



Neutral Citation Number: [2021] EWHC 115 (Admin)

Case No: CO/2561/2019

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/01/2021

**Before :**

**MR JUSTICE FREEDMAN**

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**Between :**

**THE QUEEN**  
**on the application of**  
**Yuri MENDES**

**Claimant**

**- and -**

**SECRETARY OF STATE FOR THE HOME**  
**DEPARTMENT**

**Defendant**

**- and -**

**THE ADVICE ON INDIVIDUAL RIGHTS IN**  
**EUROPE (AIRE) CENTRE**

**Intervenor**

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**Becket Bedford and Mark Bradshaw (instructed by Instalaw Solicitors Limited) for the**  
**Claimant**  
**David Blundell QC and Julia Smyth (instructed by Government Legal Department) for the**  
**Defendant**  
**Simon Cox and Bojana Asanovic (instructed by Freshfields Bruckhaus Deringer LLP) for**  
**the Intervenor**

Hearing dates: 8 & 9 December 2020  
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**Approved Judgment**

**Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 25<sup>th</sup> January 2021 at 11.10am.**

**MR JUSTICE FREEDMAN:**

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## II Introduction

1. This is a case with a complicated procedural history. The Claimant, who is a national of Portugal, was deported to Portugal on 2 July 2019 following a decision to deport him and a deportation order made on 17 September 2018. He was at that time coming to the release date of a sentence of detention in a young offenders' institution ("YOI") for 6 counts of robbery. The date of the decision was his 18<sup>th</sup> birthday. About a month before his 18<sup>th</sup> birthday, the Claimant was served with a notice of liability to deport (a "DLN") whilst still at a YOI.
2. The Claimant's claim for judicial review arises out of the decision to deport and the deportation order each dated 17 September 2018, the regulation 33 certificate also dated 17 September 2018 and the earlier DLN made on 16 August 2018. An order is sought to require the Defendant to return or facilitate the return of the Claimant to the UK.
3. In recent months, there have been important developments. In July 2020, the Court of Appeal found that the regulation 33 certificate was unlawful but adjourned the judicial review and the question of a mandatory injunction to the Administrative Court. Since then, in September 2020, the Secretary of State issued a fresh certificate, albeit long after the deportation had taken effect. There had not been a notice of appeal to the First-tier Tribunal ("FTT") against the deportation order until at earliest 24 June 2019, many months out of time. On 19 October 2020, time was extended by the FTT for bringing the notice of appeal, but the hearing of the appeal was stayed until after the hearing before the Administrative Court.
4. There is before the Court a rolled-up hearing as ordered by Julian Knowles J on 9 September 2020 to determine:
  - (a) the Claimant's application to amend his grounds of claim;
  - (b) his application for relief in the form of a mandatory order returning him to the UK;
  - (c) the application for permission to bring the claim; and
  - (d) subject to permission, the claim itself.
5. This claim was heard over two days on 8 and 9 December 2020. Before the Court was a large amount of material. It includes 2 main bundles comprising about 1200 pages. It also comprises 2 bundles of authorities comprising 60 dividers which have been supplemented by more than 10 additional authorities. In addition to having the benefit of the submissions on behalf of the Claimant and the Secretary of State, the Court has received written and oral submissions on behalf of the Aire Centre.
6. The parties have been unable to agree a list of issues. At the start of the hearing, there were lists of issues of the Claimant and the Secretary of State respectively: The Intervener agreed with the list of the Secretary of State. In the course of the hearing, the Court asked for the issues to be reordered in what was called a roadmap so as to present the issues in a way that might reflect the order in which the Court would have to consider the issues. There were two roadmaps prepared, which are referred to in the last section of this judgment. The Court is very grateful to all Counsel for their

respective expertise and experience and for their very carefully prepared written and oral submissions throughout the applications.

### **III The facts**

#### **(a) The Claimant**

7. The Claimant, Yuri Mendes, is a national of Portugal. He was born on 17 September 2000. He came to the United Kingdom from Portugal with his mother and siblings. On his own account, he arrived in the UK in December 2013, although the Secretary of State has said that it was in 2014. As an EU national, he would have entered the UK on the basis of his right of free movement within the EU. The Secretary of State does not accept on either account that the Claimant gained a right of permanent residence before the date of the Deportation Order by virtue of five years' continuous residence under regulation 15(1) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016")
8. A summary of the offending history of the Claimant was described by Murray J in his judgment of 15 August 2019 neutral citation number [2019] EWHC 2233 (Admin). Although Murray J's judgment was reversed by the Court of Appeal [2020] EWCA Civ 922, it is still convenient to set out the history of the Claimant's offending as follows from para. 9 of Murray J's judgment in this matter as follows:

“Between 21 November 2015, when the Claimant was 15 years old, and 6 March 2018, he was convicted on five occasions for 12 offences:

- i) On 21 November 2015 at Manchester and Salford Juvenile Court, he was convicted of possession of an article with a blade/sharp point on school premises. For that offence, on 26 November 2015, he was made subject to a 9-month referral order.
- ii) On 7 July 2016 at Greater Manchester Juvenile Court, he was convicted of criminal damage and battery. For those offences, on 28 July 2016, he was given a 12-month youth rehabilitation order, with a supervision requirement and an electronically-monitored curfew requirement. He was also ordered to pay compensation of £250 and made subject to a 12-month restraining order.
- iii) On 1 September 2016 at Greater Manchester Juvenile Court, he was convicted of attempted robbery. For that offence, on 22 September 2016, he was made subject to an 18-month Detention and Training Order ("DTO"), which was subsequently varied on appeal to a 12-month DTO. He was also ordered to pay compensation of £250.

iv) On 12 June 2017 at Greater Manchester Juvenile Court he was convicted of failing to comply with the DTO resulting from his conviction on 1 September 2016. He was fined £30.

v) On 6 March 2018 at Greater Manchester Juvenile Court he was convicted of six counts of robbery and remanded in youth detention accommodation, until he was sentenced on 27 March 2018 to [a] 12-month DTO.”

9. On 3 April 2018, nearly six months before his custodial sentence came to an end, the Claimant was attended by an immigration officer, an appropriate adult and his caseworker. The Secretary of State’s CID records confirm that the deportation criteria were discussed and understood.
10. It was noted on 22 May 2018 that the Defendant reviewed the case and considered deportation was “justifiable and proportionate under the EEA Regulations”. This was before any invitation for representations by the Claimant.
11. On 10 July 2018, Ruth James from the Youth Offending Team sent a letter to the Claimant’s mother, Ms Ana Mendes, seeking to visit her at her home to discuss “a number of things relating to Yuri”, referring to his application for early release and that he was being considered for deportation, but that “no final decision will be made until he reaches the age of 18 years.” Ms James’ letter expressed a willingness to pick up Ms Mendes on the morning of the next remand planning meeting on 16 August 2018. According to notes of Ms James, there was a meeting on 17 July 2018 attended by Ms Mendes and her partner where Ms James explained the deportation process and Ms Mendes said that she was keen to attend the next meeting.

**(b) Notice of liability to deport**

12. The meeting took place on 16 August 2018. Ms James had written to and telephoned Ms Mendes and there was no reply at the door when she knocked at her door on the morning of 16 August 2018.
13. The meeting took place at Wetherby YOI and was attended by Claire Woodhall (minors trained immigration officer), Ms James (Youth Justice Officer at Rochdale Borough Council) and Christine Burdis (Resettlement Practitioner at HMYOI Wetherby). The evidence about it for the Secretary of State is from Ms James (statement of 22 May 2020), Ms Burdis (statement 27 May 2020) and Ms Anne Knott (statement of 26 May 2020). The evidence from the Claimant is from the Claimant (statements 8 July 2019, 30 April 2020 and 19 October 2020). He was served with a notice of liability to detention. The Secretary of State says that the Notice of Liability to Deport was served on the Claimant on that day.

14. The notes of Ms Burdis and Ms James of 16 August 2018 say that Ms Woodhall served the papers on the Claimant, she explained them and he said that he understood them. He said that he did not want to live in Portugal although he might when he is older, in his thirties. His father lived there, but he had no contact with him. He was told that he needed to put forward reasons why he should be allowed to stay in the UK within 20 working days. Ms Burdis wrote to Barnardo's to request support with this. The Claimant said that he would like to live with his mother on release, aiming to have his own accommodation. He was keen to engage in education, having been doing Outreach (1:1) and felt he was doing well. He would like to attend college and to do a business course.

15. The documents which were served included the following:

(1) A notice of liability to deportation pursuant to the the EEA Regulations 2016. It stated as follows:

“This notice informs you that the Home Office is considering whether to make a deportation decision against you in accordance with the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations 2016”).

**What this means for you**

This means that if the Home Office decides to make a deportation decision against you, you will be served a deportation order and removed from the UK to Portugal. The deportation order will prohibit you from re-entering the UK indefinitely or for the period specified in the order unless you successfully apply to have it revoked.

As there are reasonable grounds to suspect that you are someone who may be deported from the UK under the EEA Regulations 2016 then you may be detained in immigration detention pending the deportation decision.

...

[There were then set out reasons for considering that the Claimant may be liable for deportation on grounds of public policy and/or public security referring to his criminal history. It then added “As set out in Schedule 1 to the EEA Regulations 2016 removing an EEA national or their family member with a criminal conviction, protecting the public and combating the effects of persistent offending are considered to be in the fundamental interests of society in the UK. Therefore, as a result of your behaviour a deportation decision may be made against you under regulation 23(6)(b) in accordance with regulation 27”]

...



### **Next steps**

The Home Office will not make a deportation decision against you based on your criminal conduct alone and will consider any information or evidence you provide to ensure that the decision is in accordance with the principles set out in regulation 27.

You must inform the Home Office of any reasons why you should not be deported from the UK. Part 3 of this notice explains what information and evidence you may wish to submit. Any information you wish to provide must reach the Home Office before the deadline stated below, failure to meet this deadline may mean that the information will not be considered as part of the deportation decision. [The deadline was 20 working days from the date of service, which would have been by the end of Friday 14 September 2020, excluding August Bank Holiday Monday].

**You will not have another opportunity to tell us why you should not be deported before a deportation decision is made so you must ensure that you provide any relevant information before this date.**

Consideration will be given to any evidence and information you provide as part of the decision whether to deport you. If you do not provide the Home Office with any information as to why you should not be deported we will make a decision using the information available to us. We will inform you in due course whether or not the Home Office has decided to deport you.

(2) There was also a deportation one-stop notice which stated:

“The Home Office will give more weight to claims substantiated by original documentary evidence from official sources to support your reasons and therefore it is in your interest to provide any evidence you have or can obtain.

If you cannot provide such evidence you must explain why. This is so that we can consider the credibility of any claims you submit and make a decision about whether you are entitled to remain in the United Kingdom. Less weight will normally be given to claims which are not supported by original documentary evidence.

**If you do not reply, the Home Office will make a deportation order against you and you will be deported from the United Kingdom.”**

16. There was a table of reasons and evidence to provide explanations why the potential deportee should not be deported. This included the following:

Example reason why you should not be deported

“The Home Office will normally certify a decision unless removing you before your appeal is heard would cause serious irreversible harm to you or your family, or otherwise breach your or their human rights, during the period in which you will be out of the country pursuing your appeal. If there are any reasons why you would not be able to continue an appeal from outside the United Kingdom in the event that your claim is refused, you should tell us now.”

Example of original documentary evidence which may assist in considering your claim

“Any evidence that removing you before your appeal is heard would cause serious irreversible (i.e. permanent or very long-lasting) harm to you or a member of your family.

Any evidence that removing you before your appeal is heard would otherwise breach your human rights or those of anyone else.”

**(c) Events following notice of liability to deport**

17. Ms James wrote to the mother of the Claimant, namely Ms Ana Mendes, after the meeting noting the date by which the Claimant was required to give his reasons for remaining in the UK and giving some example reasons and documentary evidence that he needed to produce.
18. On 23 August 2018, Ms Burdis noted that she spoke to the Claimant through his door. The Claimant “confirmed that he has made some notes and Barnardo’s will be visiting him **again** [emphasis added] either today or tomorrow to assist him with a letter to the Home Office stating why he believes he should be allowed to remain in the UK and not be deported to Portugal”. In fact, Barnardo’s has indicated that it opened its file on the Claimant on 20 September 2018 and had final contact on 25 September 2018. The Claimant also said that he had spoken to his mother and had updated her about the involvement of the Home Office. In a note of Ruth James of 29 June 2020, recording information in a diary note made on 20 September 2018, she said that she asked the Claimant about Barnardo’s and he said that he did not wait for Barnardo’s to help him with his appeal.

19. Whereas the evidence was that matters were explained to the Claimant on 16 August 2018, his evidence tells a story with a very different emphasis. It is as follows:

“[6] I was serving my sentence in Wetherby Young Offenders Institute (YOI) near Leeds, when in August 2018, I was told that when I turned 18, I could be deported back to Portugal. I had a meeting at Wetherby, a woman from the Home Office said that they would be looking into my case and that they might deport me. The woman gave me a letter that also said that I could be deported, I read some of it but I didn’t really understand it. The woman from the Home Office told me that I could appeal this but didn’t tell me how I could do it. I wasn’t told that I could be removed before any appeal. I wasn’t provided with a lawyer, or told how to contact one. My YOT worker, Ruth James came to the meeting with the Home Office. She didn’t say anything to me either before or after the meeting, she was there I understand because I was still only a child when they told me they were thinking of deporting me and so they needed to have someone there to act as an appropriate adult. She didn’t give me any advice and after that meeting I didn’t see her again.

[7] No one really offered me any assistance in understanding the letter. I tried to find out myself using the internet, and google, but I still didn’t understand.

[8] I didn’t want them to deport me but I didn’t know what to do. I was still at Wetherby YOI at that time and the first person I saw about my case, had a look at all of my documents, he told me that there was nothing that I could do, and that I would only be able to appeal when I was in Portugal. I know the man was a member of the prison staff at the YOI. I have forgotten his name though, and I don’t remember what his job was, just that he worked at the YOI.

[9] I was not aware of any legal assistance that I could access while I was in Wetherby YOI. I had a social worker who I think was called Vicky at the time, but she wasn’t helpful at all. None of the staff in Wetherby really knew what to do. A woman who worked at Wetherby, as a member of support staff, informed me that I could write a letter to the Home Office if I didn’t agree with the decision they were thinking of making. I told them that I had been in the UK since 2013 and I didn’t want to leave because my family were here and I didn’t know anybody in Portugal and wouldn’t have anywhere to live. The woman gave me some advice but I wrote the letter myself, I do remember that there was very little time to respond to the letter once it was received.

[10] I received the Deportation Order a few days after my 18<sup>th</sup> birthday. My 18th birthday was on 17 September 2018, it was just before I was moved from Wetherby.”

20. On 3 September 2018, the Claimant made representations in writing why he should not be deported. He wrote it himself by hand. He explained that he had no contact with his father in Portugal and his grandmother was old and ill. He wrote about his life in the UK. He said that he was in custody for robberies which he had not committed. (His antecedents show that he pleaded guilty to each of the robberies.) He had got involved with bad company despite his mother’s advice. He wanted to stay in the UK and make his mother proud. The nature of the letter appears to indicate that it was written by him, and if he had any assistance, it was limited.

**(d) Deportation Order**

21. On 17 September 2018, the day of the Claimant’s 18th birthday, the Deportation Order was made. At the same time, the Claimant was sent a letter by the Secretary of State informing him of the Deportation Order, noting that consideration had been given to his representations of 3 September 2018 and enclosing a copy of the Deportation Decision, in which (at paras 8 to 54) the Secretary of State gave her reasons for rejecting those representations and for making the Deportation Order. In the Decision, the Secretary of State also:
- i) (at paras 55 to 79) set out an analysis of the Claimant's rights under article 8 of the European Convention on Human Rights (ECHR) and concluded that his deportation would not breach the UK's obligations under article 8 of the ECHR because the public interest in deporting him outweighed his right to private and family life in the UK;
  - ii) (at paras 81 to 82) advised the Claimant of the possibility of voluntary departure from the UK;
  - iii) (at paras 83 to 85 and 108 to 109) advised the Claimant of his rights of appeal to the FTT under regulation 36 of the EEA Regulations 2016 and under section 82 of the Nationality, Immigration and Asylum Act 2002, (at paras 110 and 122) advised him that if his circumstances changed so that he had new reasons or grounds for remaining in the UK, he should notify the Secretary of State as soon as reasonably practicable and (at para 121) advised him of the deadline for appeal, namely, 14 calendar days after service on him of the Decision;
  - iv) (at para 86) certified the Claimant’s case pursuant to regulation 33 of the 2016 Regulations so that he could be removed pending appeal (the term “CD1” is used for the Certification Decision of 17 September 2018) and (at paras 87 to 107) gave reasons for it;

v) (at paras 111 to 120) advised the Claimant of his right under regulation 41 of the EEA Regulations 2016 to re-admission to the UK for the purposes of making submissions in person at any appeal hearing; and vi) (at paras 123 to 128) advised the Claimant that if he did not leave the UK voluntarily within one calendar month of the date of service of the Decision his removal would be enforced, that the Deportation Order invalidated any leave to enter or remain in the UK, that he was prohibited from re-entering the UK while the Deportation Order is in force, that if he wished to seek legal advice he "must do so now" and that if he remained in the UK he would be doing so illegally and would be subject to further enforcement action.

**(e) Events after deportation order**

22. As noted above, Barnardo's opened a file on 20 September 2018. According to a note of Michelle Vangrove of Barnardo's, a referral was made to Bail for Immigration Detainees (BIDUK) who advised that legal aid solicitors were available in Detention Centres and the Claimant should speak to his caseworker as soon as he arrived. The Barnardo's worker contacted BIDUK again to enquire if they could provide support with this. A pack was posted to the Claimant who was supported with completing and returning it to BIDUK ahead of his transfer to a young adult establishment. The Claimant indicates that because he was moved to an adult prison, he did not receive the help he had anticipated via the referral from Barnardo's.
23. As regards the statement at paragraph 8 of his witness statement above quoted as regards not being able to appeal until he was out of the country, a note of Ruth James dated 29 June 2020 contains information from the YOI diary made on 20 September 2018 which was the final DTO meeting when the Claimant was served with his Detention Order. It states that "the following information as advised by the HO<sup>1</sup> was given to Yuri...because the decision has been certified he can only appeal from outside the UK. He should contact a solicitor should he need any advice." In the grant of an extension of time to appeal, UTJ Martin accepted (para. 15 of the judgment) that the Claimant had been advised that he could only appeal from outside the UK and that that advice was incorrect. However, in a manuscript letter of the Claimant to BIDUK received on 23 June 2019, he said that the Home Office never told him face to face that he could not appeal, but they sent him a letter after the 14 days had expired to say that he could no longer appeal because time had expired. He said that when he had said that he did not appeal in time because he did not get proper legal help, he did not get legal representation even after he lodged a judicial review submission.
24. Upon his release from detention under the DTO imposed on 27 March 2018 on 25 September 2018, the Claimant was taken into immigration detention. An entry in Secretary of State's CID notes dated 27 September 2018 records that he was not considered suitable for detention in an immigration removal centre due to "*ongoing violent altercations in prison.*" His adjudications in prison are listed in Secretary of State's records as follows:

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<sup>1</sup> HO meaning Home Office

“14/09/2018 Made threats to staff 'Watch what happens when you open my door, you know what I'm capable of'. 10/09/2018 Destroyed a radio, 03/09/2018 Spat at an Officer, 03/09/2018 During restraining he became non-compliant spitting and biting staff involved, 03/09/2018 Jumped and sat on the railing and remained up there for 25 mins, 01/09/2018 Assaulted another prisoner by punching and kicking them, 24/07/2018 Involved in a fighting brawl with other prisoners, 23/07/2018 Verbally abusive to an Officer, 19/07/2018 Punched a prisoner, 12/07/2018 Kicked and punched another prisoner in the gym, 04/07/2018 Refused to work, grabbed an Officers arm and broke a computer mouse, 22/06/2018 Assaulted a prisoner, 20/06/2018 Sat on railings and remained there for 15 mins, 17/06/2018 Refused a direct order, 15/06/2018 Fighting.”

25. In completing the Claimant’s AssetPlus report<sup>2</sup> (explanation and conclusions section), the Claimant’s youth offender manager concluded that the Claimant posed a high risk of reoffending, and a high risk of serious harm to the public. The Claimant’s family has been unable to exert substantial control over his conduct, as the following passage from the AssetPlus Core Record, completed by the youth offender manager, recognises:

“Yuri had been missing from home from 8.2.18 to 6.3.18 – Ana [his mother] had not reported him as missing to the Police as it was not unusual for him to go missing and disappear for periods of time. Ana not concerned/worried about the whereabouts of Yuri. He had been as far as Southsea during this period of time as there is information on the PNC that he was stopped by Hampshire Police in the company of drug A users. Ana did not know why her son would be in Hampshire or who he was with.”

26. The Claimant was moved to HMP Forest Bank on 4 October 2018. On 8 October 2018, the Claimant was provided with details about Mr Ian Moncrieffe, the FNO Co-ordinator who is responsible for HMP Forest Bank and he was informed that immigration surgeries are held every two weeks there. He referred to having a few meetings with a man called Ian whilst at HMP Forest Bank and that he was told that he was out of time to appeal the decision: see the Claimant’s statement dated 30 April 2020 at para. 15. On 11 October 2018, he was attended by one of Secretary of State’s officials in relation to arrangements for removal, and amongst other things the deportation and detention processes were explained. The CID notes record that the

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<sup>2</sup> AssetPlus is an assessment and planning interventions framework developed by the Youth Justice Board (YJB). It is designed to provide a holistic end-to-end assessment and intervention plan, allowing one record to follow a child or young person throughout their time in the youth justice system

Claimant understood and had no further questions. He declined to sign travel documents.

27. On 18 October 2018, he attended an immigration surgery, and said that he wanted to apply for bail. He again declined to complete travel documents, for that reason, saying that he might complete the forms if he did not get bail.
28. The Claimant was moved to Colnbrook IRC between 16 and 22 November 2018. This was for the purpose of attending an Emergency Travel Document (“ETD”) interview with a Portuguese official. The Claimant attended the interview on 19 November, but again refused to sign the travel document.
29. Following support from a charity, the Claimant applied for bail and had a hearing on 30 November 2018. Bail was refused. The Claimant asserts that one of the reasons he was refused bail was because he had not appealed the decision to deport him: see his statement of 30 April 2020 para. 16. In the next paragraph of his statement, he said that he spoke to a solicitor in early 2019, but he was unable to take the matter further as the Claimant could not afford to instruct him.
30. The Claimant returned to Colnbrook IRC on 7 December 2018. On 10 December 2018, the Claimant attended a further ETD interview with a Portuguese official, and again refused to sign the travel document. On 12 December 2018, the Claimant declined to return to HMP Forest Bank, saying that he had “done his time.”
31. On 12 December 2018, an induction was completed at Colnbrook IRC . The need for early submission of further representations was explained, and he was also given information about the weekly duty solicitor schemes.
32. On 18 December 2018, the Claimant was transferred to HMP Forest Bank.
33. On 30 January 2019 the Claimant's immigration detention was reviewed by a Case Progression Panel, which recommended that detention be maintained.
34. On 11 March 2019, confirmation was received from the Portuguese consulate that an ETD had been agreed. On 12 March 2019 the Secretary of State authorised the Claimant's removal. On 29 March 2019, removal directions were set for 23 April 2019.
35. On 18 April 2019, with the assistance of the same charity as for his bail matter the Claimant apparently lodged an application for permission to apply for judicial review of his removal, as a result of which the Secretary of State on 20 April 2019 deferred the removal directions (previously set for 23 April 2019). The immigration history set out in the Immigration Factual Summary enclosed with the Removal Notice records the filing of the application, but also records that on 9 May 2019 the Secretary of State contacted the court and was informed that no sealed judicial review application had yet been served, following which she decided to take no further action on it.
36. The Claimant was returned to Colnbrook IRC on 18 April 2019. On 24 April 2019, a further induction was completed at the IRC. On 29 April 2019, a crew arrived to

collect the Claimant for transfer to HMP Forest Bank. The records of the Home Office are to the following effect. While packing, the Defendant attempted to conceal something. Following application of control and restraint measures, the Claimant punched and head-butted staff and had to be hand-cuffed. A search revealed that he had been attempting to conceal a memory stick.

**(f) The appeal**

37. On or about 30 May 2019 the Claimant wrote to BIDUK seeking legal advice on his case. On 17 June 2019 BIDUK responded to his letter with advice regarding an out-of-time appeal to the FTT. On 20 June 2019, removal directions were set for 2 July 2019. On 21 June 2019, the Claimant was served with notice of deportation arrangements, with removal to take place on 2 July 2019. BIDUK helped him submit an appeal out of time on 24 June 2019.
38. As to the submission of the notice of appeal, there was a fax confirmation. The FTT said that it had no record of receipt of that notice of appeal, but subsequently accepted on 23 October 2020 that it was faxed to the Tribunal on 24 June 2019 and no action was taken on it by the Tribunal: see the judgment of UTJ Martin. UTJ Martin extended time to appeal and that matter awaits the outcome of these proceedings.

**(g) Judicial review and removal**

39. On 27 June 2019 BIDUK referred the Claimant's case to Instalaw, who prepared and sent to the Secretary of State an urgent letter before action dated 28 June 2019, asking for a response by 4:00 pm the following day in light of the fact that the Claimant's removal was scheduled for 2 July 2019. No response having been received by that deadline from the Secretary of State, Instalaw prepared a judicial review claim and an interim application to restrain removal.
40. The judicial review proceedings challenged the regulation 33 certification. It was contended that regulation 33 was unlawful because, in respect of interim relief pending determination of an appeal against deportation, it did not require an EU proportionality balance to be performed. Instead, it was restricted to a consideration of whether removal would interfere with the individual's human rights which was contrary to the requirements of the Citizens' Free Movement Directive (Directive 2004/38/EC).
41. It was further submitted that in any event the application of regulation 33 to the Claimant had been unlawful because the notice of liability to deportation had been served on him when he was a detained and an unrepresented child. In those circumstances, it was submitted that he could not reasonably have been expected to have prepared his case e.g. to have obtained evidence as to the length of time he had been in the UK which went to the basis upon which the underlying deportation order had been made.



42. Removal directions were maintained, and judicial review proceedings were filed on 2 July 2019. Lang J refused interim relief in a paper application on the same date and the Claimant was deported. A further attempt to defer the removal did not materialise because by the time that it was about to be made, the Claimant was on the flight to Portugal.

**(h) Judicial review and application to return to the UK**

43. Following an oral hearing on 11 July 2019, on 15 August 2019 Murray J refused to grant an interim mandatory order requiring the Secretary of State to facilitate the return of the Appellant to the United Kingdom in the context of a judicial review challenge. Murray J held that his removal to Portugal pending the outcome of an appeal against a deportation decision would not be in breach of his human rights.
44. The Claimant sought permission to appeal in the Court of Appeal from the order of Murray J. Permission was granted by Hickinbottom LJ on 15 October 2019. The arguable issue was about the lawfulness of regulation 33 of the EEA Regulations 2016. In the meantime, in *R (Hafeez) v Secretary of State for the Home Department* [2020] EWHC 437 (Admin); [2020] 1 WLR 1877 it was submitted that regulation 33 was unlawful as not properly implementing the Citizens' Free Movement Directive because certification was a "measure" which restricted an individual's freedom of movement to which the safeguards of article 27 (as reflected in regulation 27 of the EEA Regulations) must apply. Foster J accepted that submission. In doing so, she said:

"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."

45. Foster J accepted 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. Therefore, a certification decision involved an EU proportionality exercise.

46. Foster J consequently granted the judicial review before her. In terms of relief, she considered that, in accordance with the principle described in *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, the EEA Regulations 2016 could be appropriately read down so that the exclusion of regulation 27 from regulation 33 decisions was simply read out.
47. The judgment in *Hafeez* was accepted by the Secretary of State, and her practice has been adapted accordingly consistently with *Hafeez*. New guidance to caseworkers has been published (“the Guidance”)<sup>3</sup>.
48. Following *Hafeez*, the position is that:
- a. an EU proportionality analysis must be conducted in accordance with Art. 27 before a certification decision is made.
  - b. as the Guidance recognises, this means that the decision must be appropriate and necessary to achieve the objective pursued, taking into account whether the objective could be achieved by less onerous means. The decision must be specific to the person concerned, rather than based on general considerations.
  - c. caseworkers are directed to take a number of factors into account, including the nature and severity of the threat posed, and the specific basis on which it is considered that the public policy, public security or public health test is met.
49. The consequence was expressed in the judgment of Hickinbottom LJ in the Court of Appeal in the instant case [2020] EWCA Civ 924 as follows:
- “[34] In the light of *Hafeez*, Mr Blundell frankly (and, in my respectful view, properly) accepted that (i) in respect of an application for interim relief in a judicial review of a regulation 33 certification (as well as in a challenge to the certification itself), regulation 27 must apply and an EU proportionality exercise must be performed; and (ii) it is clear from [42] of his judgment that Murray J neither considered that exercise necessary nor in fact performed such. The judge's approach was therefore wrong in law; and the resulting exercise of his discretion in relation to interim relief consequently unlawful. It cannot be said that that error is immaterial. In those circumstances, in my view, the appropriate course is to grant permission to appeal, allow the appeal and quash Murray J's order refusing the Appellant's application for interim relief.
- [35] In such circumstances, it would often be the case that this court would be in as good a position as the court below to re-determine the application; but, in this case, I do not consider

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<sup>3</sup> “Regulations 33 and 41 of the Immigration (European Economic Area) Regulations 2016,” version 7, published on 3 April 2020.

that this court could fairly decide now whether interim relief should be granted for the following reasons.

[36] First, the parties did not entirely agree about the correct approach to the merits of the underlying appeal when considering an application for interim relief. I have set out Mr Bedford's submissions above (see paragraph 29). Mr Blundell submitted that the merits of the underlying appeal could only be indirectly relevant in an application for interim relief pending a judicial review of certification, because the focus in such an application must be on the merits of temporary removal pending the ultimate outcome of the certification decision, rather than permanent removal as a result of deportation; and, in respect of the former, the merits of an appeal against the deportation order can only be obliquely relevant. However, even on the basis of Mr Bedford's submissions on this issue, in my view this is not a case in which it would be right for this court now to determine the interim relief application taking into account the merits of the underlying appeal, because that was not envisaged by the Order of 12 May 2020 and, even if we were able properly to conduct such an exercise involving consideration of the merits, that would to an extent usurp not only the certifying function of the Secretary of State granted to her by the EEA Regulations (which she is in the process of (re-)exercising in the Appellant's case), but also the function of the FtT (if the Upper Tribunal were to extend time) in determining whether there was (e.g.) procedural unfairness as alleged.

[37] However, more importantly, leaving aside the systemic challenges (to which I shall return), as I have described, the ultimate substantive point in the judicial review claim is whether the treatment of the Appellant involved procedural unfairness when the notice of liability to deportation was first served upon him as a child. That involves factual assessments and decisions which, in my view, this court is not in a position now to make, even if we were to admit the fresh evidence that Mr Bedford asks us to admit. That this evidence is late, and was not before Murray J, only strengthens my view.

[38] Second and in any event, even if Mr Bedford were to expand the basis upon which he sought interim relief, the Appellant is seeking a mandatory order for the Secretary of State to facilitate his return to the UK, having been removed to Portugal prior to the time of the hearing before Murray J in the circumstances I have described. As discussed in *R (Nixon and Tracey) v Secretary of State for the Home Department* [2018] EWCA Civ 3; [2018] HRLR 7 and *R (QR (Pakistan)) v Secretary of State for the Home Department* [2018] EWCA Civ 1413, such applications for mandatory orders involve consideration of factors and jurisprudence relevant to the

exercise of the court's discretion over and above those relevant to orders simply restraining removal, e.g. the circumstances of the individual abroad. In this case, it would require evidence (e.g. as to the Appellant's circumstances in Portugal) and/or submissions not currently before the court. The evidence of the Appellant's current circumstances is exceedingly thin; and there are simply no submissions from either the Appellant or the Secretary of State in respect of these issues.”

50. As regards the future steps, Hickinbottom LJ concluded at para. 41 as follows:

“having set aside the order of Murray J refusing the application for interim relief in the judicial review, that application should be remitted to the Administrative Court for re-determination of the application, in accordance with this judgment including the concessions made by the parties as recorded herein. I would encourage the court to use its case management powers to ensure that, so far as possible, all the Appellant's applications now before it are determined together and as soon as reasonably possible. I would also encourage both the FtT to proceed to determine the appeal before it with all expedition and, in the meantime, the Secretary of State to decide very soon whether or not she wishes to (re)certify. If she does not, the litigation becomes redundant. If she does, it is highly desirable that any challenge to the certificate is dealt with alongside the issues raised by the current proceedings.”

51. At para. 43, Underhill LJ said the following:

“...I wish to associate myself particularly with what Hickinbottom LJ says at the end of his final paragraph. The Appellant has now been excluded from the UK for over a year: that is a long time if his appeal against deportation eventually succeeds. The sooner there is some resolution of whether he can return on an interim basis (as a result either of a decision of the Secretary of State or of a decision of the court) the better. Of course a final resolution will be achieved once the Appellant's appeal against his deportation order is determined one way or the other. We now know that the First-tier Tribunal will be reconsidering his appeal, and I would hope that in view of the history that can be done as soon as possible.”

52. Hickinbottom LJ had referred to evidence about the Claimant's circumstances in Portugal being relevant to an application for an interim mandatory order. There was

some evidence (described by Hickinbottom LJ as being “extremely thin”) provided in his witness statement of 30 April 2020 in the following terms:

“[22] It was very difficult for me when I arrived here, I had no friends and I had to move in with my mum’s friend for a bit. She had a family though, and I was not able to stay with her for long. I have been moving around between the houses of my family and my mum’s friends. After that, I moved in with my cousins, where I have been living for a month now. I do not speak much Portuguese, but it is slowly improving, and I do not have any qualifications or ID documents, so I have not been able to get a job while I have been in Portugal. I have been living off my family and it has been difficult. My mum sends me money sometimes but I know that she does not have much. If I was still in the UK I think I would find it easier to get a job, especially because I went to college there and I speak the language.

[23] I have not re-offended since release from detention. I have cut ties with the peer group I used to have. I am not in contact with any one from that group of people. I want to be able to comeback to the UK and live with my family. I have not seen my mum since I left the UK and I think this has been difficult for both of us.

[24] I do not have any ID or documents, and so I am not able to travel. If I wanted to, it would be very difficult as I would probably have to apply to the Home Office to get temporary travel documents. I am very limited in what I am able to do. I was given a card that I used when I was brought from the UK to Portugal, but I have lost this now. Not having an ID has been difficult. It has meant I can’t get a job, and I have been stopped by the police a few times and had issues because I didn’t have any ID. I don’t know how I would apply for ID in Portugal, because I don’t really speak the language and I don’t have (sic).”

**(i) Events since the Court of Appeal hearing**

53. Since the hearing before the Court of Appeal, the following has occurred in chronological order:

- a) On 25 September 2020, the Secretary of State made a new decision on certification (“CD2”);
- b) On 19 October 2020, the Claimant provided a further statement containing evidence in particular about his life in Portugal following his deportation;

- c) On 23 October 2020 (following a hearing on 19 October 2020), the FTT allowed the application for the extension of time for the Notice of Appeal against deportation.

**a) The CD2**

The CD2 stated at paras. 3-4 and 6 as follows:

“[3] Following the judgment in the case of *R (Hafeez) v Secretary of State for the Home Department* [2020] EWHC 437 (Admin) (“Hafeez”), we are hereby withdrawing and re-considering your regulation 33 certificate. As part of this re-consideration we have assessed whether, in addition to removal not breaching section 6 of the Human Rights Act 1998, your removal pending the outcome of your appeal is proportionate, in accordance with article 27 of the Free Movement Directive (Directive 2004/38/EC).

[4] This re-consideration of the decision to certify under regulation 33 of the EEA Regulations 2016 does not affect the decision to deport you, which remains in place.

...

[6] In summary, the Secretary of State considers that your removal pending the outcome of any appeal was and is not unlawful under section 6 of the Human Rights Act 1998 and is and was proportionate in accordance with Article 27 of the Free Movement Directive, for the reasons set out below.”

54. The CD2 said that account had been taken of the Claimant’s representations including two witness statements of the Claimant dated 8 July 2019 and 30 April 2020, the witness statement of his mother, Ms Ana Mendes, dated 8 July 2019 and of his stepfather dated 9 July 2019.
55. Reference was made to the Claimant having lived in Portugal until the age of 13 and how he had difficulties adapting to life in the UK because he left his friends and life behind in Portugal. The CD2 rejected the assertion that the Claimant did not speak much Portuguese at the time of deportation. The view was taken that since he lived in Portugal for his first 13 years, the Claimant was able to speak Portuguese to a sufficiently high standard to be able adequately to communicate in Portugal: see para. 13. It was also considered that he had a sufficient knowledge of the culture and customs of Portugal to be able to re-integrate into Portuguese society pending the outcome of the appeal. He was young enough to adapt to life in Portugal: see para. 14. In respect of his inability to get a job in Portugal and to afford to go to college, there was no evidence of any attempts to get work and of failure to do so. There was no evidence that no social assistance was available to him. It was also reasonable to consider that friends and family would continue to support the Claimant whilst he sought to re-establish a private life for himself.
56. Whilst it was accepted that his mother, stepfather and siblings were in the UK, the Claimant had failed to provide sufficient evidence of a greater dependency on family members beyond normal emotional ties: see para. 19 and 53. It was noted that his family had been unable to take any effective action to prevent him from engaging in serious and persistent criminal conduct. It was not considered that pending resolution

of his statutory appeal that he was at risk of serious irreversible harm or that his removal pending the resolution of that appeal otherwise breached his ECHR rights: see para. 22. At para. 23, it was stated that the essential requirements of effectiveness and fairness were satisfied in connection with his participation in the appeal and the judicial review proceedings from Portugal. If he wished, he could apply to the Secretary of State for permission to attend the appeal in person.

57. At paras. 25-58, there was a detailed analysis leading to a conclusion that the decision to certify the case was proportionate as a matter of EU law in accordance with Article 27 of the Citizens' Free Movement Directive. There was reviewed the Claimant's history of serious offences in the UK referred to above. The youth offender manager found that he posed a high risk of serious harm to the public which could cause a serious impact. He associated with other known offenders and lacked remorse for his actions.

58. The report of the youth offender manager was referred to especially at paras. 30-31 of the CD2 as follows:

“30. The report stated: “These robberies were committed at night-time which in itself means that the victims were more vulnerable. There was a degree of force/violence used. Yuri has committed the offence as part of a group, this increases the seriousness and level of fear and intimidation towards the victim, the activity appears planned although Yuri will deny this. Yuri also has a history of committing these type (sic) of offences. There is a pattern of Yuri committing these type (sic) of violent behaviours in a public place targeting people not known to him.”

31. The report continued that you felt like you had made a “name” for yourself within a peer group and that you felt you now need to keep this up and that you had very little remorse for your actions and very little regard for your victim.”

59. There was also reference to significant periods of time being spent away from home and being located by the police in the company of known drug users. The behaviour in custody and immigration detention was highly disruptive demonstrating “an extremely violent and aggressive violent individual who has little thought or consideration of the risk which he posed to others.” The report mentioned the incidents referred to above between 14 September 2018 and 29 April 2019. There was also mentioned incidents in HMP Wetherby on 13 February 2017 and 19 March 2017 when he set fire to his cell.

60. At paras. 50-51 of CD1, it was stated as follows:

“[50] Taking into account your personal conduct, and for the reasons also set out in the decision to deport you, it is considered that you pose a genuine, present and sufficiently

serious threat affecting one of the fundamental interests of UK society.

[51] Consideration has been given to whether granting you bail pending resolution of your appeal could be a suitable alternative to interim removal from the UK. However, given the nature of your offending and the assessment of your risk of harm and re-offending, it is considered that you pose a real threat to the public. It is considered that this risk would remain if you were to be returned to the UK and released on bail.”

61. In the exercise of proportionality, the absence of evidence of dependency on his family members beyond normal emotional ties was taken into consideration. In the light of his serious and persistent offending, it was not considered that the Claimant was socially or culturally integrated in the UK. As regards Portugal, he had spent the majority of his life there, and he would have continued to be exposed to the traditions, culture and customs of Portugal within his family home. There was no evidence that he was ‘estranged’ from his country of origin. The claim of difficulties of preparing witness statements from abroad was noted, but it was not considered that this rendered the certificate decision disproportionate. He had been able to prepare statements in support of his legal proceedings from Portugal. There were modern communications there, and he was able to communicate effectively with his legal advisers from Portugal.
62. At paras. 59-61, it was considered that the Notice of Liability to Deport had been properly served and that the Claimant was afforded a proper opportunity to make representations as to why he should not be removed pending the determination of the appeal.
63. The Secretary of State accepted that there was a discretion to certify. CD2 contained the following under the heading “discretion” as follows:

“[62] The Secretary of State accepts that there is a discretion as to whether or not to certify your deportation decision under regulation 33 of the EEA Regulations 2016. However, it is considered that it is appropriate to certify in this case. The Secretary of State is satisfied that your removal pending the final outcome of your appeal will not cause a real risk of serious irreversible harm or otherwise be unlawful under section 6 of the Human Rights Act 1988 and that it is proportionate as a matter of EU law. In those circumstances, and given the serious threat which you are considered to pose, it is considered that there ought to be a good reason why a discretion should be exercised in your case. It is not considered that any such good reason exists.



[63] The decision to deport you from the UK has hereby been certified under regulation 33 of the EEA Regulations 2016.”

64. The CD2 stated that pursuant to regulation 41 of the EEA Regulations 2016, the Claimant may request permission to re-enter in order to make submissions in person at the appeal hearing subject to various conditions including an appeal date being set and his wanting to make submissions before the FTT or the Upper Tribunal in person: see paras. 64-65 of the CD2. This right is in line with Article 31(4) of the Citizens’ Free Movement Directive which states that Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting their defence in person except when the appearance would cause serious troubles to public policy or public security.

**b) Further statement of the Claimant dated 19 October 2020**

65. Mr Mendes says that he has struggled with having to live in Portugal. His life was in the UK and he was integrated despite what the Home Office says: see para. 13. He has lived in Portugal with his grandmother. He stated that his grandmother is elderly and unwell. He shares a bedroom with his grandmother and two cousins live there too. He has no privacy: see para. 14. He then substantially repeats his evidence about from his statement dated 30 April 2020. He is unable to get a job because he does not have any valid ID documents. For the same reason, he cannot obtain social assistance and attend college. In any event, he could not afford to attend college. He struggles with Portuguese and he does not remember much of the language and culture: see paras.15-19. This further information was not submitted before the Secretary of State’s CD2, but since most of it substantially repeats his statement of 30 April 2020, most of the substance was taken into account.

**c) The decision of the FTT to extend time for the Notice of Appeal**

66. The Claimant was unaware in Portugal that the appeal against his deportation was not pending, believing that the appeal had been lodged on 24 June 2019. When inquiries were made in January 2020, it was discovered that the Notice of Appeal had not been received. A further Notice of Appeal was lodged in January 2020. Both notices of appeal of June 2019 and January 2020 were considerably out of time. There was a case management review hearing at the FTT on 19 March 2020, and a decision promulgated on 26 March 2020 refusing permission to appeal out of time. There was a request for an adjournment by BIDUK to obtain legal aid. That request does not appear to have reached the FTT. On 10 July 2020, FTTJ Campbell set aside the decision of 19 March 2020 (promulgated on 26 March 2020).
67. On 19 October 2020, in a decision promulgated on 23 October 2020, UTJ Martin, sitting as a Judge of the FTT, extended time for the Notice of Appeal. UTJ Martin said that there were a number of concerns including (a) the deportation process starting when the Claimant was a minor, (b) incorrect advice being given about not

being able to appeal within the UK, and (c) no action being taken when the notice of appeal had been sent by fax to process it. UTJ Martin directed the appeal to proceed to a hearing. However, in view of the High Court proceedings, UTJ Martin directed that the outcome of the hearing of 8/9 December 2020 be awaited before progressing the appeal.

#### **IV The legal framework**

68. This is helpfully set out in the skeleton argument on behalf of the Secretary of State at paras. 31 and following and in a note of the Intervener on the Deportation Procedure.

##### **(a) Deportation – general**

69. The EU right of free movement is not unconditional. The Citizens’ Free Movement Directive protects and facilitates free movement but also provides for limitations on that right. In that respect, Article 7 sets out the substantive conditions for a right of residence to arise. Pursuant to Article 16, a person acquires a right of permanent residence if they have legally resided in a host Member State for a period of five years. It is well established that “legal” residence means residence in accordance with Article 7.
70. EU law recognises that it is legitimate for Member States to take action on public policy grounds, and to protect the fundamental interests of their society. Articles 27 and 28 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.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of

the case or that rely on considerations of general prevention shall not be accepted ...”

“Article 28

Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
  - (a) Have resided in the host Member State for the previous ten years; or
  - (b) Are a minor, except if the expulsion is necessary for the best interests of the child ...”<sup>4</sup>

71. In summary, therefore:

- a. Articles 27 and 28 permit a Member State to expel EEA nationals on grounds of public policy, public security or public health, subject to certain restrictions. There are discrete levels of protection, depending on the individual’s status.
- b. A decision must be proportionate and taken exclusively on the basis of the individual’s personal conduct, which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the case or that rely on considerations of general prevention are not acceptable (Art. 27(2) and reg. 27(5)). Account must also be taken of fundamental rights under the EU Charter of Fundamental Rights (“the Charter”).
- c. Consideration must be given to the specific factors in Art. 28.

**(b) The Citizens’ Free Movement Directive: procedural protection**

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<sup>4</sup> Recital 24 explains that this is to protect the child’s links with their family.

72. Arts 30 and 31 of the Citizens' Free Movement Directive set out certain requirements, but otherwise leave implementation to domestic law. They provide as follows:

*“Article 30 Notification of decisions*

- 1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.*
- 2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.*
- 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 notification.*

*Article 31 Procedural safeguards*

- 1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.*
- 2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:*
  - where the expulsion decision is based on a previous judicial decision; or*
  - where the persons concerned have had previous access to judicial review; or*
  - where the expulsion decision is based on imperative grounds of public security ...*
- 3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.*
- 4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.*

73. As this makes clear, the requirement under Art. 30(1) of the Citizens' Free Movement Directive is to take appropriate measures to ensure that a person understands the content and implications of a substantive decision adopted under Art. 27.
74. In relation to the substantive decision, Art. 30(1) imposes a requirement to notify a person in writing of a decision in such a way that the person understands the content and implications of that decision: see the CJEU's decision in *Petrea v Ypourgos Esoterikon kai Dioikitikis Anasygrotisis* [2018] 1 WLR 2237, [69] ("*Petrea*").

**(c) The 2016 Regulations**

75. Under the Secretary of State's guidance<sup>5</sup>, an individual must be given notice of liability to deportation and given the opportunity to make representations if they wish to do so. There are then two stages to deportation under the EEA Regulations 2016:

- (1) There must be a decision to deport pursuant to reg. 23(6)(b). That provides that:

"(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 the United Kingdom may be removed if—

....

(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

...."

- (2) That decision must be based on the individual's personal circumstances, in compliance with reg. 27 of the EEA Regulations 2016, which implements Arts 27 and 28 of the Citizens' Free Movement Directive. Regulations 27(1), (5) and (6) read 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.

...

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<sup>5</sup> EEA decisions on grounds of public policy and public security, version 3, December 2017, page 33.

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin."

- (3) If the Secretary of State considers that deportation is lawful as a matter of EU law and decides to pursue deportation, a deportation order is made. A deportation order is the formal mechanism for effecting a substantive deportation decision. As set out below, the order can only be made when the individual is appeal rights exhausted, or, if they are still in time to appeal, if their case is certified. The deportation order and deportation decision are legally distinct.

- (4) The EEA Regulations 2016 deploy the powers already in the Immigration Act 1971: see reg. 32(3). Thus, once a deportation decision is made, the procedural and supplementary provisions in s. 5 of, and Schedule 3 to, the 1971 Act then apply. An individual who is subject to an EEA deportation decision has a right of appeal pursuant to reg. 36 of the EEA Regulations 2016.
- (5) The EEA Regulations 2016 do not expressly provide for an appeal against an EEA deportation decision to be suspensive of an individual's removal, but the Secretary of State may only make removal directions if the conditions for certification in reg. 33 are satisfied and the certificate has been made. So far as material, reg. 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 (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.”*
- (6) Reg. 41 provides for a person who has been removed pending an EEA appeal to apply to make submissions in person. Permission must be granted save where the person's appearance might cause serious troubles to public policy or public security (reg. 41(3)).

**(d) Intervener's Note on the Deportation Procedure**

76. A note was produced by Mr Cox on behalf of the Intervener in which he very usefully made a summary of the stages of deportation of EEA nationals which is a four-stage decision-making process defined mostly by the Immigration (European Economic Area) Regulations 2016 ('EEA Regs'). It brings together some of the above provisions and assists in the understanding of how the legislative structure operates in connection with deportation. This section is entirely derived from that note.

(1) **Deportation Liability Notice** – this is not provided for in EEA Regs, but in the Secretary of State's guidance "EEA decisions on grounds of public policy and public security," Version 3.0, 14 December 2017. This contains a notification that the Secretary of State considers there are reasonable grounds for suspecting that a person is someone who may be removed from the United Kingdom under regulation 23(6)(b).

(2) **Decision to Deport** – is a "decision to remove" under reg 23(6)(b) of EEA Regulations 2016.

"(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 the United Kingdom may be removed if—

- 1) 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..."

The Decision to Deport is appealable to the FTT: reg 36(1) EEA Regulations 2016. It is an "EEA decision" (reg. 2(1) EEA Regulations 2016) as a decision that "concerns...a person's removal from the United Kingdom". The notice of Decision to Deport must give reasons and be accompanied by an explanation as to how to appeal it: Immigration (Notices) Regs 2003, regs 4 & 5.

- (3) **Deportation Order** – Where a Decision to Deport is made, EEA Regs reg 32(3) applies with the effect that section 3(5)(a) (liability to deportation on grounds of conducive to public good) and section 5 Immigration Act 1971 (power to make deportation orders in section 3(5) cases) apply, meaning a Deportation Order can be made.

It is standard practice for the Deportation Order to be made with the Decision to Deport, as in this case.

The Deportation Order prohibits the subject from entering the UK (section 5 Immigration Act) and permits giving of removal directions under Schedule 3 to the Immigration Act 1971.



The Deportation Order is not appealable, but a successful appeal against the Decision to Deport has the effect of requiring the Secretary of State to withdraw the Deportation Order.

(4) **Certificate Authorising Removal Pending Appeal** – Where a Decision to Deport is made and the time for appealing it has not expired or an appeal is pending, reg. 33 EEA Regulations 2016 applies, by virtue of reg 33(1). Under reg 33(2), removal directions (under the Deportation Order) may not be given unless the Secretary of State has made a certificate under reg 33(2). Under reg 33(2) a certificate may only be made by the Secretary of State if she considers removal would not violate ECHR. Though reg 33(2) does not refer to EU law, in *Hafeez* [2020] 1 WLR 1877 it was held that a certificate may only be issued if the Secretary of State is also satisfied that removal is justified as proportionate under Article 27 Directive 2004/38/EC.

Certification decisions are routinely given with the Decision to Deport and appear in the notice of that decision.

## **V Should the notice of liability to deport (the DLN) be set aside?**

### **(a) Introduction**

77. The Claimant's primary position is that the DLN stands to be set aside as a nullity and that it must follow that the steps thereafter, namely the notice of decision to deport and the deportation notice and Claimant's removal must be set aside. The submission is that this operates independently of the matters before the FTT, and that a finding in this Court to this effect will obviate the need for the Tribunal hearing. In any event, the Claimant has a concern that if the matter is simply left to the Tribunal to decide, it may give a message that the Court regarded the matters which had occurred before the decision to deport and the deportation order as satisfactory. The Court will therefore consider these submissions.

### **(b) The source of the DLN**

78. The source of the DLN is to be found in Government Guidance entitled EEA decisions on grounds of public security and public policy, version 3.0 first published on 2 February 2017. It started as follows:

“This guidance document sets out how decisions should be made under the Immigration (European Economic Area) Regulations 2016 (EEA Regulations 2016) on the grounds of public policy and public security. This guidance applies to all public policy and public security decisions made on or after 1 February 2017.”

79. It stated as follows (at page 33):

“ Liability to deportation

If an EEA national or a family member of an EEA national is liable to deportation they must be notified in writing and given the opportunity to make representations, if they want to, about why they should not be deported.

When a person is informed of their liability to deportation, they must be advised of the public policy or public security reasons for their intended removal from the UK.

The liability notice must also contain a warning under section 120 of the Nationality, Immigration and Asylum Act 2002, in accordance with paragraph 2 of schedule 2 to the EEA Regulations 2016. This places a continuing obligation to raise with the Home Office any reasons why they should not be deported from the UK including any time there is a material change of circumstances, as soon as they occur. Section 96(2) of the Nationality, Immigration and Asylum Act 2002 provides for the denial of a right of appeal in certain circumstances where a matter later relied on should have been, but was not, raised in response to a section 120 notice. For guidance see rights of appeal.”

80. The reference to the warning under section 120 of the Nationality, Immigration and Asylum Act 2002 is to the following:

**120 Requirement to state additional grounds for application**

(1) Subsection (2) applies to a person (“P”) if—

(a) P has made a protection claim or a human rights claim,

(b) P has made an application to enter or remain in the United Kingdom, or

**(c) a decision to deport or remove P has been or may be taken.**

**(2) The Secretary of State or an immigration officer may serve a notice on P requiring P to provide a statement setting out—**

(a) P's reasons for wishing to enter or remain in the United Kingdom,

(b) any grounds on which P should be permitted to enter or remain in the United Kingdom, and

**(c) any grounds on which P should not be removed from or required to leave the United Kingdom.**

(emphasis added)

....”

**(c) The factual inquiry**

81. The relevant facts have been set out above. The Secretary of State relies upon the statements of Ann Knott, Christine Burdis and Ruth James. They have been summarised above. They appear to show substantial steps being taken by the Home Office officials to comply with the Secretary of State’s guidance, Managing Young Offenders (published 14 January 2016), and in particular:

- (1) The notice of liability was served by a minor trained immigration officer (Claire Woodhall), with an appropriate adult (Ruth James), and Chris Burdis (YOI). The notes of Ms James and Ms Burdis are to the effect that Ms Woodhall served the papers on the Claimant, she explained them, and he said that he understood them.
- (2) Ruth James did everything possible to get Ms Ana Mendes, the Claimant’s mother, to attend and support was offered to the Claimant work alongside Barnardo’s. The Claimant’s mother was also encouraged to help with a response to the deportation decision. However, when Ruth James tried to collect her for a pre-arranged appointment on 16 August 2018, she was not there.
- (3) On 23 August 2018, Chris Burdis and Ruth James visited the Claimant again. He confirmed that he had made some notes and Barnardo’s would be visiting him “*again either today or tomorrow to assist him with a letter to the HO ...*”.
- (4) On 20 September 2018, following service of the deportation decision, Chris Burdis and Ruth James visited the Claimant again to explain again about deportation and his removal to an immigration removal centre. It was confirmed that Barnardo’s Advocacy would visit that afternoon.

82. This is to be contrasted with the position of the Claimant in the extracts quoted above from his witness statement of 30 April 2020. From the perspective of the Claimant, he was effectively left to his own devices, despite being in detention and still a minor. His case is as follows:

- (1) Ms James says that she acted as an appropriate adult there, but the Claimant says that there was very little which he understood, and he did not receive any advice from Ms James either at the meeting or thereafter. Mr Bedford submitted that Ms James was conflicted to act as such because she had been part of the Asset Plus team, and that team had prepared an

assessment about the Claimant. This does not appear in the written grounds and so there was not an opportunity to deal with that point. If it goes anywhere, it will be relevant to whether the Claimant was afforded an adequate opportunity to make representations, to which reference is made below.

- (2) Although Ms Burdis believed on 23 August 2020 that Barnardo's was about to visit the Claimant and to assist him with his representations to the Home Office against deportation, the documents indicate that Barnardo's only opened a file on 20 September 2018 by which time the Decision to Deport and the Deportation Order had been made. Barnardo's made a referral to BIDUK about bail.
  - (3) It appears that Barnardo's are registered with the Office of the Immigration Services Commissioner ("OISC") at level 2. The summary of OISC levels states that level 2 advisers are competent to make representations to the UK Visas and Immigration division of the Home Office ("UKVI"), on illegal entry, overstayers, removal and deportation cases and applications for Secretary of State bail. Only level 3 advisers are competent to assist in relation to judicial review.
  - (4) Whether due to the explanations from the Home Office employees or assistance from Barnardo's (if there was any prior to 20 September 2018), the Claimant understood that he had an opportunity to make written representations and so he made the hand-written representations of 3 September 2018.
  - (5) The Claimant claims that he was advised by an unidentified person that he could only appeal against the deportation order when he had been deported and from abroad. If given, that was incorrect advice.
83. There is a lack of clarity about the services available to the Claimant in addition to the lack of clarity about Barnardo's involvement. There is a witness statement dated 4 November 2020 from Elena English, Deputy Head of the Foreign National Offenders team. At paragraph 4, she referred to the availability of assistance at Wetherby YOI, in particular of a resettlement practitioner. She said that "there are in-site social workers and Advocates (Barnardo's) as well as CuSP (personal officers) who can all help facilitate access to legal advisors." She also gave evidence about the availability of a legal and bail officer at HMP Forest Bank, and assistance in the induction process where they may obtain advice on legal matters: see para. 5.
84. There is still a lack of clarity about the assistance of Barnardo's, and likewise of BIDUK to whom reference was made by Barnardo's. Although long after the decision to detain an appeal notice was issued or there was an attempt to issue such a notice on 24 June 2019, it is not apparent why it was that no appeal notice was brought against the notice of deportation until June 2019. This was despite the apparent rejection of bail on 30 November 2018 because no appeal against the decision to detain had been lodged. It is not apparent why that did not trigger a

discussion at least at that stage about a possible appeal out of time. Very little is known about the triggers to an intended judicial review in April 2019 and to how Instalaw came to be instructed in June 2019. Although much of the above was after the time of the decision to detain and the detention notice, it may be informative in respect of the representation or absence of representation at and before that time.

85. Without hearing evidence, it is difficult to get a full feel for what occurred. There are differences between the Claimant's account and the account of the Home Office witnesses. There are reasons to question the account of the Claimant. He must have understood rather more than he says as evidenced by the fact that he did prepare and submit the written representations of 3 September 2020. There are points which go to his credibility over and above his offences of dishonesty. He said in his representations that he had not committed the robberies, but he pleaded guilty to them. In his letter to the FTT in his attempt to appeal on or about 24 June 2019, he said that a reason for his appeal was that "English is my second language", whereas in his statement of 5 October 2020 (at para. 16), he said that he did not remember much Portuguese.
86. On the other hand, it may be said that a person of his age and his limited education was unlikely to understand the matters which were explained. They were far from straightforward. The interaction of the notice of liability to deport, a decision to deport, the deportation order and the certification are significantly complex. So too were the concepts of judicial review, an appeal against deportation, immigration detention and bail.
87. These are matters which raise a factual inquiry of the kind which is more suited to the FTT hearing evidence than to a judicial review such as the instant one on papers only.

**(d) Was the DLN defective without more?**

88. Are there nonetheless points which provide an unanswerable case in favour of the Claimant regarding the DLN and are such as support the submission on behalf of the Claimant that they render the DLN a nullity and have a knock-on effect on the decision to deport and the deportation order?

**(e) Was the DLN in effect a notice of deportation?**

89. It was submitted orally on behalf of the Claimant that the DLN was in substance very similar to a notice of deportation. Similarities were pointed out between the notice of deportation and DLN. This was said to be apparent from the nature of the words used which indicated that a deportation would follow. This was said particularly to be the case because the forms contained remarks like "If you do not reply, the Home Office will make a deportation order against you and you will be deported from the United Kingdom." It was also pointed out that before any representations were invited the Defendant had reviewed the case and considered deportation was "justifiable and proportionate under the EEA Regulations". The matter had been pre-judged. On the facts of this case, it was done in such a way as to provide a seamless transition from

end of custodial sentence to detention pending deportation and deportation. The timing was done similarly so that, despite the decision having been taken whilst the Claimant was still a child, the decision would purport to be on 17 September 2018, namely the Claimant's 18<sup>th</sup> birthday.

90. I reject these submissions. The notice of liability to deport refers to “the Home Office is considering whether to make a deportation decision against you”. It refers to the opportunity to say why there should not be a deportation. It refers to what would happen in the event that no information was provided: the decision would then be made on the information available. The reference in the deportation one-stop notice to the Home Office making a deportation order if there was not a reply was badly drafted. It does not bear an over literal meaning that the deportation order would be in default of representations as if like a default judgment. Properly read in the context of the totality of the documents, it means that the decision whether or not to deport would be made without any representations. The Claimant was informed by Home Office employees that he might be deported when he was eighteen (his statement of 30 April 2020 at para.6), so the Home Office employees and the Claimant understood the position. The fact that there was a planning ahead for the decision to be made does not mean that the decision was a *fait accompli*. There was a willingness to consider representations which were made. It follows that the final decision was not made until the time it was made on 17 September 2018.

**(f) Was the DLN defective because it allowed for a decision to deport prior to the Claimant becoming an adult?**

91. It was also submitted that the DLN was defective because the 20 working-day period for making representations would cease on Friday 14 September 2018<sup>6</sup>, that is three days short of the Claimant's 18<sup>th</sup> birthday, and the warning was that the decision to deport could be made at any time thereafter. However, an expulsion decision could not be taken against a Union Citizen who is a minor in view of Citizens' Free Movement Directive Article 28(3), except if the decision were based on imperative grounds of public security or in the best interests of the child. Those grounds were not alleged. In fact, there was no intention to deport before he became an adult. He was told that when he turned 18, he could be deported back to Portugal as he accepts in para. 6 of his statement of 30 April 2020 quoted above. If it had been the case that there was an intention to deport whilst the Claimant was a minor, that might be a reason to challenge the DLN. Further, if the decision to deport and/or the deportation notice had been issued whilst the Claimant was a minor, this might affect the validity of the DLN. However, in circumstances where this did not happen and was never going to happen, to the extent that it amounts to a defect in the DLN, it is not a basis for setting aside the DLN or any remedy in the circumstances of this case.

**(g) Was the DLN defective because its language led to the possibility of administrative detention against the Claimant before he was 18?**

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<sup>6</sup> It was 14 September 2018, not 13 September 2018, due to the intervening August bank holiday Monday.

92. Likewise, it was submitted that the wording in the DLN about there being reasonable grounds to suspect that he was someone who may be deported from the UK under the EEA Regulations 2016 was significant since that triggered a liability to be detained in immigration detention pending the deportation decision: see EEA Regulations 2016 para.32(1). On the facts of this case, this had and could have no practical consequence whilst the Claimant was under 18. The reason is that he was serving a sentence of detention for the robberies and he would not be eligible for release until after his 18<sup>th</sup> birthday. Further, the deportation decision was made on 17 September 2018, whilst he was still serving his sentence of detention for the robberies. Accordingly, rather like the point in the previous paragraph, this point does not give rise to practical consequence for the Claimant. In my judgment, it does not give rise to a reason to set aside the DLN or to any remedy.

**(h) Was the DLN issued in bad faith with no intention to give an opportunity to state his case?**

93. There might be cases where it could be established that the DLN was in bad faith and that there was no intention to allow the potential detainee any opportunity to state his case or there was no reason to suspect that that potential detainee was someone who may be deported lawfully from the UK. However, in my judgment, there is no arguable case to establish this in the instant case. There is no reason to believe that the Home Office officials were acting other than in good faith and seeking to comply with their duties under the Guidance. This does not form a basis to set aside the DLN or to treat it as a nullity or for any remedy.

**(i) Was the Claimant entitled to legal representation at the point of service of the DLN?**

94. The Intervener and the Claimant submit that there was a legal obligation to provide the Claimant with a legal representative because he was at the time of the liability to deport a child parted from his family due to his being in detention facing the possibility of a decision to deport. This is said to be based not on any express words in the Directive but based on extracts from the United Nations Convention on the Rights of the Child (“UNCRC”) and the EU Charter of Fundamental Rights (“the Charter”). There is nothing identified in the Charter or the UNCRC to the extent that they have application directly or indirectly which provides a right to legal representation at the stage of provision of notice of the DLN, and no authority has been provided to that effect. To the extent that they provide protection to children, it does not follow that they provide for an obligation to provide legal representation to a child or to the Claimant on service of the DLN. Thus, the suggestion that this gives rise to invalidity of the DLN is unsustainable.

95. Art. 24 of the Charter provides that children shall have the right to such protection and care as is necessary for their wellbeing, and that their best interests must be a primary

consideration. Art. 9 of the UNCRC provides that a child like the Claimant, who is detained apart from his parents, is a ‘separated’ child within the meaning of the UNCRC. Art. 9 addresses the situation of a child “*separated from his parents against their will*” (art. 9(1)) including “*Where such separation results from any action initiated by a State Party, such as the detention, imprisonment . . . deportation . . . or one of both parents or of the child...*”. It also relies on the UN Committee on the Rights of the Child’s General Comment No. 6 on *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* (2005) which stated “*In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.*”

96. The Secretary of State submits that the UNCRC is an unincorporated treaty which is not justiciable in the UK Courts: *see the majority judgments in R (SG) & others v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 at [82], [90]-[91]; [114(i)]-[115]; [134]. Nor does it have direct effect in EU law: the EU is not a party to it, even if the relevant principles of the Charter may have been inspired by it and the CJEU draws inspiration from international instruments for the protection of Human Rights on which Member States have collaborated or are signatories: *see Parliament v Council* Case C-540/03, esp. at para. 35. However, it is a matter of UK law as a result of section 55 of the Borders, Citizenship and Immigration Act 2009 that in relation to various matters including immigration, the Secretary of State must make arrangements for ensuring that those functions are discharged having regard to the need to safeguard and promote the welfare of children in the United Kingdom. This applies to how children are looked after while decisions about deportation or removal are made and to the decisions themselves: *see an acknowledgment of this point by Counsel for the Home Secretary and Baroness Hale’s observation in respect of the same in ZH(Tanzania) v Home Secretary* [2011] 2 AC 166 at [24-25]. Baroness Hale there said that the jurisprudence in Strasbourg expected national authorities to apply article 3.1 of UNCRC to treat the best interests of the child as a “primary” consideration, but not the primary consideration, still less the paramount consideration.
97. As to Art. 9 UNCRC, while he was a minor, the Claimant was separated from his family only by reason of his own criminality. When he turned 18, he was detained under a criminal sentence. Further, the Secretary of State did keep his family informed. As to General Comment No. 6 (treatment of unaccompanied and separated children outside their company of origin), relied on by both the Claimant and the Intervener, the Claimant has not been involved in asylum procedures, and any proceedings have taken place when he is an adult. Art. 12(2) of UNCRC provides simply that a child shall be provided the opportunity to be heard in judicial or administrative proceedings: this does not support the submission that a child is required to be given free legal representation, and by the time the proceedings took place, he was an adult in any event. Contrary to the Claimant’s skeleton argument, Articles 18 (assistance to parents) and 20 (care for a child removed from his parents) of UNCRC have nothing to do with, and provide no support for, a proposition that free legal representation should be provided.



98. None of the matters relied on by the Claimant and the Intervener provide for a right to legal representation at the notification stage e.g. Articles 24 and 47 of the Charter, Art. 9 or 12(2) of the UNCRC or UN committee on the Rights of the Child's General Comment No. 6. A right of a child to be heard in judicial or administrative proceedings does not lead to a right of legal representation upon receipt of the DLN. Nor do general protections of children have this effect either by themselves or as an aid to construction of an EU Directive or the like.
99. Thus, the failure to provide free legal representation at the time of service of the DLN is not a ground for quashing the DLN or for feeding the cascade effect argument that the DLN was thereby a nullity so that the same applied to the subsequent decision to deport or the deportation notice.

**(j) The opportunity to make representations, the DLN and the decision to deport**

100. As regards the opportunity to make representations, the purpose of the DLN is so that representations can be made prior to the making of a decision to deport and a deportation order. In particular, the potential deportee can comment on the reasons for considering liability to deportation contained in the DLN. Further, matters can be advanced as regards the considerations which the Secretary of State is to take into account such as how long the individual has resided in the country, age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of links with the country of origin. These are matters to be taken into account prior to taking an expulsion/deportation decision: see Article 28(1) of the Citizens' Free Movement Directive. In this way, the Secretary of State may be more informed before making the decision to deport or not to deport. These are matters to be considered in order to take into account the above-mentioned considerations before taking an expulsion decision.
101. As the Secretary of State recognises, the failure to provide a proper and adequate opportunity to make representations may affect the validity of the notice of the decision to deport or the deportation decision (albeit that on the facts of this case, it is submitted on her behalf that it has no effect at all). It is also accepted on behalf of the Secretary of State that the complaint of the Claimant not being a full and proper opportunity to make representations, and what if any consequences arise from this as regards the validity or otherwise of the decision to deport and the deportation notice, can be explored before the FTT. If the complaint is established on the facts, then the remedy needs to be considered. In the first place, the question is what effect it has on the decision to deport which is before the FTT. This can only be assessed in the light of the full facts. If there has been a failure to give an opportunity to state representations, this gives rise to potential arguments about procedural unfairness and/or a breach of his rights under the Citizens' Free Movement Directive. This will be explored in the paragraphs which now follow.
102. The matters which the Claimant can rely upon are first procedural fairness. The Guidance indicates that if there is a liability to deportation, the potential deportee "must be notified in writing and given the opportunity to make representations, if they want to, about why they should not be deported." Mr Bedford submitted that as a matter of procedural fairness, this ought to be complied with. He also referred to a

Tameside duty about making reasonable enquiries. I understood his submission to be that the opportunity to make representations arises where the decision maker was minded to make a decision based on reprehensible conduct of another because procedural fairness required that the other person be given the opportunity to respond. Mr Bedford drew the attention of the Court to the case of *R (Citizens UK) v Home Secretary* [2018] 1 WLR 123 in which Singh LJ brought the principles together as follows:

“[80] The decision of the Supreme Court in *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115 is important in this context for three reasons.

[81] First, the Supreme Court confirmed the proposition that the test for whether there has been procedural fairness or not is an objective question for the court to decide for itself. The court's function is "not merely to review the reasonableness of the decision-maker's judgment of what fairness required": see para. 65 (Lord Reed JSC).

[82] The second is the underlying rationales for why fairness is important. They include that "one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested": see para. 67. However there are other interests at stake as well. Another important rationale is the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. Lord Reed expressed this point in this way:

"... Justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken." See para. 68.

[83] The third matter is that fairness is conducive to the rule of law. As Lord Reed put it at para. 71: "the second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions ..."

[84] That link, between procedural fairness (including for this purpose the giving of reasons) and maintenance of the rule of law was also made recently by the Supreme Court in *R (CPRE Kent) v Dover District Council* [2017] UKSC 79; [2018] 1 WLR 108, at para. 54, where Lord Carnwath JSC said:

"... Although planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law. *Doody* itself involves such an application of the common law principle of 'fairness' in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by the courts. Fairness provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision."

103. In *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647 the Court of Appeal referred back to the case of *Citizens UK* and said at [60] that "unless the circumstances of a particular case make this impracticable, the ability to make representations only after a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness. The rationale for this proposition lies in the underlying reasons for having procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected, who will know that they have had the opportunity to influence a decision before it is made. Another rationale is no doubt that, if a decision has already been made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come."
104. In my judgment, there is a question as regards procedural fairness as to whether and to what extent an opportunity has been afforded to the Claimant to make representations. It remains to ascertain the primary facts as to whether the Secretary of State has been able to prove that a proper opportunity was so afforded to the Claimant both as a matter of fact and as a matter of law. It is relevant that he was still a minor until the day of the day of the decision to deport, albeit about to be 18 years old. A part of it, according to Mr Bedford, is to consider whether the Claimant as a child would, if he had been afforded a full opportunity to state his case, have called for his file and the AssetPlus report or for other evidence such as from his mother and stepfather or for evidence as to what would await him in Portugal or on his ability to defend himself from abroad.
105. It is also submitted by the Claimant and the Intervener that the Citizens' Free Movement Directive applies here. The submission is made that not only the Home Office Guidance, but also the Directive Articles 27.2 and 28, require the Secretary of State to elicit informed representations from a person before making an expulsion decision. They submit that those articles preclude the Secretary of State from taking an expulsion decision other than on particular grounds, "based exclusively on the personal conduct of the individual" (Article 27.2) and require that, "before taking an expulsion decision, the [Secretary of State] shall take account of considerations' referred to above from Article 28.1." They submit that inherent in those requirements that, before an expulsion decision may be taken, the authorities must provide a reasonable opportunity to respond.

106. A part of their argument is that the term “measures” in Article 27.2 is broad enough to refer to the DLN. Mr Bedford for the Claimant submitted that the DLN was a measure or decision because the scope of the word “measure” is apt to include a step in the full deportation process. He relied on the case of *R v Bouchereau* (Case 30/77) [1978] QB 732, recently cited at length by Foster J in the case of *Hafeez* at paras. 65-69. The Court in *Bouchereau* decided 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. A measure was taken to mean any action which affects the rights within the field of the application of article 48 freely to enter and reside in the member states. *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.
107. The ECJ said this in *Bouchereau* concerning the methodology for construing the scope of the word "measures" in a forerunner to the Citizens' Directive:
- “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.”
108. Mr Bedford for the Claimant points to the Home Office guidance that the DLN was necessary to arrive at a decision to make a deportation order: it was a step on the way to a deportation order. Mr Cox for the Intervener relies upon the fact that the DLN contained the same language as EEA Regulations 2016 regulation 32(1) that “there are reasonable grounds for suspecting that a person is someone who may be removed from the United Kingdom under regulation 23(6)(b)”, itself a trigger to the Secretary of State having authority to detain the person pending a decision to remove that

person. He also pointed to the statement that a decision would be made if there was a failure to respond. He said that these features made it into a measure.

109. Mr Blundell QC for the Secretary of State submits that the notice requirements in the Directive relate to the deportation decision. The essential procedural safeguards are that there must be written notice of the decision, written notice of the right of appeal, and a redress procedure which examines the facts and circumstances on which that measure is based. He submits that notice of liability to deportation is not a “measure” for the purposes of the Directive: it does not itself interfere with the exercise of any rights; it simply gives a person a chance to set out their position as to why an adverse decision (which would interfere with their rights) should not be taken.
110. I accept the submission of Mr Blundell QC that the service of a DLN in this case was not a “measure” for the purpose of EU law, nor was it a decision. It simply gives a person a chance to set out their position as to why an adverse decision should not be taken. According to domestic law, it gives the potential deportee an opportunity to make representations in advance of the decision whether to deport. This does not make it a “measure” in the sense of being a necessary step in the process of arriving at any decision to make a deportation. Contrast here with the “measure” in *Bouchereau* (the decision of a Crown Court to deport an EEA national) or in *Hafeez* (a certification precluding the EEA national from remaining in the country pending the in-time appeal). It is nothing like the measures in *Bouchereau* and in *Hafeez*. Unlike those steps, the giving of an opportunity to state a case why there should not be a decision to deport is not an integral part of the decision to deport. In no sense does it interfere with the exercise of any rights of the Claimant.
111. Likewise, the fact that by the DLN, the Secretary of State is saying that there is reason to suspect that the Claimant may be someone who may be deported from the UK does not make the DLN a part and parcel of a decision to have immigration detention. There might not be such a decision prior to the deportation notice. Further, in this case, there would not be such a decision if the decision to deport were made, as occurred in this case, prior to the end of the sentence of detention for the robberies. The relevant decision here is the decision to have immigration detention and not the happening of an event which could make it possible. I reject the submission of the Claimant that the DLN ought to have warned the Claimant as a child that he was expected to give reasons why he should not be removed in advance of any appeal against deportation and/or that, following certification, his remedy would be by judicial review. This did not invalidate the DLN itself which was simply a notification that the Secretary of State was considering making a decision to deport, and its purpose was to elicit representations. If such notices were required at all, this was at the stage of the decision to deport. In the statutory appeal, there may be considered what opportunity ought to have been afforded to him as a child in advance of the notice of the decision to deport, and further the adequacy or otherwise of the notices given on 17 September 2018. This may form a part of the statutory appeal.
112. I conclude from the foregoing that there is no case that the DLN is liable to be set aside. Indeed, the information is that the DLN was properly given in accordance with the Guidance, and the points about a deportation and/or administrative detention prior to the 18<sup>th</sup> birthday did not occur and were never going to occur in this case. In my judgment, there is no arguable case that the DLN was a nullity and/or that this

cascades down to the later stages. None of the arguments advanced are such as to render the DLN a nullity.

113. The Court was addressed as regards the issue of whether a DLN which was invalidly obtained was a nullity and void ab initio. The Secretary of State in particular relied upon the case of *R(Guled) v Secretary of State for the Home Department* [2019] EWCA Civ 92 where some of the principal authorities were discussed. It was submitted by reference to that case that the term nullity is sometimes not of assistance, and that in this context it “should be treated as relative and not absolute”: see para. 44. It is not necessary in this judgment to consider this line of authorities. The Court has considered that the DLN was not invalid and so it cannot have a cascade effect.
114. The case for consideration is whether the opportunity afforded to the Claimant to make representations prior to service of the notice of intention to deport and/or the deportation notice was adequate, and if and to the extent that it was not adequate, what were the consequences. That part of the enquiry may include what happened at the meeting on 16 August 2018 and the communication with the Claimant thereafter and up to the time of the decision to deport. It will include the matters relating to Barnardo’s. It will include the facilities available for him in the YOI. There is also the issue as to whether in the circumstances of this case, there was an obligation to provide legal representation or what other level of assistance may have been required. As noted above, this is at least in part a question of fact. It is possible that it will include consideration of the opportunities thereafter to challenge the notices both before the time of the removal of the Claimant and thereafter: it is an area emphasised by the Secretary of State, but here too there may be factual controversy. Within that consideration, there may arise other matters raised by the Claimant including whether he was informed wrongly that he could only appeal from outside the UK and/or not advised at the time of the decision to deport of his right to claim judicial review. All of this inquiry may entail consideration of whether any inadequacies were alleviated by whatever happened to the Claimant at a later stage whether before or after his removal.
115. These contentious areas are likely to inform the FTT in respect of the appeal against the decision to deport both as regards the alleged shortcomings and the appropriate remedy. It is noted that there is therefore an overlap between the issues before the FTT and the potential ambit of a judicial review, and it is now necessary to consider this overlap and its effect on the application for judicial review.

## **VI The overlap between the judicial review claim and the FTT appeal**

116. It is important in a discussion of the issues to consider this overlap and the place where the challenge against the decision to deport ought to take place. At the point in time when the judicial review was brought on 2 July 2019, the Claimant was about to be deported and, assuming that he had filed his appeal on 24 June 2019, he was out of time by many months. The position now is different in that he has pursued his rights in the FTT by seeking to obtain an extension of time for the notice of appeal. As a

result of the decision of UTJ Martin dated 23 October 2020, he is able to pursue that appeal.

117. The appeal is against the decision to deport him. The latest iteration of the Statement of Facts and Grounds dated 12 October 2020 is that “the decision to expel and/or exclude the claimant pending appeal or rather to suspend the enforcement of the deportation order pending his tribunal appeal is a decision for the High Court alone to be taken with reference to his defence to deportation, including but not limited to the prospect of his appeal.” It is said that the decision to deport the Claimant to exclude him pending appeal as well as the order for the Claimant’s deportation were unlawful because they were founded on the DLN which was unlawful, taken without regard for the fact that he was an unrepresented minor at the time when his response was sought: see paras. 47 and 49.
118. The Secretary of State submits that a reason for dismissing the claim for judicial review is that the core of the case is the challenge to decision to deport. The Secretary of State submits in the skeleton argument (at para. 13.1) as follows:
- “The Claimant has a right of appeal to the First-tier Tribunal (“FTT”) – and thus an alternative remedy - against that decision, which he has exercised, albeit very late. This is the proper forum for determination of the legality of the substantive decision to deport the Claimant. If he wishes to argue that there was a breach of EU law by reason of failures at the notification stage, he can advance those arguments in the FTT. The Claimant is a serious offender, and it is obviously right that the legality of the substantive deportation decision is resolved through the appropriate statutory appeal mechanism...”
119. The submission was made by Mr Blundell QC that judicial review is an instrument of last resort and that where the Claimant now has set up the hearing of his appeal out of time, the judicial review should be set aside due to the availability of an alternative remedy.
120. The Claimant says that in the circumstances of this case, it is inappropriate to await the decision of the FTT in that

(1) The ambit of judicial review is more extensive in that it enables the Claimant to challenge the DLN which should not have been issued, and upon this being set aside, there should also fall the next steps. Similarly, subject to allowing an amendment, judicial review provides remedies in respect of the subsequent unlawful detention and removal. Further, judicial review is required in respect of applications for injunctions such as the application for the interim mandatory injunction, and there may be more such applications in the future.

(2) The case in judicial review is so compelling that it works effectively without the need for the hearing before the FTT: the effect of the unlawful nature of

the DLN or the failure to provide legal representation at that stage or with the representations was to invalidate the deportation process. The Court should therefore examine and strike it down at this stage.

- (3) Whilst dealing with these matters, the Court ought to be able to rule on the decision to deport e.g. by saying that due to the DLN being a nullity that the consequence was that the decision to deport was also a nullity or otherwise unlawful.
- (4) Fairness is required at every decision-making stage: see *Citizens UK* above at [94]. At para. 9 of the skeleton argument for the Claimant, it is submitted:

“If the claimant succeeds in his primary case and the deportation order is set aside, he will be free to return to the UK and to continue his residence as before without having to pursue the tribunal appeal.”

121. I have come to the following conclusions in respect of these arguments.

- (1) The FTT is better suited than this Court to consider the matters relating to the decision to deport. The reasons for this are that “an appeal before a tribunal is a preferable procedure in this context to judicial review...the tool of judicial review has proved to be flexible, capable of being shaped to different levels of intensity and intrusive inquiry, depending on the matter in hand. However, the hearing of an appeal before the tribunal is a probably somewhat better as procedure for an intense review of the facts...”. These remarks of Irwin LJ in *Khan v Secretary of State for the Home Department* [2018] 1 WLR 125 at para. 46 were made in the context of a refusal to grant a residence card to a person claiming to be an extended family member. This recognises that which was submitted by Mr Cox on behalf of the Intervener that “factual review is routinely conducted by the FTT and only rarely through judicial review”: see para. 49 of the skeleton argument for the Intervener. The FTT judges are specialists in the area building up what Lord Toulson described as a “body of knowledge” in the case of *R (TN Afghanistan) v Secretary of State for the Home Department* [2015] 1 WLR 3083 at para. 38. They are therefore particularly suited to the factual inquiry in question, very frequently seeing witnesses and having them cross-examined.
- (2) In this case, there are issues of fact in connection with the advice given to the Claimant at the time of service of the DLN, the opportunity to make representations why the Claimant should not be deported and whether in all the circumstances the decision to deport was unjustified or illegal.
- (3) In the instant case, the Secretary of State concedes as above that the failures, if any, at the earlier stage (the alleged procedural unfairness and/or a breach of the Citizens’ Directive at the representations stage and any allegations relating to the notices given on 17 September 2018 and the impact on the process of what occurred in connection with the decision to



deport and the deportation order and CD1) can be advanced in the FTT as set out in the above quoted para. 13.1 of the skeleton argument.

- (4) I take into account the understandable concerns about the delay in this matter, and the importance of having a final resolution of the position of the Claimant. Apparently, the decision to stay the FTT proceedings pending this hearing was taken by the Tribunal of its own motion. Whilst it is for the Tribunal to make its own directions, if it were to decide to have an expedited disposal of this matter, that would be entirely appropriate and justified. The Tribunal will have in mind the concerns of Hickinbottom LJ in the instant case at para. 41 encouraging the FTT to proceed to determine the appeal before it with all expedition, and to the related concern of Underhill LJ at para. 43 as quoted above. Despite this, in my judgment, it is not appropriate for this Court to determine the matter which the Claimant has properly and understandably brought before the Tribunal.
- (5) For reasons above set out, no possible effective challenge against the DLN itself has been identified. There is no evidence that it was issued in bad faith. The fact that in a different case, it could have been used as a basis to deport a few days prior to the Claimant's 18<sup>th</sup> birthday or to give rise to administrative detention does not affect its validity when neither of these events were going to arise or did arise.
- (6) The focus in this case is the decision to deport and as part of that the allegation that there had not been an adequate opportunity afforded to the Claimant to make full and informed representations in advance of the decision to detain. Although the statutory appeal may be more confined, in practice, it is likely to extend to matters beyond the decision to deport itself, and to include the European law challenge and the challenge of common law procedural unfairness, in respect of the alleged failure to extend an adequate opportunity to make representations against a decision to deport. It is likely that given that the statutory appeal is to consider whether the decision to detain can stand, that it will also be considering matters subsequent to the decision to detain as above set out. This in turn may inform as regards the subsequent challenges relating to subsequent detention and removal.
- (7) To the extent that they are not so considered, they will be capable of being considered in this judicial review, but they are best considered only after the FTT hearing and judgment. That may obviate the need for further consideration whether the FTT finds substantially for the Claimant or for the Secretary of State. If and to the extent that this is not the case, the findings of the FTT will inform as to the future, if any, of the judicial review.

122. Further, I accept the submission made on behalf of the Secretary of State that the proper forum for determination of the legality of the substantive decision to deport the Claimant is the FTT. The scope of that enquiry may be greater than the judicial review as the FTT considers factually and legally whether there were grounds to deport the Claimant. For the reasons set out above, any shortcoming in the

opportunity to address the decision to deport may come within the scope of the inquiry of the FTT. It remains to be seen to what extent the FTT will be able to take these all into account. If they take them all into account, then there may be nothing or little more that remains to be considered in this regard in the judicial review. Even to the extent that it does not, at that point, and with the benefit of the findings of the statutory appeal, there will be an opportunity to restore the judicial review and for this Court to consider a focused judicial review with the benefit of the finding of the statutory appeal.

## **VII Events after the decision to deport/deportation notice**

123. The following matters have to be considered, namely

- (1) The certification;
- (2) The Claimant's removal;
- (3) Damages for wrongful detention

### **(1) The certification**

124. As noted above, it was accepted before the Court of Appeal that the certification should have taken into account proportionality of interference with EU law rights. It therefore followed that the certification had to be set aside. The Secretary of State has caused to be issued a further certificate, but a long time after the removal had taken place. It is submitted on behalf of the Secretary of State that the matter can be corrected by a subsequent certificate taking into account proportionality. The Claimant says that no second certificate can alter the fact that the deportation wrongly took place on the basis of a defective certificate.
125. The intended consideration of re-certification was mentioned to the Court of Appeal. The Court of Appeal in this case recognised that the Secretary of State would be considering re-certification. This was mentioned at paras. 36 and 41 of the judgment of the Court of Appeal in the instant case. Indeed, at para. 36, Hickinbottom LJ did not wish to usurp the certifying function of the Secretary of State which she was in the process of (re-)exercising in the case of the Claimant. At para. 41, he referred to the Secretary of State deciding whether or not she wished to (re-)certify. There was no criticism about this process. On the contrary, it appears to be treated as the corollary of the unlawful first certificate that the Secretary of State should carry out the proportionality exercise, and if the removal pending the appeal was considered proportionate, to certify accordingly. If there was no re-certification, that might be fatal to the case of the Secretary of State: on the other hand, if there was re-certification, the FTT could still decide whether or not the decision to deport was proportionate: see Article 27(2).
126. There is an issue between the parties as to whether the original certification was material because the removal did not occur in the face of an appeal brought in time, and the Secretary of State says that in those circumstances, regulation 33 of the EEA Regulations 2016 does not apply: see especially regulation 33(1). Since the removal,

there has been re-certification. The Secretary of State says that as a matter of construction of regulation 33, it does not apply where no appeal has been brought within time (unless permission has been given out of time). The Claimant says that this is wrong as a matter of statutory construction. Even if the Claimant were right, the key point here is as to whether the decision to deport complied with proportionality (see Article 27(2)). If it did not, notwithstanding the re-certification, then the FTT will be able to make a determination to that effect. If it did comply with proportionality, then there is no obvious reason why the non-compliance of the first certificate due to failure to deal with proportionality should lead to the decision to deport and all subsequent steps being quashed for that reason. This all underlines the sense in the FTT deciding matters at this stage, and the question of whether there is still any further scope for judicial review being stayed until after the decision of the FTT.

## **(2) The Claimant's removal**

127. As the skeleton on behalf of the Secretary of State notes, the judicial review is about the removal of the Claimant. There are various features here. However, it is to be noted that in the event that the challenge in the FTT is successful as regards the decision to deport, this may impact directly on the removal of the Claimant. If, on the other hand, the decision to detain was lawful, then it may be that the judicial review will either fall away or be far more limited. Further and in any event, although there may be concerns about the period of detention until the deportation, there are real questions as to why the Claimant as an adult did not take steps himself to bring matters to a head earlier by an appeal and/or a judicial review before 24 June 2019. If there are issues relating to the removal, it is important to have the statutory appeal first, which is likely to affect the scope of any issue relating to the removal whether the statutory appeal is resolved in favour of or against the Claimant.

## **(3) Damages for detention and/or removal**

128. This will be considered further in relation to the application to amend the claim form. For the moment, it suffices to say that before arriving at a consideration of this area, and whether or not it is capable of giving right to damages, the decision of the FTT is likely to inform. For example, if the statutory appeal were to fail in the sense that the decision to detain was upheld, that would at least inform (although not necessarily determine) whether the subsequent detention and/or removal were lawful.
129. These subsequent matters, although not determined by the FTT, are better considered after the determination of the statutory appeal.

## **VIII Mandatory injunction pending the statutory appeal requiring return/facilitation of return of the Claimant to the UK**

130. The question arises as to whether the Court should at this stage make a mandatory order requiring the Defendant to return the Claimant to the UK pending the appeal against his deportation. In *R (Nixon) v SSHS* [2018] EWCA Civ 3, [2018] HRLR 7, having reviewed relevant authorities (particularly *R (CM (Jamaica)) v Secretary of State for the Home Department* [2010] EWCA Civ 160 and *R (YZ (China)) v Secretary of State for the Home Department* [2012] EWCA Civ 1022, as read in the light of *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42; [2017] 1 WLR 2380), Hickinbottom LJ set out various propositions that could be derived from them at para. 75. In short, the Court has a wide discretion as to whether to order return. There is no presumption in favour of return. The relevant factors, which are fact-sensitive, include the following.
131. If a person has been unlawfully deprived of a statutory right to an in-country appeal, that is the starting point and a factor telling in favour of ordering return. At para. 75(iii), Hickinbottom LJ said “Where an individual is deported on the basis of an unlawful certificate, the court has a discretion as to whether to make a mandatory order against the Secretary of State to return him to the UK so that he can (amongst other things) conduct his appeal in-country. That discretion is wide, and there is no presumption in favour of return, even where certification is unlawful. The exercise of the discretion will be fact-sensitive. However, when assessing whether it is just and appropriate to make a mandatory order for return of a deportee, the fact that that person has been unlawfully deprived of an in-country appeal to which he is entitled under statute is the starting point and a factor telling strongly in favour of ordering his return.”
132. It will be highly material if the deportation order was not bad on its face, or the subject of any appeal, or if an application for a stay on removal had been refused. At para 75(iv), Hickinbottom LJ said:
- “It will be a highly material consideration if the deportation was lawful or apparently lawful, in the sense that, even if a human rights claim that a deportation order should not be made or maintained has been unlawfully certified, the individual was deported on the basis of a deportation order that was not bad on its face and was not, at the relevant time, the subject of any appeal; and/or an application for a stay on removal had been refused or the court had directed that any further proceedings should not act as a bar to removal. On the other hand, it will also be material if the individual has been removed in the face of a stay on removal, or even if there is an active relevant appeal or judicial review in which the issue of a stay on removal has not been tested.”
133. The extent to which the individual’s appeal will be adversely affected is also highly relevant. If the court assesses that the deportee could effectively pursue his appeal

from abroad, that is a factor of great weight, and often determinative in favour of not exercising the discretion. Hickinbottom LJ said the following at para. 75(v):

“The extent to which the individual's appeal will be adversely affected if he is not returned to the UK will also be highly relevant. It will be adversely affected if it is assessed that, if he is restricted to bringing or maintaining an out-of-country appeal, that will be inadequate to protect the article 8 rights of the individual and his relevant family members. The continuing absence of the individual from the UK may adversely affect his ability to present his appeal properly in a variety of ways, for example he may be unable properly to instruct legal representatives; he may be unable to obtain effective professional expert evidence; he may be unable to give evidence, either effectively or at all. If the court assesses that, even if the exercise would be more difficult than pursuing his appeal in the UK, the deportee could effectively pursue his appeal from abroad, that is likely to be finding of great weight and will often be determinative in favour of exercising the court's discretion not to make a mandatory order for return. On the other hand, if the court assesses that he could not effectively pursue an appeal from abroad, then that may well be determinative in favour of exercising that discretion in favour of making a mandatory order for return.”

134. It may be a factor of some importance if there is ongoing interference with the individual's Article 8 rights, or if his appeal against deportation would be undermined on a continuing basis. At para. 75(vi), Hickinbottom LJ said the following:

“In addition to these procedural matters, the deportee's continuing absence from the UK may be a breach of article 8 in the sense that he is deprived from being with his family, and they from being with him, pending the outcome of the appeal. Generally, such a breach will not be irremediable. However, in addition to that being a potential substantive breach of article 8, it may result in his article 8 claim in the deportation case being undermined on a continuing basis, which may be a factor of some importance. These matters too may be relevant to the assessment of whether to make a mandatory order for the deportee's return.”

135. There is also a public interest in public money not being spent on arranging for a deportee to return when his appeal could be conducted fairly from abroad. That was referred to by Hickinbottom LJ at para. 75(vii):

“There is a public interest in deporting foreign criminals –in not returning foreign criminals who have been deported – although that may be a point of little weight where the relevant individual would have had the right to remain in the UK during

the course of his appeal but for an (unlawful) certificate. There is also a public interest in public money not being expended on arranging for returning a deportee to this country to conduct an appeal which could adequately and fairly be conducted from abroad.”

136. Each of these factors will now be considered:

- (1) This is not a case where the certificate, despite not considering proportionality, was used to prevent an in-time appeal from preventing the deportation of the Claimant. This is because there was not an in-time appeal. There is an issue between the parties as discussed above as to whether the provisions of Regulation 33 in respect of certificates applied where there had not been an in-time appeal. Nevertheless, despite this, it will be assumed for this purpose that this case is or is akin to a case of a deportation as a result of an unlawful certificate. The certificate was created for this purpose. Without making any findings of fact, I shall in favour of the Claimant act as if the Claimant has been deprived of a right to an in-country appeal, which is a telling factor in favour of a mandatory injunction: per Hickinbottom LJ in *Nixon* at para. 75(iii). Nevertheless, I take into account the fact that “the discretion is wide, and there is no presumption in favour of return, even where certification is unlawful.”
- (2) This is a case where the deportation was not bad on its face or in defiance of an order of a stay. On the contrary, it took place after an order of Lang J that there were no arguable grounds for judicial review. This is the feature of Hickinbottom LJ at para. 75(iv) in *Nixon*: for this point, the fact that subsequently the Court held that the certificate was unlawful due to the failure to assess proportionality does not render the deportation bad on its face or in defiance of an order of a stay or the like.
- (3) This is not a case where the absence of the Claimant from the UK will adversely affect the ability of the Claimant to conduct his appeal. There is an argument that it might be better for him to be in the UK: there is an argument that if he were to mix with his criminal associates it would be worse for him. Either way, this factor does not significantly affect his ability to pursue the appeal. The Court bears in mind the following:
  - (i) it is evident from his witness statements that the Claimant has been able to give instructions from Portugal.
  - (ii) he is able to communicate with his legal representatives by modern means. As the Court of Appeal has recently emphasised in *R (FB & Medical Justice) v Secretary of State for the Home Department* [2020] EWCA Civ 1338, matters have moved on considerably since the Supreme Court’s decision in *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42; [2017] 1 WLR 2380. As Burnett LCJ stated at [198], “*from the point of view of a litigant, whether discussing a case with legal representatives,*

*attending a hearing or giving evidence all that is required is video enabled device attached to the internet, with widely available commercial software installed in it. The position in courts and tribunals is entirely different from how it was even three or four years ago.”*

(iii) he is able to apply to attend a hearing of the appeal when he knows the date of the hearing in order to present the case.

(4) This is not a case where the Claimant’s continuing absence from the UK may be a breach of article 8 in the sense that he is deprived from being with his family. It is not engaged because he is an adult, and even when he was a child, he had long periods of unexplained absences from his family: the family had a lack of influence over him as reflected in his escalating serious criminal behaviour. Further, the Claimant’s criminal conduct was such that his social life was with people who were a bad influence on him. His attempts to obtain education were frustrated at least in part by his regular absences from college. The AssetPlus Personal Family and Social Factors Report records: “... Yuri was attending Oldham College - he was doing a pathway to progression course with a plan to do motor vehicle. College informed me (Trish Bennett (programme leader) that Yuri presented as being disruptive, argumentative, and had a generally poor attitude towards staff ... His attendance on the course was not positive achieving only 38% prior to Xmas and 20% of attendance post Xmas ...”.

(5) If the Claimant were returned, it would follow from the assessments of risk that the Secretary of State would determine, as had been done in para. 51 of CD2 that “given the nature of your offending and the assessment of your risk of harm and re-offending, it is considered that you pose a real threat to the public. It is considered that this risk would remain if you were to be returned to the UK and released on bail”.

(6) If that were maintained, the Secretary of State would seek to detain the Claimant under her immigration powers pending a decision as to whether to lift the order for his deportation (which would be subject to challenge with a further application for bail, for example, based on the time since his last offence). This too would arguably cause injustice to have to maintain the Claimant in prison over a period of time both due to the cost involved and the danger that he posed in prison by reference to his conduct whilst previously detained.

137. Since *Hafeez* and the instant case in the Court of Appeal, there stands to be put into the balance not just the possible deprivation of article 8 rights, but the possibility that it will be disproportionate for the Claimant to be out of the country pending the appeal. The detailed analysis in the CD2 leads to a conclusion that on the information before the Court, proportionality requires the removal to be maintained at this stage. On the one hand, the Claimant is able to point to his evidence as to his difficulties in Portugal being away from the UK where he has lived for a number of years. His evidence is that he feels that he is a burden on his grandmother, he says that he has

difficulty with language, he is unable to work, he has no social assistance, and he wants his independence. He feels that there are more opportunities for him in the UK. As Underhill LJ stated in the Court of Appeal, there is concern about the length of the period of his living in Portugal if he is going to be allowed back in the UK after the decision of the FTT or the judicial review.

138. However, the proportionality exercise, as set out in the CD2, involves consideration of the following. If the Claimant were to be at liberty, there is according to the assessments which have been done a high risk of reoffending and of committing serious crimes with a high risk of serious harm to the public. This is based not only on the serious and escalating convictions, but also the conduct of the Claimant in detention, the company with which he has associated, the lack of control of the members of his family, the failure to face up to his own criminality and his protracted absences from family and college. All of this is not simply an assertion but is based on reasoned analysis in CD2 as summarised in some detail above.
139. There is no detailed attempt at this stage of the Claimant to refute the matters set out in CD2. It is right to say that there is scope for some caution about the fact that the CD2 was an ex post facto certification, and therefore might be considered with some care. Nevertheless, as set out above, the Court of Appeal made no adverse comment about the intended re-certification. Further, there is scope for concern that there are matters referred to in CD2 which were not considered in CD1 including behaviour in prison. If it had been of concern, it is suggested that the behaviour would have been recorded in CD1. These are matters of comment which can be made in the FTT. They do not invalidate the comments because ultimately the consideration of whether there were grounds of public policy or public security are objective matters to be considered by the FTT. As regards the behaviour in question, it was all documented at the time. The Claimant could have sought to answer the same before this Court, and he has not done so: he will be able to answer the same before the FTT.
140. In these circumstances, the relevant matters in *Nixon* lead clearly in my judgment to a decision that there should not be a mandatory injunction pending the decision of the FTT on the appeal. On the contrary, each of the above matters cited from *Nixon* and the proportionality exercise indicate heavily against the order of interim mandatory injunction.
141. It is suggested on behalf of the Claimant that the *Nixon* factors must yield to the fact that in the case of the Claimant as an EU national, there should have yielded a presumption in favour of his being able to remain in the UK as part of freedom of movement within the UK. There is no law which makes out this presumption. The Claimant said in final closing written submissions that “as an EU citizen is subject to EU law: *R v Bouchereau* at [30] who is invested with a fundamental right to reside in the UK.” That does not confer any presumption, albeit that there were certain protections conferred. Instead of a presumption, Article 27(1) of the Citizens’ Free Movement Directive recognises explicitly that 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 and public security: see also Regulation 23(6) and especially sub-paragraph (b) of the EEA Regulations 2016 referring in turn to Regulation 27. This is subject to other protections not available to non-EEA nationals such as proportionality and other protections in Chapter VI of the Citizens’ Free Movement Directive. The suggestion of the Claimant is that unlike in



the case of *Nixon* which concerned a non-EEA national, there is a presumption in favour of return in the case of an EEA national. In my judgment, that is not correct: there are other protections. However, if it were the case that a presumption in favour of return existed, in my judgment, the preponderance of factors in favour of deportation would have outweighed any such presumption.

142. I have considered a matter raised at the end of the speech in reply of the Claimant that he will “lose his right to reside in the UK” unless he returns by 31 December 2020. The context in which this arose was that at the end of speeches, the Court asked the parties whether the submissions would alter as a result of the withdrawal of the United Kingdom from the EU on 31 December 2020. The parties were agreed that it did not, but it was in this context that Mr Bedford raised his point. After reply orally, the Court gave permission to Mr Bedford to complete his reply in writing. At para. 26 of Mr Bedford’s written submissions dated 10 December 2020, he referred to the Claimant’s right ceasing on 31 December 2020 and that he “will lose the right to apply for pre-settled status unless he returns by that date whereupon he may delay his application until July next year.” This point had not been made at any earlier stage, neither in the written submissions prior to the hearing, nor in an oral submission which lasted most of the first day of the hearing. In the abbreviated way in which the point was made, it was difficult to understand the point.
143. By a note of 22 December 2020, Counsel for the Secretary of State responded in a way which refers specifically to the EU Settlement Scheme. This described the scheme reflecting the UK’s obligations under Part Two of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU and the European Atomic Energy Community (“the Withdrawal Agreement”) and equivalent agreements with the EEA, EFTA states and Switzerland. The Withdrawal Agreement is dated 19 November 2019. One way of qualifying depends upon a person being resident in the UK for a continuous qualifying period commencing before 23.00 GMT on 31 December 2020. Although that route to qualify would appear not to be available to the Claimant, the above note of 22 December 2020 identifies a different route as follows:

“3. ... by virtue of amendments to Appendix EU which are to come into force on 31 December 2020, the Claimant may be eligible to apply as the child of his mother while he is under the age of 21, or thereafter if he is dependent on her, regardless of the fact that he does not have the necessary residence at 31 December 2020: see statement of changes to the Immigration Rules dated 22 October 2020 (HC 813), and in particular para. 14A of Appendix EU as amended (joining family members) and the relevant definitions in Annex 1.

4. As things stand, the Claimant does not meet the suitability criteria in para. 15 of Appendix EU, because an application will be refused on grounds of suitability where the applicant is subject to a deportation order or a decision to make a deportation order at the date of decision. However, this does not include a deportation order or deportation decision which has been set aside or no longer has effect at the date of the decision on the application (para. 17). Therefore, if the

Claimant presses on with his appeal (as the SSHD submits he ought to) and is successful on appeal, the suitability criteria will not prevent him from obtaining leave.

5. The Claimant has a right of appeal against any refusal of leave under the EUSS.”

144. It is not said that this other route is necessarily available. It would require involvement of his mother in the application. Although his mother has been unable to provide control of the Claimant, and she did not attend the interview of 16 August 2018, she has provided some support to the Claimant’s case. She and her husband both provided evidence as above in support of his case: see the statement of Ms Ana Mendes of 8 July 2019 and of Marco Fernandes of 9 July 2019. In my judgment, even taking into account the fact that a route is closed off under the EUSS, this does not alter the fact that the strong preponderance of factors with or without this factor is against the order of a mandatory injunction. In my judgment, this would have been the case even if the other route as a son were not available to the Claimant. In all the circumstances, such is the preponderance of factors against a mandatory injunction that the possible EUSS route does not lead to the conclusion that the Court ought to make a mandatory order. In any event, the possibility of the route as a son of Ms Mendes may be available to the Claimant (albeit that my conclusion would be the same if it were not available). There may be time limits to consider if this course were available and were to be pursued.
145. There is an alternative approach to the application for a mandatory injunction which is submitted is appropriate on behalf of the Claimant. It is to consider whether there is a prima facie case in the appeal and then to apply the test in *American Cyanamid v Ethicon* [1975] AC 396. If the claim is not frivolous or vexatious but there is a serious question to be tried, then the Court should balance the risk of injustice on both sides. There is a possible problem about this submission because there is a line of authorities in public law cases that whilst it depends on the facts of each case, where a mandatory injunction is sought, the standard is usually a strong prima facie case. However, for this purpose, I shall assume that it is the American Cyanamid threshold of a prima facie case, and not any higher threshold. The nature of the interim relief is then a balance of convenience, or as Mr Bedford submits, a balance of injustice on both sides if the interim order proves to have been incorrect.
146. The question is what would cause the greater injustice. It was expressed in *Films Rover International Ltd. v. Cannon Film Sales Ltd.* [1987] 1 W.L.R. 670 by Hoffmann J. in considering an application for an interlocutory mandatory injunction implicitly acknowledged that there was a serious question to be tried. He said at p. 680:
- “The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a

party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

This approach was found of assistance by the House of Lords in *R v Secretary of State ex p. Factortame (No. 2)* [1991] 1 A.C. 603 at p. 683.

147. Applying the foregoing to the instant case, what is the injustice to the Claimant in the event that he is not permitted to return pending the decision as to the lawfulness of his deportation (save for having the opportunity to apply in due course for permission to return to make submissions before the FTT on his deportation appeal)? In my judgment, the potential injustice for the Claimant of refusing an interim injunction is very substantially outweighed by the injustice if an interim injunction is granted.
148. The injustice to the Claimant includes:
- (1) the Claimant continues to be away from his mother and siblings, which has already been a protracted period of separation of about 18 months;
  - (2) he is removed from a country in which he feels more comfortable linguistically, socially and with greater opportunities to have work and to be educated;
  - (3) it will be easier for him in the UK to prepare for the appeal and the continuation of the judicial review;
  - (4) it is hard for him in all of these respects in Portugal where he has no social assistance, feels a burden on his grandmother, is unable to work and lacks independence.
149. By contrast, the injustice of granting a mandatory injunction and permitting the return of the Claimant is as follows:
- (1) if returned and granted bail, the high risk of reoffending and the high risk of serious harm to the public. (That is still maintained in CD2 despite the contention of the Claimant that he has not offended in Portugal.)
  - (2) if in detention, the cost to the public of keeping him in detention and the risk of his being disruptive in detention as he was previously.

These are two points shortly expressed, but they are set out at some length above, and it is unnecessary to repeat the details.

150. The proportionality exercise in the CD2 is rather similar to the balance of injustice. There stands to be taken into account the refutations of the matters relied on by the Claimant including the following:
- (1) the absence of the Claimant does not represent an ongoing interference with the Article 8 rights of the Claimant to family life because he is an adult; in any event, he was often absent from the family when he lived at home and was out of control as evidenced by his chaotic lifestyle whilst in the UK;
  - (2) his cultural connections with the UK are not great when he had kept company with criminals and had an escalating pattern of committing serious criminal offences. His attention to education had been erratic bearing in mind his poor attendance record and his unexplained absences from the family home.
  - (3) for the reasons set out above, his ability to give instructions to his legal representatives would not be significantly affected by his absence in Portugal. He may apply to attend the appeal in person as noted above;
  - (4) his difficulties in Portugal must be real, but he does not appear to be reliable at least in respect of how he finds speaking and understanding Portuguese as difficult as he claims to do so. This seems improbable for the reasons set out in the CD2. Likewise, he claims to be removed from Portuguese culture, but here too this seems improbable for the reasons adverted to in the CD2.
151. Bearing in mind the matters set out above in connection with the *Nixon* analysis, and also the matters set out in CD2 especially in respect of proportionality, the overwhelming balance of injustice is against the award of a mandatory injunction. This is not to say that there might not arise a change in circumstances that might alter the balance of convenience.
152. For all these reasons, the Court rejects the application for a mandatory injunction. This does not impact on the availability of an order under regulation 41 of the EEA Regulations 2016 on an application for a temporary stay in the United Kingdom in order for the Claimant to attend the appeal to make submissions in person.

## **IX The roadmaps**

153. As noted at the start, the issues were not agreed. There now follows consideration of the respective roadmaps. There is a considerable overlap between them in substance if not in form. It has been more convenient to start with consideration of the roadmap of the Secretary of State.

**(a) Consideration of the roadmap of the Secretary of State**

154. The issues of the Secretary of State are as follows:

1. Should permission to proceed with judicial review be refused because it is highly likely that the outcome for the Claimant would not have been substantially different had the conduct complained of not occurred? (“SSHD Issue 1: The No Substantial Difference Threshold”)
  - a. If so, then this is the end of the claim
  - b. If not, then the remaining issues arise.
2. Is the Claimant’s appeal to the Tribunal an alternative remedy to quashing of the notice of liability for deportation and deportation decision / deportation order? (“SSHD Issue 2: Alternative Remedy of Statutory Appeal”)
  - a. If so, then to the extent that the Claimant has an alternative remedy, the claim fails
  - b. If not, then the remaining questions arise
3. Was there an obligation to provide legal representation at the time the Claimant was served with notice of liability to deportation, and, if so, was that obligation breached?
  - a. If there was no obligation, then this part of the challenge fails
  - b. If there is such an obligation: (a) what is the source of that obligation; and (b) what is the scope of the obligation?
  - c. Was the obligation met on the facts of the case, applying the principle set out in *Safeer*?
  - d. If there was such an obligation, and it was not met, what is the consequence? (see question 6) (“SSHD Issue 3: Was there a Legal Representation obligation?”)
4. Was the Secretary of State entitled to give the Claimant the notice of liability to deportation other than on imperative grounds of public security? (“SSHD Issue 4: Liability to deport other than on imperative grounds of public security”)
  - a. If not, what is the consequence? (see question 6)
5. Did the Secretary of State have a duty to give the Claimant notice in writing of the remedy and time limit for challenging the first certification decision? (SSHD Issue 5: Notice of remedy and time limit to challenge the first certification decision)
  - a. If yes, what is the consequence? (see question 6)

6. If the Claimant succeeds on one or more of these issues, what relief should be granted and in particular:
  - a. Should the Court order the return of the Claimant?
  - b. Should the notice of liability for deportation be quashed?
  - c. Should the deportation order be quashed?
  - d. What is the consequence of quashing of either the notice of liability for deportation or the deportation order?
  
7. Should the Claimant be given permission to amend his grounds to make a claim for unlawful detention and unlawful removal? (“SSHD Issues 7 and 8: amended claim for unlawful detention and/or removal”)
  
8. If the Claimant is given permission to amend:
  - a. is his claim for unlawful detention and/or unlawful removal well founded?
  - b. if so, is he entitled to nominal or substantial damages (if the latter, damages to be assessed at a late stage)?

### **SSHD Issue 1: The No Substantial Difference Threshold**

155. The relevant provisions are set out in Section 31 of the Senior Courts Act 1981 and are as follows:

“(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

...

(3C) When considering whether to grant leave to make an application for judicial review, the High Court—

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

(b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.”

156. There are exceptions where the matter is of exceptional public interest which have no application. The Secretary of State submits that none of the complaints of the Claimant would have made any difference in the Claimant’s case. If the Claimant had been provided with legal representation, or if the Secretary of State had waited until his 18<sup>th</sup> birthday before serving him with notice of liability to deportation, the outcome would clearly have been the same. The Claimant is a serious offender, who is regarded as being at high risk of reoffending and of causing serious harm to the public. Reliance is placed on the fact that despite all the matters advanced on behalf of the Claimant, the Secretary of State has maintained her decision that the Claimant’s case should be certified, and the Claimant has not mounted any challenge to the substance of the CD2. Thus, it is submitted that Court should refuse permission for the claim to proceed (s.31(3C) and (3D) of the Senior Courts Act 1981); or, if does, that the Court should refuse relief (s.31(2A).
157. The Claimant points to the fact that this ground does not appear in the Secretary of State’s Detailed Grounds. That affects the preparedness of the Claimant to deal with the submission, but as regards the grant of a relief, the Court is enjoined by statute not to grant relief or grant permission<sup>7</sup> in the event that it is highly likely the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. In any event, the Claimant submits that its points are good and that this Court ought to deal with the matters now, which would obviate the need for the hearing of the appeal.
158. There has been set out above the extent of the overlap between the FTT and central matters in the judicial review including the applications to set aside the decision to deport and the deportation notice. I have found that the FTT appeal should be heard first. They are matters which relate to the validity of the decision to deport and the deportation notice. They may include the question as to whether there was a failure to give a proper or adequate opportunity to the Claimant to make representations and any argument to the effect that this in some way affected the ability of the Secretary of State to make a decision to deport and to serve a deportation notice.
159. In the light of the decision of the FTT, it will then be necessary to consider what is left of the judicial review. That may be all of it if in fact for any reason the FTT does not deal with all or any of the matters before it. If the FTT allows the appeal, then that will mean that central parts of the judicial review may be unnecessary, but other parts will be necessary perhaps consequentially upon the decision of the FTT or as remaining matters still requiring consideration e.g. the decision to remove and/or damages for detention or wrongful removal and/or the failure to give a full opportunity to state representations if and to the extent that this still remains in issue.

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<sup>7</sup> The latter is where the point is taken by the Secretary of State, as it is in this case.

If the FTT does not allow the appeal, there might then arise for consideration whether there are any matters which survive for determination. If the FTT does not deal fully with the decision to deport and/or the deportation order, there may remain for consideration whether in fact judicial review still provides the appropriate route of redress.

160. In my judgment, it is too early to form a judgment about the continuing role of the judicial review at this stage or to second guess what parts of the judicial review arises for consideration pending the hearing and decision on the appeal before the FTT. Further and in any event, it is too early until after the FTT decision to consider the No Substantial Difference Threshold. In any event, it is unnecessary to consider the No Substantial Difference Threshold until deciding to grant permission or to award relief on the judicial review. It follows that the claim is not decided against the Claimant at this stage by reference to the No Substantial Difference Threshold.

### **SSHD Issue 2: Alternative Remedy of Statutory Appeal**

161. The Administrative Court Guide 2020 says the following:

“Adequate Alternative Remedy

5.3.3.1. Judicial review is often said to be a remedy of last resort (see *R (Archer) v Commissioners for Her Majesty’s Revenue and Customs* [2019] EWCA Civ 1021 at [87] – [95]). If there is another route by which the decision in issue can be challenged, which provides an adequate remedy for the claimant, that alternative remedy should generally be exhausted before applying for judicial review.

5.3.3.2. The alternative remedy may come in various forms. Examples include an internal complaints procedure or a statutory appeal.

5.3.3.3. If the Court finds that the claimant has an adequate alternative remedy, it will generally refuse permission to apply for judicial review.”

162. For the reasons above noted, there is an overlap between the FTT appeal relating to the decision to deport and the judicial review relating at least to the decision to deport and the deportation notice. It is appropriate to resolve this by dealing with the FTT appeal first. The question now is whether this should be considered as an alternative remedy such that the claim fails.
163. The Secretary of State states in paragraph 13.1 of the skeleton argument as above cited more fully that the Claimant has a right of appeal to the FTT which is “the proper forum for determination of the legality of the substantive decision to deport the



Claimant” and “it is obviously right that the legality of the substantive deportation decision is resolved through the appropriate statutory appeal mechanism.”

164. Despite the above, I shall not dismiss the application for permission at this stage, save for those parts of the case relating to the DLN upon which I have ruled above. In a case with significant factual and legal complications, it might be that for some technical reason the claim in the FTT will not be effective, albeit that the submissions of the Secretary of State are to the effect that all the matters in issue can be ventilated there. In my judgment, the appropriate course is to stay the claim for judicial review until after the hearing before the FTT. By keeping alive the claim for judicial review, in the event and to the extent that the statutory appeal does not cover the same ground as the claim for judicial review, such matters as can only be dealt with by way of judicial review can still be considered. In my judgment, it is likely that the effect of the decision of the FTT, subject to any appeal, will show the way forward in respect of the matters not overlapping with the statutory appeal. The fair solution here is to stay the claim for judicial review pending the statutory appeal, but with liberty to apply to restore the rolled-up hearing at any time after the decision of the FTT.
165. The FTT will be considering among other things whether or not the personal conduct of the Claimant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the Claimant: see Regulation 27(5)(c) of the EEA Regulations 2016. If there is a finding that the decision to deport was not justified, this may make unnecessary all or a substantial part of the judicial review: as regards such part as remains, it may send a clear signal as to the result of a claim in judicial review whether about the claim itself or the appropriate remedy (if any).
166. Alternatively, if the Tribunal for some reason takes the view that some aspect before it is suitable for judicial review and not for it, it will be for this Court to make a decision at that stage, with the benefit of the findings of the FTT, to decide the question of judicial review both as regards the claim and remedy. That will also be the moment to consider the No Substantial Difference Threshold, with the benefit of the findings of the Tribunal. Alternatively still, the Tribunal may reject the appeal. At that stage, taking into account the findings of the FTT, it may still be appropriate to consider what is left of the judicial review, and whether in fact the rejection of the appeal cuts across the judicial review entirely or in parts in respect of the claim or remedies sought.
167. In these circumstances, whilst, there is an alternative remedy in this case as regards the decision to deport, it is not sufficiently clear until after the hearing of the appeal the extent to which it will be dispositive of the claim for judicial review. It is just to stay the claim for judicial review including the stage of permission to proceed until after the FTT has given judgment. There should also be liberty to apply in the meantime. The need for that is in case, by way of example, there comes a need for injunctive relief notwithstanding the decision of this Court to reject at this stage the claim for interim mandatory relief.

### **SSHD Issue 3: Was there a Legal Representation obligation?**

168. In my judgment, at the time of the service of the DLN, there was no legal representation obligation. At that stage there was notice of a liability to deport, and there was a process whereby the Claimant was given an opportunity to make representations over the next 20 working days, that is until the end of Friday 14 September 2018 (a weekend before his birthday of Monday 17 September 2018). There was no intention to issue a deportation notice before the 18<sup>th</sup> birthday and that was understood by the Claimant, as set out in paragraph 6 of his statement of 30 April 2020 referred to above. There was no possibility of immigration detention prior to the Claimant's 18<sup>th</sup> birthday since the sentence of detention for the robberies would not expire until after the 18<sup>th</sup> birthday, again as set out above.
169. Thus, the essence of the DLN was to give the Claimant notice about the possible decision to deport him and to give him an opportunity to make representations. The DLN ought to have said that there would be no deportation order until at earliest his 18<sup>th</sup> birthday, that is after the weekend, on Monday 17 September 2018. However, for the above reasons, the omission in the document was a matter of no consequence, and the Claimant was informed at the time of service that there was no intention to issue a deportation notice before his 18<sup>th</sup> birthday. There was no deportation notice and/or a decision to deport prior to the Claimant's 18<sup>th</sup> birthday.
170. As noted above, there is a question as to whether sufficient was done to assist him in making representations. In my judgment, that is not relevant to the efficacy of the DLN, but, if anything, to the decision to deport him. That was important both from his perspective of advancing matters which might lead to the decision not being made or being postponed and from the perspective of the Secretary of State to take into account all relevant considerations: see Article 27(2) of the Citizens' Free Movement Directive. As stated above, the question of any failure to give sufficient opportunity to make representations stands to be considered in the light of the evidence before the FTT and can properly be considered as a part of the adjudication in respect of the notice of intention to deport.
171. I therefore reject the submission of the Intervener that the DLN was precluded by the Citizens' Free Movement Directive Article 28(3): that precluded a deportation notice or a decision to deport in respect of a child, but the notice of liability was a means to elicit representations. It was also to elicit informed representations from a person to make an expulsion decision, as the Intervener submits. If there was a deportation earlier than that, which there was never going to be, that would have been unlawful in this case prior to the Claimant's 18<sup>th</sup> birthday. Further, this was not a case where there was any possibility of immigration detention prior to the Claimant's 18<sup>th</sup> birthday.
172. The Intervener submits that the person on whom the DLN is served must be given a reasonable opportunity to address the Secretary of State. Assuming that that is a correct statement of law, it does not follow that in every case the corollary is that there is a right to a legal representative. There is nothing in the Citizens' Free Movement Directive or in the EEA Regulations 2016 or at common law which shows that there is a blanket right to receive legal representation in reply to the DLN simply

because the person on whom the DLN was served is a detained person who was a child at the time of service.

173. The Intervener prays in aid the Treaty of the EU Articles 3(3) and 3(5) requiring the EU to promote social justice and protection of the right of the child. Reference is made to the European Union Charter of Fundamental Rights (“CFR”) and article 12 of the United Nations Convention on the Rights of the Child (“UNCRC”).
174. I accept here the submissions of the Secretary of State that so far as EU law is concerned, the notice requirements in the Directive relate to the decision to deport. The essential procedural safeguards are that there be written notice of the decision, written notice of the right of appeal, and a redress procedure which examines the facts and circumstances on which that measure is based. It is at this stage that effective judicial protection is required and an effective judicial remedy: see Article 47 of the Charter based on Article 13 of the ECHR and the guarantees afforded by Art. 6 ECHR; Case C-300/11 *ZZ (France) v Secretary of State for the Home Department* [2013] QB 1136, at [61]-[62] and Case C-89/17 *Banger* [2019] 1 WLR 845, [48]. Mr Bedford sought to invoke the case of *Petrea* about a requirement to take necessary measures to ensure the content of a removal order to ensure that the person concerned understood the content: see [70] and [72]. He submitted in the circumstances that an appropriate measure would have been to provide the services of a lawyer to the Claimant. *Petrea* concerned a decision for which judicial protection was required and was therefore different from a DLN. In any event, there is nothing to show that the DLN was not substantially explained nor is there any authority requiring legal representation at that stage in this case. There are questions to be considered thereafter in respect of the making of representations which are likely to be a part of the consideration by the FTT in its consideration of the decision to deport.
175. There was an obligation to give an opportunity to the Claimant to make representations in advance of the decision whether or not to deport, whether as a matter of construction of the Citizens’ Free Movement Directive or as part of a duty of a procedural fairness at common law. How far that went on the facts of the instant case is likely to be a matter for the Tribunal in connection with its judgment relating to the challenge to the decision to deport. When this case was before the Court of Appeal, Hickinbottom LJ said at para. 36 in his judgment that the Court of Appeal would not wish to “usurp” that function of the FTT in its consideration of procedural fairness. So too this Court, having come to the conclusion the FTT ought to be considering first the challenge to the decision to deport, will not seek to usurp the function of the FTT by making findings before the fact sensitive evaluation of the FTT.
176. The question of whether there was a right of legal representation at the later stage in connection with the preparation of representations against a possible decision to deport does not need to be the subject of a decision at this stage. This is a matter which can be considered by the FTT in connection with the statutory appeal. However, at this stage, nothing that has been submitted indicates that there is a blanket right of legal representation in connection with the preparation of representations in all cases. In the statutory appeal, the FTT is likely to consider the factual position and whether and to what extent the Claimant was not given an adequate opportunity to make representations prior to the decision to deport, and, if so, what remedy is appropriate. In that context, the FTT is likely to consider the issue

of whether on the facts of this case legal representation was required. As regards its consideration of remedy, it is likely that the FTT will be able also to have regard to the availability or otherwise of representation after he was an adult in connection with the judicial review and the statutory appeal.

177. It therefore follows that there is, in my judgment, no legal obligation to provide legal representation at the time when the Claimant was served with the DLN.

**SSHD Issue 4: Liability to deport other than on imperative grounds of public security**

178. At the heart of the FTT appeal will be the question as to whether the decision to deport, which was on the basis of grounds other than imperative grounds of public security, was justified. For the reasons set out above, the FTT ought to consider these matters first. That is likely to make unnecessary further consideration of this issue in judicial review or to show the way to the conclusion, but if that is not the case, the judicial review can be restored since the matter is only being stayed at this stage.

**SSHD Issue 5: Notice of remedy and time limit to challenge the first certification decision**

179. In his appeal to the Court of Appeal, the Claimant argued that it was unlawful not to have given notice of right to apply for judicial review in respect of the certification decision. I accept the submission of the Secretary of State that on a reading of Articles 30(3) and 31(2), it is only the court or administrative authority with which the person concerned may lodge an “appeal”, and the time limit for the “appeal” which needs to be notified. The Claimant was notified of those matters. If and insofar as there was an obligation to inform about judicial review, a claim in judicial review was brought before the enforcement of the decision to deport.

**SSHD Issue 6: If the Claimant succeeds on one or more of these issues, what relief should be granted and in particular:**

- a. **Should the Court order the return of the Claimant?**
  - b. **Should the notice of liability for deportation be quashed?**
  - c. **Should the deportation order be quashed?**
  - d. **What is the consequence of quashing of either the notice of liability for deportation or the deportation order?**
180. It is apparent from the above that the Court has not found a knock-out blow for the Claimant such as to obviate the need for the hearing of the statutory appeal. There are not circumstances therefore at this stage to order the return of the Claimant irrespective of the statutory appeal. The claim for an interim mandatory order has been considered and rejected.

181. For the many reasons set out above, there is no reason to quash the DLN. Some of the questions in that regard are likely to be before the FTT as to whether there was an adequate opportunity afforded to the Claimant to make representations designed against making a decision to deport. The question whether the deportation order should be quashed is associated with the issue of the appeal against the decision to deport, and that must await the outcome of the statutory appeal. The consequence of the statutory appeal is likely to inform as regards any outstanding judicial review matters e.g. the return of the Claimant, damages for detention and/or removal (referred to below). It therefore follows that at this stage there is no relief to be granted, and in the meantime the claim for judicial review is to be stayed.

### **SSHD Issues 7 and 8: amended claim for unlawful detention and/or removal**

182. There are three iterations of the Claimant's detailed statement of fact and grounds ("SFG"):
- (1) SFG dated 2 July 2019. The two key allegations were that: (a) reg. 33 was unlawful because it did not require prospects of success at the hearing to be taken into account (para. 21); and (b) the deportation decision was unlawful because the Claimant was an unrepresented minor when the notice of liability to deportation was served. The only relief sought was an order quashing the reg. 33 certification and an interim order preventing removal;
  - (2) Proposed amended SFG dated 29 April 2020;
  - (3) Proposed amended SFG dated 12 October 2020.
183. The Secretary of State does not resist the application for permission to amend save as to two respects, namely
- (1) The new claim for damages for unlawful detention in the proposed amended SFG dated 12 October 2020. It is said that this is an entirely new claim. There was a challenge about the decision to detain, but there was no relief sought in that respect either in the original SFG nor in the amended SFG of 29 April 2020 despite the expansion of the relief sought.
  - (2) There is also a claim for damages for unlawful removal.
184. There are three key reasons why the Secretary of State resists these aspects of the application to amend:
- (1) Both new claims are now significantly out of time. No application has been made for an extension of time, and nor has any explanation been advanced for the delay.

(2) Even in the third iteration of the SFG, the claims are not particularised. The Secretary of State cannot be expected to guess on what basis the claim for unlawful detention is made and respond accordingly. As to the claim for damages for unlawful removal, neither the grounds nor the skeleton argument begins to explain the basis for that claim. As Singh LJ decided in *R (Fayad) v Secretary of State for the Home Department* [2018] EWCA Civ 54, at [47]-[56], there is no general right to damages for a breach of public law. To know whether there is a proper cause of action for damages, there has to be a substantive cause of action. Further, claims for damages must be properly pleaded and particularised. The Claimant has wholly failed to plead and particularise his claim in that respect.

(3) The Claimant does not have an entitlement to amend before permission is granted. As the Administrative Court Guide states at 6.10.2, the Court will often be guided by the prejudice which will be caused to good administration or the other parties. In the present case, there is significant prejudice to the Secretary of State. For example, it is likely that she would want to file evidence in response to an unlawful detention claim, but she cannot sensibly do so unless she knows what claim she is facing. Given the lateness of the claims, there is also significant prejudice to good administration.

185. In my judgment, whilst late, the intended claims for unlawful detention and/or removal arises out of the same facts and matters as those already before the Court. There is no substantial prejudice arising out of the lateness to the Secretary of State. There is no substantial prejudice to other court users: the effect of my ruling is that the substantive case will not be tried until after the FTT decision, and so any delay has not delayed the trial of the case. The Court is therefore minded in principle to allow the amendments.

186. However, the Court is sympathetic to the submission that the claims need to be more particularly particularised. That can be done in one of two ways: either at this stage and as a consequential matter following this judgment, or to be left pending the outcome of the statutory appeal. At that stage, a more focussed pleading may be possible. I shall hear from the parties as to which course is preferred. It should be made clear that if it is the latter, it will be recorded that the Court was not minded to refuse the amendment due to delay in bringing the claims, and that any postponement of any adjudication should be treated as a matter of case management rather than a reason to disallow an amendment. Even if permission to amend were granted, it would still be necessary to seek permission to proceed with the claim as amended.

#### **(b) Consideration of the roadmap of the Claimant**

[1] Was the decision to serve the DLN on 16 August 2018 a measure or decision for the purposes of EU law: either (a) as a necessary step in the process of arriving at a

decision to make a deportation order; or (b) in making it possible to deprive the claimant of his liberty?

### **Answer to Claimant issue 1**

187. I have set out above the arguments of the Claimant and the Secretary of State. The argument that it potentially gives rise to a right to detain under domestic law and should thus be treated as a measure in its own right is a bad one: detention is, of itself, a measure for the purposes of Articles 27 and 28. In any event, it has no application in the instant case where the Claimant was detained under his criminal sentence until the deportation decision was made.

[2] If so, was it lawful to adopt it against the claimant as a child (a) in the absence of a reasonable suspicion that the child could be removed based on imperative grounds of public security; or (b) in circumstances where the threshold for the deportation of a child under the defendant's policy for managing FNOs under 18 was not met?

### **Answer to Claimant issue 2**

188. This does not arise in view of the response to Claimant issue 1. Assume that issue 1 was decided in favour of the Claimant. In my judgment, it was still lawful to serve the DLN on a child provided that it was not the intention to serve a deportation notice prior to the 18<sup>th</sup> birthday. There was no such intention in this case and the Claimant understood this. I also accept the submission of the Secretary of State that the right question is whether the overall process for challenging deportation and certification is lawful. The availability of an appeal against a decision of deportation is of obvious significance.

[3] Was the claimant to be regarded as an unaccompanied child?

### **Answer to Claimant issue 3**

189. The question appears intended to connect with various rights under treaties (e.g. article 9 of the UNCRC about the separated child, the UN Committee on the Rights of the Child General Comment No.6 on Treatment of Unaccompanied and Separated Children). However, it does not suffice to consider simply in the abstract whether the Claimant is unaccompanied. This judgment has considered these rights above: his being detained was at the material time the result of his criminal offending, and the procedural protections in Part VI of the Directive must be considered by reference to particular provisions. There was no breach of any right in the issue of the DLN, but

as set out above, the Claimant may have had rights in respect of being assisted in respect of the ability to make effective representations: the question as to what those rights may have been, whether there was a breach and whether in the light of what has occurred subsequently there is a need for a remedy are matters which are likely to arise for consideration in the statutory appeal.

[4] Was the DLN notified to the claimant in accordance with *Petrea* in such a way that he understood its content and the implications for him? Did it inform him precisely and in full of the public policy or security grounds on which it was based? Did it specify the court or time limit for any remedy by way of judicial review?

[5] On the facts, did the claimant require legal representation to understand the DLN, its implications in order to respond appropriately or claim judicial review?

[6] If so, did the defendant come under a duty to ensure the claimant was legally represented or some lesser duty e.g. to supply him with printed guidance and a verbal explanation on how to obtain legal representation in accordance with PSI 08/2012? Did the defendant discharge the relevant duty?

[7] Was there a serious risk that the claimant could be removed without access to the court in view of: (a) the alleged failure to give proper notice of the implications of the DLN; or (b) alleged failure to discharge a relevant duty with regard to legal representation?

#### **Answer to Claimant issues 4-7**

190. The DLN has been considered above. There is no reason to set aside the DLN. It remains to be seen in the statutory appeal whether the decision to deport stands. That will involve consideration of the public policy or security grounds on which the DLN and the subsequent decision to deport were based. It is also likely that in the statutory appeal, there will be consideration of whether subsequent to the DLN, the Claimant was afforded an adequate opportunity to make representations, and if not what ought to have been provided, and what consequences and remedy, if anything, arise from any inadequacy. It is inappropriate to rule about this at this stage when the FTT is about to embark upon its fact sensitive evaluation.

[8] If it was unlawful to adopt the DLN against the claimant as a child, is the claimant's interest in setting it aside substantially reduced, as the defendant contends, by the likelihood of the defendant arriving at a similar decision when he was 18, such that the court is bound in accordance with section 31 of the Senior Courts Act 1981 to refuse the quashing order sought and the application for permission for judicial review?

#### **Answer to Claimant issue 8**

191. This has been considered in the answer to the SSHD issue 1.



[9] Or, does the claimant continue to have a substantial interest in an order quashing the DLN for the reason that the deportation decisions taken on his 18th birthday entailed the adoption of an earlier measure against him as a child on which they must depend for legal effect?

### **Answer to Claimant issue 9**

192. The DLN was not a measure for the reasons set out above. The deportation decision was not the adoption of the DLN, if the DLN was a measure, but a decision made following consideration of the matter subsequent to the DLN and taking into account the written representations of the Claimant. The FTT will consider the lawfulness of the decision to deport, and within that it is likely to consider the matters set out in the last two sentences of the answer to issues 4-7.

[10] If there is a real possibility that the Claimant would not have faced an order for his deportation on 17 September 2018 or a certified decision for his immediate removal except for the unlawful DLN or breach of duty with regard to legal representation, is the court nevertheless precluded, as the defendant says, from quashing the DLN and with it the chain of decisions based on it, including in particular the decision to remove and the deportation order, for the reason that there exists a statutory right to appeal a removal decision adopted under regulation 23(6)(b)?

[11] Or, is it essential for this court to quash the DLN and the deportation order as the claimant says to enable him to challenge respectively: (a) the legality of the removal decision in his appeal; and (b) the legality of his detention pursuant to para. 2(3) of Sched 3 to the 1971 Immigration Act for the purpose of his detention claim?

[12] Is there a compelling other reason, as the claimant says, for this court to exercise jurisdiction notwithstanding the existence of a statutory remedy in the light of: (a) the abrogation of the claimant's right of access to a court within the time allowed for his statutory appeal; (b) the failure to specify the court or a time limit for an application to prevent his removal pending the exercise or outcome of a statutory appeal?

### **Answer to Claimant issues 10-12**

193. For the reasons set out above, there is not before the Court any obvious reason why the DLN was unlawful. Further, if it became apparent that there was no reason to suspect that the Claimant was someone who may be deported from the UK under the EEA Regulations 2016 such that a DLN ought not to have been issued, the same issues would be dealt with in the challenge to the decision to deport in the statutory

appeal. If there was no basis for such suspicion, then a fortiori the decision to deport would be impugned. For all the reasons set out above, there is no compelling reason at this stage for the Court to proceed pending the hearing of the statutory appeal. Reference is made here especially to the discussion above and especially to Section VI about the overlap between the claim for judicial review and the FTT appeal. Contrary to the submission of the Secretary of State, the claim for judicial review is kept alive pending the decision of the FTT. It has been set out above how before the FTT the allegation about a lack of opportunity to make representations is likely to be a part of the statutory appeal, and how matters which occurred after the decision to deport may be relevant to that lack of opportunity. The Claimant will be able to restore the judicial review following the decision and fact finding of the FTT.

[13] If it is decided that the statutory remedy precludes the award of final relief in the form of the quashing orders sought by the claimant, then, per Hickinbottom LJ, the court has discretion to decide whether to require the defendant to facilitate the claimant's return and admit him pending the final determination of his appeal.

[14] Firstly, however, the court must decide if the defendant is correct in its contention that the claimant's removal was lawful without any need for a certificate, on the ground that an out of time appeal is not a relevant "appeal" for the purposes of regulation 33(1)(b).

[15] If the court rejects this latter contention, then the starting point for the exercise of discretion is whether the claimant's removal under the statutory scheme which failed to provide for an individual EU proportionality assessment: see *Hafeez*, amounts to a serious breach of EU law?

### **Answer to Claimant issues 13-15**

194. The Court has considered above the application for an interim mandatory injunction and rejected the same at this stage. There has also been reference above to the difference of construction above as to whether regulation 33 applied in this case, where the direction for removal was without an in-time appeal. If the Claimant is right that there had to be a certificate, the unlawful nature of the certificate is likely to be subsumed by the matters which the FTT is to consider including whether the decision to deport complied with the principle of proportionality: see Article 27(2) of the Citizens' Free Movement Directive. If the FTT decides that it was proportionate or not proportionate, the question as to the lawfulness or otherwise of the first certificate may be a matter of no consequence and is rectified by the re-certification. This all adds to the sense of not determining the judicial review until after the FTT has made its decision, and then considering after this and in the light of its decision (and whichever way the decision goes) whether there is any need or scope still for judicial review.

[16] And whether, as the claimant contends, the common law jurisdiction is bounded by EU law in accordance with *Petrea*? And if so, how does the exercise of discretion differ, if at all, from a human rights case?

### **Answer to Claimant issue 16**

195. It remains to be seen whether this will be considered and determined in the context of the statutory appeal. In any event, this is better determined after the fact finding and determination in the context of the appeal.

[17] If the court is minded to quash the deportation order, then the court must consider whether to permit the claimant to amend his claim to seek damages for unlawful imprisonment arising out of his detention pursuant para. 2(3) of Sched 3 to the 1971 Immigration Act.

[18] If the court considers that the claimant's removal was in serious breach of EU law, the court must also consider whether to allow the claimant's for claim *Francovich* damages in accordance with the principles accepted by the Supreme Court in *Hemmati*.

[19] In either case, the court should decide whether damages are to be assessed at a later stage or transferred to the county court.

### **Answer to Claimant issues 17-19**

196. As noted above, questions concerning damages may be considered at a later stage. No issue of *Francovich* damages has been canvassed in the various iterations of the Statements of Facts and Grounds.

## **IX Conclusions**

197. This is not intended to be a summary of the Judgment. As regards the appeal before the FTT, if the matters in the judicial review had led this Court to a judgment that it could and should rule on matters which would have obviated the need for the appeal, it would have done so. In my judgment, the FTT is the tribunal is to hear the appeal against the decision to deport the Claimant. The FTT is the appropriate tribunal to determine the matters before it, and not this Court.
198. In respect of a matter which is in the first instance to be decided by this Court, the application for permission to bring judicial review by setting aside the DLN is refused. The various challenges to the lawfulness of the DLN are rejected for the various reasons set out in this Judgment.

199. The matters in the period from the DLN to the decision to deport relating to the alleged failure to afford to the Claimant a proper opportunity to make representations why a decision to deport should not be made are matters which are likely to form a part of the consideration of the FTT. A particular focus here will be that at the material time from the DLN to the decision to deport, the Claimant was a minor in custody. It may be a part of the adequacy of the opportunity to state representations to consider the opportunity afforded after the notice of decision to deport both as regards an appeal and/or judicial review. The Secretary of State accepts that these are matters which may be considered before the FTT.
200. The Court rejects the submission of the Secretary of State that thus the application for judicial review fails due to the availability of an alternative remedy. It is not known at this stage how far the FTT will deal with the matters in issue relating to the decision to deport and how that will affect the other matters in the judicial review, namely the deportation notice, the certificate, the detention issues and the removal. It may be necessary for these matters to be considered consequentially upon the decision of the FTT, or in the event and to the extent that the matters are not decided by the FTT, they may still arise for determination.
201. Pending a decision of the FTT, the application for judicial review (including permission) should be stayed with liberty to restore either following the decision of the FTT or in the event that there is some other change of circumstance before then.
202. The Court also rejects the submission of the Secretary of State at this stage that it is highly likely that the outcome for the Claimant would not have been substantially different had the matters complained of not occurred. It is premature to embark upon any such consideration until after the decision of the FTT. The Court should not decide such a matter prior to the factual findings of the FTT or based upon hypotheses which may become invalidated as a result of the evidence before the FTT and/or its decision.
203. The matter has been stayed by the FTT pending the decision of this Court. This Court will not direct the FTT as to how to decide the matter. However, there is a concern expressed in particular by the Court of Appeal as to the length of time that the Claimant has been in Portugal before resolution of his case. In the light of that, the FTT may be asked to expedite the hearing of the appeal. If that is possible, it would be highly desirable.
204. The Claimant's application to amend the SFG is not opposed save as regards the claims for damages for detention and/or removal. The Court is minded to allow them in principle, but requires greater particularisation prior to permitting the amendment. The Court will hear the parties as regards when such particularisation should be provided.
205. The Claimant's application for an interim mandatory injunction to return to the United Kingdom pending the appeal is refused. This is without prejudice to any application by the Claimant under regulation 41 of the EEA Regulations 2016 for temporary admission to make submissions in his case in person.

206. The parties are asked to consider a form of order and to consider any other consequential matters.