Neutral Citation Number: [2021] EWHC 1685 (Admin)

Case No: CO/4365/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2021

Before :

MR JUSTICE GRIFFITHS

- -

Between :

THE QUEEN **(on the application of MARIUS-COSTEL COSTEA)**	**Claimant**
- and -	
THE SECRETARY OF STATE **FOR THE HOME DEPARTMENT**	**Defendant**

- -
- -

Becket Bedford (instructed by **Instalaw Solicitors**) for the **Claimant**
Robin Tam QC and William Irwin (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 15 June 2021

- -

Approved Judgment

The Honourable Mr Justice Griffiths :

1. The claimant is a Romanian national and, therefore, a national of a member state of the European Union. He challenges a decision to remove him on a flight to Romania (which was suspended pending these proceedings) and a decision to detain him, by a Claim Form apparently issued on 24 November 2020. His grounds, however, refer back to service of a Deportation Liability Notice ("DLN") dated 4 August 2020.

2. The claimant argues that this DLN was unlawful and, from that, argues that the unlawfulness of the DLN renders all subsequent proceedings by the Secretary of State unlawful, including the decision to deport on 25 August 2020, and his detention pending deportation between 25 August and 3 October 2020 (when he was granted bail). He does not challenge his deportation or detention on any other grounds. This is the only ground for which he has been given permission to apply for judicial review.

3. The Secretary of State has decided not to insist on time points on this application. Consequently, the parties agree that the application raises the following two key issues:-

    i) Whether the DLN was a "measure" within the meaning of Article 27 of Directive 2004/38/EC (the Free Movement Directive).

    ii) If so, whether the DLN complied with the requirements of Article 30 of the Free Movement Directive.

4. In relation to the first of these issues, the claimant has also raised the following issues:-

    i) Whether the start of deportation proceedings is of any relevance in determining whether any particular step in those proceedings is a "measure" within the meaning of Article 27 of the Free Movement Directive.

    ii) If so, whether a DLN is the start of deportation proceedings.

    iii) Whether a DLN allows the detention of the individual to whom it relates and, if so, whether that has any relevance to whether a DLN is a "measure" within the meaning of Article 27 of the Free Movement Directive.

Background facts

5. The claimant was born in Romania in 1987 and is now 33 years old.

Criminal record in Romania and the UK

6. On 15 December 2006 (aged 19) he was convicted of theft and sentenced in Romania to 22 months imprisonment suspended for 34 months.

7. On 15 January 2007, he was convicted of two counts of immigration offences and sentenced in Romania to 4 months imprisonment suspended for 2 years 4 months.

8. On 17 September 2007, he was convicted at West London Magistrates Court of shoplifting and going equipped for theft. He was given an absolute discharge.

9. On 29 November 2007, he was convicted at Horseferry Road Magistrates Court of going equipped for theft and using a vehicle whilst uninsured. He was sentenced to 12 weeks in a Young Offender Institution and a fine of £100 fine or 1 day (time served). He was disqualified from driving for 6 months and his licence was endorsed.

10. On 29 January 2008, he was convicted in Romania of inflicting grievous bodily harm and was sentenced to 3 years imprisonment suspended for 5 years.

11. 20 October 2008, he was convicted at Thames Magistrates Court of breaching his Young Offender Institution supervision order and sentenced to a fine of £75.

12. On 23 May 2014, he was convicted in Romania of causing or inciting prostitution or pornography involving a child aged 13 to 17. He was sentenced to 2 years imprisonment. This was subsequently varied (apparently on appeal), on 17 October 2014, to 5 years imprisonment and a restraining order for 2 years.

13. On 23 October 2015, he was convicted in Romania of driving with excess alcohol and sentenced to 1 year of imprisonment. This was varied on 5 April 2016 to 5 years 4 months imprisonment and a restraining order for 2 years.

14. On 8 July 2018, he accepted a caution from the Metropolitan Police for possession of Class B controlled drugs.

15. A movement trace from the UK Border Force shows the claimant arriving in the UK on 9 August 2019.

16. On 13 March 2020 the claimant came to the attention of the Metropolitan Police on suspicion of damage to property. However, no further action was taken.

17. On 2 June 2020, the claimant was assessed as suitable for deportation action by David Jones (a Home Office Executive Officer in the Foreign Convictions Team), based on his foreign convictions, following a referral from ACRO Criminal Records Office (the police unit which manages criminal records nationally). Mr Jones' witness statement says that, on that day, "I formed the view that the claimant met the Secretary of State's criteria for deportation action".

18. Consequently, when the claimant was arrested on 19 June 2020, and again on 4 August 2020, "the special conditions flag meant that the Foreign Convictions Team was informed of these events" (Jones 1 para 7).

19. On 4 August 2020 the claimant was arrested by Metropolitan Police on suspicion of committing actual bodily harm against his partner. No further action was taken in relation to this. However, "the Claimant was detained under immigration powers as detention in pursuance of deportation was assessed as appropriate at that time" (Jones 1 para 7).

20. Prior to his detention on that day (4 August 2020), the claimant was served with the DLN.

The DLN

21. The DLN was part of a suite of paperwork served on the claimant, divided into five as follows.

(1) Part 1 – Deportation Liability Notice

22. Only Part 1 was described in the header as "Deportation liability notice". This was a 3-page document signed by David Jones, "acting on behalf of the Secretary of State". It was headed "Notice that you may be liable to deportation pursuant to the Immigration (European Economic Area) Regulations 2016."

23. It stated as follows (all bold type in the original):

> "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 Romania. 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.
>
> **Current Immigration Status**
>
> I have considered all the information available to me and I am satisfied that you are either an EEA national, a family member of an EEA national, an extended family member of an EEA national or have a derivative right under the EEA Regulations 2016. As such the decision whether to deport you will be considered under the EEA Regulations 2016.
>
> **Reasons for considering that you may be liable to deportation**
>
> We consider your deportation may be justified on grounds of public policy, public security and public health under the EEA Regulations 2016 because on 17 October 2014 at The Oradea Court of appeal, you were convicted of Cause/Incite prostitution of/pornography involving a child 13 - 17 for which you were sentenced to Imprisonment 5 years 4 months.

We also consider your deportation may be justified on grounds because between 2006 and 2018 you have been convicted of 11 offences in Romania and in the United Kingdom.

[Here, the claimant's offending history in Romania and the UK between 12 October 2015 and his caution on 8 July 2018 was set out].

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.

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.

If you do not wish to raise any objections against a deportation decision being made against you and wish to leave the UK, you should sign the disclaimer in part 4 of this notice and send it to the address overleaf.

> **Service**
>
> This notice will be deemed to have been served on you on the date of service shown below. You must ensure that any information or evidence on the reasons why you should not be deported from the UK reaches the Home Office before the deadline shown below:
>
> **Date of service** 04/08/2020
>
> **Deadline to submit further evidence** 10 working days from the date of service
>
> Date 04/08/2020 David Jones On behalf of the Secretary of State
>
> **This notice is given, in compliance with the Immigration (Notices) Regulations 2003 (made under section 105 of the Nationality, Immigration and Asylum Act 2002), on behalf of the Secretary of State, Home Office.**"

24. This was a standard form; identical (I am told) to the DLN considered by Freedman J in *R (Mendes) v Secretary of State for the Home Department* [2021] EWHC 115 (Admin).

(2) Part 2 – One-Stop Notice

25. The next document in the pack was a One-Stop Notice, which stated (with bold type from the original):

> "This is a notice served under section 120 of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) as applied by paragraph 2(2) of Schedule 2 to the EEA Regulations 2016.
>
> What you must do now:
>
> You must now tell us about any reason you have for wishing to remain in the UK, any grounds on which you should be permitted to remain in the UK or any grounds on which you should not be removed from or required to leave the UK.
>
> (…)
>
> **If you think there are reasons why you should not be deported, you must send them to the following address to reach us before the deadline stated at the end of part 1 of this notice:** (…)
>
> The Home Office will give more weight to claims substantiated by 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 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.**"

(3) Part 3 – Information on representations

26. Part 3 was a 3-page document which "gives examples of reasons why you might think you should not be deported from the United Kingdom and examples of evidence that you might want to submit to substantiate your claim(s). This is not an exhaustive list…".

(4) Part 4 – Disclaimer for voluntary departure in a deportation case

27. Part 4 was a form enabling the claimant to indicate that he intended to leave voluntarily and that he understood that a deportation order would be made against him preventing him from returning. It is not relevant to this case, because he did not choose to sign it.

(5) Part 5 - Confirmation of Conveyance

28. Part 5 was a notice which "should be signed by the subject", i.e. the claimant. The text which he was supposed to sign up to was:

> "I confirm that I received ICD 4932 EEA [i.e. the Part 1 – DLN] and "Reasons you should not be deported" [i.e. the Part 2 Deportation One-Stop Notice], "Statement of Reason" leaflet [i.e. the Part 3 Information on Representations], & Disclaimer form [i.e. Part 4] sent on 04 August 2020 were conveyed to me on…", [followed by a place for the claimant to sign and date].

29. However, the claimant did not sign. Instead, the boxes for signature and date were marked "REFUSED" and the rest of the form was completed by the officer effecting service as follows:

> "I confirm that Marius-Costel COSTEA refused to sign for ICD.4932 EEA and associated papers ("Reasons you should not be deported", "Statement of Reason" leaflet & Disclaimer form) sent on 04 August 2020.
>
> Reason: Wants to talk with a lawyer."

Other papers served with the DLN on 4 August 2020

30. The claimant was also served (as noted in his first Detention and Case Progression Review note of 4 August 2020) with Detention Authority Form IS91, Notice to

Detainee Form IS91R, Form IS91RA setting out the claimant's risk factors, and bail forms. Of these, I was particularly referred to the first two.

31. The Detention Authority Form IS91 was signed by David Jones and dated 4 August 2020. The reason given for detention was that the claimant was:

> "A person to whom regulation 32(1) of the Immigration (European Economic Area) Regulations 2016 applies because there are reasonable grounds for suspecting that they may be removed from the UK under regulation 23(6)(b) of the EEA Regulations."

32. The Notice to Detainee Form IS91R was addressed to the claimant and, again, signed by David Jones and dated 4 August 2020. It stated:-

> "To: Marius-Costel COSTEA I am ordering your detention under powers contained in Immigration Act 1971; Nationality, Immigration and Asylum Act 2002; UK Borders Act 2007; Immigration (EEA) Regulations 2016; or Schedule 10 to the Immigration Act 2016."

33. The box for note 3 was then ticked, indicating:

> "A person served with a Notice of Decision to make a deportation order, whose detention has been authorised by the Secretary of State – Paragraph 2(2) of Schedule 3 to the 1971 Act."

34. However, it is common ground that this was an error, and it is suggested that box 8 should have been ticked, indicating:

> "For a person where there are reasonable grounds for suspecting that they are someone who may be removed from the United Kingdom under regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 – regulation 32(1) of the Immigration (European Economic Area) Regulations 2016 and paragraphs 17 to 18A of Schedule 2 to the 1971 Act apply in relation to the detention of such a person as those paragraphs apply in relation to a person who may be detained under paragraph 16 of that Schedule."

35. The IS91R Notice then continued:-

> "Detention is only used when there is no reasonable alternative available. It has been decided that you should remain in detention because (…) Your release is not considered conducive to the public good."

36. It then said "This decision has been reached on the basis of (…) Your unacceptable character, conduct or associations."

37. His right to apply for immigration bail was also explained.

38. There is no challenge to any of these forms or to any of the reasons or authorities cited in them. The sole challenge to detention is based on the challenge to the DLN, from which the unlawfulness of the subsequent detention and proposed removal is said to follow.

Events following service of the DLN and other documents

39. The claimant was detained, therefore, on 4 August 2020. The circumstances of detention, noted in the initial Detention & Case Progression Review on that day, were:

> "Subject was arrested by Police for suspicion of ABH, Police decided to NFA [i.e. take No Further Action] to save the public purse and in favour of Immigration action. The subject was assessed suitable for deportation action based on his Foreign Convictions."

40. The Review also noted:

> "The subject was served with a Stage 1 liability notice on 04 August 2020, after which he was given 10 days in which to make any representations as to why he should not be deported from the UK. A deportation decision will then be made within 30 days of the date of detention."

41. On 12 August 2020, the claimant made a 'superficial cut to his arm and bleeding due to immigration issues.' He received treatment, and the cut had healed by 18 August 2020.

42. On 18 August 2020 the deadline of 10 working days set in the DLN and in the One-Stop Notice served on 4 August 2020 expired, without any representations from or on behalf of the claimant.

43. As the claimant had submitted no representations, the Home Office prepared what it describes as "Stage 2 paperwork" on 20 August 2020.

44. The claimant applied to the First Tier Tribunal for immigration bail, which was refused at a hearing on 25 August 2020.

45. On the same day, 25 August 2020, the decision to deport the claimant was made.

46. A deportation order was signed on 26 August 2020 and all the stage 2 paperwork was served on the claimant on the same day, 26 August 2020. This included the Deportation Order of 26 August 2020 and authorisation for his detention until removal. The covering letter said:

> "On 4 August 2020 you were served with a notice that you were liable to deportation in accordance with the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") and given the opportunity to submit any reasons as to why you should not be deported from the United Kingdom.

> You have not submitted any reasons why you should not be deported. It has therefore been decided to deport you from the United Kingdom."

The decision notice enclosed with the letter of 25 August 2020

47. Included with the paperwork was a decision notice giving much more detailed reasons. It was 17 pages and 112 paragraphs long. It explained why regulation 23(6)(b) of the EEA Regulations 2016 applied, and why a decision to deport the claimant as an EEA national had been made pursuant to that regulation. It referred, not only to his criminal record, but to his period of residence in the UK. It considered an assessment of threat (including consideration of proportionality), the prospects of rehabilitation, and (separately from the claimant's position under EU law and the EEA Regulations 2016) the claimant's potential rights under Article 8 of the European Convention on Human Rights. It set out his appeal rights. It discussed the possibility of certification under regulation 33 of the EEA Regulations 2016 in the claimant's case, and concluded by certifying his case under that regulation, with the result that he might be removed from the UK "before your appeal (should you choose to appeal) is determined". It then went on to consider the Article 8 and proportionality implications of the regulation 33 certification, and concluded that they did not make certification disproportionate. There was then further text about his appeal rights, and a reminder of the One-Stop Notice requirement that he should inform the defendant of any change of circumstances or new reason for wishing to remain in the UK as soon as reasonably practicable.

48. At a number of points in this decision notice, the claimant's failure to submit any response to the papers served on him previously was referred to and relied upon, although that was not by any means the only reason given for the decision. In particular:

    i) Para 1 referred to the 4 August 2020 documents (described as a "letter") and para 2 noted "You have not responded with any representations for consideration".

    ii) Para 15 said "You have raised no grounds as to why you should not be deported".

    iii) Para 22 said "You were served with a Stage 1 Deportation Liability Notice on 4 August 2020 and given 10 working days to respond. You have not responded with any grounds for consideration."

    iv) Within para 31, which was a section headed "EEA Regulations 2016 – Conclusion", it was noted "You have not made representations". Other matters were, however, then referred to.

    v) The discussion and conclusion in relation to the claimant's Article 8 ECHR rights was lengthy, starting at para 32 and concluding at para 51. At a relatively early point in the discussion, however, para 36 said: "It is noted at this junction [sic – presumably meaning "juncture"] however that you have not sought to make any submissions based on Article 8 grounds; as such, further consideration is not possible." Thereafter, there was repeated reference, under various heads of the discussion, to the claimant's failure "to provide any information or evidence".

vi) In this same section, para 45 repeated the point that: "On 4 August 2020 the Home Office wrote to you requesting that you raise any issues that you wished to have considered before a decision was taken. You have not responded with any representations."

vii) The section discussing and then imposing a certification under regulation 33 of the EEA Regulations 2016 in the claimant's case was in paras 57-84. Para 58 said:

> "You were warned in your notice of liability to deportation that in certain circumstances, the Secretary of State may certify a deportation decision so that, should you appeal, you may be deported before the final determination of that appeal. You were informed that if you had any reasons why you should not be removed before your appeal is heard or decided, you should inform us of these as soon as possible. You have not responded to this letter and the Secretary of State is not otherwise on notice of any reason as to why your removal pending the outcome of any appeal would be unlawful under section 6 of the Human Rights Act 1998."

49. While relying on the non-response to the DLN, therefore, this last passage did not state that it was definitive. The Secretary of State referred to the possibility of information from other sources, although it was said on her behalf that she was not aware of any relevant reason from other sources either.

50. This was in line with other passages in the decision letter, which did indeed to refer to other sources of information. For example, para 14 considered representations about residence that had been made in the claimant's bail application dated 20 August 2020; para 46 referred to the fact that "all available information indicates that you have spent the majority of your life in Romania"; and para 73 referred to and considered the implications of the claimant's statement that he was "feeling stressed and anxious in detention", which had been included in his bail application of 20 August 2020.

51. The decision letter also indicated that, should the claimant choose to appeal the decision, he must "explain the reasons" and "provide any supporting evidence that is available to you in order to substantiate your grounds of appeal" (para 86).

52. It therefore made it clear that it was not too late for the claimant to provide grounds, or evidence, which he had not yet provided, either in response to the documents served on 4 August (including the DLN) or at all. There was no suggestion, nor was it the case, that the failure to comply with the request in the DLN by the deadline stated, or at all, in some way shut the claimant out from raising any point he wished to raise, or submitting any evidence that he was able to provide. He was not limited to new developments, or a change in circumstances. He had a completely free hand, and was able to start from scratch, if he chose.

53. He was, of course, by reason of the regulation 33 certification, at risk of deportation before he had lodged any appeal, or (if and when he lodged an appeal) before it had been considered and determined. However, this was on the express basis that he would still be able to "access a fair and effective appeal process" (para 63), and that, in his

case, there would be no breach of the procedural protections guaranteed to him by Article 8 (para 65). It was noted that he had not provided reasons as to why it would be difficult to prepare his appeal from abroad (para 79). It was also made clear that he could, if he wished, apply to attend his appeal hearing in person (para 66, and in the conclusion at para 84). The conditions for this were set out in para 93 and were not onerous: it was necessary that his appeal had been brought in time, that a hearing date had been set, and that "you want to make submissions before the First-tier Tribunal or Upper Tribunal in person" (para 93).

54. There is no challenge to the deportation decision itself, or to any of the documents served on 26 August 2020. Nor is there challenge to the decision to detain. The sole basis of the application is that the DLN is said to have defects in failing to comply with the Free Movement Directive which make (it is argued) all subsequent steps unlawful.

Events after 26 August 2020

55. Nothing relevant to the case argued before me happened after this, and so I can bring matters up to date quite briefly.

56. The claimant became distressed in detention. He self-harmed on 31 August, although when hospitalised he refused treatment and self-discharged back into detention. On 7 September 2020 he indicated that he wanted to return to Romania, but he changed his mind and did not sign the documents which were then provided to him. On 13 September 2020 he requested an assessment under rule 35 of the Detention Centre Rules 2001 by a medical practitioner. He was examined by Dr Mumtaz on 13 September 2020. He was granted bail by the First Tier Tribunal subject to an electronically monitored curfew on 25 September 2020 but there were difficulties in installing the equipment because of his failure to be at the curfew address at the material times as required. On 6 October 2020 he was arrested for being heavily intoxicated (upon which there was no further action) and on 14 October accepted a caution for failure to notify his address as a sex offender. He was returned to immigration detention.

57. Removal directions were set but the claimant obtained a stay from the out of hours judge, Mr Justice Pepperall, on 24 November, and the present proceedings were issued. Since then, his removal has been held in abeyance. On 30 November 2020 the First Tier Tribunal refused bail. On 8 December 2020 he was granted an extension of time for his appeal to the First Tier Tribunal. On 16 December 2020 he served a sealed copy of the present proceedings.

58. On 18 March 2021 he was given permission to apply for judicial review by a Deputy High Court Judge on the grounds I am now considering, but not on other grounds.

The claimant's understanding of the DLN and of what happened on 4 August 2020 and afterwards

59. The submissions of the claimant's counsel to me included a suggestion that the claimant's poor command of English was one of the reasons why the DLN was not Article 30 compliant. I will address that in due course, but I will here set out the evidence of the claimant's command of English.

60. No witness statement has been filed by the claimant, or on his behalf, about this (or any other aspect of the case).

61. Poor English is not a point explicitly taken in the Claim Form or the Detailed Statement of Facts and Grounds dated 23 November 2020. However, the claimant's counsel relied for this point on para 35 of the Statement of Facts and Grounds which says:

> "The claimant was unable to respond effectively or at all to the deportation liability notice; he did not understand its implications, particularly with respect to certification…"

62. However, this does not attribute the claimant's lack of understanding to a poor command of the English language. In fact, it does not allege a lack of ability to understand the document itself at all. It refers to a failure to understand "its implications", which is not quite the same.

63. Very shortly before the hearing before me, a Deputy High Court Judge granted permission for the claimant to rely on fresh medical evidence, in the form of a medico-legal report from Dr Thelma Thomas based on a Skype video assessment on 21 December 2020, with a further telephone interview on 10 May 2021 after the claimant's release from immigration detention. No reliance has been placed upon it in argument, save to highlight the following points which appear (somewhat incidentally to the main subject matter of the report) from paras 4.2 and 4.3.

64. Para 4.3 reports a general statement from the claimant, commenting about his detention from August 2020, "*I did not understand anything"* and *"I don't recognise myself sometimes*." This is consistent with the sort of lack of understanding that any lay person might experience in the claimant's situation, without reference to his or their native language.

65. Para 4.2 notes the following in relation to the doctor's two interviews with the claimant on skype video and on the telephone:

> "Mr Costea engaged well with both interviews… While the majority of the first interview was conducted through the translator, at times Mr Costea indicated his understanding of the question posed in English and both the beginning and the end of the interview were conducted in English when he exhibited a reasonable command of conversational English."

66. The claimant's counsel relied, finally, on the following GCID (General Cases Information Database) computerised notes on claimant on 11 August 2020:

    i) On 11 August 2020: "Phoned Mr Costea and updated him on his case. He stated he would like a face to face discussion with an Engagement officer. I have passed on this request to the EOs."

    ii) Later on 11 August 2020, note by a named Engagement Officer:

> "Text message received from Mr Costea on Saturday 8th August 2020 at 14:01. I was not working and so have only just

> seen the text message this morning. Mr Costea is not allocated to myself and is allocated to my colleague, Anshu Sood. The text reads as follows:
>
> > 'I kill my self I was didn't do nothing bad im here fo free suer on good my pass I was pay years ago en if you read the punishment from rumenia en you can se I was get 2 years cose I was coming involuntary alim not like that but im tired mental suer on my good al the time wend my girlfriend was call police cose was stone or gelosy was ring police'
>
> I have sent an email to Anshu to request that she follows up on this text message."

iii) Later on 11 August 020, from Ms Sood herself:

> "Further to the IM please see below. I spoke to him but he wants a F2F [face-to-face] engagement. He does not want to speak to anyone over the phone. Regarding his thoughts he feels very bad but will not do anything. I am sure you will arrange for someone to see him and notify the C & C as required."

iv) Later on 11 August, from Geoff Hartop of Colnbrook Immigration Removal Centre:

> "Mr Costea requested an interview to discuss "Liable for deportation notice" [i.e. the DLN]. He was not happy to receive this notice so I read the notice to him and explained he needs to provide reasons why he should not be deported."

v) On 12 August 2020 from Ms Sood, the Engagement Officer already referred to:

> "Mr Costea messages and phones a few of us everyday and says that why is being deported. He has been seen by Geoff on the 11.08.2020 and was informed about his case."

67. He particularly relied on the broken English of the text from the claimant. However, none of the notes suggest that the staff had difficulty in understanding him, or that he had difficulty in understanding them, or that an interpreter was used or requested for this purpose.

The legal framework

The Free Movement or Citizens Directive (Directive 2004/38/EC)

68. The purpose of the Free Movement Directive or Citizens Directive (Directive 2004/38/EC) is explained in Article 1 as follows:

> "**Article 1**

> This Directive lays down:
>
> (a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;
>
> (b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;
>
> (c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health."

69. Articles 27-33 comprise Chapter VI, which governs "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health". All three of these considerations were explicitly mentioned in the DLN. However, public policy and public security were particularly applicable, given the primary reliance on the claimant's criminal activity.

70. Article 27 deals with "General principles" and includes the following:

> "**Article 27**
>
> 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.
>
> 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."

71. Article 28 deals with "Protection against expulsion" and includes the following:

> "**Article 28**
>
> 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."

72. Article 30 deals with "Notification of decisions and includes the following:

> "**Article 30**
>
> 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."

73. Articles 27, 28 and 30 are all concerned with "decisions". "Decision" is not a word which appears in Article 27. However, Article 30(1) refers to notification in writing of "any decision taken under Article 27(1)", and Article 28(1) refers to a sub-category of possible Article 27 decisions, which is an "expulsion decision". The word "measure", which is relied on in the claimant's argument, only appears in Article 27(2). The breach alleged by the claimant against the Secretary of State is a breach of Article 30, which is explicitly an article addressing a "decision taken under Article 27(1)". I will return to this point.

The EEA Regulations 2016

74. The Free Movement Directive was originally implemented in the UK by the EEA Regulations 2006 but at the times material to this case it was implemented by the EEA Regulations 2016 (which have now been entirely repealed as a result of the UK's exit from the European Union, or "Brexit").

75. Central to the application of the EEA Regulations 2016 to this case is the concept of an "EEA decision" which is defined in Regulation 2 to include the following:

> "…a decision under these Regulations that concerns –
>
> (a) a person's entitlement to be admitted to the United Kingdom;
>
> (…)
>
> (c) a person's removal from the United Kingdom
>
> but does not include (…) any decisions under regulation 33 (human rights considerations and interim orders to suspend removal) or 41 (temporary admission to submit case in person)"

76. Regulation 33 is the provision allowing the Secretary of State to remove a person who has not appealed an EEA decision but is in time to do so, or who has appealed but whose

appeal has not been determined. This power is only exercisable when the Secretary of State certifies that removal pending appeal would not infringe the person's rights under the European Convention on Human Rights. Regulation 33 therefore governs what are usually referred to as "certification" decisions. Notwithstanding its exclusion from the definition of an "EEA decision", it was decided by Foster J in *R (Hafeez) v Secretary of State for the Home Department* [2020] 1 WLR 1877 at paras 42 and 130 that a Regulation 33 certification is a restriction on freedom of movement and falls within the measures described in Article 27.

77. Regulation 23(6) permits removal for reasons which include, at (b), the Secretary of State deciding that the person's removal "is justified on grounds of public policy, public security or public health in accordance with regulation 27…"

78. Regulation 27 governs EEA decisions taken on the grounds of public policy, public security or public health, and is the essential implementation of the Free Movement Directive. Regulation 27(8) envisages a court or tribunal considering whether its requirements have been met.

79. Regulation 32 permits detention prior to a removal decision, including the following terms:

> "**32.— Person subject to removal**
>
> (1) If there are reasonable grounds for suspecting that a person is someone who may be removed from the United Kingdom under regulation 23(6)(b), that person may be detained under the authority of the Secretary of State pending a decision whether or not to remove the person under that regulation…"

R v Bouchereau

80. In *R v Bouchereau* [1978] QB 732, the European Court of Justice was asked to consider the recommendation of a criminal court (a stipendiary magistrate) under section 6(1) of the Immigration Act 1971 that a defendant who was a citizen of what is now the European Union should be deported. As it noted (at 749A), under that procedure:

> "Such a recommendation is not binding on the Secretary of State but is a precondition on the basis of which the Secretary of State is empowered to make a deportation order. In fact, most recommendations made by a court are implemented."

81. In that context, the European Court of Justice was asked to rule (at 749C):

> "Whether a recommendation for deportation made by a national court of a member state to the executive authority of that state (such recommendation being persuasive but not binding on the executive authority) constitutes a "measure" within the meaning of article 3(1) and (2) of Directive No 64/221."

That Directive was a predecessor of the Free Movement Directive.

82. The European Court of Justice decided that it did constitute a "measure" in that sense.

83. During its reasoning, it identified (at para 8) two subsidiary questions, as follows (in which I will insert [1] and [2] for ease of reference):

> "[1] whether a judicial decision can constitute a "measure" for the purposes of the Directive and, if the answer is in the affirmative, [2] whether a mere "recommendation" by a national court can constitute a measure for the purposes of that same Directive."

84. It answered the first question in the affirmative, giving (at paras 15-17) the following reasons:

> "15. By co-ordinating national rules on the control of aliens, to the extent to which they concern the nationals of other member states, Directive No. 64/221 seeks to protect such nationals from any exercise of the powers resulting from the exception relating to limitations justified on grounds of public policy, public security or public health, which might go beyond the requirements justifying an exception to the basic principle of free movement of persons.
>
> 16. It is essential that at the different stages of the process which may result in the adoption of a decision to make a deportation order that protection may be provided by the courts where they are involved in the adoption of such a decision.
>
> 17. It follows that the concept of "measure" includes the action of a court which is required by the law to recommend in certain cases the deportation of a national of another member state."

85. I note the breadth of its description of "the different stages of the process which may result in the adoption of a decision to make a deportation order" in para 16. I also note that this "process", with its "different stages", is not begun by the decision to make a deportation order, but is said to be in operation, not only before any such decision is made, but before it is clear whether any such decision will be made. I draw that from the use of the word "may" in the phrase I have quoted. It is a process defined by its possible end-point. It is not a process which begins with a definitive decision. It is a process "which may result in the adoption of a decision".

86. The Directive is then held to apply to all those "involved" in the adoption of the decision, whether or not they are themselves making a deportation order, or even empowered to make it.

87. This is made clear by the reasoning of the European Court of Justice when answering the second question, also, in the affirmative, stating (at paras 20-24):-

> "20. As regards the second aspect of the first question, the Government of the United Kingdom submits that a mere recommendation cannot constitute a "measure" within the meaning of article 3 (1) and (2) of Directive No. 64/221, and that

> only the subsequent decision of the Secretary of State can amount to such a measure.
>
> 21. For the purposes of the Directive, a "measure" is any action which affects the right of persons coming within the field of application of article 48 to enter and reside freely in the member states under the same conditions as the nationals of the host state.
>
> 22. Within the context of the procedure laid down by section 3 (6) of the Immigration Act 1971, the recommendation referred to in the question raised by the national court constitutes a necessary step in the process of arriving at any decision to make a deportation order and is a necessary prerequisite for such a decision.
>
> 23. Moreover, within the context of that procedure, its effect is to make it possible to deprive the person concerned of his liberty and it is, in any event, one factor justifying a subsequent decision by the executive authority to make a deportation order.
>
> 24. Such a recommendation therefore affects the right of free movement and constitutes a measure within the meaning of article 3 of the Directive."

88. From this, I particularly note the breadth of the reference to "any action which **affects** the right of persons… to enter and reside freely in the member states" (in para 21, with my emphasis).

89. Subsequent references emphasise the recommendation of the magistrate being a "necessary" step in the process, and "a necessary prerequisite" for a deportation decision (para 22). This was so only because of the provisions of UK law at the time.

90. Before me, counsel for the Secretary of State submitted that a DLN is, not only not required by EU law, but not required by the EEA Regulations 2016 or any primary or secondary domestic legislation either. It is issued only as a matter of policy, as set out (at the material time) on p 33 of the Defendant's policy document "EEA decisions taken on grounds of public policy and public security". This states that the defendant:

> "…must issue a notice of liability for deportation (EEA stage 1 notice), giving the person the opportunity to raise grounds why they consider their deportation would be disproportionate."

91. However, per Lord Wilson in *R (Lee-Hirons) v Secretary of State for Justice* [2016] UKSC 46, [2017] AC 52 at para 17:

> "Where a public authority issues a statement of policy in relation to the exercise of one of its functions, a member of the public to whom it ostensibly applies… has a right at common law to require the authority to apply the policy, so long as it is lawful, to himself unless there are good reasons for the authority not to do so."

Therefore, absent good reasons to the contrary (which are not alleged in this case), the Secretary of State was obliged to provide the claimant with a DLN in accordance with her published policy as a matter of law.

92. Moreover, *Bouchereau* also (at para 23, quoted in para 87 above) referred to the procedural step in question as "in any event, one factor justifying a subsequent decision by the executive authority to make a deportation order". It is clear from the documents which followed service of the DLN that the claimant's failure to respond to it was identified as an important factor in the subsequent decision to make a deportation order (see paras 46- 48 above). The DLN itself had also made it clear in advance that this would be the case (see para 23 above) as did the accompanying One-Stop Notice (para 25 above).

93. Within the DLN, this was made particularly clear by the passage, emboldened in the original, which said:

> "**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.**"

94. The accompanying One-Stop Notice was even starker, saying (albeit in relation to the One-Stop Notice rather than the DLN):

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

95. Consistently with this, whilst the decision letter accompanying the deportation order identified the failure to respond to the DLN and accompanying documents as an important part of the Secretary of State's reasoning (para 48 above), the covering letter identified it as the decisive factor, saying (see para 46 above):

> "You have not submitted any reasons why you should not be deported. It has therefore been decided to deport you from the United Kingdom."

R (Hafeez) v Secretary of State for the Home Department [2020] 1 WLR 1877

96. The decision of Foster J in *R (Hafeez) v Secretary of State for the Home Department* [2020] 1 WLR 1877 decided (as I mentioned at para 76 above) that a Regulation 33 certification is a measure to which Article 27 applies.

97. That has been accepted by the Home Office, and also by the Court of Appeal in *R (Mendes) v Secretary of State for the Home Department* [2020] EWCA Civ 924 at para 34.

98. Foster J in *Hafeez* noted that "Freedom of movement is at the centre of the freedoms made under the EU Treaties and the Charter and is jealously protected by the EU" (para 35 of her judgment).

99. She adopted a "wide meaning" of measure, and found herself fortified in that by *Bouchereau* (para 65 of her judgment).

100. She said that the scope of the word 'measure' "… is apt to include a step in the full deportation process" (para 63, repeated at para 69).

101. She referred to the opinion of the Advocate General in *Petrea* [2018] 1 WLR 2237 and said (at para 79):-

> "In my judgment the approach in *Petrea* [2018] 1 WLR 2237 underscores the individual nature of the steps involved in an expulsion."

102. Foster J's discussion of "measure" in the sense of "a step in the full deportation process" is consistent with the language of *Bouchereau*, whether the step is necessary or not. *Bouchereau* refers, not only to "a necessary step in the process" but also to "one factor justifying a subsequent decision" which "therefore affects the right of free movement and constitutes a measure within the meaning of article 3 of the Directive"; see my full quotation at para 87 above.

103. It is also consistent with the Secretary of State's own use of language in connection with a DLN. In her policy, a DLN is described as an "EEA Stage 1 notice" (para 90 above). This language is also seen throughout the conduct of the claimant's case by the defendant. Thus, the 4 August 2020 Detention & Case Progression Review said the claimant "was served with a Stage 1 liability notice on 04 August 2020", i.e. the DLN. Hence, the subsequent deportation order and associated paperwork was described as "Stage 2 paperwork" (para 44 above). The decision notice said "You were served with a Stage 1 Deportation Liability Notice on 4 August 2020" (para 49(iii) above).

104. The DLN therefore has every appearance of being a "measure" within the meaning of Article 27, following both European Union and domestic caselaw.

R (Mendes) v Secretary of State for the Home Department [2021] EWHC 115 (Admin)

105. After the decision of the Court of Appeal in *Mendes* to which I have already referred, the case was remitted back for fresh decisions on proportionality and interim relief. It was eventually considered by Freedman J who, at the conclusion of a long judgment addressing many issues at a rolled up hearing (para 4), refused permission to apply to set aside the DLN in proceedings for judicial review, and rejected various challenges to the lawfulness of the DLN (para 198).

106. The Secretary of State relies strongly on one section of the judgment of Freedman J in support of a general proposition that no DLN in any case is a "measure" within the meaning of Article 27 of the Free Movement Directive. Freedman J rehearsed arguments about the effect of *Bouchereau* and *Hafeez* in paras 106-108 of his judgment along the lines I have myself been considering. He responded to them in this way:

> "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 18th 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."

107. This is based on the facts of *Bouchereau* and *Hafeez* rather than their reasoning. It slightly misstates the facts of *Bouchereau*, which was not "the decision of a Crown Court to deport an EEA national" but a non-binding recommendation to a different body that was empowered to make the actual decision. However, it seems to me that the emphasis placed by the judge on his decision that the service of a DLN "in this case" was not a measure for the purposes of EU law is important. The facts of *Mendes* were very different from the facts of the case before me, and it understandable that, on those different facts, Freedman J concluded that the DLN "in this case" was "not an integral part of the decision to deport" and "In no sense… interfere[d] with the exercise of any rights of the Claimant." Unlike Mr Costea, who was served with the DLN when he was of full age (33 years old) and not subject to any UK sentence of imprisonment, Mendes was under 18 and was served with his DLN when he was serving a sentence for six counts of robbery as an inmate of a Young Offender Institution. Moreover, unlike Mr Costea, who did not respond to the DLN, with the consequences that I have explained, Mendes immediately responded, both orally (judgment para 14) and in writing (para 19, final paragraph). Furthermore, as Freedman J emphasised in para 111 of the passage I have quoted, Mendes was never going to be deported until he had completed his UK sentence, even in the event (which happened) of a deportation order in the meantime, and this meant that defects in the DLN relating to information appropriate to a minor had no bearing on his case, because he was not going to be deported until his sentence had been completed, and by then he would be of full age. This is particularly stressed in para 112 of the *Mendes* judgment.

108. I therefore reject the submission that *Mendes* is authority for the blanket proposition, which I regard as inconsistent with the reasoning of *Bouchereau* and *Hafeez*, that no DLN in any circumstances is capable of being a "measure" to which Article 27 of the Free Movement Directive applies. As I read his judgment, that is not what Freedman J in *Mendes* said or decided.

109. I now turn, therefore, to the facts of the case before me, and the issues I have been asked to decide upon those facts.

Issue (1) – Whether a DLN is an Article 27 "measure"

110. It will be clear from what I have already said that I think it is important to make this decision, not in relation to any DLN in any case, but specifically in relation to the DLN in this case. The effect of a form of words cannot be divorced from its context.

111. Therefore, I would reframe this question as: "Whether the DLN served on the claimant was an Article 27(2) 'measure'".

112. I say "an Article 27(2) measure", rather than simply "an Article 27 measure" because it is in Article 27(2) that the word "measure" appears.

113. Article 27(1) does not refer to a "measure". But it does refer to the right of Member States to "restrict freedom of movement and residence… on grounds of public policy, public security or public health." That is a reference to be construed broadly – it is not limited to an actual decision to deport or detain. It includes, as *Bouchereau* decided, a "mere recommendation" (paras 82-84 above). This is because "It is essential that at the different stages of the process which may result in the adoption of a decision to make a

deportation order that protection may be provided…"; *Bouchereau* at para 16, quoted at para 84 above.

114. An Article 27 measure is "any action which affects" free movement rights; *Bouchereau* at para 21, quoted at para 87 above.

115. I regard the DLN in this case as such an action, reading "affects" in its broadest sense. It was, like the deportation recommendation in *Bouchereau,* "a necessary step in the process of arriving at any decision to make a deportation order" in the claimant's case, because it was mandated by the Secretary of State's policy; it was therefore "a necessary prerequisite for such a decision"; quoting *Bouchereau* at para 22 (para 87 above).

116. Furthermore, it was treated by the Secretary of State as a formal step which was integral to the process, not only because of its affect on the outcome (the decision to deport) but as a matter of procedure (see para 103 above).

117. It was also, undoubtedly, "one factor justifying [the] subsequent decision… to make a deportation order"; quoting *Bouchereau* at para 23 (see para 92 above).

118. I am therefore willing to accept the claimant's submission that the DLN in this case can properly be described as a "measure" in the broad sense of that word in Article 27(2) of the Free Movement Directive; compare the passages from *Hafeez* I have referred to at paras 98-101 above.

119. This makes it unnecessary to consider his additional arguments based on the relationship (if any) between the DLN and the decision to detain him which accompanied the subsequent deportation order.

Issue (2) – Whether the DLN in the claimant's case complied with the requirements of Article 30 of the Free Movement Directive

120. The claimant's Detailed Statement of Facts and Grounds alleges that the DLN breached Article 30 because it was "not notified to him in accordance with Article 30" (para 2). In particular, the claimant complains (para 3) that:-

    i) The defendant did not take every appropriate measure with a view to ensuring he understood the content and implications of the DLN, particularly with regard to certification, in accordance with the decision of the CJEU in *Petrea* [2018] 1 WLR 2237 at para 72. The claimant argues that the DLN did not warn the claimant in plain terms that a failure to answer it would place him at immediate risk of removal pursuant to a certificate.

    ii) The deportation liability notice did not specify the court or the time limit for redress to be sought against the defendant's decision to initiate deportation proceedings against him and deprive him of his liberty, thereby abrogating the claimant's right of access to the court; citing *FB (Afghanistan) v Secretary of State for the Home Department* [2020] EWCA Civ 1338 at para 151.

121. There are a number of difficulties with this argument.

122. First, Article 30 does not refer to measures, it refers to actual decisions (see para 72 above). The broad construction of "measure" which I have been led by the authorities

to adopt means that the process contained within the term "measure" for the purposes of Article 27(2) may start before any decision is made. That is logical; the decision is the result of a process, not the beginning of a process.

123. However, Article 30(1) requires notification of "any decision taken under Article 27(1)". Article 30(2) requires that, by this notification:

> "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…"

124. That does not seem apt to describe the DLN. The DLN was not a decision. It was part of a process designed to inform the decision which might subsequently be made. This is clear from the text of the DLN (quoted in full in para 23 above), and, particularly, the following passages (with emphasis added):-

i) It opens by saying "This notice informs you that the Home Office **is considering** whether to make a deportation decision against you…" That is quite different from informing him that such a decision, or any decision, had already been made.

ii) It made it clear that such a decision was by no means inevitable: "This means that **if the Home Office decides to make a deportation decision against you**, you will be served a deportation order and removed…"

iii) Similarly, it used the open verb "may" rather than "will", when saying "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."

iv) It placed any deportation decision firmly in the future: "the decision whether to deport you **will be considered** under the EEA Regulations 2016."

v) It expressed the possible justification of a deportation decision tentatively: "We consider your deportation **may** be justified on grounds of public policy, public security and public health…"; "as a result of your behaviour a deportation decision **may** be made against you…"

vi) This was even clearer under the heading "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."

vii) It also made it clear that no decision had been made when it said: "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."

125. Second, it is difficult to see how the Secretary of State could be expected to provide anything more by way of an Article 30 notification in the DLN than she actually did, given that such a notification would, by Article 30(2), have to inform the claimant

"precisely, and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based". There had not yet been any decision. It was therefore impossible to provide this information. The fact that there was no decision meant that it was not yet possible to say "precisely, and in full" the basis of such a decision. Article 30 applied to the documents served subsequently and, particularly, to the decision notice enclosed with the letter of 25 August 2020 (para 47 above). It was the decision notice which provided this information "precisely, and in full" (paras 47-50 above). No complaint is made of the decision notice in this respect, or in any respect. But, in any case, the terms of the DLN (set out in para 23 above) said all that it was possible to say at that stage about the Secretary of State's reasons for serving a DLN on the claimant, including the legal basis for thinking she was justified in doing so.

126. Third, it is not correct to skip over Article 28, dealing with "Protection against expulsion", before reaching Article 30. Article 28 requires that "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." The DLN was designed to assist the Secretary of State in informing herself of these considerations so that she could "take account" of them, as required by Article 28. The DLN was part of the Article 27 process, but it came at a point in the process prior to the requirements of Article 30, and was consistent with the requirements of Article 28 in that respect.

127. Whether or not I am correct in concluding that the DLN was a "measure" to which Article 27 applied, therefore, for these three reasons I am not persuaded that the DLN was a "decision" to which Article 30 applied.

128. Fourthly, and in any event, however, I am not persuaded that any of the three criticisms of the DLN are well-founded.

129. The first criticism is that the defendant did not take every appropriate measure with a view to ensuring he understood the content and implications of the DLN, particularly with regard to certification, in accordance with the decision of the CJEU in *Petrea* [2018] 1 WLR 2237 at para 72.

130. However, that paragraph was addressing the question whether the Free Movement Directive means that an EEA national must be notified "of the decision ordering his removal in a language which he understands" (para 28(5) of *Petrea*). In the claimant's case, there was no decision ordering his removal at the time of the DLN.

131. Moreover, *Petrea* answered that question as follows at para 72:

> "…the answer to the… question is that article 30… requires the member states to take every appropriate measure with a view to ensuring that the person concerned understands the content and implications of a decision adopted under article 27(1)… but that it does not require that decision to be notified to him in a language which he understands or which it is reasonable to

> presume he understands, although he did not bring an application to that effect."

132. Far from supporting the claimant's criticism, this passage is fatal to it:

i) It concerns a "decision". The DLN was not a decision.

ii) It specifically rejects the submission that the notification has to be in a language the EEA national understands, or even which it is reasonable to presume he understands. It therefore does not support the submission that there was an onus on the Secretary of State to translate the DLN to him, whether by providing a translation or an interpreter.

133. The claimant never asked for a translation of the DLN, or for an interpreter.

134. Given the rejection of the submission that there was an obligation to translate the DLN or to provide an interpreter without a request, there is simply nothing of substance in criticism of the DLN in general, or in the role it played in the claimant's case.

i) The DLN is written in relatively plain language. It is as clear as the points being made in it could be expected to be. It includes simple headings, and occasional emphasis.

ii) Although the claimant refused to sign for the DLN, this was not on the basis that he would not be able to understand its "content and implications". It was on the basis that he wanted to talk to a lawyer (para 29 above). This showed that he understood that the implications were important and indicated that he was both willing and able to seek the advice he required in order to understand them.

iii) There seems to be very little basis in the papers for a suggestion that the claimant did not in fact understand the DLN (see paras 60-65 above).

iv) However, as soon as he asked for a face-to-face engagement, it was given to him. The DLN was read to aloud to him, and it was explained to him orally that "he needs to provide reasons why he should not be deported" (GCID notes in para 66 above).

135. The second criticism is that "the DLN did not warn the claimant in plain terms that a failure to answer it would place him at immediate risk of removal pursuant to a certificate" (Statement of Facts and Grounds para 3.1). But a failure to answer the DLN did not place him at that immediate risk. He in fact failed to answer the DLN, and what followed was not immediate removal but the deportation order. There is no evidence that there was ever a risk that the deportation order would be accompanied by removal directions. The deportation order was not accompanied by removal directions, the first of which were set in November, well after the deportation order in August.

136. Moreover, the DLN did say, right at the beginning:

> "**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 Romania."

137. It did not say there would be a grace period between the deportation order and the removal (although, in the event, there was).

138. The third criticism is that the DLN "did not specify the court or the time limit for redress to be sought against the defendant's decision to initiate deportation proceedings against him and deprive him of his liberty, thereby abrogating the claimant's right of access to the court"; citing *FB (Afghanistan) v Secretary of State for the Home Department* [2020] EWCA Civ 1338 at para 151 (Statement of Facts and Grounds at para 3.2).

139. The DLN could not do this because there was, as yet, no relevant decision. Therefore, there is nothing in this criticism either. Whether or not the DLN was part of a process leading to a decision, it was not a "decision… to deprive him of his liberty"; nor was it a decision to deport him. It was not a decision within the meaning of Article 30 at all. If the claimant had (for example) applied for judicial review of the DLN he would have been bound to fail, because it is impossible to find a judicially reviewable decision in the DLN.

140. In argument, the claimant's counsel relied, additionally, on Article 31, which imposes procedural safeguards, including "access to judicial and, where appropriate, administrative redress procedures". But these, too, are imposed only in relation to a relevant decision. The DLN was not a decision to which Article 30 applied. It merely raised the possibility of such a decision in the future. It was not a decision requiring "access to judicial [or] administrative redress procedures" or, if it was, the administrative redress procedure was clearly stated in the DLN: namely, for the claimant (if he wished) to take the opportunity which was being given to him by the DLN to respond to and refute or counteract the points raised by the DLN before any further step was taken. Nothing in the DLN prejudiced him. The DLN gave him a warning, and a right to be heard, before a decision was made (and any such decision would, itself, if adverse to the claimant, open up the possibility of "access to judicial and, where appropriate, administrative redress procedures" in relation to *that* decision).

Conclusion

141. Consequently, the claimant's application for judicial review is dismissed.