter alia*, the EU national's conduct in the course of the criminal trial, the impact of his crime on his victim and his history of sexual assaults in his home State and in another EU State in the context of assessing serious grounds of public policy for the EU national's removal in that case. He further noted that other aspects of the EU national's conduct had influenced the decision-maker, namely his failure to acknowledge his guilt, his decision to abscond to avoid his trial, his failure to apologise to his victim or to express remorse for the offence committed. The case made on behalf of the applicant in the present proceedings is that the careful analysis which had satisfied McDermott J. in *P.R.* and *D.S.* was not carried out in respect of the applicant.

81. Of course, a distinguishing factor in the present case to the circumstances which prevailed in *P.R.* and *D.S.* is that the applicant's convictions relate to a myriad of offences, as earlier described in the review decision, as opposed to the specific serious sexual assault offences with which *P.R.* and *D.S.* were largely concerned. If one were to look at the applicant's offences individually, it is apparent that many of them would not of themselves be likely to constitute such a serious threat to public policy such that the deportation of the applicant would be the necessary measure. However, the basis for the first named respondent's decision to remove the applicant "on serious grounds of public policy" was his "continued pattern of criminal behaviour", which in the view of the decision-maker showed "a proclivity to re-offend".

82. Was the decision-maker entitled to so conclude having regard to the established principles of EU law, and is so, did that constitute a lawful basis for the Removal Order? It is certainly the case from established ECJ jurisprudence that, subject to the strictures set out therein, a recidivist tendency can constitute the basis for a Removal Order on serious grounds of public policy (*Polat* refers) Counsel for the applicant however cites the decision of the ECJ in Joined Cases C - 482/01 and C- 493/01 *Orfanopoulous and Oliveri* [2004] ECR 1-5257, where the ECJ considered, *inter alia*, whether individuals who had served a number of custodial sentences for drugs offences and showed a capacity for recidivism could be subjected to an exclusion order. The Court held that derogations from the principle of free movement had to be interpreted particularly restrictively where the subject of a Removal Order was a Union citizen, again emphasising that measures of public policy "*must be based exclusively on the personal conduct of the individual concerned"*. The applicant contends that, based on the approach of the ECJ in that case, the first named respondent was required to identify specifically why each of the applicant's relevant convictions engenders a public policy concern. Counsel refers to what is set out

at para. 67 of the ECJ judgment:

> *"While it is true that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, the public policy exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy (see, in particular, Case C-348/96 Calfa [1999] ECR I-11, paragraphs 22 to 24)."*

83. However, I agree with counsel for the respondents that the ECJ's pronouncements in *Orfanopoulous and Oliveri* have to be seen in the context that the particular provisions of German law which the Court was considering in that case allowed for an alien was to be expelled if he had been sentenced to a term of two years or more imprisonment for drugs offences or for a breach of the peace and the sentence had not been suspended. I also agree that that case is not authority for the proposition that the first named respondent was required to set out why each of the applicant's individual convictions engenders a public policy concern. As set out by the ECJ in *Polat*, recividivism may justify the making of an expulsion order. This is subject to the proviso that the behaviour of the individual against whom the Removal Order must constitute a genuine and sufficiently serious threat to a fundamental interest of society.

84. As noted by Advocate General Mayras in Case 67/64 [1975], *Bonsignore*:

> *"…the concept of personal conduct must be examined not only in the light of the offences committed, but also, in view of the 'potential criminality' of the offender, to use the language of the criminologists.*
>
> *In other words, I consider that the deportation of a national of a Member State of the Community is subject to a finding by the national administrative and legal authorities of cogent evidence on which to base their opinion that here is a serious risk that the individual concerned will commit further offences or, more generally, represent through his conduct both past and forseeable, a danger to the public security and public policy of the host State."*

85. I do not hold with the contention that the applicant's offences (even when viewed cumulatively) could not constitute a serious threat to the requirements of public policy, given that the ECJ has recognised that the cumulative effect of the applicant's offences may entitle the first named respondent to view the applicant's recidivism as a threat to public policy. A Member State is entitled to consider that it is in its fundamental public policy interest to take effective measures to remove a present and genuine threat to the social order that recidivist criminal behaviour presents. Upon a consideration of the review decision as a whole, I am satisfied that for the purpose of satisfying the requirements of Article 27(2) of the 2004 Directive, the first named respondent engaged with relevant aspects of the applicant's conduct. Furthermore, the decision-maker identified that the threat presented by the applicant was to public safety and the common good. It is in the common good that that society would not be subject to recidivist behaviour. Nor do I accept the applicant's argument that the decision-maker did not identify which aspects of his actions constituted a threat to public policy. The nature and range of his offences was specifically identified. It is also the case that particular regard was had to the fact that some of his convictions occurred after the proposal to remove had issued and after representations had been made on the applicant's behalf. Moreover, some seven convictions had been recorded in respect of offences which had been committed after a review of the 4th March, 2015 decision had been sought. It was also noted this behaviour was in contradiction to the assertions made on the applicant's behalf on 23rd March, 2015, that he had "taken responsibility" for the offences in respect of which he was convicted and received prison sentences between 2010-2013. The post-March, 2015 convictions were undoubtedly relevant insofar as they indicated no cessation to the prior pattern of offending which had led the applicant to receive over thirty convictions and for

which he was sentenced to various periods of imprisonment between 2010 and 2013, and in respect of which he was first put on notice of his proposed removal on 16th January, 2013. The decision-maker also noted NASC's representations that the applicant's rehabilitation had continued post his release from prison in mid May, 2014, in that he had moved from Tralee to Killarney so as to distance himself from negative influences. However, it was noted that this move did not have a "positive effect" as the applicant had gone on to commit further offences. Accordingly, I do not accept the applicant's counsel's argument that the decision-maker based her decision on the applicant's past convictions. In my view, even when viewed against the restrictive manner in which a derogation from the principle of free movement is to be interpreted, the analysis conducted by the decision-maker constituted a detailed consideration of the particular aspects of the applicant's activities and conduct that were considered to represent a present serious threat to public policy, not least the nature of his crimes (theft, assault and crimes against property) and that his pattern of offending did not cease after it was first proposed to remove him and indeed did not cease after the first decision issued. These facets of the applicant's personal conduct clearly prompted the finding that there were "serious grounds of public policy" justifying his removal from the State. Moreover, I do not find any evidence in the present case that the decision-maker strayed into grounds extraneous to the applicant. Clearly, the emphasis was on his recidivist tendencies of which there was cogent evidence before the decision-maker.

86. The Court also notes that, as required by the 2004 Directive and the 2006 Regulations, all facets of the applicant's individual circumstances were considered, including his age and length of time in the State, his family and employment circumstances and opportunities, the degree of his social and cultural integration into the State, submissions relating to his alcohol dependency and submissions that he had no contact with his family in Poland and upon a return to Poland he would have difficulty in finding accommodation or any assistance. It was determined that none of those circumstances would make his return to Poland impossible or one of great hardship. No challenge is made to the proportionately of the decision in this regard.

87. In all the circumstances, I am satisfied that the decision to uphold the Removal Order accords with the requisite tests as laid down in EU law and jurisprudence. The decision cannot be said to be unreasonable or irrational when viewed against the backdrop of the requirements of the 2004 Directive and established ECJ jurisprudence, and in my view, does not stray beyond the margin of discretion which is left to Member States in defining their national policy priorities. Accordingly, I find that the first ground of challenge has not been made out.

88. Given the basis upon which the court has upheld the review decision, the Court does not see the need to embark upon a consideration of the second ground of challenge.

Summary
The relief claimed in the Notice of Motion is denied.