Neutral Citation Number: [2022] EWHC 3022 (Admin)

Case No: CO/2826/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 November 2022

Before :

THE HONOURABLE MRS JUSTICE FOSTER DBE

- -

Between :

THE KING ON THE APPLICATION OF
AUGUSTAS SELEVICIUS

Claimant

- and -

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Defendant

- -
- -

Mr Becket Bedford (instructed by **InstaLaw Limited**) for the **Claimant**
Mr Thomas Roe KC and **Mr James Fraczyk** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 27 and 28 April 2022

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Approved Judgment

This judgment was handed down remotely at 3.00pm on 28 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MRS JUSTICE FOSTER DBE

MRS JUSTICE FOSTER DBE:

INTRODUCTION

1. This is an application for judicial review brought by the Claimant, a Lithuanian national, who challenges certain decisions by the Secretary of State for the Home Department ("SSHD") pertaining to his intended removal from the United Kingdom on public interest grounds.

2. He seeks to challenge the issue to him of a Deportation Liability Notice ("DLN") and also the SSHD's certification to the effect that, notwithstanding his claimed rights arising under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") (such as still apply), he should nonetheless be removed from the UK pending appeal. He also argues that failures in respect of the DLN taint his subsequent detention.

3. A number of variations on the grounds have been propounded from time to time but the permission was expressly limited as follows:

> "*Permission is granted to the Claimant to apply for judicial review, limited to the following grounds:*
>
> *a. the Defendant's decision to detain the Claimant, dated 17 June 2021, was unlawful because the deportation proceedings to which it related had been incorrectly instituted, contrary to Article 30 of Directive 2004/38/EC, and, in any event, it was disproportionate, contrary to Article 27(2) of that Directive; and*
>
> *b. the Defendant's decision, dated 14 July 2021, to certify the Claimant's removal under regulation 33 of the Immigration (Economic Area) Regulations 2016 (SI 2016/1052) was disproportionate by reference to EU standards.*"

BACKGROUND

4. The Claimant is a national of Lithuania, it is unclear when he arrived in the United Kingdom, but likely between May and August 2019. He first came to the attention of the Home Office on his application for leave to remain under the European Settlement Scheme then in operation. He was granted Limited Leave To Remain ("LLTR") on 3 October 2019.

5. Between 2019-2021 he was arrested in the UK for various potential offences relating to domestic abuse and although arrests were made charges were not preferred in respect of any of the occasions. Following arrest on 12 April 2021, a criminal record check in Lithuania was carried out and this revealed that the Claimant had a number of convictions in Lithuania which he had not disclosed when making his application for LTR. On 22 March 2012 (that is to say, when he was about 15 years of age) the Claimant was convicted of two counts of sexual assault by penetration and one count of sexual assault with no penetration of a girl of 10 years for which he was sentenced

to 2 years 7 months imprisonment all of which was suspended. On 15 June 2015 the Claimant was convicted of robbery at Vilnius City District Court in Lithuania and sentenced to 5 years' imprisonment.

6. Between early May 2021 and 17 June 2021 consideration was given to the deportation of the Claimant and to his detention pending deportation. It was concluded that the Claimant posed a high risk of absconding, of harm and of reoffending. The Secretary of State's view in early May was that detention was appropriate to facilitate removal. The grounds included the threat that Mr Selevicius posed to the UK public and more immediately to his partner and children based on her view they were serious offences overseas, and the arrests for domestic violence suggested a pattern of sexual violence and violence towards women. There was no indication he sought to address the behaviour or sought help. Furthermore, he had obtained LTR on the basis of a failure to disclose his convictions. It was deemed appropriate to serve a DLN at the time of detention.

7. Material available to the Defendant from Lincolnshire Children's Services following the police referral in respect of domestic abuse revealed the children were subject to a Child in Need Plan because of the abuse. A referral dated 9 April 2021 reported that the Claimant had pushed his partner downstairs and beaten her. The children and members of the public had reported their concerns to the police even though the Claimant's partner was unwilling to engage. It was reported to the SSHD the domestic abuse was escalating, and had been under-reported.

8. The DLN, completed on 2 June 2021, was served on 17 June 2021. A Deportation Order was served on 14 July 2021.

9. On 7 April 2022 the Claimant made an application long out of time to appeal against the decision to deport him made on 14 July 2021[1].

10. Put shortly, Mr Bedford on behalf of the Claimant says the Court should treat all of the Claimant's detention, between the dates of 17 June 2021 and 2 September 2021 (following a favourable bail decision on 1 September 2021) as unlawful and quash any Deportation Order removal directions because of fatal defects in the DLN which failed to contain material information.

11. The DLN indicated as follows:

> "*NOTICE THAT YOU MAY BE LIABLE TO DEPORTATION PURSUANT TO THE IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2016*
>
> …
>
> *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"), as saved.*

[1] The time limit was 14 days from the date of service of the decision (Regulation 19(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, applied by paragraph 3 of Schedule 2 to the EEA Regulations).

> ***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 Lithuania. 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 in accordance with Regulation 32(1) of the EEA Regulations 2016, as saved.*
>
> *You may also be detained under section 36 of the UK Borders Act 2007 pending the making of a deportation order against you.*"

12. There followed a section dealing with the current immigration status of the Claimant. It referred to the uncertainty of the arrival date, the application under the EU Settlement Scheme on 30 August 2019 and the grant of limited leave, stating that, following arrest on suspicion of assault causing actual bodily harm, a criminal record check was undertaken and revealed the convictions set out above. The DLN stated that the draftsman was satisfied that the Claimant was a person who had been granted entry clearance under the Appendix EU (Family Permit) provisions within the rules and was satisfied that the Claimant may be liable to deportation under public policy grounds under the EEA Regulations because of the convictions. It referred to protecting the public and combating the effects of persistent offending per Schedule 1 to the EEA Regulations.

13. The next part of the document said (relevantly) this:

> "***Next steps***
>
> *The Home Office will not make a deportation decision on public policy … grounds 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/regulation 18.*
>
> *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 the deadline below.*
>
> *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 then you should sign the disclaimer in part 4 of this notice and send it to the address overleaf.*
>
> ***Appeal***
>
> *There is no right of appeal against a notice that you may be liable to deportation under the EEA Regulations 2016, as saved, or pursuant to the Immigration Act 1971.*"

14. The Claimant made representations on 28 June 2021. They appear to have been served on the Defendant with the purpose of supporting a bail application as well as by reference to the proposed deportation. They were representations on the merits expressing his desire to stay in the UK with his young family, an 18-month old, his child, and a nine and six year old, from an earlier relationship of his partner. These representations were within the ten day deadline for receiving representations on proposed deportation, for which time expired on 30 June 2021.

15. On 9 July 2021 a decision was made to refuse the representations, make the Deportation Order, and deport the Claimant from the UK and to certify under Regulation 33 of the EEA Regulations, meaning that his right of appeal would not be suspensive of removal action. As stated, it has now emerged that in fact, the Claimant never made *any* appeal until a few days before the hearing of this case. The Defendant argues the absence of timely appeal renders the certification otiose and this judicial review claim academic.

16. On 13 July 2021 a decision to refuse SSHD's bail was made. The Claimant indicated he wished to depart the UK as soon as possible, he threatened not to eat or to take his medication (for diabetes) until he was removed to Lithuania. The next day, 14 July 2021, the Deportation Order was signed against him and served. He then advised that he did not wish to depart the UK any longer. On 26 July 2021 the Claimant made an application for bail before the Immigration Judge which he then withdrew on 29 July 2021. On 3 August 2021 the Claimant's removal from the UK was set for 18 August 2021.

17. An email in the bundle dated 9 August 2021 from Bail for Immigration Detainees (BiD), transferred the case to the current solicitors. They said they had no documentation concerning the immigration case but:

> "*We are instructed that a decision to deport was served and a Deportation Order followed one day later, on or about 15th July 2021, although he refused to sign to confirm receipt. We are instructed that he lodged an appeal within time, is unrepresented, and is currently awaiting a response from the Tribunal. However, we are also instructed that our client has been given a removal direction for Wednesday 18th August 2021.*"

18. A PAP letter was sent to the SSHD. On receipt of a PAP response from the Defendant maintaining the decisions, a judicial review application was issued on 18 August 2021 seeking interim relief to stay the removal. The removal was in any event deferred because the Claimant refused to take the mandatory Covid-19 test. A further bail application was made on 25 August 2021 with a hearing on 31 August 2021, bail was granted 1 September 2021 and on 2 September 2021 the Claimant was released.

THE ISSUES AND PRELIMINARY MATTERS

19. The issues sought to be argued in this case were

    i) Whether the decision to issue a DLN attracts the protections of Directive 2004/38 ("the Directive") which is reflected in English law in the EEA Regulations such that a DLN is required by Article 27(1) and Article 30 of the Directive to tell the Claimant "*precisely and in full the public policy reasons underlying the decision to begin the removal process*" failure of which vitiates the decision to remove the Claimant and detain him and the decisions must be quashed.

    ii) Whether the SSHD's decisions to remove and detain the Claimant were unlawful under the Directive and Regulations because the SSHD did not make relevant enquiry of the Lithuanian authorities to establish the more detailed circumstances of the Claimant's Lithuanian offending.

    iii) (A new point for which permission was required.) Whether the SSHD's decision to detain the Claimant under Regulation 32(1) of the EEA Regulations was also a decision under Article 27(1) of the Directive and required to provide "*precisely and in full the public policy grounds for the decision to detain*" under Article 30, and state the remedy available to him to challenge its lawfulness and to seek release, failing which the detention was unlawful.

    iv) Whether as the SSHD submits, given that the SSHD is obliged to certify *only* where the Claimant has made an in-time application to appeal which remains undetermined – which it is now admitted, did not happen – there was no obligation on the SSHD to certify here, so the lawfulness of the certificate is irrelevant. Furthermore, the Claimant was released from detention so the late detention challenge (even if allowed to proceed) is academic.

20. For reasons I shall come to, I have decided the Secretary of State is correct in the first of the preliminary submissions recorded at (iv) above.

21. There was an application for permission at the hearing to argue the challenge to detention which I refused in the course of the hearing, but I record here also the reasons why the challenge to the DLN must in any event fail.

22. The new point the Claimant applies to raise is an argument that a decision to detain attracts the same protections under Article 30 as a decision to certify under Article 33

or a decision to deport. That is to say the requirements of EU law reflected in the EEA Regulations are to be written in in order to comply with the law.

23. I refused permission to move for judicial review on this extra ground for the following reasons:

    1) There was every opportunity to take this point earlier, and a judicial review challenge is not an iterative process. It is an abuse of the judicial review procedure to take in a Reply, a point that was available at the outset of proceedings. The new application is the result of either overlooking the point or deciding earlier it was not worth taking.

    2) The point takes the Secretary of State by surprise, in my judgement it would require more time and further authority and indeed further skeleton arguments in order to explore it fully. As the SSHD points out, if correct, which she strongly disputes, it represents a radical departure from the law and practice as it has been understood to be, and has far-reaching implications.

24. The first of these reasons is founded on the history of this case. In my judgement there has been every opportunity for the Claimant to have raised the point before, had he thought this was a good point to make. He did not do so, for whatever reason, and it is wholly inappropriate to continue to throw into the mix of judicial review, which is a contained and controlled process, any new idea that occurs to counsel or advisors along the way. As was said for the Defendant by Mr Roe KC, this is an *ex facie* point: always available on the face of the document which the Claimant asserts is the detention decision, and the point was there to be taken, if thought to be good. Although it was said that somehow the new point derived from late disclosure by the Home Secretary that is not the case. There is nothing in the materials from the GCID that adds to or indeed detracts from the submission which would be required. Accordingly, it is now far too late.

25. As to the second reason, the Secretary of State indicates that it will be necessary to have an adjournment were permission given to argue a point which was raised only by Reply which concern events first challenged in August 2021.

26. It was in my judgement wrong for this Court to seek to spell out from a reply document unaccompanied by a formal application to amend, an application for further permission for a further point which could have been raised long ago against the background of expressly restricted permission. The Secretary of State's view that an adjournment would be necessary was in my judgement well founded.

LEGAL FRAMEWORK

27. Under EU law, the right of free movement is not unconditional. Directive 2004/38 sets out the limitations and conditions on that right. The background to the operation of the EEA Regulations was not in issue before me, indeed it has been set out in a number of cases, notably *R (Nouazli) v Secretary of State for the Home Department* [2016] UKSC 16, *R (Lauzikas) v Secretary of State for the Home Department (No. 2)*

(CA) [2019] EWCA Civ 1168 [2019] 1 WLR 6625 and the decision in *R (Hafeez) v Secretary of State for the Home Department* [2020] EWHC 437 (Admin).

28. Broadly, the scheme established by the Directive, implemented by the 2016 Regulations, gave an initial right of residence for three months; an EEA national had an extended right of residence if he fulfilled the conditions set out in Article 7(1) of the Directive; and after a continuous period of five years' legal residence, an EEA national acquired a right of permanent residence (Article 16(1)). Articles 27 and 28 of the Directive permitted a Member State to expel EEA nationals and their family members on grounds of public policy, public security or public health, subject to certain restrictions. Increasing levels of protection applied depending on the status of the EEA national in the host Member State. A person with a right of permanent residence might only be expelled on serious grounds of public policy or public security. A person who had resided in the host Member State for the previous ten years could only be removed on imperative grounds of public security.

29. There were thus fundamental differences between deportation in the case of an EEA national and his or her family members ("an EEA case") and deportation in a case where EU law did not apply. Significantly, in an EEA case, deportation had to be based exclusively on the personal conduct of the individual concerned: which had to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (Article 27(2)).

30. I take with gratitude the gist of the overview of the post-Brexit amended legislative scheme provided in the skeleton argument of the Defendant.

31. The Directive required EEA Member States to legislate so as to give effect to the rights of EEA nationals to reside in the EEA. The last such legislation in this jurisdiction was to be found in the EEA Regulations.

32. The EEA Regulations have been revoked because of the UK's withdrawal from the EU and EEA. However, by Regulation 2(1) of the Citizens' Rights (Restrictions of Entry and Residence) (EU Exit) Regulations 2020 (made under the European Union (Withdrawal Agreement) Act 2020), certain provisions of the EEA Regulations continue to have effect, with modifications, "*for the purpose of removing a person who is protected by the citizens' rights provisions*".

33. Regulation 2(2) explains that such persons include a person who "[…] *has leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules*". This is a reference to the EU Settlement Scheme under which EU and EEA nationals were generally entitled to apply to remain in the UK notwithstanding the UK's withdrawal from the EU and the EEA.

34. Regulation 2 of the EEA Regulations, as modified, provides that:

> "[…]
>
> *"EEA decision" means a decision under these Regulations that concerns a person's removal from the United Kingdom;*
>
> […]"

Regulation 23 as modified provides that:

> "*(6) a person protected by the citizens' rights provisions 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.*"

Regulation 27 as modified provides, relevantly:

> "[…]
>
> *(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.*
>
> […]
>
> *(3) A relevant decision may not be taken in respect of a person with indefinite leave to enter or remain in the United Kingdom granted under residence scheme immigration rules* […] *except on serious grounds of public policy and public security.*
>
> […]
>
> *(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 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.*
>
> *[...]*
>
> *(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).*"

35. Schedule 1 sets out, as modified, several considerations, which include the following:

> "*(1) The United Kingdom enjoys considerable discretion, acting within the parameters set by the law, to define its own standards of public policy and public security, for purposes tailored to its individual context from time to time.*
>
> […]
>
> *(3) Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.*"

36. Regulation 23(6)(b) of the EEA Regulations thus provides for an express power of removal of an EEA national in circumstances where the SSHD has decided that the person's removal is justified on public policy, public security or public health grounds; Regulation 27 of the EEA Regulations sets out the principles by which such a decision is to be made.

37. An appeal right is given by Regulation 36 of the EEA Regulations. There is no express provision within the Regulation for an appeal to be suspensive of the removal of an appellant. However, Regulation 33 provides relevantly as follows:

> "***33.— Human rights considerations and interim orders to suspend removal***
>
> *(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.*
>
> *(4) If P applies to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision, P may not be removed from the United Kingdom until such time as the decision on the interim order has been taken, except—*
>
> *(a) where the removal decision is based on a previous judicial decision;*
>
> *(b) where P has had previous access to judicial review; or*
>
> *(c) where the removal decision is based on imperative grounds of public security.*
>
> *(5) In this regulation, "finally determined" has the same meaning as in Part 6.*"

38. Accordingly, certification must take place if removal is desired to be made during the period of an appeal.

39. As seen by Regulation 2 above, a decision that a person's removal is justified "*concerns a person's removal from the United Kingdom*", and is thus an "*EEA decision*" and Regulation 36 provides that the subject of an EEA decision may appeal to the First-tier Tribunal ("the Tribunal").

40. In the present case certification was effected at the date when time started to run in respect of an appeal against the deportation decision but no appeal was made in time. Nonetheless, Mr Bedford on behalf of the Claimant asserts he may maintain a challenge to the certification decision saying the EEA Regulations allow him to make a challenge to certification as long as a notice to appeal has been lodged, even if out of time.

41. These provisions transpose Article 27 of the Directive, which laid down in its paragraph (1) the entitlement of Member States to:

> "*… 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.*"

Paragraph (2) provides (among other things) that:

> "*… 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.*"

42. Article 30 of the Directive provides that:

> "*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.*"

43. Regulation 32(1) provides relevantly that:

> "*(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* […]."

44. Regulation 33 is as set out above.

45. It is uncontentious following (among other cases) *R v Bouchereau* [1978] QB 732 ECJ, that rights provided for in the Directive are directly applicable, and create rights against the state in domestic law. Section 4 of the European Union (Withdrawal) Act 2018 preserves these rights, formerly given effect in domestic law by Section 2(1) of the European Communities Act 1972.

THE ARGUMENTS

GROUND ONE: DLN IS A "MEASURE"

46. The first argument is put by Mr Bedford to the effect that the DLN is a "*measure*" in the sense understood in Article 27 of the Directive, and requires the procedural safeguards which attach by virtue of Regulation 30, because the DLN supplies the "*reasons to potentially justify his detention and removal*". He also argued that there was an "*underlying*" decision, which was only discovered by trawling through the case notes disclosed by the SSHD after the proceedings had begun.

47. Since, as is common ground, the DLN did not inform the Claimant precisely and in full of the public policy grounds relied upon to justify his arrest, detention or removal, the notice did not fulfil the procedural requirements required of a "*measure*" he says. He also argues, as above, that the DLN gave a misleading reason for the deportation: it omitted to mention what the notes reveal, namely that the core reason for removal was the threat perceived by the Secretary of State that the Claimant posed to his partner and the children. He took the Court through many pages of records of internal discussions and briefings which he said provide the "*real*" reasons for the deportation and which the EEA Regulations required to be set out in the DLN.

48. He submitted the Article 30 provisions and safeguards must apply because of the nature of the DLN when considered in light of the case law on what constitutes a "*measure*", which is equivalent to a "*decision*" for the purposes of the EEA Regulations. The essence of Mr Bedford's submission is that the DLN was a necessary step leading to the making of a decision that made it possible for the person to be detained and deported which means it is at least a "*decision*" to which the Article 30(3) safeguards apply even if, as I understand his argument, it might not be regarded as a "*measure*" as such under Article 27. Although he primarily submits there is no material distinction between a "*measure*" and a "*decision*".

49. Mr Bedford relies upon the case of *Bouchereau* and points to paragraphs [27] and [28] where he says the test for what is a "*measure*" for the purposes of the Directive is set out.

50. The case of *Bouchereau* considered a recommendation for deportation made by a Magistrates' Court in the UK. The first question raised by the Court asked whether a recommendation for deportation, which was persuasive but not binding on the Secretary of State, constituted "*a measure within the meaning of Article 3(1) and (2) of* [the Directive]". The UK government had submitted it was not a measure because it was a recommendation only. At paragraphs [21] to [24] the Court said:

> "*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 means of Article 3 of the Directive.*"

51. Mr Bedford also drew the Court's attention to two recent cases. He referred to *R (Costea) v Secretary of State for the Home Department* [2021] EWC 1685 (Admin) [2021] 1 WLR 5223 a decision of Mr Justice Griffiths. In that case Mr Bedford had also argued that the DLN was a "*measure*" within the Directive, and that the protections afforded by Regulation 30 applied to it. The submissions of the SSHD were to the effect that the DLN was not a requirement of EU law, nor indeed of the EEA Regulations or otherwise under primary or secondary legislation in England and Wales. It was issued as a matter of policy. Government policy was to issue a notice of liability to deportation indicating the right to raise grounds of objection, it did not have the character of a "*measure*".

52. Griffiths J held that the Secretary of State was in fact obliged to provide the Claimant with a DLN, at law, since she had a published policy indicating that she would do so. Furthermore, the Secretary of State in the case of *Costea* had relied upon the fact there had been no response to the DLN when she came to make her Deportation Order. He referred to wording in that case that suggested that a failure to respond to a DLN would result in the making of a Deportation Order. Griffiths J also relied on the decision of *R (Hafeez) v Secretary of State for the Home Department* [2020] 1 WLR 1877 in which I held that certification under Regulation 33 was in that case, a measure to which Article 27 applied. He concluded that the DLN had "*every appearance of being a "measure" within the meaning of Article 27*" (paragraph [104]). However, he went on to hold that Article 30 did not refer to "*measures*" in the broad sense, but its protections only applied to "*decisions*" which were the <u>result</u> of the deportation process, not to a DLN which, on its face related to a future decision that might be taken. (See paragraph [127].)

53. Griffiths J distinguished the case of *R (Mendes) v Secretary of State for the Home Department* (*AIRE Centre* intervening) [2021] EWHC 115 (Admin). In that case Mr Justice Freedman concluded that a DLN is never "*a measure*" within the meaning of Article 27. He said the following at paragraph [110]:

> "*110. I accept the submission of* [counsel for the Secretary of State] *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.*"

54. Freedman J declined to find that the DLN was part and parcel of any decision to impose immigration detention. For that reason Freedman J rejected arguments similar to those advanced before this Court that the DLN ought to have provided with far greater particularity the reasoning for the "*decision*" which Mr Bedford argues is encapsulated in the DLN.

55. Griffiths J rejected the conclusions of Freedman J because he understood them as relating to the "*facts*" of *Bouchereau* and *Hafeez* and did not feel inhibited to characterise the DLN in his own particular case of *Costea* in a different manner. He went on to hold that although it could in the case before him be described as a "*measure*", the DLN did not constitute a "*decision*" for the purposes of Article 30. The DLN he held was part of a process designed to inform the Claimant that "*a decision might subsequently be made*" (see paragraph [124]). Since Article 30 required notification of any "*decision*" and the terms of the DLN were clear that the

Secretary of State was considering making a decision – this was not a decision in itself. Accordingly, a DLN could be a "*measure*" but was not a "*decision*".

56. I regret I disagree with the reasoning of Griffiths J in so far as he held a DLN is or could be a "*measure*" for the purposes of the Directive. In my judgement Freedman J was correct in stating that the status of a DLN was not that of a "*measure*", nor could it be. Put shortly, a DLN is not "*any action*" which affects a person's right of free movement (*Bouchereau* [21]).

57. The submission on behalf of the Secretary of State from Mr Roe KC was to this effect. The choice of the SSHD to serve a DLN was not properly characterised as a measure under Article 27 or indeed a decision (if there be a difference) under Article 30. It was conceptually different to serve a DLN on the one hand and to make a decision that a deportation should take place on the other. Similarly, the DLN did not affect the lawfulness or otherwise of the detention.

58. I accept the submission of the Secretary of State that the DLN is not a document in the same category as either a decision to certify (see the case of *Hafeez*) or the decision of a court in England and Wales to make a recommendation as to deportation (see *Bouchereau*). In my view the essential characteristic of a "*measure*" and indeed a "*decision*" which attract the protections of the Directive is: legal consequence engaging the right of free movement. In *Hafeez*, the action in question was the physical removal of a person from the jurisdiction before the full opportunity for appeal had been exhausted. Such necessarily engaged the right of free movement. Similarly in *Bouchereau*, the Magistrates' Court recommendation was an action with the legal consequences of a Court recommendation to the SSHD, and described by the Court there as a "*necessary prerequisite*" to a deportation decision.

59. The description afforded to the process (as it was then) in England and Wales by the Advocate General in *Bouchereau* is helpful in understanding the distinction. The Immigration Act 1971 provided by Section 3(6):

> "*(6) Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.*
>
> *(6A) A court may not recommend under subsection (6) that a relevant person be deported if the offence for which the person was convicted consisted of or included conduct that took place before IP completion day.*"

60. To found a deportation there required to be: (a) conviction for an offence of the requisite character; and (b) the recommendation for deportation from the relevant court. These were necessary although not sufficient for deportation: the SSHD had the final decision under Section 5 of the 1971 Act, the power arising "*where a person is under Section 3(5) or (6) liable to deportation*".

61. The Advocate General also described what took place in the following terms, by reference to the various submissions that had been made [page 738 c-f)]:

> "*The Metropolitan Police which is responsible for the Defendant's prosecution submits that a recommendation for deportation made by the United Kingdom court to the Secretary of State does not constitute a "measure" within the meaning of those provisions. In support of that submission the Metropolitan Police argues "in reality a recommendation for deportation is no more than a notification to the Secretary of State that a particular foreign national who is capable of being deported has been convicted of an offence punishable with imprisonment" and it draws attention to the fact that all previous reported cases in this court regarding the interpretation of Article 48 of the Treaty and of the Directive concerned actual decisions leading directly to restrictions on the free movement of workers within the Community.*
>
> *The United Kingdom government, which assisted the court with observations independent of those of the Metropolitan Police, concedes however that the argument put forward on behalf of the Metropolitan Police goes too far. A recommendation for deportation made by a United Kingdom court is not a mere notification to the Secretary of State of particular facts. It has legal consequences. Not only does it render the alien concerned liable to be detained it empowers the Secretary of State to make a deportation order in respect of him without the need, in any circumstances, for the decision to that effect to be subjected to review by an adjudicator or by the Immigration Appeal Tribunal.*"

62. Although the UK government submitted that a judicial decision as opposed to an action of the legislature could never constitute a measure, and also explained that the Court could not bind the Secretary of State who retained discretion, the Court nonetheless described the Magistrates' Court Order as a "*necessary prerequisite*" which, in legal terms, it was, to that particular route to a Deportation Order by the Secretary of State.

63. In the present case it cannot be said that the DLN has legal consequences in the manner described, nor does it render a person liable to be detained. I hesitate to describe the difference as that between 'procedural' and 'substantive' legal acts in characterising what is or is not a "*measure*" for the purposes of the right to free movement (although that was the language reflected by the Attorney General). However, in my judgement the tenor of Article 27 is suggestive of legal actions that impinge upon the central right at issue: namely the right to move freely in the territory not merely procedural notification matters. Notifying a person of the process of decision-making and of representations in the DLN is quite different from, by that notice, impinging upon their liberty to move freely. Rights arise, or indeed are curtailed by other means.

64. Before a detention decision is made the grounds giving rise to the power to do so are "*reasonable grounds for suspecting*" that the Claimant is "*someone who may be removed*" as set out under Regulation 32, thus:

> "***Person subject to removal***
>
> ***32.***—

> *(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, 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.*
>
> *(2) Where a decision is taken to remove a person under regulation 23(6)(a) or (c), the person is to be treated as if the person were a person to whom section 10(1) of the 1999 Act(**1**) applies, and section 10 of that Act (removal of certain persons unlawfully in the United Kingdom) is to apply accordingly.*"

65. I also accept the submissions of Mr Roe KC that a DLN is neither a "*measure*" nor a "*decision*". As I have explained above, it is not equivalent to a deportation decision but nor is it a legally necessary step in the process and it is not itself the justification for detention. It does not affect detention in a meaningful sense.

66. Mr Roe KC reminds the Court that the process of considering, making and giving effect to a Deportation Order is as follows: there is at some point a determination that the Claimant should be served with a DLN. That is not a decision to deport him nor is it a decision of any other kind that is capable of curtailing the right to free movement. There may or may not be a decision at the same time that he should be detained, but, as set out, that is made on the basis there are reasonable grounds to suspect that he may be deported (here, on public policy grounds). The next stage is that a subsequent decision is or may be made to deport. There is, independently, a set of detention reviews from time to time, bail applications, or not and grants of bail, or not. In the present case there were reviews and a grant of bail at the very end of August. The power to detain arises under Regulation 32(1) of the EEA Regulations, or Section 36 of the UK Border Act 2007.

67. Mr Roe KC submits and I accept that the wording of the DLN is quite inconsistent with the suggestion that it is in itself a "*measure*". He submits that the core question must be does the provision complained of affect the right of free movement. There is a material difference between a certification, which may directly affect the right of free movement and a DLN which is merely notification that a decision of a particular type (deportation) might be made.

68. This is the basis upon which the case of *Mendes* (above) was decided, as stated, it is in my view correct.

69. The DLN includes these words:

> "*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"), as saved.*
>
> *What this means for you*

> *This means that if the Home Office decides to make a deportation decision against you, you will be served with a deportation order and removed from the UK to Lithuania. 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.*"

70. Article 30 is a procedural provision governing the information required for "*any decision taken under 27(1)*". There is in my view no distinction between "*measure*" in the sense it is used in Article 27 and "*decision taken under 27(1)*". The latter phrase connotes a determination directed at an individual that affects the right of free movement – such as a deportation decision or a certification decision – "*measure*" also connotes "*any action*" which, in my judgement necessarily comprehends a decision as referred to in Article 30.

71. Further, in so far as Mr Bedford sought to suggest that there was an underlying "*decision*" that was not revealed save by examination of the GCID notes, I reject that submission. These materials showed discussions, proper consideration of the various aspects of the Claimant's case and the resolve that the Secretary of State would consider deportation. Necessarily, the notes reveal materials that came to the attention of the SSHD that go beyond the convictions which form the foundation of the public policy deportation consideration. It is quite impossible to spell out of the to and fro of internal memoranda, some "*silent*" decision different from that which was notified to Mr Selevicius by the Deportation Order of 14 July 2021.

72. It follows from the analysis of the DLN, above, that there was no obligation in law to set out all of the details which Mr Bedford asserts were missing from it. The framework of a deportation decision affords a right of appeal to the potential deportee. It is a HRA and EU law compliant scheme in the course of which he may raise any points concerning his background, present situation or other materials to enable a proportionate and HRA compliant decision to be made. It is irrelevant that the DLN has indicated the likely scope of the Deportation Order. The decision to make a Deportation Order was served under cover of the letter dated 14 July 2021, and ran to 25 pages (164 paragraphs) in length. It included the legal framework, asserted factual basis, remedies and opportunities for challenge in respect of that decision. The Claimant was informed of the basis of that decision and in my judgement it is not arguable that the DLN is required to incorporate similar materials for the reasons given above.

GROUND TWO: THE SSHD'S OBLIGATION OF ENQUIRY

73. Mr Bedford submitted that it was not lawful for the SSHD to refer merely to criminal offences and convictions. She was required to enquire from Lithuania; for example it was necessary to see the Judge's sentencing remarks and make an assessment of propensity and so forth on the basis of materials available to the local Judge. The SSHD submitted that there is no blanket obligation to acquire new information from the territory in which the convictions were imposed. Mr Roe KC said the SSHD is entitled to look at the offence and the sentence and form a view as to the implications and the seriousness. The Directive does not require further information on a blanket basis. The relevant words are as follows:

"*Article 27 General principles…*

3. …the host Member State may should it consider this essential, request the Member State of origin and if need be other Member States to provide information concerning any previous police record the person concerned may have, such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months." [Emphasis added.]

74. Clearly, on this wording, there is no universal requirement in each case to acquire more information. Indeed, it is only if "*essential*", the State may request further information. In my judgement the SSHD is entitled to look at the offences in question and at the sentences which were passed in respect of them. In the present case these were serious offences with an obvious relationship to public protection, and do not, without more, require further investigation. They are on their face serious. As the SSHD points out, there is no detailed submission on the evidence as to why the appearance of seriousness or risk to public protection is not the appropriate characterisation. The Claimant was 14/15 at the time of the offence against a girl of 10, the 5 year sentence for a first offence of robbery demonstrates the issue was serious. No particular facts in mitigation have shed doubt on that.

75. Mr Bedford referred to the case of *K v Stattssecretaris van Veliligheid en Justitie (ECJ)* [2019] 1 WLR 1877 to support a proposition that the commission, for example of war crimes, could not amount to an absolute ban such that a State was absolved from making any enquiry into the risks of reoffending, the sufficiency of serious threat to the fundamentals of society, etc.

76. The ratio of the Court in *K* at paragraph [51] was to the effect that the fact that a person had been excluded in the past from refugee status for a very serious reason, did not automatically permit the finding that their mere presence in the territory was a genuine present and sufficiently serious threat. A case by case assessment by the competent national authorities was required and it is the personal conduct of the individual concerned that must constitute a genuine and sufficiently serious threat.

77. The problem with Mr Bedford's submissions is that a specific case assessment took place in Mr Selevicius' case. The SSHD draws attention to the case progression report for the Claimant as evidence of the material before the SSHD when considering the making and the maintenance of a Deportation Order. It records how Mr Selevicius came to attention on his arrest on suspicion of common assault on 16 May 2019. There was an application for LLTR as set out above, and the history was considered. Following his arrest for assault on 12 April 2021 his criminal record was requested from Lithuania which showed a conviction on 22 March 2012 of two counts of sexual assault and one of robbery. The PNC showed he had been arrested on five occasions between 2019 and 2021 for offences relating to domestic abuse, as confirmed by Children's Services. The timing suggested that he had not served the full 5 years' imprisonment for robbery and came to the UK shortly after his release. The reoffending risk was regarded by the reviewing officer at that time as high. These are all case-specific, and there is nothing exceptional that suggests further information should have been obtained. The offences and the sentence, in particular of 5 years, speak for themselves as to seriousness. The decision was in my judgement plainly proportionate under EU law.

78. When the Secretary of State makes a decision concerning deportation assistance may be gained from Schedule 1 to the EEA Regulations. That provides as follows:

> "*Schedule 1 Considerations of public policy, public security and the fundamental interests of society etc.*
>
> *1. The EU treaties do not impose a uniform scale of public policy or public security values: member states enjoy considerable discretion acting within the parameters set by the EU treaties applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts from time to time.*
>
> *2. An EEA national or a family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom: a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.*
>
> *3. Where an EEA national or a family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society.*
>
> ..." [Emphasis added.]

79. Elsewhere in the schedule further matters of relevance to the Secretary of State's proportionality judgment are set out. The SSHD followed the approach set out in the Schedule. This was not in any way an "*automatic*" decision such as fell for consideration in *K* and that case does not assist.

80. Mr Roe KC submitted, if and to the extent that I was minded to consider that this was a challenge to an extent to the deportation decision, that could be defended on grounds of proportionality in any event. I agree.

81. An EU proportionality assessment was plainly carried out, the Secretary of State took into account factors which I have listed above, among others, there can be no challenge to the lawfulness of her approach in this case including, to the extent it is separately challenged, the decision to deport. Mr Bedford's complaints about the substance of the decision and the manner in which it was reached ranged far and wide but his pleaded case and the burden of his submission was that a proportionality assessment had not been carried out, or had been inadequately carried out. I cannot accept that submission.

ARGUMENTS THREE AND FOUR: DETENTION AND AN ACADEMIC DECISION

82. Mr Bedford made a number of submissions that sought to impugn the detention of the Claimant. Given the scope of the permission these resolve themselves into his primary contention, as reflected in his grounds, that because the detention was part

and parcel of the "*deportation proceedings*", it was infected by the failures of the DLN. I have rejected the proposition that there is any fault or failure in respect of the DLN as argued. Furthermore, however, in my judgement the DLN is not connected to the detention such that a failure of the one causes a failure of the other.

83. This case is different from the case of *Lauzikas*. The DLN is not a decision to detain, it is not in my judgement a decision to do anything of legal consequence in the sense that the regulations and the jurisprudence reflect, as I have said.

84. Accordingly, whether the challenge is framed in terms of a judicial review of the decision to make a Deportation Order, or whether it is framed in terms of an indirect challenge to the detention it must, fail on its own terms. The nature of the disturbing childhood offences, the seriousness of a 5 year sentence for robbery provide ample justification for the later decisions – that is to say not the DLN but the detention and the Deportation Order.

85. In this case, as I indicated at the start of the judgement, the challenge to the certification issue has fallen away. It is further the case that Regulation 33 applies only where two conditions are fulfilled:

> " *... 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.*"

86. The Regulation provides an inhibition upon the Secretary of State giving directions for removal in certain circumstances. Absent those circumstances, Regulation 33 has no application. The logic of this is that there was, in truth, nothing stopping the Secretary of State removing the Claimant. The true position is and always has been that there is no valid appeal before the Tribunal so neither 33(3)(a) nor (b) is true.

87. I am clear that it is not possible to argue other than the meaning of the phrase "*P has so appealed*" means that a person in the position of the Claimant has appealed, or may yet appeal within time. The Claimant is therefore not a person to whom Regulation 33(3) applies: the Regulation has no application. There is no proper way in which that provision can be read so as to include an *ex post facto* application for permission to appeal out of time. In terms, 33(1)(a) directs the reader to ignore any possibility of permission to appeal out of time. This was never, accordingly, a circumstance where the Secretary of State was entitled only to give directions for removal if she certified under the Regulation that removal would not be unlawful etc.

88. I am clear that the plain meaning of the words of Regulation 33 is that the appeal does not "*reactivate*" Regulation 33 as has been argued by Mr Bedford. For that Regulation to apply and oblige the Secretary of State to issue a certificate, the Claimant must have appealed within time, or remain entitled to appeal within time, and that appeal has not been determined. Even though, as Mr Bedford suggests, this

may have the effect where the Claimant is only a few days out of time to appeal, the SSHD may set removal directions and is not required to issue a certificate.

89. I am strengthened in my view that this is the correct interpretation of the regulation by the reference made by Mr Roe KC to the case of *R (Akinola) v Upper Tribunal* [2021] EWCA Civ 1308 [2022] 1 WLR 1585. In *Akinola*, albeit under a different regime, where leave to remain expired without an application to vary it having been made in time, that leave could be revived. However, it could be revived only with future rather that retroactive effect. The date from which the leave would begin to run again, was the date from which the appeal was instituted: the late grant of leave did not have retroactive effect. The conclusion of Sir Stephen Richards in *Akinola* was to the effect that where an extension of time is granted for an appeal out of time the date when the appeal was instituted and became a pending appeal (within Section 3C(2)(c) of the Immigration Act 1971) was the date when the notice of appeal was filed, not the date when the extension of time was granted. This allowed a very small element of retroactivity in those cases where the extension grant post-dated the filing of the notice of appeal.

90. Mr Bedford submitted that if the Tribunal were to admit the appeal, even though the application were made long out of time, it would be a "*pending appeal*" under the regulations. Mr Bedford said it is not relevant for the operation of Regulation 33(1)(a) to know whether or not the notice of appeal is lodged – the operation is by reference to the final determination of an appeal. He said that the interpretation provision in Regulation 35 supports his analysis. By that Regulation an appeal is treated as pending during the period when a notice of appeal is given ending when it is finally determined, withdrawn or abandoned. An appeal is not to be treated as finally determined under 35(3):

> "*... while a further appeal may be brought; and if such further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is finally determined, withdrawn or abandoned.*"

91. I reject his analysis. The operation of the Regulation is premised on an in-time appeal. His submission is that the word "*so*" does not refer to making an appeal <u>in time</u>, but just making an appeal. In his analysis the phrase "*ignoring the possibility of any out of time appeal*" means that there has to be a certificate whether the person does appeal or not. That, in my judgement, does not reflect the natural meaning of the words nor is it likely that an open ended process of the nature he propounds could have been the draughtsman's intention.

92. Mr Bedford had a number of subsidiary procedural submissions directed towards the main submission that the DLN was surrounded by procedural unfairness. This impacted the further decisions taken later he argued. I have concluded that the DLN is not as he characterises it.

93. The Claimant had a full right of appeal against the Deportation Order and, in certain circumstances, he could remain in this country to exercise it. Even if he could not, under Regulation 41 he might come back to the UK in order to promote such an appeal.

SUMMARY

94. I reject the contention that the DLN was a "*measure*" under the Directive, or indeed a "*decision*", attracting the protections of Article 30.

95. The certification decision falls away.

96. I reject the challenge to either the DLN as a "*measure*" (or the substantive deportation if such is made) on the basis that there was some silent or secret decision involving undisclosed materials that is somehow revealed by an examination of the contemporaneous file notes. The Secretary of State placed her decision on the basis of the previous convictions. As I have stated they are not susceptible of a proportionality challenge. Given that information came to her knowledge concerning the activities of the Claimant whilst in the United Kingdom, and given that those activities raise rather than diminish the concerns of a threat to the public policy grounds, it is entirely acceptable, indeed necessary that the Secretary of State adverted to the new material in the course of her considerations through her officers as reflected in the notes.

97. There is nothing in the challenge that the SSHD was required to revert to the Lithuanian authorities for sentencing or other materials. Neither the Regulations nor the facts of this case compelled it.

98. There is no separate challenge (whether pleaded or in fact not pleaded) that could succeed on the basis of the decision-making in this case.

99. This application for judicial review must be dismissed.