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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF APPLICATIONS BY (1) ANTHONY LANCASTER, (2) SHARON RAFFERTY AND (3) ANTHONY McDONNELL FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE POLICE SERVICE OF NORTHERN IRELAND AND THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Karen Quinlivan KC and Leona Askin (instructed by Madden & Finucane, Solicitors) for the first Appellant
Ronan Lavery KC and Malachy Magowan (instructed by Phoenix Law) for the second Appellant
Ronan Lavery KC and Mark Bassett (instructed by Brentnall Legal Ltd) for the third Appellant
Neasa Murnaghan KC, Joseph Kennedy and Ben Thompson (instructed by the Crown Solicitor's Office) for the Respondents
Tony McGleenan KC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the notice party

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Before: Keegan LCJ, Treacy LJ, Horner LJ

KEEGAN LCJ *(delivering the judgment of the court)*

Introduction

[1] The present case is an appeal from the judgment of Scoffield J ("the trial judge") reported at [2023] NIKB 12 wherein he dismissed applications for judicial review made by the three appellants named above.

[2] The appellants are all Registered Terrorist Offenders ("RTOs"). As RTOs, they are the subject of notification requirements under the Counter Terrorism Act 2008 ("the 2008 Act") and the Counter Terrorism Act 2008 (Foreign Travel Notification Requirements) Regulations 2009 ("the 2009 Regulations"). The notification regime was amended by the Counter Terrorism and Border Security Act 2019 ("the 2019 Act"), effective from April 2019. The respondents are the Police Service of Northern Ireland ("PSNI") and the Secretary of State for the Home Department ("SSHD"). The Department of Justice ("DOJ") acts as a notice party.

[3] The appellants challenge the decision made by Scoffield J on issues of articles 7, 8 and 14 of the European Convention on Human Rights ("ECHR") compatibility as well as the right to exit the UK to enter a member state of the European Union in provisions now enshrined by the European Union Withdrawal Agreement and the Northern Ireland Protocol. Mr McDonnell further appeals against the dismissal of the breach of the data protection regime as contained in the Data Protection Act 2018 ("the DPA").

[4] There are therefore four grounds of challenge which comprise this appeal and require us to consider whether the trial judge erred in finding against the appellants on all issues. We must ask ourselves the following questions in determining the four core grounds of appeal:

(i) Whether the current notification requirements breach article 8 of the ECHR.

(ii) Whether the current notification requirements are discriminatory contrary to article 14 of the ECHR.

(iii) Whether the current notification requirements breach article 7 of the ECHR.

(iv) Whether the current notification requirements breach EU rights.

Summary of the background circumstances of each appellant

[5] Mr Lancaster was convicted on 15 October 2015 of one offence of assisting in arranging a meeting to be addressed by a person who belongs or professes to belong to a proscribed organisation (in this case the IRA), contrary to section 12(2)(c) of the Terrorism Act 2000 and was sentenced to 12 months imprisonment, suspended for three years. Although he did not spend any time in custody, the appellant was subject to notification requirements under the 2008 Act for a period of 10 years pursuant to section 53(1)(c) of the 2008 Act.

[6] Mr McDonnell was convicted on 4 December 2013 of five counts of possessing documents or records likely to be useful to a person committing or preparing an act of terrorism, contrary to section 58(1)(b) of the Terrorism Act 2000. He received a determinate custodial sentence ("DCS") of three years and six months, divided as one year and nine months in custody and one year and nine months on licence. Like Mr

Lancaster, Mr McDonnell is subject to the notification requirements for a period of 10 years.

[7] The final appellant, Mrs Rafferty, was convicted of possession of a firearm, attending at a place used for terrorist training, and the preparation of terrorist acts on 12 September 2014. She was sentenced to eight years imprisonment and released on licence on 12 May 2016, although she was subsequently remanded into custody on another charge unrelated to the present appeal. Unlike Mr Lancaster and Mr McDonnell, Mrs Rafferty's conviction falls within the scope of section 53(3) of the 2008 Act, subjecting her to a notification period of 15 years.

[8] Each of the appellants advance personal factual circumstances in relation to their appeal. Mr Lancaster is a resident of Derry-Londonderry, close to the border with the Republic of Ireland. He has family and friends who live in the Republic of Ireland and makes regular trips across the border. Mr Lancaster has supplied several reasons why he will travel into the Republic of Ireland, including *inter alia* visiting his sister or brother-in-law in Co Donegal, driving his son to work in Burnfoot, and travelling in support of Derry City Football Club and Derry GAA.

[9] Mr McDonnell lives in Belfast, although he regularly travels to the Republic of Ireland. The appellant cares for his two children in an arrangement that is comparable to joint residence. Mr McDonnell has stated that he regularly takes his children to stay in his sister's caravan in Co Louth, where they enjoy leisure and other activities. Mr McDonnell disclosed before the trial judge that he had been interviewed twice under caution for failure to comply with the travel notification requirements (once in relation to a trip to Spain and once in relation to a trip to Dundalk). We have received an affidavit in this appeal which explains in more detail that he has been convicted on several occasions of failing to notify and received fines on conviction of up to £150.

[10] Mrs Rafferty lives approximately 10 miles from the border town of Aughnacloy in Co Tyrone. She averred before the trial judge that there will be instances where she would travel into the Republic of Ireland without even meaning to do so. Mrs Rafferty has grandchildren and considers it important that she can take them on day trips to Bundoran or Dublin Zoo.

The Statutory Scheme

[11] The statutory scheme has been comprehensively set out by the trial judge in paras [5]-[19] of his judgment and so we will not repeat it here. In brief, the proceedings concern Part 4 of the 2008 Act, which sets out notification requirements to be made to the authorities, in this case the Police Service of Northern Ireland ("PSNI") before RTOs may leave the jurisdiction of the United Kingdom. Notably, the regime pre-2019 permitted RTOs to leave the jurisdiction for a period of up to three days without having to supply notice to the PSNI. This aspect of the regime was removed following the 2019 Act, meaning that RTOs would have to provide notice every time they left the UK, no matter the duration of their journey.

[12] In summary, the relevant provisions of the 2008 Act provide as follows:

- Sections 41-43 identify the relevant offences;

- Section 45 identifies the triggering sentences;

- Sections 47-52 set out the obligations;

- Section 53 determines the duration of the period in which the requirements will apply; and

- Section 54 creates a criminal offence for failure to adhere to the notification requirements (which includes, on conviction on indictment, imprisonment for a term not exceeding 5 years or a fine or both).

[13] The obligations incumbent under sections 47-52 of the 2008 Act may further be explained by the following synopsis of their import:

- Section 47 prescribes the information the RTO must initially notify the police of;

- Sections 48 and 48A set out the obligation to notify police when relevant details change and at least annually;

- Section 49 concerns periodic renotification;

- Section 50 sets out the method of notification and related matters;

- Section 51 pertains to the meaning of "local police area" (for the purposes of which, Northern Ireland is considered a single police area); and

- Section 52 permits the Secretary of State to make provision by regulations to set out notification requirements for persons to comply with before they depart the UK.

[14] The 2009 regulations further added to the legislative framework. These regulations contained the original allowance for RTOs to leave the UK without notification for a period of less than three days (Reg 3(1)). Further, Reg 3(3) originally determined the required information. Reg 4 governed the timing of notification, requiring the RTO to inform the PSNI of their intention to travel no later than seven days before the period of travel unless there was a reasonable excuse for travel (in which case, notification must be given no later than 24 hours before travel).

[15] Whilst the 2009 regulations remain in force, this appeal is primarily concerned with the amendments made in 2019. Scoffield J has summarised the changes made by

the 2019 Act. In brief, the 2019 Act included the following new or additional requirements:

- A requirement to provide contact details such as telephone numbers and email addresses;

- A requirement to provide financial information and information about identification documents;

- Provisions in relation to the notification of vehicles which the individual owns or uses; and

- The broadening of travel notifications to include all cross-border travel, not only travel "*for a period of three days or more*", together with the adjustment of certain time periods provided within regulation 4(4).

[16] It is the appellants' primary contention that these amendments amount to a violation of their rights under articles 8, 14 & 7 ECHR, and pursuant to EU rights under article 18 of the Treaty on the Functioning of the European Union ("TFEU").

Discussion of the grounds of appeal

[17] We have approached this case as a reviewing court in line with authority which was not disputed by any party to this appeal. Two decisions of the Supreme Court have dealt with this issue as follows. In *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, it was held that the appellate court may only "consider whether there was any such error or flaw in the judge's treatment of proportionality" (per Lord Carnwath at para [65]) and that the appellate court must essentially decide whether the judge was wrong. This line of reasoning was affirmed in *H-W (Children) No 2* [2022] UKSC 17, where the court unanimously held that "the existence of the requirement of necessity and proportionality does not alter the near-universal rule that appeals in England and Wales proceed by way of review rather than by way of re-hearing" (per Dame Siobhan Keegan at para [48]). The same principle applies to the present case. As such, it is not for this court to start the proportionality analysis anew. Rather, the correct approach is to review the trial judge's findings and to intervene only if we consider that he was wrong. In any event, we are bound to say that in this case even if it were a rehearing as opposed to a review we would have come to the same conclusion.

Ground 1: Compliance with article 8 ECHR

[18] Article 8 ECHR requires respect for private and family life. It is a qualified right. The text of the article is as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[19] The facts of the present case clearly engage article 8; that much is not controversial. Whilst legitimate aim was not conceded, this element of article 8 was not strenuously debated by the appellants. The approach adopted is unsurprising given the fact that what we are dealing with is a counterterrorism measure. Most focus was upon the question of whether the notification regime amounts to an unjustifiable interference in the appellants' private lives, contrary to article 8(2). In that regard the appellants maintain that the measure offends the quality of law test and that it is disproportionate to the legitimate aim. We will focus on these two issues drawing from the comprehensive analysis of the trial judge as follows.

[20] The "in accordance with the law" test has two fundamental components which are well known. First, the measure complained of must have a basis in domestic law. Second, the domestic law must be sufficiently precise and accessible so that there is "sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" (*Sunday Times v United Kingdom* (1979) 2 EHRR 245, at para 49; see also *Silver v United Kingdom* (1983) 5 EHRR 347, at paras 85-88). The appellants do not dispute that the notification regime has a basis in law. The issue, then, is whether the notification regime is sufficiently precise and accessible to satisfy this quality of law test.

[21] The trial judge dealt with this point at paras [67]-[80] of his judgment. He found the legal effect of the 2008 Act and 2009 Regulations to be clear (para [74]). Central to his consideration was the question of whether those requirements are justified in Convention terms, not whether they are clear applying the dicta in *Re Gallagher's Application* [2019] UKSC 3 at para [14]). While accepting that the PSNI had "over-stated" what was required, the trial judge held that "a misstatement of the requirements in correspondence is not in itself determinative of the question of whether the restrictions are insufficiently clear to be Convention compatible" (para [75]). Further, any confusion, the trial judge maintained, could be considered rectified by his judgment (para [72]).

[22] In addition, the trial judge considered the issue of block notification, and the elements of uncertainty contained within that aspect of the regime and the correspondence that followed between Mr Lancaster and the PSNI. On this point, he concluded that there was a lack of flexibility, not a lack of clarity (para [76]). Having then considered further issues regarding sections 47-48 of the 2008 Act, the trial judge

concluded that despite the potential for some administrative difficulties, RTOs could nonetheless regulate their conduct with sufficient precision to a degree that is reasonable in the circumstances.

[23] The appellants argue that the court failed to engage with the implications of the fact that the PSNI correspondence with Mr Lancaster was authored by specialist police officers in charge of implementing the 2019 amendments. Their argument is that if the police did not understand the requirements of the 2009 regulations, on what basis could it be said that the requirements were accessible to the appellant with the benefit of legal advice. Thus, while a misstatement may not be determinative, they argue that it is "strong evidence … that the legislation is not sufficiently precise and accessible."

[24] The appellants further take issue with the trial judge's suggestion that RTOs could arrange to meet with specialist officers when making their notifications. On this issue, the appellants argue that, in addition to the PSNI's difficulty in interpreting the 2019 regime, there is no requirement in law to make an in-person appointment in order to make notifications and that this discrete requirement is unlawful in itself.

[25] Another submission made by the appellants was that the judge had misunderstood the appellants' reasons for not travelling. Where Scoffield J suggested that Mr Lancaster's decision not to travel was a circumstance of him "regulating [his] conduct in response to foreseeable effects" (para [77]), the appellants contend that the true reason why Mr Lancaster did not travel is because the "regulations are so unclear that he will not be able to comply with them and therefore will not know whether he is exposing himself to the risk of prosecution and imprisonment."

[26] The appellants' final point on this issue focussed upon the trial judge's treatment of emergency situations. On that topic, the trial judge indicated at para [100] of his judgment that, in such circumstances, the Public Prosecution Service ("PPS") would take a "common sense approach." However, the appellants contend that RTOs should not have to rely on subjective exercises of discretion; a further indication (in their view) that the Regulations do not satisfy the quality of law test.

[27] For their part, the respondents maintain that the question of legality is binary: either the legal requirements at issue are in accordance with the law, or they are not. In support of their argument, the respondents highlight that the appellants' stance effectively invites the court to declare a legislative scheme, which applies throughout the whole of the United Kingdom, as not being in accordance with law, because of the alleged lack of clarity adopted by some members of a single police force in its dealings with one RTO.

[28] The respondents further advance the point that reliance on the "common sense approach" is supported by jurisprudence: specifically, *Re Gallagher*, para 17. In addition, the respondents point out that just as Mr Lancaster had apparently decided not to travel to avoid prosecution, he equally could have made the arrangements necessary to travel, thus demonstrating the foreseeability and ability to regulate

conduct. As such, the respondents contend that the trial judgment is "unimpeachable", and that the notification regime has always been in accordance with the law.

[29] We have considered these competing arguments. Having done so we accept the respondents' argument on the question of legal certainty for the following reasons. To our mind the appellants can access and read the law and understand the effect of it with the benefit of legal advice. Our view is validated by the correspondence which has passed between the appellants and relevant agencies. The PSNI concede that early correspondence did overstate the obligations, however, that is a PSNI error now corrected which does not amount to a valid judicial review claim. We do not think a formal declaration is required in relation to that.

[30] From the above discussion, we are entirely satisfied that an RTO could regulate his or her activities with a reasonable degree of foreseeability. Furthermore, the clarification provided by the trial judge at para [71] of his judgment serves as interpretive guidance of the scheme. There the judge said this:

> "[71] There is plainly *no* requirement within the 2008 Act or the 2009 Regulations that an RTO explain the purpose of their cross-border travel; nor that they set out their destination (unless they are staying overnight, in which case the address where they will stay for their first night should be notified); nor their intended route (other than the points of departure and entry to the United Kingdom and, in the event that more than one country is being visited, the point of arrival in each such country). Indeed, in the respondents' skeleton argument it was noted that, where an RTO wishes to provide a block notification for non-overnight trips to the Republic of Ireland, they need only disclose (1) the relevant dates of intended travel or the day of the week for regular travel from which those dates can be gleaned; and (2) the point of arrival and return, namely where they will cross the border. That is plainly correct since, for a simple trip of that nature, all that the 2009 Regulations require are notification of the date of departure and return (which will be the same date); the country of destination (which is clear in those circumstances); and the points of arrival and return. Indeed, the date and point of return are not required to be notified in advance of the trip, although it makes sense to do so since, where these are known or can be accurately predicted, there will then be no need to make a further notification after the return (see regulation 5(4))."

[31] In the ensuing paragraphs the judge also explains how the additional requirements under the scheme may be met. Thus, in agreement with the judge we are satisfied that the standard set by the ECtHR in the *Sunday Times* and *Silver* cases is clearly satisfied. The quality of law test is met.

[31] Next, we turn then to the core question of proportionality. The principles are comprehensively set out in domestic and Convention law. In *Bank Mellat (No.2)* [2013] UKSC 39, para [20] Lord Sumption expressed the now well-known four stage test as follows:

> "The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. […] Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community […] The question is whether a less intrusive measure could have been used without unacceptably compromising the objective."

[32] In the present case, almost every factual circumstance raised by the appellants is related to the issue of proportionality. We will therefore examine the legal issues individually. First the issue of cross border travel. In dealing with this the trial judge considered the rationale behind the 2019 amendments. The SSHD had consulted with the PSNI, who had indicated that they would work with those persons impacted to ensure that their daily patterns, should they include travel outside the UK, would not be impacted upon in a significantly greater way than under the previous requirements (para [102]). As a result, and in consideration with a variety of pertinent factors (set out at para [103]), including the fact that proscribed organisations may seek to utilise cross-border travel to carry out terrorist acts, it was held that the 2019 amendments pursued a legitimate aim.

[33] The judge's analysis carefully considered each of the appellants' factual circumstances. It further highlighted the position in Strasbourg that in the field of national security, the court will exercise a less intense scrutiny than in other areas. This point is further reflected in domestic law, as a court "should afford proper deference to the fact that the legislation represents the view of the democratically elected legislature as to where the balance should be struck" (*R (L) v Commissioner of*

Police of the Metropolis [2009] UKSC 3, per Lord Hope at para [74]). In other words, when issues of national security are in play the margin of appreciation is wide.

[34] The trial judge also considered the different regime for registered sex offenders ("RSOs"). The regime in Northern Ireland currently permits RSOs to cross the border without notification if they are travelling for less than three days (ie the pre-2019 RTO regime). However, on this point, the judge highlighted that it has been accepted before the English Court of Appeal that terrorist offending and sexual offending are not strictly analogous (see *R (Irfan) v SSHD* [2013] QB 885, per Maurice Kay LJ at para [12]). Further, because of the additional cross-border element of terrorist offending, the trial judge concluded that "it cannot be assumed that the Northern Ireland Assembly would have taken a similar view had it been called upon to legislate in respect of the counter-terrorism notification requirements" (para [127]). This analysis is undoubtedly correct given the particular nature of terrorist offending at issue which spans across the border.

[35] The trial judge explicitly set out his reasons for finding that the notification regime was proportionate at paras [128]-[134]. In doing so, he noted that the regime will cause the appellants "some inconvenience", and that it remains entirely possible for the appellants to manage the bulk of their affairs in a predictable and foreseeable manner (para [128]). Further, the trial judge suggested that only Mr Lancaster exhibited the potential to be considered a 'hard case.' However, the judge rightly relied upon the fact that it is the effect of the scheme in general that is determinative in the proportionality analysis, rather than the impact on an individual. Therefore, he said that "once the legitimacy of this aim is acknowledged, it is difficult to see how the State's objective could be achieved without requiring notification of all cross-border travel." (para [129])

[36] The trial judge also concluded that the requirement for notification in person was entirely proportionate (paras [130]-[134]). While he accepted the desirability of non-in-person notification, the judge was persuaded by the PSNI's evidence that other means of assessment would be susceptible to manipulation and could present evidential issues were a case to arise. Thus, the trial judge held that the present notification scheme was proportionate.

[37] The appellants submitted that the trial judge had minimised the impact of the 2019 amendments on RTOs and attached too much weight to the PSNI's evidence. In support of this argument, they sought to display before this court the true impact of the travel regime on the appellants. In doing so, the appellants highlighted that the 2019 amendments "are quite clearly geared towards foreign travel from Britain, and thus refer to several matters that are not relevant to RTOs resident in NI travelling to the Republic of Ireland." Thus, they said that despite concerns raised by Northern Irish political parties, the SSHD had paid insufficient attention to the nuances presented by the land border.

[38] The appellants contended that the PSNI's failure to fully brief the SSHD, purporting that the PSNI had (i) unduly reassured the SSHD that they would be able to manage the impact of the new amendments; (ii) failed to inform the SSHD of the identical RSO regime in place in Northern Ireland; and (iii) failed to highlight the lack of flexibility inherent in the notification requirements. Further, the appellants pointed out that the PSNI had tried (and, in the appellants' view, failed) to incorporate a block notification system precisely because of the onerous nature of the notification regime. Therefore, in seeking to lessen the burden on RTOs, the PSNI had implicitly accepted that the 2019 amendments were "disproportionate, in terms of impact."

[39] In this regard, the appellants drew in aid the decision in *Gabriel Mackle's Application* [2023] NIKB 13, a judgment that was incidentally delivered on the same day as the original decision in this case, and by the same judge. The appellants contended that *Mackle* demonstrates that the PSNI have been able to manage less onerous travel requirements incumbent on Terrorist Registered Offenders ("TROs") who are subject to notification requirements while on licence. Thus, in comparison to the *Mackle* regime, the argument goes, the present regime is unduly onerous on offenders who have been received less stringent sentences.

[40] We note the appellants' position that it is simply not possible over a 10-year period to organise one's daily affairs 7 days in advance. The effect, the appellants say, has been that Mr Lancaster, Mrs Rafferty and Mr McDonnell have decided to stop travelling spontaneously in order to avoid the risk of prosecution. As such, the trial judge was wrong to conclude that the impact of the travel regime was simply of "some inconvenience."

[41] Allied to this was the appellants' argument that notification in person renders the appellants' obligations more onerous in each instance of travel, and that there were less intrusive measures available to the PSNI when mandating travel notifications. In support of this argument, the appellants point to Supreme Court authority: in *R(F) v Secretary of State for the Home Department* [2011] 1 AC 331, where it was held that the requirement to give notification in person at a police station, "imposed a considerable burden on anyone who was a frequent traveller" (per Lord Phillips, at para [43]). Further, the appellants suggested that advancements in technology seen to work in practice since the COVID-19 pandemic demonstrate that the requirement for physical attendance is disproportionate in all the circumstances.

[42] In considering the adverse impact of the requirements against the public interest in imposing the notification requirements, the appellants submitted that the judge erred in considering that the enhanced requirements would significantly improve the PSNI's ability to deliver its public protection objectives. Rather, they contended that the correct approach is to be found within the *Mackle* regime: that it should be permissible for RTOs to travel in a similar fashion, just as the police saw fit to introduce a significantly more flexible scheme for Mr Mackle.

[43] The respondents' submissions highlighted the fact that the Northern Irish courts have dealt with four travel notification cases in 2023 alone. They are *Lancaster* [2023] NIKB 12 (the original trial decision), *Gabriel Mackle's Application* [2023] NIKB 13, *JR123* [2023] NICA 30 and *Ward's Application* [2023] NIKB 92. We pause to observe that each case is fact specific. Nonetheless we think that some general points of principle emerge which can legitimately be utilised in this case.

[44] Particular reliance was placed on the recent ruling in *JR123*. In that judgment, the Court of Appeal set out the principles of proportionality and engaged with the questions of margin of appreciation and the role of the courts in assessing the decision of the legislature. In particular, the court cited a seminal decision from the ECtHR in Strasbourg in relation to general measures namely *Animal Defenders v United Kingdom* [2013] ECHR 491. This was a case involving a blanket media ban in which the court analyses the issues.

[45] Adopting the rationale of the ECtHR, the Court of Appeal in *JR 123* stated that the core issue in cases where the legislature has proceeded by way of general measure is "whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it" (*Animal Defenders,* para [110]). As such, the Court of Appeal in *JR123* highlighted the "unmistakeable nexus between the state's margin of appreciation and the doctrine of proportionality."

[46] In addition we have been referred to a recent decision in *Ward's Application* in which Temporary High Court Judge Mr Friedman KC helpfully distilled five key principles from *Animal Defenders* that set out how the court should approach the third and fourth *Bank Mellat* criteria in light of the jurisprudential developments since. The synopsis of the law in *Ward* is worth setting out as follows:

> "[76] Hence, in *Evans v United Kingdom* (2007) 22 BHRC 190 (§89), the Grand Chamber of the Strasbourg court recognised that such general measures could serve "to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by-case basis." The Grand Chamber followed in *Animal Defenders International v United Kingdom* by reference to citation of extensive previous case law to provide:
>
> (i) [A] State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases" (§106).

(ii) Relevant to such decisions is the "risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess" (§108).

(iii) That can be especially so where such measures are "a more feasible means of achieving a legitimate aim than a provision allowing case-by-case examination, where the latter would give rise to a risk of significant uncertainty, of litigation, expense and delay, as well as discrimination and arbitrariness" (§108).

(iv) As a guide to judgement the court advised that while the application of the general measure to the facts of a case "remains … illustrative of its impact in practice and thus material to its proportionality ... the more convincing the general justifications for the general measure are the less importance … will attach to its impact in the particular case" (§109).

(v) The "central question" as regard such measures "was not whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it" (§110).

[77] From the foregoing I am therefore bound to approach the third and fourth *Bank Mellat* criteria in this particular context on the basis that unless there is some reason to object to the blanket and indiscriminate nature of a general measure (as the Supreme Court did in *R (F (A Child) v Secretary of State* for lifetime notification for requirements), or its otherwise human rights obtuse nature (which can always potentially happen), then Parliament's choices can be taken to constitute an appropriate designation of where the reasonable least intrusive and fair balance should be struck. Put another way, although not the last word as regards independent judicial oversight, the legislative choices must be taken to have written proportionality in; and especially so when what is at stake is interfering with rights to protect rights of others where significant positive obligations upon the state are in play."

[47] Applying the legal principles to the present case, the respondents stressed the requirement of the court to consider the overall proportionality of the scheme, and not to decide the case based on individual circumstances. Further, the respondents advance the claim that the appellants have "overplayed the impact of the requirements and demonstrated an unwillingness to properly engage with them."

[48] Concerning the comparison with the RSO and the regime at issue in *Mackle*, the respondents maintained that there is a fundamental difference between terrorist offending and sexual offending, and that the court must appreciate the democratic mandate of the legislature. In particular, the respondents noted that the appellants were not entitled to argue that the Stormont Assembly would have legislated for an exception to the 2019 amendments. This is because the devolved legislature may not legislate on "excepted matters", which covers the regulation of national security as provided for in the Northern Ireland Act 1998, Schedule 2.

[49] A further point of appeal raised under the article 8 rubric was that the absence of a review mechanism within the notification regime is incompatible with article 8 of the Convention. In this regard, Mr Lancaster argued that his offending was not at a high enough level to merit a custodial sentence, and that, by extension, he should not have been subjected to notification requirements without the possibility of review. During oral submissions, counsel pointed out that had Mr Lancaster been handed a sentence a day shorter in length, he would not have been subject to the notification regime at all.

[50] The trial judge considered the absence of a review mechanism within his judgment in detail at paras [144]-[164]. His assessment began by discussing the permissibility of so called "bright line rules" in the statutory framework. In this regard, he highlighted that "bright line rules" are not in themselves contrary to the Convention (see *Animal Defenders* para [106]). In essence as this authority clearly states:

> "[w]here Parliament determines where such lines will be drawn, it is a well-recognised feature that hard cases will arise falling on the 'wrong side' of the line; but that this will not be held to invalidate the rule if, judged in the round, it is beneficial" (para [146]).

[51] The trial judge held that "the need for a precautionary approach in relation to the prevention of future terrorist offending" falls within the scope of a general measure, as permitted by the ECtHR in *Animal Defenders* (para [148]). The trial judge then pointed to caselaw both in this jurisdiction (*Re Gallagher's Application* [2003] NIQB 26) and in England & Wales (*Halabi* [2020] EWHC 1053 (Admin)) that demonstrated automatic notification requirements can be Convention compliant. The trial judge further rejected Mr Lancaster's contention that his offending did not merit the imposition of the notification requirements.

[52] Dealing with the absence of a review mechanism, the trial judge dismissed the appellants' arguments based on the Supreme Court's decision in *R (F)* [2011] 1 AC 331. In that case, the Supreme Court held that claimants subjected to a lifetime notification regime, could seek review. This is not the case in the present proceedings. Additionally, the trial judge repeated his reluctance to compare by analogy the regime between RTOs and RSOs.

[53] With regard to the appellants' arguments that a review mechanism had been considered by the Joint Committee on Human Rights, the trial judge was content to point out that it was entirely within the Government's mandate to reject the review once it had been considered (para [154]). This submission is persuasive given the sovereignty of Parliament.

[54] The trial judge dealt in some detail with the English Court of Appeal decision in *R (Irfan)*. In that case, the court considered that the absence of a review mechanism in respect of notification requirements on an RTO for a period of 10 years did not amount to a violation of article 8 ECHR. This case was subsequently applied by the High Court in *Re McDonnell's Application* [2019] NIQB 48. As such, the trial judge believed that there is "powerful authority for the proposition that a notification period of up to 10 years without review is Convention compliant." We have also been referred to a Scottish case of *Main v Scottish Ministers* [2015] CSIH 41 which reinforces the point.

[55] Having further considered the *Ashan* case raised by the appellants, the trial judge was satisfied that there was no lack of proportionality and no breach of article 8, by virtue of the automatic imposition of the notification requirements by operation of law in these cases (para [164]).

[56] In the present proceedings, the appellants argued that the trial judge's conclusion that the absence of a review mechanism was Convention compliant was wrong. The appellants contended that the trial judge misunderstood their original submissions, and that in essence their true argument was that had the sentencing judge known of the onerous nature of the 2019 notification requirements at the time of sentencing, representations would have been made on their behalf in relation to the appropriate sentence.

[57] For this reason, the appellants dispute the trial judge's acceptance of Parliament's "bright line rule" within the statutory framework. The appellants further point to the possibility of a Parole Board type review mechanism. Such provisions elsewhere indicate that a review mechanism for RTOs could be realistically enacted. Therefore, the appellants claimed, the trial judge's approach to bright line rules in the present case is unsustainable.

[58] The appellants pointed out that the relatively small number of RTOs may not justify the imposition of a "bright line rule." Specifically, they argued that the small

class of offenders lends itself to flexibility within the notification regime, and that it would not be especially onerous on the State to adapt accordingly.

[59] Finally, the appellants turned to the Supreme Court's treatment of offenders who are considered no longer dangerous within the RSO regime (*Re (F)*, at para [51]). In this territory, the appellants argued that when the RTOs are no longer of such risk as to merit being subject to notification requirements, then those notification requirements no longer pursue the legitimate aim of the legislation and cannot be proportionate in the absence of a review to determine whether they continue to be necessary.

[60] For their part, the respondents reiterated the relevance of *Halabi* (paras [69]-[80] of the judgment). They further highlighted that in *Ward*, the court not only upheld the proportionality of the automatic imposition of the imposition of the notification requirements but further warned against the risk of unravelling the system by inversion of the central question as defined in *Animal Defenders* through calls for individual assessment on the basis that such would represent a less intrusive approach (para [82]).

[61] Moreover, they stressed that *Re (F)* was decided on the basis that the claimant in that case was subjected to the imposition of indefinite notification requirements *for life*. The present case does not deal with life-long notification requirements. Additionally, they highlighted case law that questioned the relevance of the appellants' arguments. In *JR123*, the court held that, "*Re F* predated the jurisprudential developments in particular, *Animal Defenders*, *Bank Mellat (No 2)* and *Re P*." Further, the Court of Session in Scotland rejected a challenge in *Main v Scottish Ministers* 2015 SC 639 to the lack of a review mechanism earlier than 15 years where notification requirements are imposed for an indefinite period.

[62] Finally, the respondents highlighted that the Court of Appeal in *Irfan* set out four reasons why the terrorist notification requirements, absent of a review mechanism, were proportionate (*Irfan*, paras [13]-[14]).

[63] Ms Quinlivan also ran with an argument that there was inadequate Parliamentary scrutiny of the position pertaining to RTOs in Northern Ireland prior to the 2019 amendments and that the court should take this into account. In advancing this claim, she sought to rely on the passages in *Animal Defenders* which read as follows:

> "… in order to determine the proportionality of a general measure, the court must primarily assess the legislative choices underlying it. The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation" (para [108]).

> … the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it" (para 110).

[64] Thus, the argument was made that as the ECtHR was reassured by the fact that proper scrutiny had been afforded in Parliament, the lack of scrutiny in the present case was determinative of the legislature's failure to uphold Convention rights. The appellants further argued that the PSNI had not fully realised the true impact of the new amendments, and that Parliament did not pay enough attention to the situation in Northern Ireland in general.

[65] In response to this argument, which was skilfully advanced by Ms Quinlivan, the respondents highlighted that judicial approval of the principle of legislating for pre-defined categories can be traced back to the decision of the House of Lords in *Carson v Secretary of State for Work and Pensions* [2005] UKHL 37 (see also *JR123,* at para [39]). Moreover, the respondents referred to the fact that the ECtHR explicitly stated at para 109 that "… the more convincing the general justifications for the general measure are the less importance the court will attach to its impact in the particular case." Further, the respondents relied upon the recent Supreme Court decision in *Re Gallagher*, in which Lord Sumption specifically found that hard cases will not be enough to militate against a general measure (*Re Gallagher* [2019] UKSC 3, at [50]).

[66] The respondents utilised *Animal Defenders* to argue that the judicial review process was essential in determining the legality of the proposed measures and it would have been an error of principle to treat the Parliamentary process as being determinative of the matter. This approach was also discussed in in *Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32 where the Supreme Court expressly disavowed a qualitative assessment of the Parliamentary debate in relation to abortion buffer zones.

[67] The respondents further averred that the trial judge had engaged in a full analysis of the margin of appreciation and gave proper weight to the evidence put forward by the respondents in the original trial. As such, it is their contention that the trial judge correctly applied the margin of appreciation principle in his decision.

[68] Having set out the competing arguments in some detail above we turn to our conclusions on the article 8 points. Overall, we do not consider that the trial judge erred in his decision on this for the following reasons. With respect to the quality of law test, it is clear to us that the PSNI's correspondence with Mr Lancaster muddied the clarity of the regime. However, the PSNI's correspondence does not supplant the statutory regime. It is thus the wording of the 2019 amendments that the court must consider.

[69] In addition, as the above discussion of the jurisprudence should make plain, the weight of doctrine and caselaw falls in favour of the respondents. It is arguable that Mr Lancaster's factual circumstances represent a 'hard case.' We are prepared to accept that descriptor for argument's sake even though we think some of the evidence is overplayed and rather farfetched as to the frequency of cross border travel. We are also bound to say that the evidence in the other two cases is not as strong.

[70] In any event it is also clear (even within this appeal) that Mr Lancaster's circumstances are not automatically indicative of those within the RTO regime as a whole. As the law provides, the role of the court is not to decide solely on the basis of hard cases. The reality is that there will be certain cases that must, compelling though they may be in isolation, be contained within a given framework to ensure the effectiveness of the law in general. Such reality has been recognised time and again in the caselaw, both in this jurisdiction (see *inter alia*, *JR123* at [39], *Re Gallagher* [2019] UKSC 3 at [50]), and before the Strasbourg Court (see *Animal Defenders* at [109]).

[71] In the *Safe Access Zones* case the Supreme Court endorsed this line and also clarified the test which derives from *Christian Institute v Lord Advocate* [2016] SLT 805, Lord Reed at para [18] of that judgment was clear in saying:

> "18 … Lady Hale cited *Christian Institute,* para 88, as authority for the proposition that "[i]t is enough [to render legislation incompatible with Convention rights] that it will inevitably operate incompatibly in a legally significant number of cases." With respect, that is not what was said in *Christian Institute,* para 88. The critical words were:
>
> > "if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with article 8 rights in all or almost all cases, the legislation itself will not be incompatible with Convention rights ..."

[72] It must be noted that the RTO regime is a UK-wide regime, so it will encompass RTOs who will rarely have cause to cross a border without notification (for example, travelling from the UK to Europe). Moreover, the PSNI has supplied evidence that indicates that, in the Northern Irish context, Mr Lancaster's circumstances remain exceptional. But even in Mr Lancaster's case, he is still able to regulate – for the most part – his activities. Thus, even in a recognised exceptional case, the RTO regime is not so onerous as to entirely prohibit travel. Therefore, it must be considered that the general measure is sound and proportionate, despite the recognised additional effect on Mr Lancaster.

[73] We do not think that the comparison with an RSO can win the day given the very different nature of terrorist offending which has a cross border element. We do

not think that the absence of a review in cases of 10 and 15 year notifications is unlawful either. The comparison with *Fox & McNulty* [2013] NICA 19 cannot avail the appellants as the requirement for guidance in that case was part of the statutory scheme. The circumstances are different here. We understand the additional inconvenience of in person notification however we accept the respondents' evidence on the necessity for that as the trial judge did. A good point is made that indirect methods may be adopted particularly given the testing of such during covid times. That is an operational matter which may be considered by legislators in consultation with the operators of the scheme going forward but is not something we will interfere with given our role.

[74] Finally, in explaining our conclusion on article 8, we reiterate the fact that there are strong policy considerations that suggest a wide margin of appreciation should be afforded to the legislature in the present case. First, national security and counterterrorism are recognised as "excepted matters" within the meaning of Schedule 2 to the Northern Ireland Act 1998. Already this indicates a level of uniformity that needs to be applied on a UK-wide basis, thus militating against any holding of incompatibility within Northern Ireland. However, it further prevents the Northern Ireland Assembly from legislating a different regime. Therefore, the appellants' contention that Stormont may have decided differently is by and large moot. We are also not prepared to say that the Parliamentary process has been so flawed so as to render the resulting legislation unlawful principally because of the aim of this legislation to counter terrorism including cross border activities.

[75] Second, as a matter of national security, there is a well-established line of caselaw that demonstrates a wide margin of appreciation owed to the State.

[76] Third, within the specific RTO policy, the PSNI has stipulated that the instance of cross-border travel gives rise to particular monitoring issues which could be capitalised on by those seeking to perform terrorist activities. For similar reasons, it must be accepted that notification in person, while an infringement on the private life of an RTO, reduces the likelihood of manipulation of the notification regime. In this sense, it can be said that the 2019 amendments pursue a legitimate aim, and that the courts should not unnecessarily interfere with the counterterrorism policy of a democratically elected Government. Accordingly, the ground of appeal based on article 8 ECHR fails.

[77] Whilst the argument focused on the notification requirement for any travel, to be clear we do not consider that any of the other aspects of the law in relation to financial notification or renotification fails on article 8 grounds for the reasons given by the trial judge.

Ground 2: Compliance with article 14 ECHR

[78] Article 14 ECHR contains the prohibition of discrimination:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[79] At para [37] of *R (SC and Others) v Secretary of State for Work and Pensions* [2021] UKSC 26 Lord Reed set out the approach adopted to article 14 by the European Court of Human Rights ("ECtHR") applying *Carson v UK* [2010] 51 EHRR 13. At para [37] of the judgment Lord Reed explains how an article 14 claim should be addressed as follows:

> "37. The general approach adopted to article 14 by the European Court has been stated in similar terms on many occasions and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* 51 EHRR 13, para 61 ("Carson"). For the sake of clarity, it is worth breaking down that paragraph into four propositions:
>
> (1) The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14.
>
> (2) Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.
>
> (3) Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> (4) The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.

[80] In *SC*, Lord Reed also observed that the ECtHR generally proceeds to consider whether a person in an analogous situation has been treated differently and whether there is an objective justification for that. In summary, it is not clear what the group against which the differential treatment is to be contrasted with is. Applying the

principles set out in *SC* there must be justification objectively provided for differential treatment.

[81] In the present appeal, it was accepted that the subject matter comes within the scope of article 14. However, all other aspects of article 14 applicability were contested.

[82] The trial judge rightly dispatched some of the appellants' more sweeping claims regarding discrimination with short shrift. The appellants' position on status appeared to be that they had been discriminated against "as compared with RTOs resident in Great Britain, on the basis of their status as being resident in Northern Ireland and/or associated with a national minority." Before the trial judge and on appeal, the appellants also argued that they had been the victim of indirect discrimination, and of *Thlimmenos*-type discrimination which derives from a Strasbourg decision of that name reported at (2001) 31 EHRR 15 at para [44].

[83] In his judgment, the trial judge found that the appellants' claim of disproportionate adverse impact "is far from clearly evidenced and amounts to little more than assertion." (para [174]). Instead, the trial judge held, the burden faced by the applicants was "because of their residence in close *proximity* to the land border, which increases their ease of cross-border travel and therefore the likelihood that regular or daily trips will be impacted by the notification regime." (para [175]).

[84] While the trial judge was prepared to assume that RTOs resident in Northern Ireland as a cohort are disproportionately affected by the notification regime as compared with RTOs resident in Great Britain, he did not agree that the appellants suffered indirect discrimination by their association with a national minority (para [176]). As such, there could be no indirect discrimination. As to the *Thlimmenos*-type discrimination (which arises where materially different cases have unjustifiably been treated the same), the trial judge found that the separate treatment of applicants called for justification.

[85] The appellants seriously disputed the court's rejection of the "association with a national minority" status. This, they argued, led the judge to fall into error when deciding on the status of the appellants. The respondents, in their submissions, argued that the relationship between the appellants and the national minority status is not directly connected to the core grounds. As such, the burden becomes less onerous when dealing with an allegation of indirect discrimination. They further pointed out that the appellants cast their net too widely; and that the appellants cannot approach an article 14 case on the basis of multiple alternatives conflating different possible article 14 analyses in doing so (*A & B v Secretary of State for Health* [2017] UKSC 41).

[86] As regards to the indirect discrimination allegedly suffered, the respondents contended that the appellants' comparison with RTOs in Great Britain fails to appreciate the significance of the land border between NI and ROI. The respondents

further dispute the relevance of the *Thlimmenos* argument in the present proceedings, arguing that the principle the Grand Chamber sought to set in that case was the application of a general rule which applies to all without exception in circumstances that give rise to unavoidable interference with a Convention right. Thus, the argument goes, as the RTO regime is neither a rule of general application and nor does it amount to a total prohibition on travel, the appellants claims do not fall squarely within the *Thlimmenos* criteria.

[87] In any event the trial judge was satisfied that the appellants' treatment could be justified. In doing so, he noted that in the period between oral submissions and the original trial judgment, the UKSC's judgment in *R (SC and Others) v Secretary of State for Work and Pensions* [2021] UKSC 26 was handed down. This judgment, in effect, confirmed that a balanced approach to discrimination must be taken, allowing courts to use the "manifestly without reasonable foundation" ("MWRF") test as indicative of the wide margin of appreciation (*SC*, paras [128]-[129]). In that judgment, Lord Reed further suggested that the MWRF test is appropriate in cases of national security (*SC*, paras [160]-[161]).

[88] From this point, the trial judge made the following conclusions:

> "The status relied upon by the applicants is not, in my view, one where differential treatment is "especially serious" and therefore calls for a strict test of justification […] I have not found there to be a prima facie case of differential treatment on the basis of association with a national minority but, even if I am wrong in that, although it is listed as a protected status in article 14, it does not follow that it falls into the particularly 'suspect' category.
>
> This case arises in the context of national security in which a wide margin of appreciation is usually allowed to the State.
>
> In such a case, the court will generally respect the legislature's choice unless it is MWRF. The impugned notification requirements, save for those details addressed in secondary legislation made by the Secretary of State, have been determined to be appropriate by Parliament after debate and scrutiny.
>
> I do not understand there to be common standards among the Council of Europe contracting states in relation to notification requirements for convicted terrorist offenders." (para [185a-d]).

[89] The trial judge further pointed to reasons given earlier in the judgment when dealing with article 8 and indicated that these were indicative of the justification of the appellants' treatment (para [187]).

[90] Against this the appellants maintained that the trial judge fell into error by mischaracterising their treatment as not especially serious. Therefore, the argument was advanced that the strict test of justification was mis-applied. Moreover, the appellants argued that they were more likely to travel across the border directly because of their association with a national minority. As such, they claimed that the trial judge's decision was incorrect.

[91] For their part, the respondents argued that the court is bound to follow the decision of the Supreme Court in *SC* and submitted that the question for the court is whether there is *any* reasonable foundation for the impugned provisions or alleged treatment. On this basis, they submitted that if the balance struck by the State is tenable, then the test will be satisfied. Alternatively, if a conventional proportionality analysis is applied then the objective of the impugned measure is clear as there is a rational nexus between that measure and the objective.

[92] We agree with the trial judge's legal analysis of the article 14 argument. In essence, the treatment of the appellants is purely by virtue of their being an RTO. They face notification requirements not because they are Irish or resident in Northern Ireland; it is because they have been found to pose sufficient risk to national security that they are subject to additional preventative measures in order to minimise the likelihood of terrorist attack. This regime has a basis in law and is, as held above, proportionate within the meaning of article 8 ECHR.

[93] The appellants' assertion that they have suffered discrimination (be it indirect or *Thlimmenos*-type) because they have not been treated the same as an RTO resident in Great Britain is unsustainable. This argument avoids the fact that an RTO resident in Great Britain would be the subject of the same notification regime were they to seek to consistently travel between the UK and Ireland.

[94] Additionally, the appellants asserted that their association with a national minority further evidences their discrimination. While the appellants' status within the Irish national minority group may be maintainable, that status is, in fact, merely incidental in the present proceedings. For every member of the Irish national minority group resident in Northern Ireland is not subject to a notification regime. Thus, the difference in treatment is not between Irish nationals/nationalists and non-Irish nationals/nationalists as a whole. The difference in treatment is solely between RTOs and non-RTOs.

[95] As such, the treatment of the RTOs in the present proceedings is not manifestly without reasonable foundation. The RTO regime pursues legitimate security aims and has been found by the trial judge to not interfere unjustifiably with the RTO's private

lives. It follows that the difference in the appellants' treatment is justified, and that there is no violation of article 14 ECHR.

Ground 3: Compliance with article 7 ECHR

[96] All parties rested on their written submissions on this ground. We have considered the written arguments and the recent decision of the Supreme Court in *Morgan v Ministry of Justice (Northern Ireland)* [2023] UKSC 14 which sets the parameters of article 7 rights.

[97] Article 7 ECHR provides:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

[98] At first instance the trial judge held that the 2019 amendments were not punitive within the meaning of article 7(1) ECHR (para [199]). In doing so, he relied on the ECtHR's decision in *Adamson v UK* (1999) 28 EHRR CD209, and the Court of Appeal's decision in *R v Foley* [2019] NICA 44. Both of these cases concerned sex offender regimes, with *Foley* explicitly considering the issue of notification requirements. In addition, the trial judge referred to the "plainly forward-looking and preventative" aim of the scheme (para [199]).

[99] The appellants argued that the trial judge had erred in considering that the notification requirements did not constitute a penalty. The court, they averred, failed to consider that the requirements in *Adamson* were less onerous than in the present proceedings, and that the court was wrong to consider that no alternative approach to sentencing was available.

[100] The appellants further point to the fact that, in Mr Lancaster's case, a sentence of a day shorter would have left him outside of the notification regime. As such, they submitted that had the 2019 amendments been known to Mr Lancaster's lawyers before sentencing, they would have made submissions to ask the judge for a more appropriate sentence.

[101] Finally, the appellants argued that the court was wrong to decide that the possibility of prosecution for not complying with the notification regime points away from the fact that the regime is a penalty. The appellants instead argued that the court should have looked "behind the appearances at the realities of the situation" (*Welch v UK* (1995) 20 EHRR 247, at [34]), and decided that the appellant "faced more far-reaching detriment as a result of the change in the notification requirements than that to which he was exposed at the time of the commission of the offences for which he was convicted."

[102] The respondents submitted that the notification provisions are not a penalty, but rather are, "measures which were introduced to provide a means of monitoring the activities, whereabouts and travel plans of convicted terrorists and to allow police to intervene where required. They are designed as administratively imposed preventative measures." As such, the respondents' main contention was that any examination of article 7 must be viewed in light of the fact that notification requirements are preventative and forward-looking, rather than a penalty, similar to other schemes such as Violent Offender Prevention Orders ("VOPOS").

[103] The debate on article 7 has been overtaken by the Supreme Court's recent decision in *Morgan v Ministry of Justice*. In that case, section 30 of the Counter Terrorism and Sentencing Act 2021 ("the 2021 Act") was challenged, which altered the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). Under the original scope of the 2008 Order, prisoners could be released on licence before serving the full term of the sentence imposed. The effect of section 30 was that instead of offenders being released on licence after serving half of their custodial sentence, they would be referred to the Parole Commission once two-thirds of their sentence had been served (section 20A 2008 Order). The challenge in *Morgan* was that this amendment was contrary to article 7(1) ECHR.

[104] While the Court of Appeal in *Morgan* [2021] NICA 67 found that there had been a breach of article 7, the Supreme Court held that Article 20A of the 2008 Order had not imposed an additional penalty on the offenders. Rather, they found that the original custodial sentence was the original penalty (*Morgan*, para [107]). Thus, the Supreme Court rejected the argument that section 30 of the 2021 Act extended the custodial period beyond that which the Crown Court had formerly declared to be commensurate with the circumstances of the respondents' offending (*Morgan*, para [111]).

[105] Nor did the Supreme Court find that section 30 redefined or modified the scope of the penalties imposed on the respondents (*Morgan*, para [113]). Within this conclusion, the Supreme Court considered the policy behind the 2021 Act. Thus, they placed weight on the fact that the purpose of that Act was "to protect the public from terrorist prisoners by confining them for a longer period under their determinate custodial sentences" (*Morgan*, para [114]). Further, they pointed to the ECtHR's decision in *Del Río Prada Spain* (2014) 58 EHRR 37, where the court held "the severity of [an] order is not itself decisive, […] since many non-penal measures of a preventive

nature may have a substantial impact on the person concerned" (at [82]). Thus, as section 30 of the 2021 Act and Article 20A of the 2008 Order related to the "execution or enforcement of a penalty" and thus do not fall within the concept of law within the meaning of article 7(1) ECHR.

[106] Having considered the full implications of the *Morgan* case, it is difficult to see how the article 7 challenge can succeed. The appellants' reliance on the *nullua poena sine lege* principle hinges on the classification of the 2019 amendments as punitive. Yet, the Supreme Court's decision in *Morgan* comprehensively demonstrates that the only punishment within the meaning of article 7(1) is the original determinative sentence.

[107] This holding translates to the present appeal. The effect of the 2019 amendments, though they might be more onerous on the individual concerned, do not alter the punitive measure incumbent on the appellants. That is plainly the sentence they received. Rather, the 2019 amendments alter the application of an order that was in effect before any of the appellants were sentenced. They (or at least their counsel) knew that the notification scheme applied to them, and that they would have to regulate their activities accordingly. The change in regime is thus not an additional punishment, but a change in policy to enact preventative measures. Accordingly, there is no violation of article 7 ECHR, and this ground of appeal must also fail.

Ground 4: Compliance with EU Law

[108] This challenge focussed on Articles 4 and 27 of the Citizen's Rights Directive ("CRD") (2004/38/EC):

> "**Article 4 Right of exit**
>
> 1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State. […]
>
> **Article 27 General principles**
>
> 1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."

[109] The trial judge's decision regarding EU Law is set out at paras [201]-[222]. Within this part of the judgment, the court found that restrictions on freedom of movement could be justified on the grounds of public interest (namely, national security). The appellants disputed this conclusion. Their principal objection is that the trial judge did not sufficiently engage with the caselaw of the CJEU. Had he done so, he would have found that the 2019 amendments clearly amounted to "restrictions" and were equally incompatible with article 27(2) of the CRD. Consequently, applying the supremacy principle the application for judicial review should have been granted.

[110] The appellants contended that the trial judge's acceptance of the decision in *McDonnell (No.1)* [2019] NIQB 48 was inconsistent with article 4 of the European Union Withdrawal Agreement and the European Union (Withdrawal) Act (2018).

[111] The appellants next pointed out the alleged dissuasive effect that the notification requirements had on the appellants. Relying on affidavit evidence they submitted that such a dissuasive effect was contrary to a strong line of CJEU caselaw. The argument was therefore made that the 2019 amendments amounted to an unjustifiable restriction on the free movement rights of the appellant.

[112] The appellants also disputed the trial judge's conclusion that the assessment of proportionality under article 8 ECHR provides an answer to the question of justification rather than the cumulative conditions in article 27(2) CRD. This, they submitted, was a significant error in law. Rather, it was argued that the correct approach was to apply article 27(2) CRD. On this point, the appellants argued that the State failed to apply the test "genuine, present and sufficiently serious threat" to each individual, as required by article 27(2) CRD. That the additional restrictions on free movement were automatically imposed, then, means that the respondents did not consider "all relevant factors such as the actual circumstances which constituted the particular offence, the Union citizen's conduct since conviction, the period on licence, his family situation, his children and the purpose, frequency and importance of cross-border travel" (McDonnell, para 96). Moreover, the "public protection" threshold applied by the respondents is of a lower standard than the test set out in article 27(2) CRD.

[113] Finally, the appellants highlighted that the additional restrictions were not the result of an individual assessment, meaning that they were contrary to EU Law. On this point, the burden of proof in demonstrating risk falls upon the state (*Commission v France; Commission v Austria*) and the respondents have been unable to satisfy that burden.

[114] The respondents' primary submission made with clarity by Ms Murnaghan was that this circumstance did not fall within the scope of article 4 of the Free Movement Directive. The respondents relied on the decision of Dyson LJ in *R (F & Aubrey Thompson)* [2008] EWHC 3170 (Admin), where the judge held that notification requirements are not a formality equivalent to an exit visa (under the scope of article 4(2) of the Free Movement Directive) (*R (F)*, at para [61]). They further agreed with the trial judge's conclusion in the present case that "the balance falls decisively in favour of the public interest aims which are being pursued."

[115] In the alternative, the respondents argued that article 27 CRD does not require consideration given that its engagement is not triggered by a breach of free movement rights. On this point, they rely on the CJEU's judgment in *E (Citizenship of the Union - Right to move and reside freely in the territory of the Member States: Judgment)* [2017] EUECJ C-193/16 (13 July 2017), which found at para 27 that:

> "The fact that a person is imprisoned at the time the expulsion decision was adopted, without the prospect of being released in the near future, does not exclude that his conduct represents, as the case may be, a present and genuine threat for a fundamental interest of the society of the host Member State."

[116] Thus, for these reasons, the respondents submitted that there had been no unjust infringement on the appellants' rights under EU law.

[117] Having considered the above we cannot accept the arguments in support of this appeal based upon EU law. We think that the trial judge analysed this aspect of the case fairly and cannot be criticised for missing relevant law. There is no authority that we have been referred to on appeal that makes a point definitively for the appellants. The only argument of any substance was Mr Lavery's submission that whilst not a prohibition on travel, notification should be construed as a restriction given the width of definition as to a restriction within EU law. Dealing with this point we think that the trial judge was implicitly sympathetic to this view when he discussed some reservations about the *McDonnell No.1* decision. However, even if this argument were correct, it does not result in success for the appellants when this case is considered in context.

[118] Applying a contextual lens we see some strength in the argument made by Ms Murnaghan that the circumstance at issue here does not fall within the scope of the EU law under examination. However, we do not need to analyse this position further

as in any event, we consider that the trial judge was entitled to conclude that the notification requirements do not amount to a restriction on freedom of movement. Even where article 27 CRD is engaged (and bearing in mind the strength of the respondents' position that it is not engaged here), it is reasonable to conclude that the appellants have each been judged to pose "genuine, present and sufficiently serious threat[s]" to public security. This has been decided by virtue of their offending sentences. Therefore, we think that it can be said that there has been an individual consideration of each appellant made by the respective sentencing judge, and that there is a legitimate public security ground to limit the right of exit in the appellants' circumstances.

[119] In summary, as to the appellants' EU challenge, there is nothing to suggest unjustified restriction on their rights as EU citizens. Instead, the restriction on a right of exit is founded upon the same proportionality issues as in the challenge to the Convention law and is lawful.

Additional issues

[120] For the sake of completeness we briefly mention some other arguments which seem to us to feature as loose ends more than anything else. The arguments based upon the General Data Protection Regulation ("GDPR") and the Law Enforcement Directive ("LED") were specifically not pursued on appeal. The challenge in this sphere was limited to the Data Protection Act 2018. This did not occupy any time in oral argument at all which is unsurprising as we find no merit in a data protection argument in this case. As the trial judge said, the PSNI revised its retention policies subsequent to the decision in *Re Cavanagh's Application No.2* [2019] NIQB 89. It cannot be argued that the obtaining of information is anything other than consistent with the DPA purposes of law enforcement. Data subjects such as the appellants also have rights to access to information under the regime. There is no discernible point of substance in any of the appeals on data protection grounds. Similarly, the appellants were wise not to pursue arguments based on section 75 or to appeal the dismissal of the rationality challenge.

Overall conclusion

[121] We commend the trial judge for the comprehensive judgment he delivered dealing with a wide range of complicated issues with clarity and precision. We broadly agree with his conclusions. We answer the four questions we posed at para [4] herein in the negative and find no breach of Convention, EU or domestic law in this case. Accordingly, the appeals are dismissed on all grounds.