Neutral Citation Number: [2020] EWHC 437 (Admin)

Case No: CO/129/2018

QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 28 February 2020

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

THE QUEEN (on the application of Ali HAFEEZ)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE) CENTRE	**Intervenor**

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Mr Richard Drabble QC and Leonie Hirst (instructed by **Wilson Solicitors LLP**) for the **Claimant**
Mr David Blundell and Julia Smyth (instructed by **Government Legal Department**) for the **Defendant**
Bojana Asanovic (instructed by **AIRE Centre Intervenor (written submissions only)**)

Hearing dates: 9 October 2019

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Judgment Approved by the court for handing down

MRS JUSTICE FOSTER:

INTRODUCTION

1. The Claimant who was born on 21 July 1995, in Detmold, Germany, came to the United Kingdom aged about 10 with his family where he has lived ever since. As an EEA national he is subject to the provisions of the Immigration (Economic Area) Regulations 2016 S.I. 2016/1052 ("the Regulations") which derive from Directive 2004/38/EC ("the Citizens' Directive" or "the Directive").

2. The question raised in this case is whether, when certifying under Regulation 33 of the Regulations that the Claimant was to be removed under a Deportation Order before the conclusion of his appeal against removal, the Secretary of State ("the SSHD") was obliged to apply a test which included individualised tests of proportionality and necessity.

3. The essence of the Claimant's submission is that because the certification of the Claimant's case under Regulation 33 was decided by applying a purely Human Rights Act compliant test, together with consideration of whether the Claimant would face a serious risk of irreversible prejudice if removed at that point, it was unlawful in that it did not reflect the full extent of EU law protection to a person in the Claimant's position.

4. Permission was granted on 24 August 2018 on paper on amended grounds which challenged the legality of Regulation 33 and the SSHD's policy guidance.

BACKGROUND

5. The Claimant has a short but disturbing offending history. At the age of 17 on 22 March 2013, he was convicted of theft from a motor vehicle for which he received a conditional discharge on 27 October 2014. He was convicted of one count of dangerous driving committed on 27 February 2014 for which a twelve month consecutive sentence was received and two counts of rape committed on 8 June 2013 for which he received a six-year concurrent sentence and the requirement for indefinite registration on the sex offenders' register. The circumstances of the rapes, not relevant to this application, were highly unpleasant and he was described by the trial judge as sophisticated and cunning but without empathy, insight or understanding. There was a further count of robbery committed on 8 June 2013 for which he received a three year concurrent sentence. He was sentenced to a total of seven years' imprisonment and released from the custodial part of his sentence on 4 January 2018 and thereafter released on immigration bail on 31 January 2018. His licence expires on 15 June 2021.

6. On 16 May 2016 the Claimant was notified that he was liable for deportation and on 8 December 2017, after representations, he was served with a deportation decision and a Deportation Order. The SSHD stated that Regulation 23(6)(b) of

the Regulations applied to the effect that his removal was "justified on grounds of public policy, public health or public security in accordance with Regulation 33". When deciding whether or not to make the deportation decision the SSHD was, she accepts, obliged to apply her mind to the particular circumstances of Mr Hafeez, by reason of his status as an EEA national.

7. Included with the reasons for deportation was a separate decision dated 8 December 2017 certifying the Claimant's removal under Regulation 33 which allowed for his removal from the United Kingdom pending his appeal hearing. That decision was not reached by taking into account in the full manner which Mr Drabble QC argues is necessary, the particular personal circumstances of Mr Hafeez, and the SSHD says she was not obliged to do so. The substance of the Certification Decision is no longer challenged but the lawfulness of the domestic Regulations under which the Certification Decision was made is the subject of this application.

8. The Regulations were brought into force to give effect to the Directive, and the Claimant contends that they fail to do so correctly in that the Regulations do not recognise that the certification of the Claimant's case under Regulation 33 is a decision as described by Regulation 27 and so attracts the protections afforded by that provision because it is a measure that restricts freedom of movement.

9. Regulation 27 was mentioned expressly in connection with the first decision, namely that under Regulation 23(6)(b) concerning the expulsion order itself. The SSHD accepts that when making a deportation decision she must base her decision not on a general policy in respect of deportees, but rather on the personal conduct of the person concerned and apply an individualised proportionality test.

THE ISSUE

10. The Claimant makes the relatively short point that, properly understood, a decision to certify the removal of an EU citizen pending an appeal is a decision restricting freedom of movement on grounds of public policy, public security or public health as described in Article 27 of the Directive. As such, as a matter of pure construction, the safeguards set out in Article 27(1) and 27(2) of the Directive apply.

11. The SSHD argues that whilst Article 27 applies to the decision to make a Deportation Order, it does not apply to the decision to certify that a deportee may be removed pending appeal under Regulation 33, and also relies upon the construction of the wording of the Directive to support her case.

12. The AIRE (Advice on Individual Rights in Europe) Centre have been granted permission to intervene by way of written submissions. They support the Claimant's case.

LEGAL FRAMEWORK

The Directive

13. EEA nationals enjoy enhanced rights of residency and free movement. A statement of the fundamental differences in the rights of EEA Citizens in this context is provided by the overview given by Lord Clarke in R (on the application of) Nouazli v SSHD [2016] UKSC 16; [2016]1 WLR 1565:

> *"19. .... There are UK immigration controls relating to (a) entry, (b) restrictions on removal and (c) detention, although this appeal is directly concerned only with detention. At each point there are important differences between the rules which apply to those exercising rights of free movement derived from laws applying to the European Economic Area, which I will call EU law rights, namely EEA nationals and their family members, and those who are not exercising such rights.*
>
> *20. As to controls on entry, for a non-British citizen not exercising EU law rights, the regime which confers leave to enter and remain in the United Kingdom is governed by the Immigration Act 1971 …*
>
> *21. By contrast, those exercising EU law rights are not subject to the above regime. They enjoy extensive additional rights, no doubt as a means of promoting the internal market, including the market for labour, as given effect in UK law. By section 7(1) of the Immigration Act 1988, people with directly effective EU rights to enter or remain in the UK, or who enjoy such rights by virtue of any provision made under section 2(2) of the European Communities Act 1972, do not require leave to enter or remain.*
>
> *"30. It is correctly accepted on behalf of the SSHD that, in contrast to the position described above, those exercising EU rights do not require leave to enter or remain and have the benefit of powerful protections against their expulsion from the UK. The ability of member states to restrict the Treaty rights described above is limited by Chapter VI of the Directive, which is entitled*
>
> *"RESTRICTIONS ON THE RIGHT OF ENTRY AND THE RIGHT OF RESIDENCE ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC HEALTH"*
>
> *and comprises articles 27 to 33.*
>
> *…*
>
> *"31. It is clear that EEA residents who fall within the scope of the Directive enjoy powerful rights of residence far beyond those*

afforded by domestic law. As appears above, the Directive applies three different escalating threshold tests for restriction on rights of free movement as follows. In the case of a person such as the appellant with the right of permanent residence, an expulsion decision must be based on "serious grounds of public policy or public security": article 28(2).

..."

14. Under an amendment to Section 2 (2) of the European Communities Act 1972 there is power to lay regulations in order to give effect to community law and effect to the European Economic Area Agreement. This allows the SSHD to lay secondary legislation before Parliament governing admission to the United Kingdom of EU and EEA Citizens. The Regulations, and their predecessors were made in order to give effect to Directive 2004/38/EC, often referred to as the Citizenship Directive, which governs free movement and the residence rights of EU and EEA nationals in the United Kingdom.

15. Assistance on the context may be had from a further passage in the judgment of Lord Clarke in Nouazli, discussing the previous version of the Regulations:

"22. Critical to the construction of the EEA Regulations 2006, including of course regulation 24(1), is the true meaning and effect of the Directive, which consolidates and extends the rights granted by pre-existing secondary legislation and reflects established CJEU case-law. Further, it applies to all of the countries in the EEA.

23. It appears to me that the recitals are of some assistance. Moore-Bick LJ drew attention (at para 6) to the following recitals:

"Whereas

(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the member states ...

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market ...

(5) The right of all Union Citizens to move and reside freely within the territory of the member states should, ... be also granted to their family members, irrespective of nationality ...

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union Citizens and their family members residing in a member state on the basis of this Directive should enjoy, in that member state, equal treatment with nationals in areas covered by the Treaty ..."

24. Article 1 explains that the Directive lays down the conditions governing the exercise of the right of free movement and residence by Union Citizens and their family members, the right of permanent residence and the limits placed on the rights set out above, on grounds of public policy, public security or public health.

….

"26. In short, so far as leave to enter and remain are concerned, those exercising EU rights have much greater rights than those not exercising such rights but are subject to immigration control. The same is true so far as restrictions on removal and deportation are concerned. For example, a person subject to immigration control who has leave to remain may be liable to deportation or removal under a number of statutory provisions, namely sections 3(5)(a), 3(5)(b) and 3(6) of the Immigration Act 1971 and section 32 of the UK Borders Act 2007. …

27. A person who is not a British citizen (and not exercising EU law rights) is liable to deportation under the Immigration Act 1971 where (a) the SSHD determines that his or her deportation is conducive to the public good: section 3(5)(a) ; or (b) another person to whose family he belongs is or has been ordered to be deported: section 3(5)(b) ; or (c) after attaining the age of 17 he has been convicted of an offence punishable by imprisonment and on his conviction the judge recommended deportation: section 3(6). The power to make deportation orders is contained in section 5 of the 1971 Act.

28. In addition to those powers of deportation, the UK Borders Act 2007 introduced automatic deportation for certain "foreign criminals". Section 32(5) of that Act provides that the Secretary of State "must make a deportation order in respect of a foreign criminal". The regime of automatic deportation is, however, subject to certain exceptions set out in section 33 of the 2007 Act including, inter alia, where removal of the foreign criminal would breach that person's rights under EU Treaties (section 33(4)) and where deportation would breach a person's Convention rights or the UK's obligations under the Refugee Convention (section 33(2)).

…"

16. The recitals to the Directive reflect the fact that Citizenship of the European Union confers a primary right to move and reside freely in the territory of the States subject to such limitations as are laid down by the Treaty and by measures adopted to give it effect and that free movement of persons is one of the fundamental freedoms within the internal market.

17. Chapter VI of the Directive has the following heading:

"Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health."

18. Within Chapter VI are Articles 27 and 28 which permit a Member State to expel EEA nationals on grounds of public policy, public security or public health, subject to certain restrictions. They provide as follows:

"Article 27

General Principles

1. Subject to the provisions of this Chapter, member states may restrict the freedom of movement and residence of Union Citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

3. The personal conduct of the individual concerned must represent a genuine, 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 the considerations of general prevention shall not be accepted."

"Article 28

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

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

3. An expulsion decision may not be taken against Union Citizens, except if the decision is based on imperative grounds of public security as defined by member States, if they

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

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

...."

19. Article 30 contains notification provisions concerning decisions. It provides materially for present purposes as follows:

"Article 30

...

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of the notification"

"Article 31

Procedural Safeguards

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

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

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

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

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

3.The redress procedure shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They should ensure

that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

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

"Article 32

Persons excluded on grounds of public policy or public security may submit an application for lifting of the expulsion order after a reasonable period, depending on the circumstances and in any event within three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.

Article 33

Expulsion as a penalty or consequence

1.The expulsion orders may not be issued by the host member state as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.

2.If an expulsion order, as provided for in Paragraph 1, is enforced more than two years after it was issued, the member state shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued."

The Regulations

20. Regulation 23 of the Regulations enacted to give effect to the Directive makes provision for exclusions from the UK. It states as follows:

"23 Exclusion and removal from the United Kingdom

(1) A person is not entitled to be admitted to the United Kingdom by virtue of Regulation 11 if the refusal to admit that person is

justified on grounds of policy, public security or public health in accordance with Regulation 27.

(2) A person is not entitled to be admitted to the United Kingdom by virtue of Regulation 11 if that person is subject to a deportation or exclusion order, except where the person who is temporary admitted pursuant to Regulation 41.

…"

21. Regulation 23(6)(b) provides relevantly as follows:

"(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered into the United Kingdom may be removed if –

(a)That person does not have or ceases to have a right to reside under these Regulations;

(b)The Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with Regulation 27; or

(c) The Secretary of State has decided that the person removal is justified on grounds of misuse of rights under Regulation 26(3)."

Regulation 33 provides:

"(1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom regulation 32(3) applies, in circumstances where—

(a)P has not appealed against the EEA decision to which regulation 32(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or

(b)P has so appealed but the appeal has not been finally determined.

(2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section 6 of the Human

Rights Act 1998(1) (public authority not to act contrary to Human Rights Convention).

(3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.

(4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—

(a)where the removal decision is based on a previous judicial decision;

(b)where P has had previous access to judicial review; or

(c)where the removal decision is based on imperative grounds of public security.

(5) In this regulation, "finally determined" has the same meaning as in Part 6."

22. The general effect of these provisions was uncontentious. The following overview is taken in large part from Mr Drabble QC's skeleton argument.

23. An expulsion decision under Regulation 23(6)(b) gives rise to right of appeal which may be exercised in-country under the EEA Regulations (commonly referred to as an 'EEA appeal'). There may also, in a case like the Claimant's, be a separate right of appeal against the refusal of the individual's human rights claim under s82 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). That will also ordinarily be an in-country appeal unless the case is certified under Regulation 33, in which case paragraph 2 of Schedule 2 to the Regulations requires that the human rights appeal must be brought from outside the United Kingdom.

24. An appeal against removal under Regulation 23(6)(b) does not suspend removal automatically but as the Defendant's policy makes clear, removal prior to appeal requires certification under Regulation 33.

25. Regulation 41 allows for re-entry in order to present an appeal in person, unless the appellant's presence would "cause serious troubles to public policy or public security."

26. The central criterion for certification under both Regulation 33 and s94B of the 2002 Act covering the parallel situation in respect on non - EEA Citizens is whether removal pending appeal would be unlawful under s6 HRA 1998.

27. It is important to note the manner in which the United Kingdom Regulations characterise decisions. In Regulation 27(1) it states as follows:

> *"27(1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health."*

28. A decision under Regulation 33 is expressly excluded as an EEA decision under the UK Regulations and does not attract, therefore, Regulation 27 protection. This exclusion is achieved by Regulation 2, the General Interpretation section which states that

> *""EEA decision" means a decision under these Regulations that concerns-*
>
> *a person's entitlement to be admitted to the United Kingdom;*
>
> *a person's entitlement ... to be issued with or have renewed, or not to have revoked, a registration certificate [etc.]*
>
> *a person's removal from the United Kingdom; or*
>
> *the cancellation ... of a right to reside ...*
>
> *But does not include a decision to refuse to issue a document under regulation 12(4) (issue ... a right to reside: material change of circumstances), or any decisions under Regulation 33 (human rights considerations and interim orders to suspend removal) or 41 (temporary admission to submit case in person) ..."*

Policy

29. The SSHD's policy in this area is contained in Guidance entitled "Regulations 33 and 41 of the Immigration (European Economic Area) Regulations 2016; Version 6 August 2017."

30. Mr Drabble QC takes issue with certain paragraphs of the current Guidance on Regulation 33 and section 94B certifications. The relevant parts read as follows:

“

…certifications under regulation 33 differ significantly from certifications under section 94B. A critical difference is the fact that regulation 41 of the EEA Regulations 2016 allows a person to apply to be temporarily admitted to attend their appeal hearing. It is therefore possible for a person whose case is certified under regulation 33 to provide oral testimony in person at their appeal Lord Wilson noted this particular difference between section 94B and regulation 33 in paragraph 62 of his judgment in Kiarie and Byndloss.

There are other key differences between regulation 33 and section 94B certifications. An appeal under regulation 33 of the EEA Regulations 2016 can be commenced while the person is in the UK and therefore a person can consult their UK legal advisers before any appeal hearing. Furthermore, individuals have 30 days to leave the UK voluntarily, unless one of the exceptions in regulation 32(6) applies, which means they can also use that time to prepare evidence for an appeal. Therefore, the Supreme Court judgment in Kiarie and Byndloss does not undermine the application of regulation 33.

[…]

In R (OO) (Nigeria) v SSHD [2017] ECWA 338 the Court of Appeal confirmed the Secretary of State’s position in respect of certification under section 94B. These principles also apply to certification under regulation 33. The Court’s findings in OO(Nigeria) specifically included the following points [the Court]

- rejected the contention that the public interest in certification is connected with the merits or otherwise of the underlying appeal (from the deportation order) - rather, it accepted that the public interest ‘is essentially the same as that underlying the provisions about deportation generally, namely that foreign criminals should in principle be removed from the UK as soon and as efficiently and effectively as they can be’ [paragraph 37]

- agreed that there is no general duty on the Secretary of State (SoS) to proactively investigate the position of children. Rather, it is for the appellant to provide information on their family life, including the effect of removal on any children: ‘It should not be necessary for the SoS to make separate enquiries as to the position of any child’. The Court goes on to state that if the SoS is not satisfied ‘that all has been said that might be’ about the interests of a child, she

- might be obliged to make further enquiries, but confirms that these will generally be limited – 'normally the enquiry would in the first place be of the potential deportee's representatives' [paragraph 39]

- rejected the argument that the fact that removal pending appeal would result in the loss of Indefinite Leave to Remain (ILR) was relevant [paragraph 45]

- rejected the argument that a number of cumulative factors were required in order to override the best interests of a relevant child, concluding that 'it seems ...that to prescribe the operation of the balancing exercise as requiring more than one factor to be put in the opposite scale from the best interests of the children would be altogether formulaic and inappropriate' [paragraph 51]

- accepted that 'a case based on the best interests of an affected child... would be much more powerful if it were supported by evidence showing some specific reason why the child would suffer during a period of interim removal, by itself evidence that the child would suffer from separation from the parent risks being too general, and too commonplace, to prevail over the public interest in removal' [paragraph 61]

[…]

… and held that
"

- When considering [human rights procedural protection], it is important to reflect on the Supreme Court's reasoning in Kiarie and Byndloss, and, in particular, paragraphs 60 to 78. In paragraph 76, Lord Wilson concluded that for a human rights appeal to be effective the individual 'would need at least to be afforded the opportunity to give live evidence'. A person certified under regulation 33 will, other than in exceptional cases (see re-entry to attend appeal in person), be able to request a return to the UK for their hearing. This means that Lord Wilson's primary concern should not arise. However, there may be other procedural issues in an individual case that mean interim removal would render the procedure ineffective or unfair."

DISCUSSION and ANALYSIS

31. Each party relied upon the plain meaning of the Directive as supportive of the arguments they made, and each relied upon domestic and CJEU authority making reference to the previous drafting materials of the Directive itself.

32. It is not in issue that EU and EEA citizens have a right of free movement derived from Article 21 of the Treaty of the Functioning of the European Union ("TFEU") and Article 45 of the Charter of Fundamental Rights. Directive 2004/38 came into force on 30 April 2006 and has direct effect (Van Duyn v Home Office (41/74) [1975] 1 C.M.L.R. 1).

33. Within the UK, an amendment to section 2(2) of the European Communities Act allows the SSHD to lay secondary legislation before Parliament which governs the admission to the UK of EU and EEA Citizens. The most recent iteration of the UK Regulations to give effect to the Directive came into force on 1 February 2017.

34. It is also well recognised that removal from the UK of a person exercising an EEA treaty right is very different from removal of a person merely enjoying leave to enter or remain outside the EEA regime. The public policy grounds for removal in the former case must be sufficiently serious to provide lawful justification. General considerations of deterrence and the maintenance of effective immigration control are inadequate to support such a course, the particular circumstances of the case must be weighed. This enhanced protection was comprehensively described in Nouazli (see paragraph 13 above).

35. Freedom of movement is at the centre of the freedoms under the EU Treaties and the Charter and is jealously protected by the EU, and indeed there is no disagreement between the parties as to the effect of an EU approach: it would require the proportionality principle as it is understood in EU law to be applied. This was explained in R (Lumsdon and others) v Legal Services Board [2006] AC 697 at paragraph 23 and 34 as follows, with particular reference to the importance of context and the flexibility of the principle:

> "… 23. As in the case of other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context. This summary will range beyond the type of case with which this appeal is concerned, in order to demonstrate the different ways in which the principle of proportionality is applied in different contexts…"

> "31. Where the proportionality principle is applied by a national court, it must, as a principle of EU law, be applied in a manner which is consistent with the jurisprudence of the court: as is sometimes said, the national judge is also a European judge.…"

> "… 34. It is however important to avoid an excessively schematic approach, since the jurisprudence indicates that the principle of proportionality is flexible in its application." …
>
> "36. As a generalisation, proportionality is a ground of review of EU measures is concerned with the balancing of private interests adversely affected by such measures against the public interest which the measures are intended to promote. Proportionality functions in that context as a check on the exercise of public power of a kind traditionally found in public law."

36. Accordingly, it is well settled that it would entail a personalised proportionality assessment of the balance to be struck between the public interest and the interests of the appellant (see Lumsdon paragraphs 33-38).

Plain Reading

37. The Claimant says that on a plain reading of the Directive, a certification decision ordering an EEA subject to leave the territory pending an appeal constitutes a "measure" which restricts his fundamental EEA right of freedom of movement. It falls within the wide wording of Article 27 of the Directive and must be subject to the safeguards from which, under the UK Regulations, it is expressly excluded.

38. The SSHD argued that Articles 27 and 28 provide what should be regarded as detailed rules on substantive deportation decisions in contrast to "framework rules" governing procedural protection such as are found in Articles 30 and 31 and that the detail of these latter protections is left to domestic law. However, this is in my view a misreading of the operation of the provisions.

39. In my judgement, the fact that a domestic court makes a decision as to whether or not an appeal is suspensory, does not mean that when considering whether to suspend or not, (which is essentially a matter of EU rights), the UK is not obliged to decide the matter consistently with EU law. It does not mean that UK law and UK proportionality necessarily must apply to the manner in which the decision concerning a fundamental right -namely of freedom of movement- is made.

40. The SSHD submitted that the Directive leaves procedural matters (including the process by which a substantive deportation decision is challenged) to Member States, subject to any safeguards that are expressly provided in the Directive itself.

41. In my judgement, as a pure matter of the language, Article 31(4) contains a distinct exclusionary measure which attracts protection under Article 27. Absent a compelling reason why this should not be so, its exercise is subject to principles of EU proportionality, based on the personal circumstances of a claimant.

42. In my view such an exclusion, that is to say, the decision to certify, is clearly within the description "restriction on freedom of movement" and therefore *prima facie* falls within the measures described in Article 27. Given that an expulsion order will remove a person from the domicile of choice as an EEA national and

must be described as a restriction on freedom of movement it is not inconsistent with other parts of the Directive that this also should be determined by reference to appropriate EU standards. That is to say by the incorporation of the EU proportionality assessment.

43. In my judgement the term "measures" is apt indeed on its face to include any decision that is capable of curtailing the right of free movement. A decision imposing a restriction on the ability to remain to conduct an appeal is such a decision.

44. The centrality of the fundamental right to free movement (a right absent from a non-EEA case) is clear from the recitals. Article 27 speaks in terms of a restriction on the right of freedom of movement and residence. The opening wording of Article 31(4) uses the language of exclusion and provides:

> *"Member States may exclude the individual concerned from their territory pending the redress procedure. "*

45. In my judgement these words on their face do give a power to restrict freedom of movement.

46. The SSHD argued, as part of her analysis, that even if the language might suggest such a meaning, Article 31 does not concern any new restrictive measure but rather governs the means by which the deportation decision itself (which is the relevant restrictive measure) is challenged: a certification decision enabling pre-appeal removal represents the immediate enforcement of the deportation decision itself, it is not a separate and distinct measure. At the point of the decision to remove pending appeal, Mr Blundell submitted, any right to stay has been brought to an end. Thus both as a matter of substance and in practical terms, there is no need for a second stage in the analysis – there has already been a full consideration of the issues at the stage of the deportation decision.

47. In my judgement however it is artificial to envisage that the initial decision as to whether or not to deport somehow carries through into any decision to remove pending an appeal. In order for removal of an EEA citizen pending appeal, the SSHD must make a separate distinct decision to certify in order to restrict the deportee's rights.

48. The SSHD says also that the Directive has left the decisions concerning removal pending appeal to the domestic forum (see Article 31) and this reflects a legislative intention that domestic law and principles apply. The approach is the same as if the EEA citizen were in fact a foreign national: a less intrusive analysis of his rights and the balance of interests is carried out.

49. Article 31(4), said Mr Blundell, can be seen in part as a *quid pro quo* for the fact that an EEA national enjoys powerful protection against expulsion. Where a Member State has determined that the relevant threshold is met, there is no requirement for yet another Article 27 - compliant proportionality analysis when considering an interim removal decision. The Directive itself reflects the

requirements of proportionality. Further, whether or not domestic law in a particular Member State gives a suspensory right of appeal, the Directive he says compels a hearing of that issue before removal takes place, if suspension is not automatic. That is the minimum safeguard.

50. However, it seems to me clear that Article 31 is describing only the mechanism for any challenge, and indicating that a member state is not compelled to render an appeal suspensory of removal.

51. It cannot be implied, in my judgement, that, if it is necessary for a decision to be made in the Member State as a matter of interim application (because no suspensive right is given), that it is not in some way a decision (a "measure") with the potential to curtail rights of free movement.

52. In order to determine whether or not it is to be suspensory in any case, an application will be made to the court and must be determined before any further steps are taken with respect to the Deportation Order. The provision itself is not purporting to characterise the exclusion decision in any particular way. It is not drawing a distinction between a deportation decision on the one hand, and an exclusion decision pending an appeal on the other. They both in my judgement are measures that curtail rights of free movement, nothing in the wording of Article 31 suggests otherwise.

53. I therefore disagree that, as submitted by the SSHD, Article 31 demonstrates that there is a scheme of substantive and procedural rights representing a carefully negotiated legislative solution as to where the balance between individual interests on the one hand, and the legitimate public policy interests of Member States on the other, should be struck.

54. The SSHD further argued that the Directive imposes a public policy test which is a personal conduct test; Articles 27 and 28 doing no more than codifying existing case law. Article 31(1) showed he said that there is merely an enforcement stage of the decision to deport. Thus there is one underlying measure only.

55. Emphasis was put by the SSHD on the fact that States are permitted to exclude an individual pending an appeal although not permitted to prevent that individual from submitting their defence in person except for what are referred to as "serious troubles to public policy or public security or when the appeal concerns a denial of entry to the territory". This shows he says that there is in European law, no automatic suspensive effect to an appeal.

56. That point, of course, was not in issue between the parties and this argument of the SSHD in my judgement takes the matter no further.

57. It is in my view more appropriate to look to the character of the instrument, its purpose and structure and further to the nature of the right that is being decided, and its practical context – that is, how it operates in practice, and to apply the appropriate law to that right. In order to do that one must examine the character of any refusal to allow a deportee to remain pending an appeal. As indicated, the general words of Article 27 are, in my judgement consistently with the protective

intention of the Directive, apt to cover a decision the effect of which, adversely affects a fundamental right.

58. The Travaux Preparatoires make clear that there was considerable debate amongst the parties to the draft of the Directive as to whether or not a suspensory appeal should be mandatory. In the event, that issue was left to be decided by the national court. The EU imposed an obligation with respect to the decision-making around the expulsion before appeal. In my judgement, Article 31 says nothing about the character of the decision to expel before appeal; indeed the use of the word expulsion emphasises, in my judgement what is implicit from the other articles in the Directive. The other articles, in particular the wording of Article 27 include any decision which engages the rights at issue in the Citizens' Directive: viz. rights of free movement/residence.

59. Finally, compellingly, and as it seems to me as a matter of common sense, it may be the case that the substance of the information relevant to a decision about appeal is different from that available at the time the substantive Deportation Order was made. Accordingly, the circumstances that are to be considered with respect to remaining for an appeal may be different from those considered at the Deportation Order stage.

60. Further, I agree with the submission of the AIRE Centre regarding the current wording of the Directive. Namely that the intention in the redraft of the Directive which became the Citizens' Directive was to strengthen procedures and reinforce protection for the right to free movement.

61. The original Proposal for a European Parliament and Council Directive on the right of Citizens' of the Union and their family members to move and reside freely within the territory of Member States (/CLM/2001/0257 final-COD 2001/0111*/) by its Explanatory Memorandum by its paragraph 2.5 indicated relevantly as follows:

> *"The proposal also sets out to provide a tighter definition of the circumstances under which the right of residence right of the Union Citizens and their family members may be restricted... In addition, the introduction of new provisions drawing on the concept of fundamental rights will provide Union Citizens with greater safeguards in dealings with both administrative authorities and the courts concerning decisions restricting their fundamental right of movement and residence…"*

62. Directive 2004/38/EC in Chapter VI reflected, in what became article 27.1, a change to originally proposed wording. That article (then numbered 25.1) originally referred to refusal of entry or expulsion. The Amended Proposal for the Directive (/*CLM/2003/0199 final – COD 2001/011*) in its altered form was stated to apply to "any decision restricting the freedom of movement of Union Citizens…"

63. In my judgement these words reinforce the submissions on behalf of the Claimant; in particular as to the scope of the word "measure" which is apt to include a step in the full deportation process.

Assistance from the Case law

64. Mr Blundell went on to argue that even if an initial analysis of the wording suggested that the Claimant's argument had force, the weight of authority both domestic and European was against such a conclusion.

Bouchereau

65. I say at the outset that I am fortified in my initial conclusions as to the wide meaning of "measure" by the caselaw and in particular by the authority of R v Bouchereau (ECJ)[1978] QB.32.

66. The Court there had occasion to decide among other questions, whether the recommendation only of a Court for deportation could be described as a "measure" within an earlier iteration of the Citizens' Directive, Directive 64/221. The Court held that it could: it was a step on the way to a final order. Moreover, and relevantly here, a measure was taken to mean any action which affects the rights within the field of the application of article 48 to freely enter and reside in the member states.

67. Bouchereau was a case concerning a challenge to the process then attaching to the decision of a Crown Court to deport an EEA national and the proper characterisation of that step within the deportation process.

68. The ECJ said this in Bouchereau concerning the methodology for construing the scope of the word "measures" in a forerunner to the Citizens' Directive, beginning at page 758:

> "9. Article 2 of Directive No. 64/221 states that the Directive relates to all "measures" (dispositions, Vorschriften, provvedimenti, bestemmelser, voorschriften) concerning entry into the territory, issue or renewal of residence permits or expulsion from their territory taken by member states on grounds of public policy, public security or public health.
>
> 10. Under paragraphs (1) and (2) of article 3 of that Directive, "measures" (mesures, Massnahmen, provvedimenti, forholdsregler, maatregelen) taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned and previous criminal convictions shall not in themselves constitute grounds for the taking of such measures.
>
> …

14. The different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.

15. By co-ordinating national rules on the control of aliens, to the extent to which they concern the nationals of other member states, Directive No. 64/221 seeks to protect such nationals from any exercise of the powers resulting from the exception relating to limitations justified on grounds of public policy, public security or public health, which might go beyond the requirements justifying an exception to the basic principle of free movement of persons.

16. It is essential that at the different stages of the process which may result in the adoption of a decision to make a deportation order that protection may be provided by the courts where they are involved in the adoption of such a decision.

17. It follows that the concept of "measure" includes the action of a court which is required by the law to recommend in certain cases the deportation of a national of another member state.

…

20. As regards the second aspect of the first question, the Government of the United Kingdom submits that a mere recommendation cannot constitute a "measure" within the meaning of article 3 (1) and (2) of Directive No. 64/221, and that only the subsequent decision of the Secretary of State can amount to such a measure.

21. For the purposes of the Directive, a "measure" is any action which affects the right of persons coming within the field of application of article 48 to enter and reside freely in the member states under the same conditions as the nationals of the host state.

22. Within the context of the procedure laid down by section 3 (6) of the Immigration Act 1971, the recommendation referred to in the question raised by the national court constitutes a necessary step in the process of arriving at any decision to make a deportation order and is a necessary prerequisite for such a decision.

23. Moreover, within the context of that procedure, its effect is to make it possible to deprive the person concerned of his liberty and it is, in any event, one factor justifying a subsequent decision by the executive authority to make a deportation order.

> 24. Such a recommendation therefore affects the right of free movement and constitutes a measure within the meaning of article 3 of the Directive."

69. In my judgement these words reinforce the submissions of the Claimant in particular as to the scope of the word "measure" which it is apt to include the notion of a step in the full deportation process.

Petrea

70. The SSHD referred to the description of the effect of Article 31 by the Advocate-General in the case of Petrea v Ypourgos Esoterikon Kai Dioikitikis Anasygrotesis [2018] 1 WLR 2237 which he says, supports the proposition that the Article does give procedural protection, but such protection is limited to the right to return to make a defence in person. Absent express provision in the EU instrument, (and there is no express protection in the Directive in respect of removal pending appeal) the SSHD says there is no requirement to apply EU principles. Recourse is only to domestic law in the usual way,

71. Petrea was a case in which a Romanian national convicted of crime had been removed from Greece on the grounds he constituted a serious threat to public policy and public security. He made no challenge to the Order expelling him and said he was waiving all his legal remedies. Within two years he returned and, by administrative mistake, was granted a certificate of registration as an EU citizen. When they discovered their mistake, the Greek authorities took away the certificate stating that the original deportation order was valid, and 13 months later made a return order, ordering that he be returned to Romania.

72. Petrea sought to judicially review the withdrawal of the bogus certificate on the basis inter alia, of the failure of Greece to apply the protective procedures of the Citizens' Directive to the withdrawal and to re-examine the up-to-date position. The court held there was nothing to stop them from withdrawing the wrongly issued certificate and imposing a further return order on him without further process since the wrongly given certificate did not grant any rights to Petrea. His deportation was now beyond challenge and the previous exclusion order remained valid.

73. Mr Blundell QC points to the court's analysis that the deportation decision once made remained in force until lifted to support his argument that there was only one expulsion decision in the present case that attracted EEA safeguards.

74. At paragraph [36] of Petrea the Advocate-General explained the effect of the provisions of Article 31(4) of the Directive:

> "36. It should be recalled that, under article 31(4) of Directive 2004/38, Member States may exclude the individual concerned from their territory pending the redress procedure against a measure restricting his rights under that Directive. However, a person subject to such a measure may ask to be heard in person by the competent court. It might be possible to argue that,

> during the redress procedure, the presence of the individual concerned must therefore be permitted to ensure that he receives a fair hearing and is able to present all his grounds of defence.
>
> 37. By contrast, under article 32(2) of Directive 2004/38, persons subject to an exclusion order have no right of entry to the territory of the member state concerned while their application for lifting of the order is being considered."

75. Particular emphasis is laid by Mr David Blundell on paragraph 77 of the Advocate General where he says as follows under the heading "General Remarks":

> "77. Directive 2004/38 lays down a number of procedural rules with which Member States must comply if they are to restrict the Union the Citizens' right of residence, namely those set out in articles 30 and 31. However that Directive does not contain provisions on the detailed rules governing administrative and judicial proceedings relating to decisions terminating the right of a Union citizen to reside in the territory of the host state. According to the court settled case law, in the absence of EU rules on the matter, it is for the national legal order of each member state to establish such detailed rules, ensuring however, that they are no less favourable than the rules governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness)…"

76. He submits that this approach reflects his submission that the matters pertaining to the removal pending appeal are for domestic law alone.

77. The SSHD says it follows that Art. 31 is in truth to be treated as not concerning any new restrictive measure but governs the means by which the deportation decision (which is the restrictive measure) is challenged. Any further decision whether or not to suspend removal is, "*in the absence of EU rules on the matter ... for the national legal order of each Member State*" and thus to be decided purely by reference to domestic law.

78. Mr Blundell added that the fact that there is merely an ECHR test isn't really capable of criticism in any event because article 6(3) of the Treaty on European Union expressly sets out that ECHR rights are general principles of EU law.

79. I disagree. In my judgement the approach in Petrea underscores the individual nature of the steps involved in an expulsion.

80. Importantly, the Advocate General reflected upon a submission of the UK government in Petrea that is very similar to that made by the SSHD in this case – and rejected it. The Advocate General and the Court both agreed in concluding that the removal of an erroneously issued residence permit did not attract the protections of Article 27. On the way to that conclusion the Advocate General's

Opinion reflected an argument of principle run by the UK as follows [emphasis added]:

> [AG]"51. …. I observe that article 27 of Directive 2004/38 appears in Chapter VI of that Directive, entitled "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health". It may therefore be thought that this article concerns only measures restricting the rights conferred on Union Citizens. If we were to accept that interpretation of the scope of article 27 of Directive 2004/38—as the United Kingdom Government did, which stated in its written observations that a decision following upon an exclusion order "does not of itself constitute a measure for the purposes of article 27(2), or … for the purposes of article 28 [of Directive 2004/38]"—it would follow that the 2014 return decision, despite its nature which assimilates it to the 2011 decision, does not fall within the scope of article 27 of Directive 2004/38. It would therefore be a matter for domestic legislatures to adjust all of the rules relating to measures following upon an exclusion order.
>
> 52 I am not persuaded by that approach.
>
> 53 First, article 27 of Directive 2004/38 was given quite a broad scope. The initial draft wording of article 27(1) of that Directive, which referred only to "decisions whereby Union Citizens and their family members … are refused entry or expelled", was amended during the proposal's legislative passage so as to cover "all types of decision restricting freedom of movement", namely "all types of measure—removal, refusal of leave to enter the territory and refusal to leave".
>
> 54 Secondly, it should be recalled that the wording of article 27 of Directive 2004/38 does not simply and exclusively cover measures restricting "rights" under that Directive, but encompasses, in more general terms, all measures restricting "the freedom of movement and residence".
>
> 55 Thirdly, the provisions of Chapter VI of Directive 2004/38 also concern persons whose rights of entry or residence have previously been restricted by a measure validly taken in accordance with EU law: see article 32(1) and article 33(2) of Directive 2004/38.
>
> 56 In the light of the foregoing reasoning, I consider that a return order following upon an exclusion order falls within the scope of article 27 of Directive 2004/38. Nevertheless, I take the view that the adoption of such a measure does not require a prior

examination of the continued existence of the reasons which justified the adoption of the exclusion order."

81. This case concerned the invalid and mistaken provision of a certificate that, as a matter of law, did not affect the underlying deportation decision (judgment paragraph 30).

82. In my judgement these passages relied on by the SSHD from Petrea do no more than explain that a domestic court must evolve a process, whether administrative or judicial, to provide a forum for determining the issue of removal pending appeal if required. It does not assist the SSHD in her argument.

83. Petrea does not purport to exclude the decision in the present case from consideration according to the appropriate EU standards. It was a case about a grant of entry that was a nullity, that was founded on a fatal error of fact, it granted no rights (judgment paragraph 32). Together with the reasoning as to the status of a post-deportation order decision, in my judgement the case does not advance Mr Blundell's argument.

Pecastaing

84. Mr David Blundell also refers to C-98/79 Pecastaing v Belgium [1981] ECR 691 at paragraphs 12 and 13 This was a case where it was asserted that there would be a breach of Article 8 of Directive 64/221 unless Member States were compelled to allow appellant deportees to remain pending an appeal in every case.

85. He submits that Pecastaing indicates by paragraph 12 that any right to remain had been brought to an end already.

"12 … it cannot be inferred [from the relevant part referring to suspensory effect] … of Directive 64/221 that the person concerned is entitled to remain on the territory of the State concerned throughout the proceeding initiated by him.

"Such an interpretation, which would enable the person concerned unilaterally, by lodging an application, to suspend the measure effecting him, is incompatible with the objective of the Directive which is to reconcile the requirements of public policy, public security, and public health with the guarantees which must be provided for the persons affected by such measures …

13 Accordingly, the reply to be given to the question submitted must be that … there may not be inferred from Article 8 an obligation for the Member States to permit an alien to remain in their territory for the duration of the proceedings, so long as he is able nevertheless to obtain a fair hearing and to present his defence in full."

86. He underlines this by pointing to the proposed text and its form within the earlier materials. The proposed text of the Article (at that point numbered Article 29) at subparagraph (5) was as follows:

"Member States may exclude the individual concerned from their territory pending the trial, but they may not prevent the individual from appearing in person at the trial".

The commentary on this particular piece of proposed text states:

"Paragraph 5 allows the member state to exclude the individual concerned for their territory pending the hearing, while ensuring the individuals presence in person at the hearing and protecting their fundamental right to a fair trial (Court of Justice judgment in Pecastaing paragraph 13)".

87. The absence of an express general right to a suspensive appeal as reflected in the wording of Article 31 (4), has been affirmed in Pecastaing he said. Thus, the fact that the predecessor of the Citizens' Directive had been interpreted as not containing a right unilaterally to suspend the measure affecting an appellant showed that such an outcome was not incompatible with the objective of the Directive which balanced requirements of public policy and security with guarantees to the persons concerned. This, is all of course, subject to the caveat that a person will be allowed back in almost all circumstances, in order to appear at the appeal.

88. The inference the SSHD invites the court to draw is that there has been a deliberate policy choice at EU level not to afford the deeper safeguards of proportionality to an interim decision to remove pending appeal. In other words, the balance of the Directive is argued to reflect a political choice that fell short of affording Article 27 guarantees to any stage other than the full deportation order decision.

89. In my judgement this puts too much weight upon what in my assessment is a discussion about the balance regarding the existence of a suspensive right of appeal. It says nothing about a deliberate policy choice to exclude the safeguard of a personalised proportionality assessment where a decision is taken which means a person may be expelled.

90. It is more important, in my judgement, to look at the nature of the right in issue in order to judge which safeguards inhere. I am fortified in this approach by reference to the case of Kiarie.

Kiarie

91. As part of his case, the Claimant adverted to the fact that the Article 33 provision mirrors that of s94B, applying also to non-EEA Citizens which was inserted into the 2002 Act by the Immigration Act 2014. It enables an individual to be removed before appeal rights are exhausted. He relied on Kiarie as shedding some light on how a court should deal with the issue here. Kiarie shows unequivocally he said that where the fundamental rights of a claimant are in issue, appropriately stringent standards apply. In other words the nature of the right in issue, conditioned its

approach. (In Kiarie, of course, the issue had been Convention rights on a deportation in advance of an appeal, rather than EEA rights).

92. Kiarie was a case about out of country appeals on human rights grounds following a deportation order and then subsequent certification by the SSHD that, although arguable, the appeal had to be brought out of country. The issue was explained in these terms by Lord Wilson:

> "4. In deciding to make deportation orders against them, the Home Secretary rejected the claims of Mr Kiarie and Mr Byndloss that deportation would breach their right to respect for their private and family life under article 8 of the European Convention on Human Rights ("the Convention"). Mr Kiarie and Mr Byndloss have a right of appeal to the tribunal against her rejection of their claims and they propose to exercise it. But, when making the deportation orders, the Home Secretary issued certificates, the effect of which is that they can bring their appeals only after they have returned to Kenya and Jamaica."
>
> 5. As I will explain in paras 33 and 55, it may well, for obvious reasons, be difficult for Mr Kiarie and Mr Byndloss to achieve success in their proposed appeals. But the question in these proceedings is not whether their appeals should succeed. It is: are the two certificates lawful?"

93. The Kiarie case records the relationship between the domestic provision, section 94B governing all foreign national offenders inserted into the Immigration Act 2002, and the predecessor of the Regulations namely SI 2006/1003. At paragraph 62 Lord Wilson with whom the majority agreed said

> "62. When the power to certify under section 94B was inserted into the 2002 Act, an analogous power was inserted into the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("the 2006 Regulations"), now recently replaced. Regulation 24AA (2) enabled the Home Secretary to add to an order that an EEA national be deported from the UK a certificate that his removal pending any appeal on his part would not be unlawful under section 6 of the 1998 Act. But regulation 24AA (4) enabled him to apply "to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision …
>
> It is also worthwhile to note that, even if an EEA national was removed from the UK in advance of his appeal, he had, save in exceptional circumstances, a right under regulation 29AA of the 2006 Regulations (reflective of article 31(4) of Directive 2004/58/EC) to require the Home Secretary to enable him to return temporarily to the UK in order to give evidence in person to the tribunal.

"63. The Home Secretary submits to this court that the fairness of the hearing of an appeal against deportation brought by a foreign criminal is highly unlikely to turn on the ability of the appellant to give oral evidence; and that therefore the determination of the issues raised in such an appeal is likely to require his live evidence only exceptionally. No doubt this submission reflects much of the thinking which led the Home Secretary to propose the insertion of section 94B into the 2002 Act. I am, however, driven to conclude that the submission is unsound and that the suggested unlikelihood runs in the opposite direction, namely that in many cases an arguable appeal against deportation is unlikely to be effective unless there is a facility for the appellant to give live evidence to the tribunal."

94. Mr Drabble QC also referred to two later paragraphs as illustrating the truth of his submission that there may be two distinct decisions – the first as to deportation, the second, regarding presence here on an appeal, which is a further and distinct decision connected to deportation.

57. On an appeal against a deportation order the overarching issue for the tribunal will be whether the deportation would be lawful. But, if the certificate under section 94B is lawful, the appellant will already have been deported. In determining the overarching issue the tribunal will be likely to address in particular the depth of his integration in United Kingdom society and the quality of his relationships with any child, partner or other family member: see para 55(a)(b) above. But, were the certificate under section 94B is lawful, his integration in United Kingdom society would already have been cut away; and his relationships with them ruptured.

58. Statistics now produced by the Home Secretary, which the claimants consider to be surprisingly optimistic, suggest that an appeal brought from abroad is likely to be determined within about five months of the filing of the notice. So, by the time of the hearing, an appellant, if deported pursuant to a certificate, will probably have been absent from the United Kingdom for a minimum of five months. No doubt the tribunal will be alert to remind itself of its duty to set aside the deportation order and thus to enable an appellant to re-enter the United Kingdom if his human rights were so to require. But, by reason of his deportation pursuant to a certificate, his human rights are less likely so to require! It is one thing further to weaken an appeal which can already be seen to be clearly unfounded. It is quite another significantly to weaken an arguable appeal: such is a step which calls for considerable justification. The Home Secretary argues that, by definition, the foreign criminal will have been in

> prison, perhaps also later in immigration detention, in the United Kingdom and so he will already have suffered both a loosening of his integration, if any, in United Kingdom society and, irrespective of any prison visits, an interruption of his relationship with family members. I agree; but in my view the effect of his immediate removal from the United Kingdom on these two likely aspects of his case would probably be significantly more damaging than that of his prior incarceration here.

95. I agree that the treatment of the appeal stage in Kiarie by the Supreme Court is consistent with the Claimant's analysis of two separate but connected decisions. The case is useful in showing that a court will when considering safeguards, indeed analyse the nature of the right alleged to be infringed, the practical context in which it arises and any apparent incursion into it.

96. Further and importantly, clearly in Kiarie the court treated the decision to deport, and the decision to certify as two separate exercises, arguably raising two separate sets of facts and matters to be considered. This undermines considerably the SSHD's preferred approach which was to assert that there is in truth only one decision operating - that to make a Deportation Order.

Lauzikas

97. This approach is fortified by the case of R (Jonas Lauzikas) v SSHD [2018] EWHC 1045 (Admin). The Claimant argues the case is clear authority for the proposition that decisions ancillary to deportation do indeed attract the protection of EU standards of personalised proportionality. The Claimant points out that the material holding was not disturbed on appeal and is consistent with later Supreme Court authority.

98. The case of Lauzikas, a decision of Michael Fordham QC (as he then was) sitting as a Deputy High Court Judge, concerned the power to detain, ancillary to deportation. This was a post-deportation order decision to detain which Mr Drabble QC submitted was similarly restrictive of the rights of the claimant in that case and therefore the same reasoning must apply here. He noted that it remained untouched by the subsequent appeal ([2019] EWCA Civ 116) and is not gainsaid by other authority.

99. The court in Lauzikas described the issue thus:

> 23. As I discerned them, the essential steps in Ms Dubinsky's argument on this question of principle came to this. (1) The claimant could be the subject of a deportation (expulsion) decision on grounds of public policy or public security: see article 28(1) of the Citizens' Directive. (2) Immigration detention pending or following a deportation decision is a "restriction of movement [or] residence", itself permissible on grounds of public policy or public security for the purposes of

> article 27(1) of the Directive. (3) Such detention is also a "measure" taken on grounds of public policy or public security, for the purposes of article 27(2). (4) It follows, by reason of article 27(2), that such immigration detention is lawful only if it meets the article 27(2) standards. (5) The article 27(2) standards are applicable in law to a decision to detain, albeit that they are applied under the domestic implementing Regulations only to a "relevant decision", being an "EEA decision" ("a decision … that concerns … a person's removal from the United Kingdom"): see regulation 21(5) and regulation 2(a) of the 2006 EEA Regulations. (6) The "principle of proportionality" applicable to a decision to detain, which limits the recognised right to liberty, requires that the action be "necessary", this being (a) part of the recognised general EU test of proportionality (R (Lumsdon) v Legal Services Board [2016] AC 697 , para 33); (b) part of the standard articulated in the Charter of Fundamental Rights of the European Union (OJ 2010 C83 , p 389) ("the CFR") (article 52(1) , here with article 6(1)) applicable to a member state when implementing EU law (article 51(1) of the CFR; Lumsdon's case, para 48); and (c) recognised in the case law of the Court of Justice of the European Union in the context of national measures derogating from fundamental freedoms (Lumsdon's case, paras 50–51 and 55) and in the specific context of article 27(2) …"

100. The court accepted this submission, holding that the immigration detention of an individual pursuant to regulation 24 of the Regulations was required to meet the standards contained in Article 27 (2) of the Directive including the test of individualised proportionality and necessity.

101. In that case, as here, Article 27(2) standards were expressly mentioned in the SSHD's deportation decision, but when a decision in respect of detention came to be made shortly thereafter, these principles did not feature, the SSHD submitting that a decision to detain was not an EEA decision and further, that domestic law (in that case Hardial Singh principles alone) should apply, rather than individualised proportionality or necessity.

102. As here, part of the argument by the SSHD was that individualised consideration was only required of the deportation decision itself and not of the detention linked to the deportation. The court in Lauzikas rejected that submission.

103. The concept of detention in the case of Lauzikas, is, however, different from the present case, submits the SSHD, because detention is not an automatic consequence of the deportation order, whilst leaving the territory is. EU law thus leaves the choice of process to the Member State (subject to the right to a return for the appeal, which is expressly provided for): the deportee is entitled to one EU compliant, personalised proportionality decision - that which decides whether a Deportation Order shall be made at all. Any subsequent decision as to remaining pending appeal is of a different character. The objective of the Directive, he

argues, is to reconcile the requirements of public policy, public security, and public health guarantees, and (as he says is reflected in Pecastaing v Belgium [1981] ECR 691), there is no absolute right to remain pending an appeal in EU law. The United Kingdom has adopted what is described by the SSHD as a protective position - that is to say HRA protection is given, but not the full extent of EEA protections involving personalised proportionality consideration.

104. It follows, submits the SSHD, that there is no requirement to apply a test of EU proportionality to a decision as to whether a deportee may be removed pending his appeal, the ECHR protection suffices. Further, there are no errors of law in the guidance, which is consequently, post Kiarie, still lawful.

105. I do not accept these submissions. It is not, in my judgement, correct to describe removal pending an appeal as an automatic consequence of the Deportation Order. That is to misread Article 31(4) of the Directive. It is not a consequence that will follow automatically. Absent the process of certification, an in-country appeal will take place; and if the subsequent appeal is successful there will have been no removal. This is a strained use of the word automatic. In my judgement any "automatic" outcome will obtain only if the SSHD does not make a decision to certify.

106. The SSHD argued the case was of little assistance because it was common ground in Lauzikas that the Claimant's immigration detention was subject to EU principles as detention pursuant to Regulation 24(1) and 24(3) (of the 2006 Regulations), which is not the case here. In my judgement that does not undermine the analysis.

107. This is made clear by returning to the case of R v (Nouazli) v SSHD [2016] 3 CMLR 17. There it had been argued by the Claimant that detention pending removal was not permitted at all within the Citizens' Directive. The judge at first instance held that it was, provided the requirements of Article 27 were satisfied. The Court of Appeal agreed: detention of an individual under the Regulations attracted Article 27(2) standards in order for the detention to be compatible with the applicable EU Law. The findings of Lauzikas at first instance (in paragraphs [20 – 28]) supporting that proposition are left intact by the Supreme Court judgment of Nouazli.

108. It was also submitted by Nouazli in the Supreme Court that detention was not "an EEA decision" so as to attract Article 27(2) standards - unlike the decision to deport under regulation 19(3)(b), which was subject to those standards ([2016] 1 WLR 1565, para 80). On that basis, the Regulations were submitted to be incompatible with the Directive. Lord Clarke JSC concluded that there was no structural incompatibility. Firstly, because regulation 24(1) detention is "ancillary" to regulation 19(3)(b) removal, (to which regulation 21(5) does apply). Secondly, he accepted the SSHD's submission that the person is "detained pursuant to a decision which 'concerns … a person's removal' within the meaning of … an 'EEA decision'" [paras 81–84.]

109. The Claimant submits this reasoning is indistinguishable in the context of the present case. I agree. The relationship between the detention decision in Lauzikas and the removal pending appeal decision in the present case is the same. In my

judgement there is no real distinction between the two as was argued for by the SSHD.

Alimanovic

110. The SSHD sought further to argue that no further safeguard need be read into the exercise of deciding questions of presence during an appeal. It was said by the SSHD that the Directive does facilitate the exercise of the right to free movement, but it sets conditions upon it, balancing the legitimate interests of Member States against private rights. Mr Blundell relied on the decision of the CJEU in Jobcenter Berlin Neukölln v Alimanovic [2016] 1 WLR 3089 at [59-61], to support the proposition that that proportionality has already been taken into account in the Directive.

111. In C-67/14 Jobcenter Berlin Neukölln v Alimanovic [2016] 2 WLR 208, a case concerning benefit entitlement for a previously working subsequently unemployed individual, the CJEU made it clear that the express wording of the Directive had to be respected in the interests of certainty. An individual assessment of the circumstances of the person is not required because the Directive itself takes proportionality into account.

112. Article 24 is a very different type of provision in my judgment. The provisions in Article 24(2) expressly derogate from a principle of EU law, namely equal treatment – and do so expressly to reflect the intended balance between the interests of the state and those of the individual - as is set out in the Directive. Those parts upon which the SSHD relies to support the proposition that the Directive itself has already balanced the relevant interests, is wholly different from that in issue here. In the earlier parts, there is detailed guidance as to what is or is not to be considered and, indeed, choices are expressly made by the draftsman. The case of Alimanovic is not in my judgment of much assistance.

General Principle

113. General principles of EU law were advanced by both sides as leading to a conclusion in support of their main submission.

114. Under EU law the Claimant argues, because the fundamental right of free movement is in issue, EU proportionality must apply to any decision that might derogate from it. The purpose of the Directive is to protect and facilitate free movement as a fundamental freedom within the EU Treaties (see in particular the Recitals and Article 1 of the Directive) and it was thus not to be restrictively interpreted as reflected in paragraph 34 of Clauder [2012] 1 CMLR 1 which said as follows:

> "34. Having regard to the context and objectives of Directive 2004/38 —promoting the right of nationals of EC Member States and EFTA States and their family members to move and reside freely within the territory of the EEA States—the provisions of that directive cannot be interpreted restrictively …"

115. I accept the submission of Mr Drabble QC for the Claimant and of the AIRE Centre, that the EU jealously guards rights of free movement. The burden is therefore on the expelling state to justify an expulsion decision; the SSHD must demonstrate that the constraints in Article 27 are met and, in particular, that the personal conduct of the individual concerned meets the threshold for expulsion.

116. This approach is consistent with/described in: Tsakouridis [2011] 2 CMLR 11.

117. In my view it is correct to characterise a pre-appeal expulsion as a potential restriction on free movement because, absent a separate certification decision, the Claimant would not be removed immediately. Albeit there has been a previous decision to make a deportation order, absent a certification under Regulation 33, akin to a section 94B certification, the Claimant could remain in the UK to exercise his right of appeal.

118. There is nothing in the case law that persuades me this analysis is wrong. On the contrary, it is consistent with Kiarie, with Nouazli and consistent with the treatment of detention pending deportation removal examined in Lauzikas. In particular, it is clear that in Nouazli the Supreme Court regarded the decision to detain pending removal as a "decision concerning removal". It is impossible to distinguish the present case from this analysis. Accordingly the language of the Regulation, purporting to reflect the meaning of the Directive does not, when it specifically exempts the current decision from EEA decisions, do so. The wording of the domestic instrument takes it outside the natural meaning of the Directive.

Domestic cases

119. Although Mr Blundell did not advance sustained submissions in reliance upon them, the SSHD made reference to the fact that in 2 or 3 domestic cases the issue, although not apparently argued in detail, had been before the court and had not yet been decided in favour of the Claimant. In R (Macastena) v. Secretary of State [2015] EWHC 1141 (Admin), Collins J had considered an application for permission and had refused it. The reasons given by the judge in respect of the predecessor to Regulation 33 are limited, in effect, to what was said at paragraph [18]. "*it cannot be said that it is at all arguable that [regulation 24AA] … is itself unlawful*." There is no indication that any of the materials or argument put before me were available to the judge in that case and I do not feel inhibited from reaching my conclusion in this case by the short extempore permission hearing.

120. In X v SSHD [2016] EWHC 1997 (Admin), Walker J rejected a submission that the predecessor to reg. 33 of the Immigration (EEA) Regulations 2006 was contrary to EU law as disproportionate [111–112] and declined to consider a submission that reg. 24AA was contrary to EU law by reason of the fact that action taken under that provision was not required to comply with reg. 21of those regulations [117-118].

121. The holding of Walker J included at paragraph 17(3), in summary in respect of a submission concerning the lawfulness of the predecessor Articles:

> “ it is not appropriate in the present claim to decide certain aspects of X's other challenges to the EEA Regulations and to the Home Secretary's policy. They are aspects which do not need to be decided in the present claim, and are best left to be decided in a claim where they will affect the practical outcome. I also explain in section D that the remaining aspects of those challenges are not established. “

122. This was in respect of a challenge made in the following terms (recorded at paragraph 117):

> “….The second criticism is that EU law was broken when regulation 24AA was introduced without an express provision to ensure that action taken under it was required to comply with the principles set out in regulation 21 .
>
> 118. This second criticism is not one that I find easy to resolve. It concerns general principles of EU law and the specific principles set out in chapter VI of the Citizens’ Directive
>
> 119. My conclusion in section E below is that the action taken by the Home Secretary under regulation 24AA against X was unlawful for reasons entirely independent of this second criticism. In these circumstances I do not need to resolve whether the correct analysis of this second criticism is that put forward by the Home Secretary or that put forward by X – or some other analysis.”

123. I am therefore not inhibited by the judgment of Walker J in reaching my judgment here.

124. The SSHD also relies on a decision of Murray J in R (Mendes) v SSHD [2019] EWHC 2233 (Admin), refusing interim relief where a number of allegations concerning the lawfulness of Regulation 33 appear to have been in play. Again, it does not seem the judge there had the benefit of the developed arguments I have heard from Mr Drabble QC for Mr Hafeez.

125. The cases do not in my judgement contain compelling material that induces me to change the conclusion to which I am led by the materials examined before me.

Guidance

126. Mr Drabble QC’s complaint is that the Guidance is unlawful in so far as it suggests that OO (Nigeria) (above) remains authority for the proposition that there is a strong public interest in interim removal. Such an approach was expressly disapproved by the Supreme Court in Kiarie at [35]. Similarly, it is wrong he says to suggest that any public interest in interim removal is not outweighed by the public interest in the appeals system being effective.

127. Similarly, he argues, the conclusions in OO (Nigeria) on family life and the best interests of children, need now to be considered in light of the concerns of the Supreme Court in Kiarie and Byndloss v SSHD [2017] UKSC 42; [2017] 1 WLR 2380 that interim exclusion undermines the effectiveness of an appeal by undermining substantive Article 8 rights. In the context of an EEA appeal, the substantive rights in question are additionally EEA rights of free movement stemming from Directive 2004/38 and the Regulations, in addition to any human rights in issue.

128. The Guidance is submitted to be inaccurate in stating that Kiarie "does not undermine the application of regulation 33". Rather, Kiarie makes clear that on an interim exclusion the SSHD must show that the individual will nonetheless be able to prepare and present his appeal effectively and the merits will not be weakened by the removal. The case law now emphasises that the burden is on the SSHD, and the court must scrutinise decisions with intensity. These points are still applicable to EEA appeals and interim exclusion, says the Claimant, even though a person may (in most cases) seek permission to return to the UK for the appeal hearing.

129. These points must follow in my judgement. The Guidance requires refinement to reflect these points.

CONCLUSION

130. Accordingly, I accept the submissions of the Claimant to the effect that the decision under the Regulations as to whether or not an appellant may remain in the UK pending the hearing of an appeal must be made having regard to the constraints in Article 27 including personalised proportionality in the sense understood in EU law.

131. It is a corollary of that conclusion that the Guidance requires some amendment to recognise the most recent case law and that conclusion. It would, in my judgement, require express mention afforded to EEA Citizens.

132. It is not the result of such a conclusion, that the Regulations are "unlawful" as was suggested on occasion within the papers in this case. It is well established that national rules will be dis-applied where incompatible with rights arising under EU law. I accept, as submitted by the SSHD, this is the principle as expressed in case C – 555/07 Kucukdeveci v Swedex GmbH & Co KG [2010] All ER (EC) 867 where it was said at paragraph [51]:

> "it is for the national court… to provide… the legal protection which individuals derive from European Union law at… Dis-applying if need be any provision of national legislation contrary to that principle."

133. The Regulations seem to me capable of being read down, in any event, pursuant to the Marleasing principle (see Marleasing SA v La Comercial Internacional de Alimentacion SA (C-106/89) [1990] E.C.R. I-4135; [1992] 1 C.M.L.R. 30), in order to achieve the result pursued by the Directive. Alternatively, to the extent necessary, an individual is entitled to rely upon the terms of the Directive, rather than the Regulations to vindicate their rights.

134. Accordingly, this application for judicial review is granted.